

SENTENCING THE CEO: PERSONAL LIABILITY OF CORPORATE EXECUTIVES FOR ENVIRONMENTAL CRIMES.

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I. INTRODUCTION

"Clean up your act or go to jail" is a message increasingly sent to corporate executives. In the field of environmental enforcement, criminal prosecution of corporate officers for violations increased throughout the 1980s.¹ Criminal prosecutions against individuals in the environmental context now outnumber

1. See John F. Seymour, *Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws*, 20 Env't Rep. (BNA) No. 6, at 337 (June 9, 1989); see also,

prosecutions of corporations by a three to one margin,² and that increase is likely to continue. Indeed "by 1995, the level of fines and convictions could be double."³ Courts are increasingly sentencing corporate officers and directors to longer jail terms. As a result of increased media attention and political activity, the public has begun to view harm to the environment as a serious crime.

This comment will attempt to set forth the major federal environmental statutes that provide for criminal sanctions of individuals, and will also explore the expanding doctrines of corporate and personal liability of corporate officers. Some of the potential weaknesses and problems in holding officers and directors personally liable in a criminal action will also be examined, especially in those instances where there is no knowledge or intent on the part of the corporate official. Expansion of the law of liability in this area must be carefully considered, as there is the potential that certain fundamental liberties may be constricted by imposing criminal liability on officers and directors simply by virtue of their position in the company.

II. BASIS FOR LIABILITY IN ENVIRONMENTAL CRIMES

A corporate defendant faces potential criminal liability from a myriad of sources. Criminal charges spring from a number of complex and confusing state and federal statutes that may also be augmented by administrative regulations or common law actions.⁴ Although this comment will focus on the federal aspects of criminal prosecutions that target the corporate

Andrew M. Goldberg, *Corporate Officer Liability for Federal Environmental Statute Violations*, 18 B.C. ENVTL. AFF. L. REV. 357, 357 (1991).

2. George A. Rodenhausen, *Individual Civil and Criminal Environmental Liability*, in THE IMPACT OF ENVIRONMENTAL REGULATIONS OF BUSINESS TRANSACTIONS 1990, at 547, 549 (P.L.I. Litig. & Admin. Practice Course Handbook Series No. 716, 1990).

3. Susan Zeidler, *Government Widens Net Around Corporate Polluters*, Rueters, Feb. 5, 1990, available in LEXIS, Nexis Library, Rueters File (quoting Herb Johnson, senior environmental counsel for the National Association of Attorney Generals).

4. For a more in depth treatment of the federal environmental laws and the applicable sections of the U.S. Code, see Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 824 (1991); James A. Rogers, *Criminal Liability of Corporations and Corporate Officers for Environmental Offenses*, in CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS 75, 87-98 (ALI-ABA Course of Studies Series No. C496, 1990); Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOYOLA L.A. L. REV. 1133, 1133 (1986). For an excellent discussion of emerging theories of criminal liability from common law, see generally Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311

officer, a brief overview of other potential grounds for criminal actions will help to illustrate the growing magnitude of this risk.

A. Criminal Aspects of Major Federal Environmental Laws

Depending on the nature of an environmental violation, a number of federal statutes could impose liability, with any resultant fines or penalties being cumulative in nature. Most of the environmental statutes contain criminal provisions, and while many contain a "knowing" requirement, such that liability can only be imposed on an offender who is aware that the violation has occurred, others impose liability for mere negligence, regardless of what knowledge the individual actually had. Furthermore, most are enforceable against either the corporate actor or the individual. Generally, the criminal provisions also provide for fines, incarceration, or both.

1. Comprehensive Environmental Response, Compensation, and Liability Act

In environmental crime cases, one of the most utilized federal statutes is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁵ Enacted in 1980, CERCLA's main objective is to create a method of dealing with the remediation and cleanup of abandoned hazardous waste disposal sites.⁶ CERCLA also governs the uncontrolled release of hazardous substances into the environment.⁷ A release is defined in the Act as any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment . . ." any hazardous substance.⁸ Hazardous substances are defined to include those hazardous wastes that fall within the coverage of the Resource

(1989) (discussing the emergence of such theories as negligent homicide and their increasing application to environmental actions).

5. 42 U.S.C. §§ 9601-9675 (1988 & Supp. I 1990) amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101(35), 100 Stat. 1613 (codified in scattered sections of 42 U.S.C. §§ 9601-9675 (1988 & Supp. I 1990)). For a more in depth treatment of CERCLA, see Jose R. Allen and Robert P. Doty, *Toxic Shock: Personal Liability of Corporate Officials Under CERCLA*, in *PERSONAL LIABILITY FOR ENVIRONMENTAL VIOLATIONS: AVOIDING AND DEFENDING CIVIL SUITS AND CRIMINAL PROSECUTIONS* 1991, at 17 (P.L.I. Litig. & Admin. Practice Course Handbook Series No. 409, 1991).

6. S. REP. NO. 848, 96th Cong. 2d Sess. 2 (1980), reprinted in 42 U.S.C.C.A.N. 6119, 6120-22.

7. 42 U.S.C. § 9603.

8. *Id.* § 9601(22).

