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The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form

Robert A. Milne

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No defendant to come before this Court has exhibited a more callous and flagrant disregard for the safety and lives of vast numbers of citizens . . . than this defendant . . . . The managers of industry [who have] no concern with how . . . pollutants are disposed of earn the enmity of citizens and commit ecologic suicide.
—Comments of Judge Allen of the Western District of Kentucky upon sentencing of the president of a disposal company to two years in jail for deliberately dumping chemicals into the Louisville sewage system, thereby injuring 161 people.[1]

I. INTRODUCTION

THE extent of the damage caused to the environment and to the health of the world's population through industrial pollution is staggering. To name just a few examples, acid rain is slowly destroying northeastern freshwater fisheries and forests.[2] The depletion of the ozone layer threatens to alter radically the climatic patterns of the earth and to expose humans to dangerous solar rays.[3] Land-fill disposal of wastes forced the evacuation of an entire residential development in the infamous Love Canal disaster.[4] One study has concluded that approximately

1. United States v. Distler, Crim. No. 77-00108, Transcript of Sentencing 10 (Sept. 14, 1979) (cited in Note, *Federal Enforcement of Individual and Corporate Criminal Liability for Water Pollution*, 10 MEM. ST. U.L. REV. 576, 607 (1980) [hereinafter *Federal Enforcement*]).

2. *See* Reiger, *What Can Be Done About Acid Rain?*, FIELD AND STREAM 15 (Apr. 1987); Peterson, *Watch on Acid Rain: A Midterm Report*, 132 SCI-NEWS 36 (July 18, 1987); Begley, *Who'll Stop the Acid Rain*, 107 NEWSWEEK 60 (Mar. 29, 1986); Tangley, *Acid Rain: The Evidence Mounts*, 36 BIOSCIENCE 366 (June 1986).

3. *See* Singer & Crandahl, *Assessing the Threat to the Ozone*, CONSUM. RES. MAG. 11 (July 1987); *The Heat is On*, 130 TIME 58 (October 19, 1987); *The Ozone Hole*, 257 SCI. AMER. 19 (Aug. 1987); Brasseur, *The Endangered Ozone Layer*, 29 ENV. 6 (Jan.-Feb. 87).

4. The Love Canal disaster riveted the public's attention in the late 1970s. Hooker Chemical Company improperly buried thousands of drums of industrial solvents under the land that had once been a canal. Hooker eventually sold part of this land for residential development. The people who moved into this area later reported unusually high incidences of stillborn children, deafness, birth defects, retardation, and deterioration of bone marrow. In 1978, the New York State Health Commissioner recommended the evacuation of the area because of the "great and imminent" peril presented by the contamination. The State eventually purchased the contaminated homes. BROWN, LAYING WASTE 3-38 (1979); *See* N.Y. Times, Aug. 5, 1978, at A18, col. 1 (for report of evacuation

nine percent of all deaths annually in the United States, about 140,000 per year, can be attributed to air pollution.[5] Despite this alarming evidence, pollution continues at an extraordinary rate.[6]

The general public first became aware of the dangers of pollution in the late 1960s and early 1970s.[7] The Federal Government began to address the problem more aggressively at that time, but mainly in a civil context.[8] Civil remedies were pursued in large measure because the act of polluting had not yet engendered the kind of moral condemnation normally associated with criminality.[9] Gradually, though, the realization came that pollution, because of its scope and long term ill effects, was at least as morally reprehensible as most crimes. A 1984 poll placed environmental crimes seventh on the list of severity, ahead of such crimes as armed robbery and bribing public officials.[10] This shift in perception, combined with the realization that the civil approach was meeting with

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recommendation); McQuaig, *The Legacy of Love Canal*, MCLEANS 10 (Oct. 3, 1987) (overview of the aftermath of the disaster).

5. Mendelsohn & Orcutt, *An Empirical Analysis of Air Pollution Dose Response Curves*, 6 J. ENVT'L ECON. AND MGMT. 85 (1979); *see* Kramer, *Corporate Criminality* in CORPORATIONS AS CRIMINALS 20 (E. Hochstedler, ed. 1984) (air pollution estimated to cause 140,000 deaths annually).

6. It has been estimated that between 255 and 275 million metric tons of hazardous waste is produced in the United States each year. Mosher, *EPA Still Doesn't Know the Dimensions of the Nation's Hazardous Waste Problem*, NAT'L. L. J., Apr. 16, 1983 at 796. The EPA has also estimated that ninety percent of the hazardous waste produced annually in the United States is disposed of improperly. S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980).

7. Morris, *Environmental Problems and the Use of Criminal Sanctions*, 7 LAND & WATER L. REV. 421, 422 (1972); Ways, *The Environment, A National Mission for the Seventies*, ENVIRONMENTAL PROTECTION 1 (Jaffe & Tribe, eds. 1971) (description of the mounting public awareness of environmental problems).

8. Civil remedies proved ineffective as a deterrent to corporate polluters. One of the preliminary objectives of the 1972 amendments to the Federal Water Pollution Control Act was to eliminate completely the discharge of pollutants into navigable waters by 1985. 33 U.S.C.A. § 1251 (1982). The enforcement under these amendments has been mainly civil and, at present, we are still far from realizing this goal.

Many of the statutes had criminal provisions, but they were rarely used. *See infra* notes 114-49 and accompanying text; *see also* Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALB. L. REV. 61 (1972) [hereinafter *Criminal Responsibility*].

9. The principal reasons for this were that, in most cases, individual acts of pollution did not produce radically noticeable ill-effects and the offenders (often corporate officers) were upstanding members of the community. *See* Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 95-99 (1985) [hereinafter *Putting Polluters in Jail*] (discussion of reasons for the sparing use of criminal sanctions in environmental cases).

10. U.S. Department of Justice, Bureau of Justice Statistics Bulletin, January 1984 (cited in Starr, *Countering Environmental Crimes*, 13 B.C. ENVT'L AFF. L. REV. 379, 380 n.1 (1986)). A 1970 Harris Poll indicated that most Americans considered pollution to be the most serious problem facing their community. *Criminal Responsibility*, *supra* note 8, at 68.

little success, resulted in an increase in the use of the criminal provisions of federal environmental statutes.

Many commentators have argued that the most effective way to deal with illegal pollution is to actively pursue, on a wide scale, criminal convictions[11] against corporate policy-makers for environmental violations.[12] This Comment subscribes to this point of view. One of the principal objections leveled against this approach is that the chances of consistently obtaining convictions against corporate officers[13] are limited because of the mens rea requirements of federal environmental statutes and the more stringent standard of proof exacted in all criminal proceedings.[14] This Comment will demonstrate that criminal convictions of corporate officers for environmental offenses could be obtained more easily than the critics suggest. Two avenues are available. The first involves full utilization of the Rivers and Harbors Act of 1899, a rarely invoked strict liability statute covering water pollution.[15] Secondly, the case law suggests that, even where federal environmental statutes impose mens rea requirements, the standard employed in substance, though not in form, is one of strict liability.

The analysis will begin with an examination of the historical development of the federal government's response to the problem of pollution,

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11. For the purposes of this Comment, "criminal convictions" refers to jail sentences, not criminal fines.

12. *See* Starr, *supra* note 10, at 379 ("Congress recognized the public's concern by providing criminal sanctions for violations of environmental laws . . ."); *Putting Polluters in Jail*, *supra* note 9, at 97 ("The social stigma which attaches to a criminal proceeding and to imprisonment will be an effective deterrent. . . .); *See generally* Comment, *Prosecuting Corporate Polluters: The Sparing Use of Criminal Sanctions*, 62 U. DET. L. REV. 659 (1985) [hereinafter *Sparing Use of Sanctions*] (general support for the use of criminal sanctions); Comment, *Criminal Enforcement of Federal Water Pollution Laws in an Era of Deregulation*, 73 J. CRIM. L. & CRIMINOLOGY 642 (1982) [hereinafter *Era of Deregulation*] (support for the use of criminal sanctions).

13. Corporate officers frequently insulate themselves from actual knowledge through corporate compartmentalization.

14. The mens rea requirements of the criminal provisions of environmental statutes are difficult to meet because of the division of tasks and compartmentalization of most large corporations. There is also the probability that an officer will disclaim knowledge of a violation and blame it on a subordinate. Further, in criminal proceedings, guilt must be proven beyond a reasonable doubt, whereas in civil cases the standard is a preponderance of the evidence. *Sparing Use of Sanctions*, *supra* note 12, at 661.

It has also been found that punishment of individual officers for corporate crimes of *any type* has been extremely uncommon in the United States. One study concluded that only 1.5 percent of all criminal enforcement efforts in 1975 and 1976 resulted in the conviction of a corporate officer (of these, only twenty percent were high level officers). M. CLINARD, ILLEGAL CORPORATE BEHAVIOR 206 (1976).

15. The Rivers and Harbors Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (1899) (Current version at 33 U.S.C. § 407 (1982)) [hereinafter Refuse Act].

with particular emphasis on the evolution of criminal environmental sanctions. Practical and theoretical justifications for the use of criminal sanctions against corporate officers for environmental violations will also be explored. This Comment will then show how the strict criminal liability provisions of the Refuse Act can be combined with relevant holdings of the United States Supreme Court to convict corporate officers for pollution of navigable waterways. Next, the criminal provisions of the major federal environmental statutes will be outlined. Finally, an analysis of the relevant case law will demonstrate that, even when a criminal environmental statute has a mens rea requirement, the operational standard formulated by the courts is one of strict liability.