Conservation and Recovery Act (RCRA).⁹

In 1986, CERCLA was reauthorized by the Superfund Amendments and Reauthorization Act of 1986 (SARA).¹⁰ A number of criminal sanction provisions are found in this amended statute. For example, the statute requires immediate notification to the appropriate federal agency of the release of hazardous substances.¹¹ Failure to notify the appropriate authorities of a release, or submitting a notice containing false or misleading information,¹² is punishable either by a fine of up to 250,000 dollars for individuals or 500,000 dollars for corporations, or by a prison sentence of up to three years for the first conviction.¹³ This provision does not contain any "knowing" requirement, thus the mere failure to notify can result in a violation and potential conviction without the offender ever having known that the release occurred.¹⁴ This strict liability provision might appear too stringent under these circumstances, but it was considered important by Congress in order to further the purposes of the statute and to maximize its protective goals.¹⁵ Although § 9603 requires that the person "in charge" of a facility notify the appropriate agency of any discharge, it does not define what is meant by "in charge."¹⁶ Thus, the courts have been left with the task of defining this phrase. The Second Circuit, for example, has held that the person "in charge" may be someone of a less significant rank than might be expected, as long as that person is in a position "to detect, prevent, and abate a release of hazardous substances."¹⁷

CERCLA also requires notification to the Environmental Protection Agency (EPA), within certain time limits, of the existence of any facility used for the treatment, storage, or dispo-

9. *Id.* §§ 9601(14)(c).

10. Superfund Amendments and Reauthorization Act of 1986, Pub L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C. §§ 9601-9675 (1988 & Supp. I 1990)).

11. 42 U.S.C. § 9603.

12. 42 U.S.C. § 9603(b).

13. *See also supra* note 8 and accompanying text. 18 U.S.C. § 3671 (1988) (providing for fines in the case of a felony conviction).

14. 40 C.F.R. § 302.6 (1991); *see also* *United States v. Greer*, 850 F.2d 1447, 1453 (11th Cir. 1988) (upholding a conviction where defendants failed to report a release).

15. *See Fromm, supra* note 4, at 835 (discussing the notification provisions of CERCLA and the potential dangers associated with the release of hazardous matter).

16. 42 U.S.C. § 9603(b)(3).

17. *United States v. Carr*, 880 F.2d 1550, 1554 (2d Cir. 1989) (holding that a maintenance foreman at an army installation was "in charge" within the meaning of the statute and therefore had a duty to report the disposal of certain paint cans).

sal of hazardous substance.¹⁸ This section does contain a "knowing" provision that, if violated, can lead to a maximum fine of 10,000 dollars or a jail term of up to one year or both.¹⁹ CERCLA also contains felony sanctions for any person who knowingly destroys, mutilates, erases, disposes of, conceals, or otherwise renders unavailable or unreadable, or falsifies any records required to be provided to EPA.²⁰ If convicted under this provision, an offender could be fined, face up to three years in prison, or be subject to both penalties.²¹

2. The Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act²² (RCRA) provides for "cradle to grave" management of hazardous waste,²³ and for extensive criminal liabilities in a wide variety of instances. Section 3008(d) contains sanctions for "knowingly" conducting any activity prohibited by RCRA.²⁴ These prohibited acts include transportation without a manifest;²⁵ improper foreign export of hazardous materials;²⁶ treating, storing, or disposing of hazardous waste without a permit or in violation of such permit;²⁷ transporting hazardous waste to an unpermitted facility;²⁸ and making false statements in a document or destroying, altering, or concealing any document which is required to be maintained under RCRA.²⁹ A violation of any of these provisions can result in a felony conviction punishable by a fine of up to 50,000 dollars per day, per violation, and imprisonment of between two and five years.³⁰ A second violation can result in

18. 42 U.S.C. § 9603(c). In this section, hazardous substances are specified to be any listed or characteristic hazardous wastes, as defined under § 3001 of RCRA. *Id.*; see, e.g., 42 U.S.C. § 9601(29) (noting that the term hazardous waste shall have the meaning provided in § 1004 of the Solid Waste Disposal Act).

19. *Id.* § 9603(c); see also 18 U.S.C. § 3671 (provided for fines in the case of a felony conviction).

20. *Id.* § 9603(d)(2); see also 18 U.S.C. § 3671 (providing for fines in the case of a felony conviction).

21. *Id.* A repeat offender can be subject to up to five years imprisonment. *Id.*

22. *Id.* §§ 6901-6987.

23. See, e.g., Fromm, *supra* note 4, at 825.

24. 42 U.S.C. § 6928(d)(1)-(7).

25. *Id.* § 6928(d)(5).

26. *Id.* § 6928(d)(6).

27. *Id.* § 6928(d)(2)(A)-(C).

28. *Id.* § 6928(d)(1).

29. *Id.* § 6928(d)(3)-(4).

30. *Id.* § 6928(d).

doubling of all fines and imprisonment time.³¹ Furthermore, RCRA includes a "knowing endangerment" provision that comes into play when the violator who knows at the time that he thereby "places another person in imminent danger of death or serious bodily injury."³² A conviction under this provision will result in substantial penalties: a fine of up to 250,000 dollars and the possibility of imprisonment for up to fifteen years.³³

3. The Federal Water Pollution Control Act

The Federal Water Pollution Control Act (FWPCA), also known more commonly as the Clean Water Act,³⁴ regulates sources of water pollution by establishing a permit system. Any person or entity that discharges pollutants into national waterways must obtain a permit, known as a "national pollutant discharge elimination system permit" (NPDES), in order for this discharge to be lawful.³⁵

Section 1319(c) outlines the activities sanctioned by criminal penalties under the Clean Water Act.³⁶ Activities that could result in violations include, but are not limited to, an unpermitted discharge of any pollutant, oil, or hazardous substance into the waters of the United States,³⁷ and any discharge of a pollutant into a publicly owned treatment works that violates a pretreatment standard which could cause personal injury or property damage.³⁸ If such violations occurred due to "negligence," they will result in a fine of up to 25,000 dollars per day and could potentially result in imprisonment for up to one year.³⁹ If these violations occurred "knowingly," the resulting conviction is considered to be a felony and is punishable by a fine of 50,000 dollar per day and up to three years imprisonment.⁴⁰

Felony penalties are also imposed where a person knowingly "makes any false material statement, representation, or certification in any application, record, report, plan, or other

31. *Id.*

32. *Id.* § 6928(e).

33. *Id.*

34. 33 U.S.C. §§ 1251-1376 (1988).

35. *Id.* §§ 1311(a), 1342. Section 1342 outlines the National Pollutant Discharge Elimination System (NPDES).

36. *Id.* § 1319(c)(1)-(3).

37. *Id.* § 1319(c)(1)-(2) (§ 1319(c)(1) provides penalties for negligent acts while § 1319(c)(2) requires knowledge before liability will be imposed).

38. *Id.* § 1319(c)(1).

39. *Id.* § 1319(1)(b).

40. *Id.* § 1319(c)(2).

document filed or required to be maintained . . . or knowingly falsifies, tampers or renders inaccurate any monitoring device" ⁴¹ These felony provisions subject an offender to a fine of up to 10,000 dollars and the possibility of imprisonment for up to two years. ⁴²

In addition, like RCRA, the Clean Water Act contains a "knowing endangerment" provision whereby anyone who knowingly violates any provision of the Act, or who knows at that time that he "places another person in imminent danger of death or serious bodily injury," will upon conviction, be subject to a fine of up to 250,000 dollars and/or imprisonment of up to fifteen years. ⁴³

4. The Clean Air Act

Initially passed in 1963, the Clean Air Act (CAA)⁴⁴ originally provided for pollution abatement. Subsequently amended in 1970, 1977⁴⁵ and 1990,⁴⁶ the Act now controls the emissions of air pollutants from stationary sources by requiring the issuance of permits. ⁴⁷

Violations of the CAA are misdemeanors that have a knowledge requirement. ⁴⁸ Such violations may be committed by any person, including a "responsible corporate officer" and can result in fines of up to 25,000 dollars per day per violation and potential imprisonment of up to one year. ⁴⁹ Similar to other federal legislation such as RCRA and CERCLA, it is a felony under the Clean Air Act for any person to knowingly make false statements in any document that is to be filed or maintained pursuant to the provisions of the Act, or to falsify, tamper with, or knowingly render inaccurate any monitoring device. ⁵⁰ These

41. *Id.* § 1319(c)(4).

42. *Id.*

43. *Id.* § 1319(c)(3).

44. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)).

45. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1709 (1972) (codified as amended at 42 U.S.C. §§ 7401-7491 (1988)); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. §§ 7401-7491 (1988)).

46. Clean Air Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended in scattered sections of 42 U.S.C. 7401-7491 (West. Supp. 1991)).

47. See generally Fromm, *supra* note 4, at 846-848.

48. 42 U.S.C. § 7413(c).

49. *Id.*

50. *Id.* § 7413(c)(2).

offenses are punishable by fines up to 10,000 dollars and have the potential to impose imprisonment up to six months.⁵¹

5. Other Federal Environmental Statutes

Criminal provisions are also found in several other federal environmental statutes. Although a discussion of all the relevant statutes is outside of the scope of this comment, when alleging or defending an environmental criminal action, counsel should examine the following potentially relevant statutes: the Rivers and Harbors Appropriation Act,⁵² the Hazardous Materials Transportation Act,⁵³ the Toxic Substance Control Act (TSCA),⁵⁴ and the Federal Insecticide Fungicide and Rodenticide Act (FIFRA).⁵⁵

The most recent piece of federal legislation that criminalizes environmental accidents is the Oil Pollution Act of 1990 (OPA).⁵⁶ OPA is intended to prevent oil spills, and, for those spills that do occur, to ensure immediate and effective response.⁵⁷ It is also intended to help restore damaged natural resources and to compensate those who have sustained economic losses by establishing a national oil spill planning and response system as well as a comprehensive liability scheme.⁵⁸ The Act also provides for many other prospective remedies for injuries resulting from oil production and transportation.⁵⁹

51. *Id.*

52. 33 U.S.C. § 411 (1982).

53. 49 U.S.C. § 1809(b) (1988). This statute provides criminal penalties for any person who willfully violates a provision of the Hazardous Materials Act. Criminal penalties for each offense can result in a fine of up to \$25,000 and/or imprisonment up to five years. *Id.*

54. 15 U.S.C. §§ 2601-2671 (1988). The TSCA allows EPA to require testing of both old and new chemical substances to which the public or the environment might become exposed. *Id.* § 2603(b). The less stringent criminal provisions of TSCA are included in §§ 2603, 2604, and 2605. Under this Act, it is a misdemeanor to knowingly or willfully violate any of the TSCA provisions or the regulations promulgated pursuant to the act. *Id.* § 2615(b).