II. HISTORY OF ENVIRONMENTAL ENFORCEMENT

The Rivers and Harbors Act of 1899 (more commonly known as the Refuse Act) was the first federal legislation dealing with pollution.[16] It provided for a misdemeanor penalty of up to one year in prison and/or a fine of up to $2,500[17] for discharge of any "refuse matter" into the navigable waters of the United States.[18] The Act imposed a standard of strict liability upon polluters. However, the utility of the statute for purposes of water pollution control was severely limited by judicial interpretations that applied it only to discharges that obstructed navigation.[19] This limi-

16. The Refuse Act states:

> [I]t shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment or mill of any kind, any refuse matter of any kind or description whatever . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water . . . whereby navigation shall or may be impeded or obstructed . . .

Id. at § 13 (current version at 33 U.S.C. § 407 (1982)).

The Refuse Act was not the first statute to employ criminal sanctions for environmental regulation. In the fourteenth century, an Englishman was executed for violating a royal proclamation on smoke abatement. *See* Chass & Feldman, *Tears for John Doe*, 25 S. CAL. L. REV. 349, 352 (1954). *See generally Federal Enforcement*, *supra* note 1, at 578-85 (outline of Refuse Act provisions); Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835, 840-59 (1973) (detailed commentary on Refuse Act).

17. Refuse Act, *supra* note 15, § 16, 33 U.S.C. § 407 (1982).

18. The Refuse Act modified §§ 6, 7, and 8 of its predecessor, Act of Aug. 18, 1894, ch. 299, 28 Stat. 363, which enjoined the deposition of refuse matter into navigable waters "for the improvement of which money has been appropriated." Morris, *supra* note 7, at n.18. The Refuse Act extended coverage to all navigable waters as well as the tributaries thereof. *See supra* note 16.

19. *See, e.g.*, Warner-Quinlan Co. v. United States, 273 F. 503 (3d Cir. 1921); United States v. Ballard Oil Co. of Hartford, 195 F.2d 369 (2d Cir. 1952); Maier v. Publicker Commercial Alcohol

tation was a reflection of society's failure to perceive pollution as a significant problem, and was due in large measure to a lack of technical knowledge regarding the potential dangers of pollution. Further obscuring the danger was the absence of any outwardly perceptible sign of environmental degradation. Additionally, between 1917 and 1945, national attention was understandably focused on two world wars and the Great Depression, rather than on as yet invisible environmental problems.

The first glimmer of realization that pollution was more than a mere nuisance came after the Second World War. However, the prevailing attitude endorsed negotiation between industry and government as the best means of dealing with the problem, with the threat of civil sanctions providing the motivation for compliance.[20] The Water Pollution Control Act of 1948 (WPCA)[21] reflected this approach.

The WPCA required the Surgeon General of the Public Health Service to initiate government action through the issuance of notice to the alleged polluter[22] and to his state.[23] The Surgeon General could then serve the polluter with suggestions for abatement and a compliance schedule.[24] If the compliance dates were ignored, a second notice could be given.[25] If the second notice were disregarded, a board would be convened and a public hearing held on the matter. After the hearing, the board would make its recommendations for abatement.[26] Only after all of these suggestions had been ignored could the case be referred to the United States Attorney's Office for a possible lawsuit.[27] The predictable result of this cumbersome mechanism was that, from the date of the

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Co., 62 F.Supp 161 (E.D. Pa. 1945), *aff'd per curiam*, 154 F.2d 1020 (3d Cir. 1946); United States v. Bigan, 170 F.Supp. 219 (W.D. Pa. 1959), *aff'd*, 274 F.2d 729 (3d Cir. 1960).

20. In 1973 Michael K. Glenn, former Deputy Assistant Administrator for Federal Water Enforcement stated: "[D]uring the past twenty-five years the federal government has relied almost exclusively on negotiation, public pressure, and voluntary compliance . . . as the principal means of achieving compliance with federal water pollution control laws." *Putting Polluters in Jail, supra* note 9, at 102.

21. Act of June 30, 1948, ch. 758, 62 Stat. 1155 (codified as amended in 33 U.S.C.A. §§ 1251-1376 (1982)) [hereinafter WPCA].

22. Act of June 30, 1948, ch. 758, § 2(d)(2), 62 Stat. 1155, 1156.

To qualify as a "polluter" under the WPCA it was necessary to demonstrate that the discharge endangered "the health or welfare of persons in a state other than that in which the discharge operate[d] . . ." 33 U.S.C. § 466(d)(1) (1952). This was a harsh requirement because of the difficulty in showing that a particular defendant's discharge (apart from of all of the other sources of pollution) caused harm to people in another state.

23. Act of June 30, 1948, ch. 758, § 2(d)(2), 62 Stat. 1155, 1156.

24. *Id.*

25. *Id.*

26. *Id.* § 2(d)(3).

27. *Id.* § 2(d)(4). It is important to note that, throughout this long and arduous process, the

Act's passage in 1948, until 1965, not a single lawsuit was initiated.[28] Unofficial negotiations between the regulatory agencies and industrial polluters were the only practical alternative to the administrative quagmire created by the WPCA.[29]

In 1956, amendments to the Federal Water Pollution Control Act[30] were passed in an attempt to stimulate enforcement. Ironically, the amendment added yet another conference requirement to the already complex procedures of the initial Act,[31] which only added to the confusion and delay.[32]

The Water Quality Act of 1965[33] established procedures by which states would determine maximum pollution levels for waterways. These standards were intended to create a more easily demonstrable cause of action under FWPCA. However, this approach was fraught with practical difficulties, for it was nearly impossible to prove that an individual polluter was responsible for the decline in quality of an entire body of water.[34]

Increasing public awareness of the dangers of pollution led to a somewhat more aggressive enforcement effort in the late 1960s and early

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discharges were permitted to continue unabated. There was no provision for the issuance of a temporary restraining order.

28. *Hearings on S.4 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Pub. Works*, 89th Cong., 1st Sess. 29-32 (1965). Note also that WPCA contains no criminal sanctions.

29. Glenn, *supra* note 16, at 836 n.7; *see* Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970).

30. Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498 [hereinafter 1956 Amendments].

31. The conference was to be between the Surgeon General and the appropriate state pollution control agency. 33 U.S.C. § 466(g)(c)(1) (1958).

32. *Federal Enforcement, supra* note 1, at 581 (outlines how the 1956 amendments caused even further delay in the abatement procedure).

In 1961, additional amendments were passed to FWPCA. These served mainly to broaden the Act's jurisdiction and did nothing to streamline the abatement procedure. Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204.

33. Pub. L. No. 89-234, 79 Stat. 903 (1965) (codified at 33 U.S.C. §§ 466-466n (Supp. V (1965-69)).

34. *See* Grady, *Effluent Charges and the Industrial Water Pollution Problem*, 5 NEW ENGL. L. REV. 61, 75 (1969) (for an illustration of the difficulties of proving erosion in water quality).

Criticisms of the Water Quality Act were similar to those levied against other legislative efforts to control pollution until that time. These criticisms concerned the lack of sufficient funding to provide adequate manpower for enforcement purposes, the states' tolerance of excessive recalcitrance on the part of the dischargers, the predisposition of administrators to rely upon persuasion rather than punishment, and the lack of procedures adequate to differentiate between noncompliance due to hardship and noncompliance due to bad faith excuses. *Federal Enforcement, supra* note 1, at 583.

1970s. The Refuse Act was given new clout in light of Supreme Court rulings which expanded the judicial definition of the term "refuse" as used in the Act to include "all foreign substances."[35] This change allowed the government to criminally prosecute polluters under the Act's strict liability provisions.[36]

In spite of this change, however, polluters still were not considered criminal in a moral sense. Consequently, there was a reluctance to prosecute *individuals* criminally. Many of the cases brought under the Refuse Act were civil in nature,[37] and those that were criminal were brought against the corporate entity rather than an individual corporate officer. Criminal prosecutions were pursued only in cases of "isolated and instantaneous discharges resulting in serious damage" and not in cases of "continuing" discharge.[38] Since the major thrust of the effort was procurement of civil and criminal fines against corporations, the utility of the Act was severely curtailed by the maximum fine limitation of only $2,500.[39]

Regulators attempting to control pollution under the Refuse Act were faced with a dilemma. The Act called for an absolute prohibition of discharges, making it unlawful to "discharge . . . refuse matter of any kind . . . into any navigable waters of the United States . . ."[40] However, in most cases, it was not desirable to completely enjoin discharges, because such extreme action would result in the closing of industrial plants.

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35. United States v. Standard Oil, 384 U.S. 224 (1966); *see* Tripp & Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 ALB. L. REV. 60 (1970) (for a description of the revitalization of the Refuse Act).

36. *See supra* note 16 (for the language of the strict liability provisions of the Refuse Act).

Most of the early prosecutions under the revitalized Refuse Act were against corporations rather than individual corporate officers. *See* United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974); United States v. Republic Steel Corp., 491 F.2d 315 (6th Cir. 1974); United States v. Mobil Oil Corp., 464 F.2d 1124 (5th Cir. 1972).

37. Civil actions under the Refuse Act primarily sought injunctive relief. *See, e.g.*, United States v. Florida Power and Light Co., 311 F.Supp. 1391 (S.D. Fla. 1970) (court declined to issue a preliminary injunction to enjoin the defendant from discharging heated water into Biscayne Bay absent a showing of irreparable harm). Between December 3, 1970 and December 31, 1972, the EPA referred 106 civil Refuse Act actions to the Justice Department. Glenn, *supra* note 16, at n.56.