55. 7 U.S.C. § 136 (j)(A)(1), (2) (1988).

56. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C.A. §§ 2701-2761 and in scattered titles of U.S.C.A. (West Supp. 1991)).

57. Oil Pollution Control Act of 1990, S. REP. NO. 101-94, 101st Cong., 2d Sess. 5 (1991), reprinted in 1990 U.S.C.C.A.N. 722, 723.

58. See George J. Mitchell, *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 ENV'T L. 237, 238 (1991).

59. See generally Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1 (1990) (describing how the Act alters and increases liability for those engaged in the exploration, production, and transportation of oil).

B. General Criminal Statutes Applicable to Environmental Actions

Most environmental crime cases are not seen as being "pure" environmental actions. Instead, environmental actions are often supplemented by relying on general criminal statutes and other federal statutes. For example, an indictment in a criminal environmental action will often include counts relating to conspiracy,⁶⁰ false statements,⁶¹ mail fraud,⁶² wire fraud,⁶³ aiding and abetting,⁶⁴ and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).⁶⁵ Each of these additional crimes fall within Title Eighteen of the United States Code.⁶⁶

Section 1001 of Title Eighteen, which provides for criminal penalties in a wide variety of instances involving false statements made to the government⁶⁷ and is frequently employed in environmental actions. This section applies to all matters within the jurisdiction of any department or agency of the United States, and makes any person who "knowingly and willfully falsifies, conceals, or covers-up . . . or makes any false, fictitious or fraudulent statement or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry. . . ." guilty of a felony.⁶⁸

In cases involving a "whistle blower," 18 U.S.C. § 1503 comes into play.⁶⁹ This statute prevents witnesses being intimidated, or justice from being obstructed by corrupt or threatening conduct, by prohibiting a corporation from intimidating an employee who has testified or wishes to give information to the government.⁷⁰

Conspiracy is another common charge alleged in environmental crime cases. The United States Code provides that a fel-

60. 18 U.S.C. § 371 (1988 & Supp. I 1990).

61. *Id.* § 1001.

62. *Id.* § 1341.

63. *Id.* § 1343.

64. *Id.* § 2.

65. *Id.* §§ 1961-63.

66. For a more indepth treatment of these Title 18 provisions, see Fromm, *supra* note 4, at 848-52.

67. 18 U.S.C. § 1001.

68. *Id.* Under this statute penalties of up to \$10,000 and/or five years imprisonment may be imposed. *Id.*

69. *Id.* § 1503.

70. See McMurry & Ramsey, *supra* note 4, at 1149-51.

only is committed when two or more persons conspire to commit an offense against the United States or any agency of the United States.⁷¹ Violations of conspiracy can result in a punishment of a 10,000 dollars fine and/or up to five years imprisonment.⁷²

Title Eighteen, §§ 1341 and 1343 of the United States Code provide for criminal penalties for anyone who attempts to defraud any person by sending materials through the mail or who transmits such materials by means of wire, radio, or television communication in interstate commerce.⁷³ These provisions for mail fraud and wire fraud can result in fines of up to 1,000 dollars and/or imprisonment for up to five years.⁷⁴ Closely tied to these charges of mail and wire fraud, the Racketeer Influenced and Corrupt Organizations Act (RICO) may also apply to an environmental crime situation.⁷⁵ Though it has not been utilized to a great degree in environmental actions, the statute's potential can be seen in cases involving securities and banking.⁷⁶ Accordingly, because an offender convicted under this statute may be subjected to the forfeiture of certain property and may face up to twenty years imprisonment, RICO may become more frequently used in environmental prosecutions.⁷⁷

Other federal statutes that may be significant in an environmental action include the "alternative fine provisions"⁷⁸ and the automatic mandatory debarment provisions,⁷⁹ applicable to all types of criminal actions. These provisions exclude those convicted of environmental crimes from contracting with or receiving grants or loans from the United States.⁸⁰ It should also be noted that a conviction in these instances is defined to include pleas of *nolo contendere* as well as guilty pleas and actual convictions.⁸¹

71. 18 U.S.C. § 371.

72. *Id.*

73. *Id.* §§ 1341, 1343.

74. *Id.*

75. *Id.* §§ 1961-1963.

76. See generally ARTHUR F. MATTHEWS, *CIVIL RICO LITIGATION* (1985).

77. *Id.* § 1963; see generally Elizabeth E. Mack, *Another Weapon: The RICO Statute and the Prosecution of Environmental Offenses*, 45 S.W. L.J. 1145 (1991) for the most recent scholarly discussion of this issue..

78. *Id.* § 3623.

79. 40 C.F.R. § 15 (1991).

80. See, e.g., The Clean Water Act, 33 U.S.C. § 1368; The Clean Air Act, 42 U.S.C. § 7606.

81. 40 C.F.R. § 15 (1991).

C. The Federal Sentencing Guidelines

In 1987, the first Federal Sentencing Guidelines were promulgated.⁸² Recent amendments to these guidelines have considerably stiffened the penalties for environmental violations by mandating increased fines and more jail time.⁸³ As a result, these new guidelines have eliminated much of the discretion previously available in sentencing defendants in environmental actions.⁸⁴

Under the guidelines, sentences are based upon a "score," which score is determined by computing numerical values conferred upon a variety of factors set forth in the guidelines.⁸⁵ The guidelines provide that penalties are based on the dollar amount of the crime and other factors, including the size of the company.⁸⁶ Furthermore, the guidelines require judges in federal

82. Amendments to the Sentencing Guidelines for United States Courts, Chapter Eight - Sentencing of Organizations, 56 Fed. Reg. 22,787 (1991).

83. *Id.*

84. Until 1985, criminal prosecutions were almost unheard of and when they were brought, sentences were usually light. See Michelle Kuruc, Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 102-03 (1985). However, some cases are difficult to reconcile. In *United States v. Blue Lagoon Marina, Inc.*, No. 75-80824 (E.D. Mich. filed Dec. 12, 1975), the individual defendant was found to have deliberately discharged hundreds of gallons of gas onto the surface of a frozen lake by turning on a gasoline pump. Despite this finding, he was fined only \$2,500, the minimum provided for by FWPCA. *Id.* However, in *United States v. Frezzo Brothers, Inc.*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), the maximum fine was imposed on a corporation and on the two responsible corporate officials. In *Frezza*, the defendants were found to have willfully discharged manure into a creek located near their mushroom farm. The individuals were fined \$25,000 each, and the corporation was fined \$50,000. *Id.*

85. With respect to monetary fines, the guidelines provide for a "base fine" under § 8C2.4. 56 Fed. Reg. 22,790. This fine is tied to what is called the "offense level" table. The base fine will be the greatest of (1) the amount taken from the offense level table, (2) the pecuniary gain derived from this table, or (3) the pecuniary loss caused by the crime. *Id.* However, under § 8C2.5, the base fine can then be reduced by a multiplier which depends on the corporation's culpability score. Each convicted company will originally be given a culpability score of five. *Id.* Points will then be taken off if the company has an "effective program to prevent and detect violations of the law" and if the company has "fully cooperated in the investigation." *Id.* at 22,791. A company can also get reductions for showing remorse and for an acceptance of responsibility. *Id.* Some feel that this type of system will create de minimis fines for large corporations while smaller corporations which are unable to mitigate the fine will face the greatest potential fines. See John C. Coffee, Jr., *Sentencing Commission: Big Business's Best Friend*, N.J. L.J., May 23, 1991, at 11 (critiquing the guidelines and the fines that big business may face).

86. Amendments to the Sentencing Guidelines for United States Courts, Chapter Eight - Sentencing of Organizations, 56 Fed. Reg. 22,791. The sentencing guidelines set out different penalties for companies with 10, 50, 200, 1,000, and 5,000 employees. *Id.* See also, Michael K. Block and John R. Lott, Jr., *Is Curbing Crime Worth the Cost?*, N.Y. TIMES, May 5, 1991, § 3, at 13. For an excellent overview of the sentencing guidelines and

cases to impose specific sentences on defendants who plead guilty or who are found guilty, leaving little room for prosecutory discretion.⁸⁷ The new guidelines seem to indicate an upward departure in sentencing for environmental offenses because the likelihood of receiving a jail term for a first offense appears to increase while incarceration for a second offense seems almost certain.⁸⁸

In 1989, the first two environmental cases to apply the Federal Sentencing Guidelines were decided. The first of these cases, *United States v. Mills*, involved the filling of a wetland area without a permit in violation of the CWA.⁸⁹ Ocie Mills and his son were convicted of knowingly discharging fill on their property and were found guilty of all six counts in the indictment.⁹⁰ Applying the sentencing guidelines, the district court sentenced the defendants to a twenty-one month jail term, required payment of 5,000 dollars in fines, and mandated restoration of the wetlands.⁹¹ In the second case involving the federal sentencing guidelines, *United States v. Pozsgai*, the defendant was also charged with filling in a wetland area without a permit in violation of the CWA.⁹² Again the defendant was found guilty, and was sentenced to a term of twenty-seven months, the maximum jail term provided under the guidelines.⁹³

The third and most recent environmental case employing the sentencing guidelines involved hazardous waste violations under CERCLA. In *United States v. Bogas*,⁹⁴ the defendant was found guilty of violating the provisions of the statute and was sentenced to four years probation, 180 days of which would be

the methods for computing sanctions and sentences, see generally Benson B. Weintraub & Alan J. Chaset, *Federal Sentencing for Organizations: 'You Ain't Seen Nothin' Yet,'* THE CHAMPION, May 1992, at 6.

87. See, e.g., Fromm, *supra* note 4, at 852.

88. See *id.*

89. *United States v. Mills*, No. 89-3325 (11th Cir. 1989); see also *Water Act Violators Given Prison Terms in First Application of Sentencing Guidelines*, [May-Apr.] Env't Rep. (BNA) No. 19, at 2633 (Apr. 21, 1989).

90. *Id.*

91. *Id.*

92. *United States v. Pozsgai*, 757 F.Supp. 21 (E.D. Pa. 1991), *aff'd in part, reversed in part*, 947 F.2d 938 (3d Cir. 1991) (unpublished opinion). See also *Developer to Spend Three Years in Jail, Paying \$202,000 Fine for Illegally Filling Wetland*, 20 Env't Rep. (BNA) No. 12, at 579 (July 21, 1989). It is interesting to note that John Pozsgai is the first person to be convicted after a jury trial of filling wetlands in violation of the CWA.