38. Glenn, *supra* note 16, at 848. In the early 1970s, regulatory violations were viewed mainly as economic crimes lacking the kind of moral culpability necessary to warrant incarceration. F. GRAD, TREATISE ON ENVIRONMENTAL LAW, 2-561 to 2-562 (1983). *See Putting Polluters in Jail*, *supra* note 9, at 96 (for the observation that environmental regulation is not the only area in which courts have been unwilling to impose substantial punishments).

39. *See supra* note 17. A fine of $2500 is negligible for a multi-million dollar chemical manufacturer. Fines this small are easily assimilated as a cost of doing business. *Sparing Use of Sanctions*, *supra* note 12, at 664.

40. *See supra* note 16.

Such actions would be devastating from an economic perspective—diminishing the nation's productive capacity and eliminating jobs. As a practical matter then, the overriding goal was abatement of discharges, rather than their complete elimination.[41]

In an effort to circumvent this problem, in 1970, President Nixon issued an Executive Order instituting the "Refuse Act Permit Program."[42] The Permit Program authorized the Secretary of the Army to permit the discharge of pollutants within limits set by the Chief of Engineers.[43] Each discharger was required to apply for a permit from the Secretary, even if it was operating well within the mandated parameters.[44] The Program was attractive because the permits imposed specific effluent limitations, the violation of which constituted a breach of the Refuse Act itself.[45] There was no need, as there had been under the Water Quality Act of 1965,[46] to show that the specific discharge degraded the quality of the entire body of water.

Despite its promising start, the Permit Program ultimately proved unsuccessful. The basis of the Program, the Refuse Act, provided insufficient monetary fines to serve as an effective deterrent.[47] Additionally, the administration of the Program was virtually crippled through the judicial requirement that an Environmental Impact Statement be prepared for every permit application submitted.[48]

The Refuse Act Permit Program was replaced by the 1972 amend-

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41. Glenn, *supra* note 16, at 847.

42. Exec. Order No. 11,574, 3 C.F.R. 309-10 (1973).

43. The Refuse Act itself was amended as follows:

> *And provided further*, That the Secretary of the Army, whenever in the judgement of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

33 U.S.C. § 407 (1982).

Under President Nixon's Executive Order, the Secretary of the Army was required to consult with the Administrator of the EPA before issuing regulations, procedures and instructions for permit applications. *See supra* note 42.

44. 33 U.S.C. § 407 (1982).

45. *Id.*

46. *See supra* notes 33-34 and accompanying text.

47. *See supra* note 17.

48. Kalur v. Resor, 335 F.Supp. 1 (D.D.C. 1971). The Army Corps of Engineers received more than 20,000 permit applications at the time of the Kalur decision. Glenn, *supra* note 16, at 854.

Environmental Impact Statements are *detailed* statements of the likely environmental impact of a

ments to the Federal Water Pollution Control Act.[49] The 1972 Amendments implemented a National Permit System[50] and provided for more substantial civil[51] and criminal sanctions.[52] The Amendments also explictly provided that Environmental Impact Statements need not be prepared for every permit application. [53]

The passage of the 1972 amendments demonstrated Congressional resolve to effectively address the problem of pollution. The passage in 1977 of the Clean Water Act,[54] which was essentially an amendment to the 1972 amendments, further evidenced this commitment. The Clean Water Act stiffens the criminal sanctions of the 1972 Amendments by

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proposed action by a federal agency. They are required under the National Environmental Policy Act of 1969. 42 U.S.C. §§ 4321-70 (1982).

Despite its demise, the Refuse Act Permit Program accomplished the following:

(a) The criminal actions brought thereunder focused public attention on the criminality of water pollution.

(b) The threat of individual criminal liability made corporate officers more cognizant of environmental laws.

(c) The federal government established a willingness to go to court over environmental violations.

(d) The permit system encouraged voluntary compliance.

(e) The inadequacy of the fines collected under the system provided Congress with valuable data in drafting new legislation.

Glenn, *supra* note 16, at 857-58.

49. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-240, 86 Stat. 47 [hereinafter 1972 Amendments]. Note, however, that the Refuse Act has never been repealed.

50. The framework of the Permit System is found in Title III (Standards and Enforcement) and Title IV (Permits and Licenses). Title IV authorizes the Administrator of the EPA to issue permits for discharge based on the standards established in Title III. 1972 Amendments, *supra* note 49, § 402(a). Title III requires the EPA to promulgate standards for effluent quality based upon, "the best available technology economically achievable . . . which will result in reasonable further progress toward . . . eliminating the discharge of all pollutants." *Id.* §§ 301(b)(1)(A), (2)(A).

51. Civil remedies may be pursued for any violation of Title III or IV. *See supra* note 50. The maximum civil penalty is $10,000 per day of violation. 1972 Amendments, *supra* note 49, § 309(d). Temporary and permanent injunctions may also be sought. *Id.* § 309(b).

52. The major criminal provision of the 1972 Amendments is § 309(c):

> (1) Any person who willfully or negligently violates [any substantive provision of Title III or IV] . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both.
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> (2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan or other document filed or required to be maintained . . . or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device. . .shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.
>
> (3) For purposes of this subsection, the term "person" shall [include] . . . any responsible corporate officer.

1972 Amendments, *supra* note 49, § 309(c).

53. *Id.* § 511(c)(1); *see supra* note 48 and accompanying text; Glenn, *supra* note 16, at 854.

54. Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C.A. §§ 1251-1376 (1982).

increasing the fines and providing for maximum one year jail sentences.[55]

The criminal and civil provisions of the Federal Water Pollution Control Act, as modified by the 1972 amendments and the Clean Water Act, typify the Congressional approach to the problem of pollution. The Clean Air Act [56] was passed in 1970 and served as a model for the 1972 amendments to FWPCA.[57] In 1976, the Resource Conservation and Recovery Act (RCRA)[58] was passed to provide cradle-to-grave documentation of the movement of hazardous wastes. In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[59] which created a "Superfund" to pay for federal cleanup of hazardous waste sites. Both RCRA and CERCLA provide for substantial civil[60] and criminal[61] penalties for their violation.

Despite the fact that, by 1972, the major federal environmental statutes contained criminal provisions, pursuit of civil remedies remained the norm for the next decade.[62] However, by the late 1970's, under pressure from the Carter Administration and an impatient Congress,[63] the Envi-

55. *See infra* notes 114-24 and accompanying text (for a more detailed analysis of the criminal provisions of the Clean Water Act).

56. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

57. *Federal Enforcement*, *supra* note 1, at 588.

58. 42 U.S.C. §§ 6901-6987 (1982).

59. *Id.* §§ 9601-9657.

60. Civil remedies under RCRA can attach for violation of any of its provisions and record keeping requirements. Remedies available include temporary restraining orders, 42 U.S.C. § 6973 (1982), and civil fines of up to $25,000 per day, *id.* § 6928(a)(3).

Under CERCLA, if the President determines that there is an "imminent and substantial" threat to public health or the environment from an actual or threatened toxic discharge, he may authorize the Attorney General to seek injunctive relief. 42 U.S.C. § 9601 (1982). Failure to comply with an order issued under CERCLA can result in fines of up to $5,000 per day and treble damages. *Id.* § 9606(b).

61. *See infra* notes 125-33, 134-37 and accompanying text (for discussion of the criminal provisions of RCRA and CERCLA, respectively).

62. Only fifteen criminal cases were brought under the federal environmental statutes between December 1972 and November 1974. *White Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 169, 370 n.1721 (1980). By way of contrast, between 1977 and 1985, 1,210 civil actions and 676 judicial consent decrees were filed. McMurry & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L. A. L. REV. 1133, 1136 n.10 (1986).

63. McMurry & Ramsey, *supra* note 62, at 1135, 1141. The impatience of Congress is evidenced by the following:

> The Committee, of course, has in the record documentation of the poor enforcement under the 1965 Act. The Committee concluded that not only were there weaknesses in the procedures established on enforcement, there were weaknesses in the overall design of enforceable requirements.
>
> The Committee further recognizes that sanctions under existing law have not been sufficient . . .

ronmental Protection Agency[64] began to allocate more resources to enforcement, and in particular, to criminal enforcement.

This new strategy began to be implemented in the early 1980s. In 1981, the Office of Criminal Enforcement was created within the EPA.[65] This body's mission is to implement the EPA's commitment to the use of criminal sanctions.[66] Prior to 1982, there were no full-time EPA criminal investigators. Between 1982 and 1986, however, the number had reached thirty-five.[67] Further, an Environmental Crimes Unit was organized in the Land and Natural Resources Division of the Department of Justice[68] to prosecute criminal cases and seek substantial penalties, including incarceration.[69]

The results of this effort have been encouraging thus far. Between fiscal 1983 and fiscal 1986, 252 indictments have been returned.[70] Two hundred two of those indictments have been against corporate officers in their personal capacity.[71] Two hundred eleven guilty pleas have been obtained and over ten accumulated years of actually-served jail time has been meted out.[72]

Despite the increase, the use of criminal environmental sanctions has not caught up proportionally with the enforcement of more tradi-

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SENATE COMMITTEE ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971, S. REP. No. 92-414, 92d Cong., 1st Sess. 63-64 (1971).

64. The Environmental Protection Agency (EPA) was established by President Nixon on December 2, 1970. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072-75 (1970), *reprinted in* 5 U.S.C.A. app. 75-85 (West Supp. 1985), *and in* 84 Stat. 2086 (1970), *amended by* Pub. L. No. 98-80, 97 Stat. 485 (1983). The EPA is charged with administering the Federal environmental statutes.

See generally Starr, *supra* note 10 (for an overview of EPA's enforcement efforts with respect to the criminal environmental statutes).

65. McMurry & Ramsey, *supra* note 62, at 1140.

66. *Id.*

67. Starr, *supra* note 10, at 380 n.2.

68. *Id.* at 381; McMurry & Ramsey, *supra* note 62, at 1140.

69. *Id.*

70. McMurry & Ramsey, *supra* note 62, at 1141 n.32. In 1984 alone, the EPA initiated seventy-nine new criminal investigations and referred thirty-one cases to the Justice Department for criminal prosecution. Tundermann, *Personal Liability for Corporate Directors, Officers, Employees and Controlling Shareholders under State and Federal Environmental Laws*, 31 ROCKY MT. MIN. L. INST. 2-1, 2-4 (1985).

See, e.g., United States v. Frezzo Bros., Inc., 461 F.Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), *defendants petition to vacate dismissed*, 491 F.Supp. 1339 (E.D. Pa. 1980), *rev'd*, 642 F.2d 59 (3d Cir. 1981), *dismissed again on remand*, 546 F.Supp. 713 (E.D. Pa. 1982), *aff'd*, 703 F.2d 62 (3d Cir. 1983) (defendant officers of mushroom farming operation sentenced to 30 days for allowing toxic manure to flow into a creek).

71. McMurry & Ramsey, *supra* note 62, at n.32.

72. *Id.*

tional crimes.[73] Not surprisingly, the number of criminal environmental prosecutions undertaken does not even represent a substantial fraction of the total number of environmental crimes actually committed.[74] Criminal and civil enforcement must compete for the limited resources available to the EPA.[75] These budgetary problems were exacerbated by spending cuts instituted during the Reagan administration.[76]

III. JUSTIFICATIONS FOR THE USE OF CRIMINAL SANCTIONS AGAINST CORPORATE OFFICERS

Deterrence is the fundamental justification for the use of criminal sanctions against corporate officers for environmental violations.[77] There can be little doubt that managers would be highly motivated to seek out and remedy potential transgressions if they knew that there existed a substantial possibility of personal incarceration if their corporation violated an environmental statute.

An oft-voiced objection to this rationale is that studies have been unable to establish a clear link between certainty of criminal conviction and deterrence.[78] Many of these studies were weighted heavily with

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73. *Sparing Use of Sanctions*, *supra* note 12, at 665; *see* NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, UNITED STATES DEPT. OF JUSTICE, ILLEGAL CORPORATE BEHAVIOR xxii (M. Clinard, project director, 1979).

74. Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 ELR 10065, 10066 (1985).

75. *Id.* (for assessment that the disparity between the number of criminal prosecutions launched and the actual number of environmental crimes committed is due mainly to lack of sufficient funding); *see* Starr, *supra* note 10 (for overview of EPA's program of criminal prosecution within existing budgetary constraints).

76. In his first six months in office, President Reagan moved to substantially cut EPA funding. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1801, 95 Stat. 764 (1981). Responding to the cuts, former EPA Administrator Douglas Costle said, "This is not a question of saving money . . . this is a wrecking crew at work." N.Y. Times, Sept. 29, 1981, at A20, col. 1. *See generally Era of Deregulation*, *supra* note 12 (for a detailed critique of the Reagan cuts of EPA operating budgets).

77. *See Sparing Use of Sanctions*, *supra* note 12, at 675 ("Criminal sanctions levied against corporate polluters can be an effective method of deterring illegal conduct. . . ."); *Putting Polluters in Jail*, *supra* note 9, at 101 (arguing that the broad purpose of the criminal provisions of the environmental statutes is deterrence). In 1978, James R. Moorman, then Assistant Attorney General of the Land and Natural Resources Division of the Department of Justice said, "[i]t is self-evident that corporations work through individuals and that the nature of criminal responsibility is such that it properly falls on individuals." *Federal Enforcement*, *supra* note 1, at 598 (quoting J. MOORMAN, CRIMINAL ENFORCEMENT OF THE POLLUTION CONTROL LAWS, *reprinted* in ALI-ABA, ENVIRONMENTAL ENFORCEMENT 27 (1978)).

A corollary to the notion of deterrence is that, because of the greater deterrent effect, the use of criminal sanctions will be a more prospective remedy than civil sanctions have proved to be.

78. *See* S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 198-

crimes and criminals less likely to be affected by the threat of incarceration than would corporate officers in the context of environmental crimes.[79] An upper-middle class corporate officer would probably be stigmatized to a greater degree by his peers upon a criminal conviction than would a member of a lower socioeconomic class.

Another objection to the use of criminal sanctions against corporate officers is that, in many instances, the officer does not, in fact, have knowledge of the commission of the illegal act. To hold such a person criminally liable, it is argued, would be patently unjust.[80] It is this type of capricious government action that the substantive and procedural protections of the criminal law were designed to guard against.[81] This argument ignores the reality of the corporate form. If actual knowledge of the violation were required in every case, rarely would an officer of a large corporation be convicted. But, since such officers formulate company policies and procedures, they should be held ultimately responsible for the acts of their employees.[82]

A strong argument can be made that crimes against the environment are more reprehensible than most "traditional" crimes. The damage wrought by pollution is devastating, widespread, and will be present for generations.[83] Countless individuals have suffered ill-health and many have died as a result of pollution. These crimes are coolly carried out in a premeditated and methodical manner, motivated by the desire to make a

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202 (4th ed. 1983) (overview of studies on criminal sanctions and deterrence); A. REISS & A. BIDERMAN, DATA SOURCES ON WHITE-COLLAR LAW-BREAKING x 1 vi (1980) ("Surprisingly little is known from statistics or formal experiment about how white-collar offending may be deterred by the imposition of sanctions. . . ."). *But see supra* note 77.

79. In most traditional instances of criminal activity, the actor is less likely to be deterred by the threat of incarceration because he is motivated by a burst of passion or because he is apathetic as to the possibility of going to prison, or to the possibility of having the stigma of a criminal conviction placed on his record. For an upper class executive, none of these qualifications apply. Such a person would likely be acutely sensitive to the prospect of criminal prosecution. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 356 (1968). *See supra* note 77.

80. *See* Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571, 1572 (1978) (conviction without knowledge subverts the basic meaning of innocence).

81. The Supreme Court has already held that this type of vicarious criminal liability is permissible when the prosecutions occur under public welfare statutes. The rationale is that the need to protect the public welfare is paramount and that corporate officers must be motivated to seek out and prevent harm to the public. *See infra* notes 98-110 and accompanying text (for a complete analysis of the Court's rulings).

82. Officers can still be responsible for the actions of their employees even if they do not specifically order them to violate the law. Often tacit approval is given through failure to disapprove a particular practice.

83. *See supra* notes 2-6 and accompanying text.

profit.[84] In *United States v. Manfred De Rewal*,[85] the defendant was the owner and manager of a company that held itself out as an expert in the area of hazardous waste disposal and storage. The company was paid more than $200,000 to properly store certain chemicals. Instead of so doing, the chemicals were dumped into the Delaware River near the Phildelphia water treatment plant.[86] Acts of such callousness and scope must be branded morally unacceptable by our society through the stigma of criminal classification.[87]

Another justification for the use of criminal sanctions against corporate officers is that the alternative to criminal sanctions—civil actions resulting principally in fines—is ineffective as a tool of deterrence.[88] Fines are typically calculated as an ordinary cost of doing business, and are ultimately passed on to the public in the form of higher prices.[89] Therefore, society in general, the victims of environmental crime, may

84. It might be argued that, at least a few decades ago, pollution was more the result of ignorance than of a desire to make profit. However, even early in this century, certain polluters were hardly ignorant of the potential danger of their acts. The most striking example is the asbestos industry's knowledge of that chemical's harmful effects well before lawsuits publicized the problem. *See* P. BRODEUR, OUTRAGEOUS MISCONDUCT (1985). Further, publicity regarding the problem of pollution, the proliferation of government regulation, and the improvement of scientific monitoring makes the ignorance excuse untenable today.

85. Crim. No. 77-287 (E.D. Pa. 1978) (cited in *Federal Enforcement, supra* note 1, at 606 n.180).

86. The defendant was convicted and sentenced to six months in prison. *Id.* In United States v. Distler, Crim. No. 77-00108-01-L (W.D. Ky. 1979) (cited in *Federal Enforcement, supra* note 1, at n.184), The defendant-president of a disposal company was convicted of the willful discharge of a hazardous material that directly resulted in the injury of 161 people. Judson Starr, the Director of the Environmental Crimes Unit of the Land and Natural Resources Division of the Justice Department has observed that the typical environmental offenders' acts ". . . are generally willful, deliberate, rational and pre-meditated; . . . motivated by a desire to enjoy the substantial profits that can be derived from such illegal activities." Starr, *supra* note 10, at 382.

87. The magnitude of the environmental harms that result from pollution seem to warrant a greater societal condemnation in the form of longer jail sentences than the misdemeanors (maximum sentence: one year) now found in the federal environmental statutes. *See infra* notes 114-49 and accompanying text.