93. *Id.* Mr. Pozgagi was found guilty of all 41 counts in the indictment brought against him. *Id.*

94. 920 F.2d 363 (6th Cir. 1990).

served in a home detention program, and to 1000 hours of community service.⁹⁵

III. CRIMINAL LIABILITY OF CORPORATIONS AND THEIR CORPORATE OFFICERS

It is common knowledge that, in this country, a corporation can commit a crime. It is also generally accepted that the imposition of criminal liability on a corporation is consistent with certain goals of criminal law, more specifically those of deterrence and retribution.⁹⁶

In 1909, the seminal case of *New York Central and Hudson River Railroad Company v. United States* established the principal that a corporation could be criminally liable.⁹⁷ In *New York Central*, the railroad company and its assistant manager were found guilty of violating the Elkin Act by agreeing to transport goods below the listed tariff.⁹⁸ Relying on the principle of respondeat superior and on public policy considerations, the Supreme Court held that the corporation was criminally liable.⁹⁹ This holding overruled former doctrine stating that a corporation could not commit a crime.¹⁰⁰

Under the present law, corporations are now considered to be legal "persons."¹⁰¹ In several statutes, corporations are expressly defined as persons for purposes of criminal actions in environmental suits.¹⁰² Criminal liability is imputed to the corporation when three conditions have been met: a crime has been committed, the defendant employee is acting within the scope of his employment, and the defendant employee intended to benefit the corporation.¹⁰³ Even though these statutes make defendant

95. *Id.* at 367.

96. See WILLIAM F. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS §§ 8.01-8.16 (1988) for a general discussion of the criminal liability of corporate officers. See also HARRY G. HENN, LAWS OF CORPORATIONS 480-84 (3d ed. 1983) (discussing theories of corporate criminal liability).

97. 212 U.S. 481 (1909).

98. *Id.* at 499.

99. *Id.* at 493-95.

100. *Id.* at 495. In this decision, the Court noted that "[t]o give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at it." *Id.* at 495-96.

101. See, e.g., *New York Central and Hudson River Co. v. United States*, 212 U.S. 481, 494-96 (1909); *Boise Dodge Inc. v. United States*, 406 F.2d 771, 772 (9th Cir. 1969).

102. See, *McMurry & Ramsey*, *supra* note 4, at 1155.

103. *United States v. T.I.M.E. - D.C., Inc.*, 381 F.Supp. 730, 740-41 (W.D.Va. 1974) (holding that a corporation may be deemed to have the collective knowledge of its

corporations accountable for their actions, many writers and theorists are frustrated by this type of recourse.¹⁰⁴ Indeed, many have expressed agreement with the words of Barron Thurlow, an eighteenth century Lord Chancellor of England who reportedly noted the following: "Did you ever expect a corporation to have conscience, when it has no soul to be dammed, and no body to be kicked?"¹⁰⁵ Because many critics feel a corporation can have no conscience and express no remorse for its actions, prosecutors have recently reached into corporations, imposing personal liability on its officers and directors, because they believe that these individuals may feel more guilt and remorse than does the corporate entity.

A. *The Responsible Corporate Officer Doctrine*

In general, a corporate officer who has neither actively participated in nor authorized a violation of the law, is rarely held personally liable for the offenses or wrongdoings of a corporation.¹⁰⁶ However, corporate officers are liable for those activities of a corporation that fall within their knowledge and control.¹⁰⁷ In federal environmental enforcement actions, the courts have found that the statutes exhibit a clear intent to impose liability on individuals who actually participate in the management or control of hazardous waste operations, even if the "corporate veil" would ordinarily shield such individuals.¹⁰⁸ It is fairly well established that in environmental actions, a corporate manager,

employees and the requisite knowledge may be imputed into the corporation from the employees as a group); *Standard Oil Co. v. United States*, 307 F.2d 120, 127-29 (5th Cir. 1962) (noting that "within the scope of employment" is determined by referring to the civil tort doctrine of respondeat superior); *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979) (holding that an employee could not be held to be within the scope of his authority if he did not intend his actions to benefit the corporation). However, it should be noted that some courts have held that the "intent to benefit" is necessary only where specific intent is an element of the crime charged. *United States v. Cincotta*, 689 F.2d 238, 241-43 (1st Cir. 1982), *cert. denied sub nom.*, *Zero v. United States*, 459 U.S. 991 (1982).

104. See, e.g., John C. Coffee, Jr., *No Soul to Damn, No Body to Kick; An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 390 (1981); Michael E. Tigar, *It Does the Crime But Not the Time, Corporate Criminal Liability in Federal Law*, 17 AM. J. CRIM. LAW 211, 213 (1990).

105. Edward, First Barton Thurlow 1731-1806 (quoted in Coffee, *supra* note 86, at 386, n.1).

106. See *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1372 (D.C. Cir. 1975) (quoting *United States v. North American Van Lines, Inc.*, 202 F. Supp. 639, 644 (D.D.C. 1962)).