88. *See Sparing Use of Sanctions, supra* note 12, at 664 ("Nominal civil fines . . . were viewed by many corporations as a cost of doing business. . ."); Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 ALB. L. REV. 61, 64-75 (1972).

89. The "Chicago School" of law and economics would advocate an increase of civil fines to the point at which it becomes more economical for the corporation to abate rather than absorb the fines. This approach would purportedly deter environmental crime at the lowest cost to society, "since society expends capital to imprison an individual, while it increases its revenue through the collection of corporate fines." *Era of Deregulation, supra* note 12, at 666 (citing R. POSNER, ECONOMIC ANALYSIS OF THE LAW 236 (2d ed. 1977)).

However, the "Chicago School" ignores such problems as: the possibility of corporations going bankrupt as a result of large fines with the concomitant loss of jobs and damage to the economy; the fact that the larger fines will also be passed along to the consumer (who is also the victim of the

actually pay the offender's fine.[90]

IV. APPLICATION OF THE REFUSE ACT TO THE CRIMINAL PROSECUTION OF CORPORATE OFFICERS

Once it is accepted that a policy of aggressive criminal prosecution of corporate officers for environmental violations should be pursued, and effective means of implementation must be devised. The critical stumbling block is the difficulty of establishing that a corporate manager possessed the statutorily-required mens rea.[91] An analysis of federal statutory and common law indicates that this obstacle already has been largely overcome because the overriding standard in substance, though not in form,[92] is one of strict liability.

The Refuse Act of 1899[93] provides for strict criminal liability for discharge of any "refuse matter" into the navigable waters of the United States. As noted previously, the Refuse Act has never been repealed.[94] The Supreme Court's expansion of the definition of "refuse matter" to include "all foreign substances," allowed for the prosecution of polluters under the Act.[95] However, most of the criminal actions brought under the Refuse Act thus far have been against corporations rather than individual corporate officers. Despite the manner in which the Refuse Act has historically been used, it has the potential to become a powerful vehicle for obtaining criminal convictions against corporate officers for water pollution.

It is clear that, under the Refuse Act, criminal liability could attach to the individual who, regardless of his state of mind, performs the actual

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crime of pollution); and the unlikelihood that legislatures and courts would ever raise the fines to a sufficient level. *Era of Deregulation*, *supra* note 12, at 666-67.

90. Because most of the products produced by the industrial processes that generate much pollution are beneficial to society, society should bear some of the costs of the pollution. The point is that the costs should be borne by society prospectively, in order to prevent pollution. When the costs must be borne by society retrospectively, society pays not only through the costs of cleanup (if cleanup is even possible), but also through the physical suffering brought about by the pollution. Criminal sanctions against corporate officers will help to insure that society bears the costs in a prospective fashion.

91. Until only recently, this burden discouraged prosecutors from even seeking criminal convictions against individual corporate officers in environmental cases.

92. This refers to the federal environmental statutes containing mens rea requirements. *See infra* notes 114-49 and accompanying text.

93. Refuse Act, *supra* note 16.

94. *See supra* note 49.

95. *See supra* notes 35-36 and accompanying text.

cal act, and who in all probability had no knowledge of the incident in its specificity,[97] can be held liable under this statute.

The Supreme Court dealt with this issue in *United States v. Dotterweich,*[98] which dealt with the criminal prosecution of the president and general manager of a drug company for violations of the federal Food, Drug, and Cosmetic Act.[99] The particular provision under which the defendant was charged was one of strict liability.[100] First, the Court ruled that the defendant was a "person" within the contemplation of the statute.[101] Second, the Court ruled that the defendant could be held liable even though he neither participated in the act, nor had any knowledge of it.[102] The justification for this seemingly harsh ruling was based on the public welfare character of the statute:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[103]

In *United States* v. *Park,*[104] the Supreme Court followed the reasoning of *Dotterweich* in upholding the conviction of the president of a large grocery chain for violations of the federal Food, Drug, and Cosmetic

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97. It is likely, however, that most corporate officers have at least some idea, or are at least suspicious of, the types of activities engaged in by their employees.

98. 320 U.S. 277 (1943).

99. 52 Stat. 1040, 21 U.S.C. §§ 301-392 (1982).

100. The relevant provisions:

> were based on § 301 of [the Federal Food, Drug and Cosmetic Act], . . . which prohibits "The introduction . . . into interstate commerce of any . . . drug . . . that is adulterated or misbranded." "Any person" violating this provision is . . . made guilty of a misdemeanor.

320 U.S. 277, 278 (1943).

101. The Court held that:

> The statute makes "any person" who violates § 301(a) guilty of a "misdemeanor." It specifically defines "person" to include "corporation." § 201(e). But the only way in which a corporation can act is through the individuals who act on its behalf. . . .To hold that the Act . . . freed all individuals . . . from . . . culpability . . . is to defeat the very object of the . . . Act.

Id. at 281.

Since the statutory language of the Refuse Act is similar to that of the Federal Food, Drug, and Cosmetic Act, *see supra* notes 16, 100, corporate officers should be considered persons under the Refuse Act as well.

102. It is also important to note that Dotterweich was convicted and the corporation was acquitted. *Dotterweich,* 320 U.S. 277, 278 (1943).

103. *Id.* at 280-81.

104. 421 U.S. 658 (1975).

In *United States* v. *Park*,[104] the Supreme Court followed the reasoning of *Dotterweich* in upholding the conviction of the president of a large grocery chain for violations of the federal Food, Drug, and Cosmetic Act.[105] In this case, the defendant was made aware of the violations and had delegated the responsibility for remediation to a subordinate. The remediation was not made. According to the opinion: "the 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 do not occur."[106]

It is clear from the decisions in *Dotterweich* and *Park* that the highest corporate executives can be held criminally liable for the actions of their subordinates.[107] The issue of how far down the corporate ladder the Court is willing to descend to attach this vicarious liability has not been reached.[108]

The goal of securing criminal convictions against corporate officers for water pollution without having to meet any mens rea requirement can be accomplished through a coupling of the Refuse Act with the reasoning of *Dotterweich* and *Park*. The Refuse Act is a public welfare statute[109] that imposes strict criminal liability upon violators.[110] Therefore, the statutory underpinnings of a criminal prosecution pursuant to the Refuse Act and those suits brought in *Dotterweich* and *Park* are identical.

A prosecution of this type would allow the government to subject corporate policymakers to the threat of incarceration upon a showing:[111]

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104. 421 U.S. 658 (1975).

105. *See supra* note 100.

106. United States v. Park, 421 U.S. 658, 672 (1975). *See* McMurry & Ramsey, *supra* note 62, at 1152-54 (for an analysis of *Park* and *Dotterweich*); Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses — A Comment on* Dotterweich *and* Park, 28 U.C.L.A. L. REV. 463 (1981).

Similar results were reached in Carolene Prods. v. United States, 140 F.2d 61 (4th Cir. 1944), *aff'd*, 323 U.S. 18 (1944); United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

107. *See supra* notes 102-06 and accompanying text.

In *Carolene Products*, the Fourth Circuit held that "[t]here is ample authority in support of the principle that the directing heads of a corporation which is engaged in an unlawful business may be held criminally liable for the acts of subordinates. . ." 140 F.2d at 660.

108. *Dotterweich*, 320 U.S. at 285 ("It would be too treacherous to define . . . the class of employees which stands in such responsible relation.")

109. Indeed, it may be argued that the Refuse Act protects a much greater interest than the Food, Drug, and Cosmetic Act because of the probable long-term effects of water pollution.

110. *See supra* note 16.

111. In many environmental cases, it is also difficult to establish causation because of the uncertainty inherent in the monitoring devices. This problem exists in both the civil and criminal settings and is beyond the scope of this analysis. It is encouraging to note, however, that scientific advances

(1) of a discharge of "refuse matter" into the navigable waters of the United States[112] and (2) that the defendant held a position of sufficient responsibility to be held accountable to the public.[113] This reduced burden would make consistent criminal convictions a reality, thus maximizing the deterrant potential of the Refuse Act.

V. FEDERAL ENVIRONMENTAL STATUTES THAT IMPOSE MENS REA REQUIREMENTS

Most of the Federal environmental statutes currently in effect have scienter requirements in their criminal provisions. Before analyzing the standards of proof necessary to meet these requirements, a brief overview of the statutes will be provided.

A. Clean Water Act

The Clean Water Act[114] was passed in 1977. The purpose of the Act according to its legislative history was to "put teeth" into the enforcement mechanism of the 1972 amendments to the Federal Water Pollution Control Act.[115]

The criminal provisions of the Act call for misdemeanor penalties of up to one year in prison and/or a $25,000 per day fine for willful or negligent violations of effluent limitations or permit requirements.[116] Also, it mandates a misdemeanor penalty of up to six months in jail and/or a $10,000 fine for knowing falsification of documents or tampering with measuring devices.[117]

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in the area of measuring and monitoring equipment have helped to alleviate this problem somewhat. *See Sparing Use of Sanctions, supra* note 12, at 662.

112. *See supra* note 16.

113. *Dotterweich*, 320 U.S. at 280-81. This requirement should not be difficult to meet since the highest corporate policy makers would be the targets.

114. 33 U.S.C. § 1319(c)(1) (1982); *see supra* notes 54-55 and accompanying text.

115. The Committee on Public Works recommended stronger penalties with the "threat of sanction [being] real, and enforcement provisions [being] swift and direct." II LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1483 (Gov't. Printing Office 1973). *See supra* note 53-54 and accompanying text.

116. 33 U.S.C. § 1319(c)(1) (1982):

> Any person who willfully or negligently violates section 1311, 1312, 1317 or 1318 of this title, or any permit condition or limitation . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction — punishment shall be by a fine of not more than $50,000 per day of violation or by imprisonment for not more than two years, or by both.

Id.

117. 33 U.S.C. § 1319(c) (1982).

Criminal convictions against corporate officers have been obtained under the Clean Water Act. In *United States* v. *Distler*,[118] the president of a waste disposal company was convicted of willful violations of the permit and discharge requirements of the Act.[119] The company was found to have discharged toxic chemicals into the Louisville sewage system. Exposure to the chemicals caused 161 people to require medical care.[120] The defendant president was sentenced to two years in prison and fined $50,000.[121]

In *United States* v. *Frezzo Brothers, Inc.*,[122] mushroom farmers were convicted in their capacity as corporate officers for wilfully allowing toxic manure to overflow into a local creek in contravention of the Clean Water Act.[123] The defendants were each sentenced to thirty days in prison and fined an aggregate of $50,000.[124]

B. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA)[125] regulates the "treatment, storage, disposal [and] transportation" of hazardous wastes.[126]

RCRA provides for felony penalties of up to two years in prison and/or a $50,000 per day of violation fine for knowingly: transporting

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118. Crim. No. 77-00108-01-L (W.D. Ky. 1979) (cited in *Federal Enforcement, supra* note 1, at n.184). *See supra* note 86 (for discussion of *Distler*).

119. *See supra* note 116.

120. United States v. Distler, Crim. No. 77-00108, Transcript of Sentencing 9 (W.D. Ky. Sept. 14, 1979) (cited in *Federal Enforcement, supra* note 1, at n.186).

121. *Id.* (Judgement and Commitment Order).

122. 461 F.Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), *defendant's petition to vacate dismissed*, 491 F.Supp. 1339 (E.D. Pa. 1980), *rev'd*, 642 F.2d 59 (3d Cir. 1981), *dismissed again on remand*, 546 F.Supp. 713 (E.D. Pa. 1982), *aff'd*, 703 F.2d 62 (3d Cir. 1983).

123. 602 F.2d at 1130.

124. *Id.* at 1124.

125. 42 U.S.C. §§ 6901-6987 (1982). *See supra* note 58.

126. *Id.* § 6928(d):

> Any person who —
>
> (1) knowingly transports or causes to be transported any hazardous waste [as defined herein] to a facility which does not have a permit.
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either —
>
> (A) without a permit . . . or
>
> (B) in knowing violation of any . . . condition. . . of such permit . . . or
>
> (C) in knowing violation . . . of any applicable . . . standards;
>
> (3) knowingly omits material information or makes any false statement in any [document] . . . under this subchapter;
>
> (4) knowingly generates, stores, treats, transports . . . any hazardous waste . . . and

hazardous wastes to an unpermitted facility;[127] disposing hazardous wastes without a permit;[128] omitting or falsifying information material on compliance;[129] destroying, altering, or concealing records required by the Act;[130] or transporting hazardous waste without the required manifest.[131]

In 1980, RCRA was amended to include the offense of "knowing endangerment."[132] This provision applies only to the most serious cases of environmental abuse. It provides for felony penalties of up to fifteen years in prison and/or a fine of $1 million for knowing, life-threatening actions that violate RCRA prohibitions or requirements.[133]

C. *Comprehensive Environmental Response, Compensation, and Liability Act*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[134] calls for the clean-up of already existing hazardous waste disposal sites. The Act provides for a "Superfund" to finance the clean-ups. This fund is generated mainly through a special tax levied upon the chemical and petroleum industries.[135] When "Superfund" monies are used to finance a clean-up effort, the government is authorized to seek reimbursement from "responsible parties," as

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or fails to file any record, . . . manifest, report, or other doccument [required by this statute];

(5) who knowingly transports [hazardous waste] without a mainfest . . . ; shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years, or both [with the penalties doubled for second convictions].

Id.

127. *Id.* § 6928(d)(1).

128. *Id.* § 6928(d)(2).

129. *Id.* § 6928(d)(4).

130. *Id.*

131. *Id.* § 6928(d)(5)

A leading case on liability under 42 U.S.C. § 6928(d) (1982) is United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). See *infra* notes 162-84 and accompanying test for a detailed discussion of *Johnson & Towers.*

132. 42 U.S.C. § 6928(e) (1982).

133. § 6928(e) states:

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than fifteen years, or both. A defendant that is an organization shall . . . be subject to a fine of not more than $1,000,000.

Id.

134. 42 U.S.C. § 9601-9657 (1982).

135. *Id.* § 9604.

defined by the Act.[136] CERCLA also requires current owners of property to disclose any past or present releases of hazardous materials.

The criminal provisions of CERCLA provide for a misdemeanor penalty of up to one year in jail and a $25,000 fine for *knowing* destruction or falsification of certain records.[137]

D. Clean Air Act

The Clean Air Act (CAA)[138] regulates both stationary and moving sources of air pollution. The EPA establishes air quality standards. State Implementation Plans translate the standards into emission limitations.[139]

The Act calls for misdemeanor penalties of up to one year in prison and/or a $25,000 per day of violation fine for *knowingly* violating air pollution control requirements[140] or making false documents.[141]

E. Federal Insecticide, Fungicide, and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[142] regulates substances used to repel or destroy insect, plant, or

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136. Responsible parties include:
1. Current operators of a facility;
2. Owners or operators of disposal facilities at the time the hazardous substances were disposed of;
3. Persons who arranged for disposal or treatment of hazardous substances by others;
4. Persons who accept or accepted hazardous substances for transport to dispersal or treatment facilities selected by them.

42 U.S.C. § 9607 (1982) (quoted in Warshauer & Stansel, *Analyzing the Relationship between the Civil, Governmental, and Criminal Obligations and Liabilities for Hazardous Waste*, TORT & INS. L. J. 37, 49 (1986)).

137. 42 U.S.C. § 9603(d)(2) (1982).

138. *Id.* §§ 7401-7642.

139. *Id.* § 7413(c).

140. *Id.* § 7413(c) states:

> (c)(1) Any person who knowingly
>
> (A) violates any requirement of an applicable implementation plan . . . [as required by this Act] . . . shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both [with the sanctions doubled for second offenders]
>
> (2) Any person who knowingly makes any false statement, representation, or certification in any application, report, plan, or other document [required under this Act] shall . . . be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

Id.

141. 42 U.S.C. § 7413(c)(2) (1982). *See* Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978).

142. 7 U.S.C. §§ 135-136y (1982).

animal life defined as pests.[143]

The Act mandates misdemeanor penalties of up to one year in jail and a $25,000 per day of violation fine for *knowingly* violating any provision of the Act;[144] using a pesticide in a manner inconsistent with its labelling;[145] or distributing an unregistered pesticide.[146]

F. Toxic Substances Control Act

The Toxic Substances Control Act (TSCA)[147] is designed to regulate chemical substances that are deemed to present an unreasonable risk of injury to human health or to the environment. The EPA determines which substances are to be considered unreasonably dangerous, but the burden of generating the relevant data is placed upon the manufacturers.[148]

The Act provides for misdemeanor penalties of up to one year in jail and a $25,000 per day of violation fine for *knowing* or *willful* violations of its provisions.[149]

"Knowledge" is the mental state required almost exclusively in these statutes. In a more conventional corporate crime scenario,[150] to establish knowledge, a showing must be made that the defendant was aware or believed that the unlawful result was almost certain to follow his act or omission.[151] The following section will demonstrate how courts have so reduced the knowledge requirement, in the application of public welfare statutes, that the true operational standard is one of strict liability.

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143. *Id.* § 135.

144. *Id.* § 135(1)(b).

145. *Id.* §§ 136j(a)(2)(G), 136(1)(b).

146. *Id.* §§ 136j(a)(1)(A), 1361(1)(b). *See* United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

147. 15 U.S.C. §§ 2601-2629 (1982).

148. *Id.* § 2603(a).

149. *Id.* § 2615(b).

150. A crime to which the "responsible corporate officer" theory does not apply is what is meant by conventional corporate crime. *See infra* notes 152-62 and accompanying text.

151. *See* Riesel, *supra* note 74, at 10072 ("[K]nowledge requires a lesser standard of proof than willfulness since the individual with knowledge need not intend or desire the result to occur, so long as he is substantially certain that it will occur.").

VI. THE JUDICIALLY CREATED STANDARD FOR FEDERAL ENVIRONMENTAL STATUTES CONTAINING MENS REA REQUIREMENTS: STRICT LIABILITY IN SUBSTANCE BUT NOT FORM

Courts have taken the rationale developed in the *Dotterweich*[152] and *Park*[153] cases—holding corporate officers criminally liable for violations of strict liability provisions of public welfare statutes[154]—and extended it to federal environmental statutes containing scienter requirements. This hybrid has come to be known as the "responsible corporate officer theory."[155]

As in *Dotterweich* and *Park*, the "responsible corporate officer theory" holds that a corporate official can be criminally convicted for the violation of a public welfare statute if it can be demonstrated that her position provided her the opportunity to "seek out, discover and stop"[156] the illegal act, and yet she failed to do so. Actual knowledge of the act is not required. Under this theory, the *Dotterweich* and *Park* principles are extended to cover public welfare statutes containing mens rea requirements. How can a person with absolutely no knowledge of the commission of an illegal act be held liable when the statute under which she is charged specifically requires a showing of intent?[157] Courts have concluded that the policy concerns of protecting the public outweigh the compromise of individual defendants' rights.[158] Implicit in the reasoning is the pragmatic realization that, if mens rea requirements were faithfully

152. 320 U.S. 277 (1943).