107. See, *McMurry & Ramsey*, *supra* note 4, at 1156.

108. See, e.g., *Anderson v. Abbott*, 321 U.S. 349, 363 (1944); *United States v. Little Rock Sewer Commission*, 460 F. Supp. 6, 9 (E.D. Ark. 1978).

officer, director, or other "responsible person" may be held criminally liable if that person has knowingly participated in the alleged violation.¹⁰⁹

The most commonly used theory of responsibility in environmental actions is "the responsible corporate officer doctrine." In the field of environmental regulation, the responsible corporate officer doctrine is founded on two primary cases: *United States v. Dotterweich*¹¹⁰ and *United States v. Park*.¹¹¹ In each of these cases, the Supreme Court held that the corporate officers involved had the authority to prevent the violations, and liability was premised on their failure or unwillingness to properly supervise the corporate operations.¹¹²

The foundational case for the theory of the responsible corporate official is *United States v. Dotterweich*.¹¹³ This case centered around a prosecution under the Federal Food, Drug, and Cosmetic Act.¹¹⁴ The pharmaceutical corporation and its president and general manager, Joseph H. Dotterweich, were charged with shipping adulterated and mislabelled drugs.¹¹⁵ Although there was no claim that Dotterweich knew of the violation at the time it occurred, nor was there any allegation that he actively participated in the shipping or distribution of the items, he nevertheless was held responsible as a result of his position in the company.¹¹⁶ Affirming the conviction, the Supreme Court noted that the activities of a corporation may be attributed to officers "standing in various relations" to the corporation and its actions.¹¹⁷

In 1975, almost thirty years after the *Dotterweich* case, the Supreme Court again found a corporate official personally liable for actions of his company. In *United States v. Park*,¹¹⁸ the

109. *United States v. Wise*, 370 U.S. 405, 407 (1962) (noting that actual participation will create criminal liability for an officer, even if this statute is aimed generally at corporate behavior without a direct mention of individual or personal liability); *United States v. Valencia*, 492 F.2d. 1071, 1074 (9th Cir. 1974) (holding that a corporate official will be liable for any criminal activities that he commands or authorizes his subordinates to perform).

110. 320 U.S. 277 (1943).

111. 421 U.S. 658 (1975).

112. *Dotterweich*, 320 U.S. at 282; *Park*, 421 U.S. at 674.

113. 320 U.S. 277.

114. 21 U.S.C. §§ 301-92 (1988).

115. 320 U.S. at 278.

116. *Id.* at 279-81.

117. *Id.* at 283.

118. 421 U.S. at 658.

Supreme Court addressed the issue of whether a senior officer in a large corporation who had delegated responsibility to lower level employees could be held liable for the actions of those employees. In this case, as in *Dotterweich*, both the corporation and the president, John R. Park, were charged with violating the Federal Food, Drug, and Cosmetic Act. Park pled not guilty and argued that he had delegated all of his responsibilities and duties to subordinates.¹¹⁹ The Court noted, however, that Park had been personally notified repeatedly of the presence of rodents in two food warehouses.¹²⁰ In this instance, the Court believed that since Park was aware of the previous violations and was in a supervisory provision, 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 ensure that violations will not occur."¹²¹ Further, the Court went on to state that

"[t]he requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."¹²²

Therefore, the *Park* case imposes a "should have known" standard of responsibility on corporate officers for activities or violations that they supervise. Nonetheless, this case has been cited as presenting a potential defense to corporate officers because the presumption of responsibility arising from a corporate position may be rebutted with evidence that the corporate officer was "'powerless' to prevent or correct the violation."¹²³ Furthermore, this doctrine may be limited to instances where the director had direct authority or control over the actions of the corporation which led to the violations or may be restricted to instances where the officer had knowledge of previous infractions.¹²⁴

The responsible corporate officer doctrine imposes liability

119. *Id.* at 677.

120. *Id.* at 678.

121. *Id.* at 672.

122. *Id.*

123. *Id.* at 673.

124. *See id.*

on corporate executives who are in a position to monitor and control the activities of their organization. Not only are corporate officials expected to monitor and exercise control, but they are expected to do so in an effective manner.¹²⁵ It has been argued, however, that this doctrine may be limited to instances or infractions that fall within the ambit of statutes that do not require a showing of knowledge, willfulness, or intent.¹²⁶

B. *The Mens Rea Requirement*

When a statute includes an explicit mens rea requirement, it has generally been required that there be some showing of an affirmative action on the part of the officer charged.¹²⁷ However, the inclusion of a scienter requirement in a statute does not completely eliminate the application of the responsible corporate officer doctrine. The prosecutor normally is only required to show that the defendant's conduct was intentional or voluntary, as opposed to merely accidental.¹²⁸

In recent decisions, both the Eleventh and the Third Circuits have embraced the idea of general intent or constructive knowledge in order to impose personal liability on corporate executives for violations of environmental statutes. In *United States v. Hayes International Corporation*,¹²⁹ the Eleventh Circuit held that, to be held liable, the defendant did not need to possess actual knowledge of the illegality of his actions, but rather the court noted that "a defendant acted knowingly if he willfully fails to determine the permit status of a facility."¹³⁰ In this case, Hayes International Corporation (Hayes) operated an airplane refurbishing plant in Birmingham, Alabama. While in the process of refurbishing the aircraft, Hayes generated two types of toxic waste, one from the fuels tanks which were drained and the second from the solvents used to clean the paint guns and lines.¹³¹ An employee of Hayes, L.H. Beasley, con-

125. See Frederick W. Addison, III, & Elizabeth E. Mack, *Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time*, 44 SW. L.J. 1427, 1433-35 (1991).