153. 421 U.S. 658 (1975).

154. *See supra* notes 98-113 and accompanying text.

155. *See* McMurry & Ramsey, *supra* note 62, at 1153 n.124.

156. *Id.* at 1153.

157. The principal objection to the "responsible corporate officer" theory is that it provides an unwarranted relaxation of the scienter requirements of the federal environmental statutes. *See* Tundermann, *supra* note 70, at 2-19.

158. *See supra* notes 98-113 and accompanying text.

In formulating the "responsible corporate officer" theory, the courts have also sought to satisfy the clear congressional will that corporate officers be punished for environmental violations. The clearest expression of this intent is found in the statutes themselves. The Clean Air Act, 42 U.S.C. § 7413(c)(3) (1982), and the Clean Water Act, 33 U.S.C. § 1319(c)(3) (1982), specifically cover "responsible corporate officers." The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(a)(5), (b)(4) (1982), specifically names officers, agents, and employees. The Clean Air Act, 42 U.S.C. §§ 7411-14, 7419-20 (1982), The Clean Water Act, 33 U.S.C. §§ 1319(f), 1321 (1982), CERCLA, 42 U.S.C. §§ 9601(2), 9607-08 (1982), and RCRA, 42 U.S.C. §§ 6924, 6925(a) (1982), subject "owners and operators" to certain provisions. The Senate Environment and Public Works Committee stated that liability should not be limited to the individuals who actually commit the physical act of polluting, but should include, "those corporate officers under whose responsibility a violation has taken place." S. REP. No. 127, 95th Cong., 1st Sess. 51 (1977).

adhered to, the corporate form would shield all but the most egregious offenders from the possibility of conviction.[159]

The responsible corporate officer theory has the effect of imposing strict liability upon statutes that ostensibly have mens rea requirements.[160] This formulation, along with the judicial sympathy implicit therein, could be employed by prosecutors to secure widespread convictions of corporate officers for environmental offenses.[161]

Although the responsible corporate officer theory has not been overruled, the most current case law with respect to criminal actions under the federal environmental statutes appears to retreat from the strict liability formulation somewhat. It will be shown, however, that this supposed shift is one of form only. The underlying strict liability remains intact.

An important case in this area is *United States v. Johnson & Towers, Inc.*[162] Its rationale has subsequently been embraced by the Eighth[163] and Eleventh[164] Circuits.

Johnson & Towers involved the criminal prosecution of a foreman and a mid-level manager for a "knowing" violation of RCRA permitting requirements.[165] Neither defendant was in a position to secure the permit

159. Further, there seems to be an underlying skepticism about the true ignorance of corporate officers in these types of cases. The desire is to create a positive incentive for officers to actively work to insure compliance. Strict adherence to traditional scienter requirements would create an incentive for officers to deliberately insulate themselves from inculpatory information.

160. *See* McMurry & Ramsey, *supra* note 62, at 1154 (for the view that the responsible corporate officer theory imposes a tort-like "knew or should have known" standard).

161. This strict liability formulation should also substantially decrease the cost of prosecuting criminal environmental actions because less time and effort would need to be spent establishing mental culpability. *See Federal Enforcement, supra* note 1, at 609 (for an illustration of the massive resources required to be expended to secure a misdemeanor conviction when mental state must be shown).

162. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

163. United States v. Northeastern Pharmaceutical and Chemical Co., 810 F.2d 726, 745 (8th Cir. 1986) (*Johnson & Towers* rationale used to impose strict liability under RCRA on past transporters of hazardous waste for present conditions resulting from past activities).

164. *See* United States v. Hayes International Corp., 786 F.2d 1499 (11th Cir. 1986) (jurors may draw inferences from all of the circumstances to establish knowledge); *see also* United States v. Engler, 806 F.2d 425 (3d Cir. 1986) (*Johnson & Towers* rationale applied to criminal sanctions of the Migratory Bird Treaty Act).

165. Specifically, the defendants were charged with the unauthorized draining of methylene chloride and trichloroethylene from vehicle cleaning operations into a trench which eventually drained into the Delaware River. *Johnson & Towers*, 741 F.2d 662, 664 (3d Cir. 1986). There was no evidence as to defendants' actual knowledge of either the permit requirement or of the illegality of the discharges. *Id.* at 670. The charge under review by the Third Circuit was brought under RCRA and possessed a *scienter* requirement. 42 U.S.C. § 6928(d) (1982); *see supra* note 126 (for the relevant statutory language).

for the company on his own authority.

The Court first reiterated the principle expressed in *Dotterweich* that:

> [T]hough the result may appear harsh, it is well established that criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common-law crimes, are to be construed to effectuate the regulatory purpose.[166]

The Court then had to contend with the fact that *Dotterweich* involved a strict liability statute[167] and that the case it was considering dealt with a statute containing a scienter requirement.[168] The opinion suggested that, because of the public welfare nature of RCRA, there might be a "reasonable basis for reading the statute without any *mens rea* requirement."[169] The Court quickly retreated from this statement, reasoning that, because of the explicit knowledge requirement and the syntax of the statute,[170] the government would have to prove that the defendants knew that Johnson & Towers, Inc. was required to have a permit, and also knew that Johnson & Towers, Inc. did not have the permit.[171]

At this point, it appears as if the Court was attempting to cut back on the harsh results and theoretical inconsistencies of the responsible corporate officer theory, and was formulating a standard at least peripherally grounded in intent.[172] This notion is contradicted a few paragraphs later when the Court announces that "knowledge, including that of the permit requirement, may be inferred by the jury as to those individuals who hold the requisite responsible positions"[173] within the corporation.[174]

By allowing juries to infer knowledge on the basis of position within the corporate hierarchy, the defendant's actual knowledge becomes irrelevant.[175] Therefore, the Court-imposed standard is very close to strict

166. *Johnson & Towers*, 741 F.2d at 666 (3d Cir. 1984).

167. *See supra* notes 99-100 and accompanying text.

168. *See supra* note 126.

169. *Johnson & Towers*, 741 F.2d at 668. If this view had been accepted, this would have been a pure application of the responsible corporate officer theory. *See supra* notes 156-58 and accompanying text (for discussion of responsible corporate officer theory).

170. *Id.*

171. *Id.* at 670.

172. *See supra* note 160.

173. *Johnson & Towers*, 741 F.2d at 669.

174. The determination of what knowledge can be inferred from a particular corporate position is left to the common sense of trial judges and juries as it was in *Dotterweich*. *Id.* *See supra* note 108.

175. It could be argued that it should be an affirmative defense that, in fact, the defendant did

liability.[176] The strict liability formulation relieves prosecutors of the burdensome requirement of showing that a corporate officer had actual knowledge of an environmental violation, previously the major stumbling block in this type of case. Prosecutors have thus been afforded an ideal opportunity to secure, on a regular basis, convictions of corporate officers for environmental crimes—an opportunity which should be exploited to the fullest.

This relaxation in the standard of proof for individual criminal convictions can be utilized to pursue concurrent civil and criminal actions.[177] In a concurrent action, if an individual corporate officer knows that there is a substantial certainty of his conviction on the criminal charge, she probably will be willing to accept a plea bargain in which she agrees to cooperate with the government in the civil action against the corporation in return for leniency in sentencing. Thereby, the ancillary criminal prosecution complements the civil action.[178]

It has been argued that the rationale of *Johnson & Towers* is inappropriate because it blurs the distinction between strict liability statutes and scienter-based laws.[179] This contention is weak, however, for there is

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not know of the violation (even though, by virtue of his position, he should have). To allow this defense would be counterproductive because it would create an incentive for corporate officers to insulate themselves from knowledge of their companies' activities.

176. The classic definition of strict liability is "liability without fault." BLACK'S LAW DICTIONARY 1216 (5th ed. 1979).

177. Concurrent criminal and civil actions have been pursued in the past. *See* United States v. Salter, 432 F.2d 697 (1st Cir. 1970); *See, e.g.*, Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

178. *See* McMurry & Ramsey, *supra* note 62, at 1159. The threat of criminal prosecution may also motivate individual corporate officers to come forward prior to any official investigation or suspicion of wrongdoing. *Id.* The more liberal civil discovery rules also present the possibility of the acquisition of evidence that might be utilized in a concurrent criminal action in appropriate circumstances. United States v. Kordel, 397 U.S. 1, 11 (1970). As of yet, what constitutes "appropriate circumstances" has not been defined. *See* McMurry & Ramsey, *supra* note 62, at 1163 n.172. It is a difficult determination to make because it requires the courts to, once again, balance criminal defendants' constitutional rights against the public health and welfare. *See supra* note 158 and accompanying text (for another instance of judicial balancing).

179. The argument runs as follows:

> The difference between *Park* and *Johnson & Towers* is the type of statute involved: the Food, Drug, and Cosmetic Act does not require knowledge or intent, but imposes strict responsibility on those with the power to prevent or correct unlawful acts. In contrast, the federal environmental statutes consistently require personal knowledge, intent, or negligence as the basis for criminal liability. The Third Circuit's dictum in *Johnson & Towers* that knowledge can be inferred from position applies the reasoning in *Park* to a wholly different statutory scheme. It blurs the distinction between strict liability statutes and scienter-based laws, and should not be followed.

Tunderman, *supra* note 70, at 2-21.

no ambiguity in the substance of the Court's holding. The standard is almost indistinguishable from classic strict liability. The confusion lies in how the Court could adopt a strict liability standard in the disposition of a scienter-based statute.

The Court has essentially paid lip-service to the mens rea requirements of the statute. This may represent a superficial attempt to alter the form to reflect a more constitutionally acceptable standard while retaining the substance of strict liability.

The constitutionality of strict criminal liability has been vigorously challenged by many commentators.[180] The Court had to balance these concerns against the hazards posed by continued pollution. It has already been established that the cumulative effects of pollution are more dangerous and their repercussions more long-lasting and profound than any crime yet faced by a judicial system.[181]

The unprecedented nature of the crime requires an unprecedented response. If ever there existed a situation which mandated the compromise of defendants' individual rights to achieve a greater good, this is it. In comparision, the personal rights at stake here are not overwhelmingly compelling. The maximum sentences under the federal environmental statutes are one year and rarely, if ever, is the maximum assessed.[182] Balanced against this are the continued viability of the earth's ecosystems and the health and well-being of its inhabitants.[183] Pollution must be

180. The principal constitutional challenges to strict criminal liability are: (1) that it violates the Eighth Amendment bar on cruel and unusual punishment and (2) that it denies substantive criminal law due process in that it is inconsistent with a presumption of innocence. *See, e.g.*, Saltzman, *supra* note 80.

181. James Moorman, former Assistant Attorney General of the Land and Natural Resources Division of the Department of Justice, has warned that "[t]he discharge of [pollutants] into the environment may cause as much harm as any act known to man." *Federal Enforcement*, *supra* note 1, at 597 (quoting J. MOORMAN, *supra* note 77, at 27).

182. In practice most of those convicted receive suspended sentences or probation. In United States v. Blue Lagoon Marina, Inc., No. 75-80824 (E.D. Mich. Dec. 12, 1975) (cited in *Putting Polluters in Jail*, *supra* note 9, at 103 n.89), the individual defendant was found to have deliberately discharged hundreds of gallons of gasoline onto a frozen lake and was sentenced only to a minimal fine. In United States v. Little Rock Sewer Comm., 460 F.Supp. 6 (E.D. Ark. 1978), the individual defendant was convicted of knowingly making false statements in required reports on a regular basis, and received only a suspended jail sentence. In United States v. A.C. Lawrence Leather Co., Crim. No. 82-37-01-L (D.N.H. Apr. 7, 1983) (cited in McMurry & Ramsey, *supra* note 62, at 1154) five defendant corporate officers were convicted for the deliberate bypassing of the company's on-site wastewater treatment plant and discharging the raw sewage into the river. Incredibly, throughout the time of the illegal discharge, the company applied for and received about $25 million from the EPA to study the effectiveness of its wastewater plant (the data was, of course, useless). The defendants in this case all received probation.

183. In United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1326 (6th Cir. 1974), the

stopped. The corporate forum in which most environmental crimes occur prevents the effective use of the traditional criminal law. Strict liability standards for convictions of corporate officers would provide the desired deterrent effect.[184]

There are many who would argue that, notwithstanding these intuitively appealing theoretical justifications, the widespread imposition of strict criminal liability upon corporate officers for violations of environmental statutes should not be pursued because it represents too radical a departure from the traditional Anglo-American jurisprudential conception of culpability. On the contrary, far from being radical, the application of this type of vicarious criminal liability is perfectly consistent with the well settled rationale of *Dotterweich*[185] and *Park*.[186]

If anything, the reasoning of these cases is rendered more compelling by the gravity of the societal interests represented by the environmental statutes. Further, the imposition of strict criminal liability against corporate officers might be viewed as a parallel to the increased willingness of courts to impose strict liability in the civil setting.[187]

Courts have become very comfortable with the imposition of strict personal liability on corporate officers in civil actions under the federal environmental statutes.[188] In *New York v. Shore Realty Corp.*,[189] for example, the controlling shareholder and officer of the defendant real estate development company was held personally liable for the cleanup costs of property upon which he allowed 90,000 gallons of toxic chemicals to be stored. The defendant did not personally participate in the prohibited storage, but was deemed responsible because of his indifference. In *United States v. Northeastern Pharmaceutical and Chemical Co.*,[190] the president of the defendant corporation was held strictly liable for the

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pollution of the local river by petroleum-based chemicals was so severe that the river repeatedly caught fire. In United States v. Ralston Purina Co., 12 Envt'l L. Rep. (Env. L. Inst.) 2057 (W.D. Ky. 1982) (cited in McMurry & Ramsey, *supra* note 62, at 1141 n.30), the defendant corporation discharged hexane gas illegally into the sewers of Louisville, Kentucky. The gas eventually triggered a massive explosion that caused millions of dollars worth of damage and would have taken many lives, had it not occurred at 5:00 a.m.

184. *See supra* notes 77-90 and accompanying text.

185. 320 U.S. 277 (1943).

186. 421 U.S. 658 (1975).

187. *See generally* J. DI MENTO, ENVIRONMENTAL LAW AND AMERICAN BUSINESS, DILEMMAS OF COMPLIANCE (1986) (for a comprehensive discussion of civil environmental enforcement).

188. "[I]t is now well settled that strict [civil] liability is imposed on any party . . . responsible for a hazardous waste site." Warshauer & Stansel, *supra* note 136, at 52.

189. 759 F.2d 1032 (2d Cir. 1985).

190. 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986).

cleanup costs associated with an illegal disposal of hazardous wastes, despite the fact that he was unaware of the disposal plan, and had instructed his employees in a general manner as to the potential dangers and liabilities of improper disposal. The court predicated the president's liability upon his capacity to control the disposal that was vested in his office. This formulation provides the theoretical link between the criminal and civil conceptions of strict vicarious liability in the environmental context. The reasoning here is identical to that of *Johnson & Towers.*[191]

Although courts routinely impose strict personal liability upon corporate officers in civil environmental cases,[192] they remain unwilling to pierce the corporate veil.[193] Officers' liability is founded upon position and responsibility within the firm.[194] Thus, in civil cases, as in criminal, courts have managed to preserve the form of traditional legal doctrine while obtaining substantively opposite results.[195]

The Third Circuit's decision in *Johnson & Towers* has been good law for several years. It provides prosecutors with the tools they need to secure convictions on a regular basis. What is needed now is a greater effort on the part of the government to bring criminal actions under the environmental statutes.

VII. CONCLUSION

The extent of the damage to the environment and to the health of living creatures caused by pollution is staggering. The deleterious effects will be felt for generations to come. It is ironic that, while we as a society

191. 741 F.2d 662 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). *See supra* notes 162-84 and accompanying text.

192. *See supra* notes 188-90 and accompanying text.

193. In *Shore Realty*, 759 F.2d 1032 (2d Cir. 1985), the Court specifically declined to hold that the corporation was the defendant's alter-ego. *See supra* note 189 and accompanying text. In United States v. Mahler, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20068 (M.D. Pa. Jan. 5, 1984), the Court held the president of a disposal company personally liable for cleanup costs based upon his corporate title without any alter-ego allegations being made. *See* Note, *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

194. Most of the federal environmental statutes include "individuals" among the "persons" covered by them. 42 U.S.C. § 7602(e) (1982) (CAA); 33 U.S.C. § 1362(5) (1982) (CWA); 42 U.S.C. § 9601(21) (1982) (CERCLA); 7 U.S.C. § 136(5) (1982) (FIFRA). But the "individual" referred to is most clearly the person who actually carried out the physical act of pollution. Most of the major statutes also specifically hold the "owner and operator" liable. 42 U.S.C. §§ 9601(20), 9607, 9608 (1982) (CERCLA); 42 U.S.C. §§ 6924, 6925(a) (1982) (RCRA); 33 U.S.C. §§ 1319(f), 1321 (1982) (CWA); 42 U.S.C. §§ 7411-14, 7419-20 (1982) (CAA). Owner and operator liability has been predicated on capacity to control. *See supra* notes 190-91 and accompanying text.

195. In the criminal context, the legal doctrine that was ostensibly upheld was the mens rea requirement, and in the civil it is the traditional reluctance to pierce the corporate veil.

place so much emphasis on attempting to save the world from nuclear holocaust, we may be striving to save a dying planet. We have only recently begun to realize that the long-term effects of pollution are potentially as threatening to the continued viability of life as we know it as is nuclear annihilation. The unchecked erosion of the earth's ecosystems as a result of pollution could render it unfit to support life. The gravity of the threat warrants a swift and innovative response.

Efforts to control pollution, mainly through civil actions, have met with little success. The civil remedy of monetary damages is treated by the offending corporation as a cost of doing business and is ultimately passed on to the consumer. In a sense, then, the public is being forced to pay to become a victim of pollution.

The most effective way to circumvent this problem is to expose corporate policy-makers to the threat of criminal prosecution for environmental violations. This would create a positive incentive for corporate officers to actively pursue compliance with the environmental statutes. The judicially-developed standards of proof required to convict corporate officers for environmental offenses have been relaxed so greatly that they are tantamount to strict liability. Greater effort should be made by the government to utilize the opportunities provided by these standards to secure more criminal convictions.

ROBERT A. MILNE