126. See, e.g., 40 C.F.R. § 302.6; 33 U.S.C. 1319 (c)(1) (providing a negligence standard for punishable offenses).

127. See generally Seymour, *supra* note 1, at 342.

128. Addison & Mack, *supra* note 125, at 1435.

129. 786 F.2d 1499 (11th Cir. 1986).

130. *Id.* at 1504.

131. *Id.* at 1500.

tracted with Performance Advantage to dispose of the waste.¹³² However, Performance Advantage did not possess a permit for the disposal of hazardous waste and deposited the waste in seven illegal disposal sites in Georgia and Alabama.¹³³ The court found both Beasley and Hayes guilty of violating eight counts of RCRA.¹³⁴ The court noted that the defendants had an affirmative duty to attempt to determine the permit status of the facility and whether the waste handler was properly licensed.¹³⁵

The Third Circuit, in *United States v. Johnson & Towers, Inc.*,¹³⁶ held that the criminal provisions of RCRA may apply to individual defendants who are employees of a facility as well as the owners and operators.¹³⁷ In *Johnson & Towers*, the court found the foreman and manager of the plant, along with the facility itself, guilty of dumping hazardous wastes into a tributary of the Delaware River without a permit.¹³⁸ The court, however, restricted its holding by stating that employers will only be subject to criminal prosecutions when they know, or should have known, that the permit requirements were not being complied with.¹³⁹ Such knowledge can be inferred as to certain defendants, such as a foreman or manager, who supervise and direct a substantial portion of the plant's activities, specifically those activities relating to the disposal of hazardous wastes.¹⁴⁰

Cases like *Hayes* and *Johnson & Towers* cannot be underestimated because they open the door for prosecutions based on what a director "should have known," as compared to what he actually knew, even in instances where the statute requires intent or knowledge.¹⁴¹ What each of these cases ultimately does, is impose liability on an officer or director solely by virtue of his position in the corporation. The jury is allowed to impute knowledge to the defendant based upon circumstantial evidence,

132. *Id.*

133. *Id.* at 1501.

134. *Id.* Beasley and Hayes were each convicted of eight counts of violating 42 U.S.C. § 6928(d)(1) which provides criminal sanctions for "any person who knowingly transports any hazardous waste . . . to a facility which does not have a permit under § 6925 of this title." *Id.*

135. *Id.* at 1504-05.

136. 741 F.2d 662 (3d Cir. 1984), *cert. denied sub nom.*, *Angel v. United States*, 469 U.S. 1208 (1985).

137. *Id.* at 664-65.

138. *Id.* at 664.

139. *Id.* at 665.

140. *Id.* at 670.

141. *Addison & Mack, supra* note 125, at 1437.

and an officer may actually be convicted without ever having been aware that a crime was committed and without having any duty to prevent it.¹⁴² Such an approach creates questions as to what constitutional protections will continue to exist for the corporate defendant.¹⁴³

IV. THE POTENTIAL PROBLEMS WITH PERSONAL LIABILITY FOR ENVIRONMENTAL CRIMES

It is difficult to disagree with the statement that "deliberate and egregious environmental crimes that threaten public safety" should be sanctioned, and sanctioned severely.¹⁴⁴ However, some do disagree with the contention of environmental prosecutors that criminally charging "the highest person" is the best means of deterring corporate polluters. Defense attorneys, like Judson Starr, who was both a former prosecutor and former Assistant United States Attorney General, are questioning whether the criminal sanctions in environmental statutes are the best means of ensuring compliance.¹⁴⁵

One commentator has stated,

"American justice is rapidly going down the tubes, and it is going to be extremely costly to our economy. Accidents are being criminalized . . . [and] once the historic protection that has been provided by the principle that crime requires intent is breached, it will spread into other parts of the law, and no citizen will be safe from government."¹⁴⁶

Yet, there are others who believe that the only way to ensure compliance with environmental regulations is to impose personal liability on corporate officers.¹⁴⁷ Monetary liability is seen by some, not as a criminal punishment or deterrent, but rather as a

142. See *id.* at 1438.

143. See, e.g., Daniel Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, [1985] 15 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,065, 10,074 (Mar. 1985).

144. See, e.g., Jonathan Weber, *Corporate Crime of the '90s: Prosecutors Are Aiming for the Boardroom in a Growing Push Against Polluters. Critics Argue They're Going Overboard*, L.A. TIMES, November 5, 1989, at A1.

145. See *id.* Fred M. Blum of the San Francisco law firm Jaffe, Trutanich, Scantena & Blum charges that such sanctions are "Draconian in nature." *Id.*

146. Commentary, WASH. TIMES, Oct. 7, 1991, at D3. This commentary delivered a scathing attack on the criminal enforcement of environmental statutes as epitomized by the charges brought against Exxon in the wake of the Exxon Valdez oil spill in Prince William Sound, Alaska. *Id.*

147. See generally Zeidler, *supra* note 3; Kurvc, *supra* note 84; Addison & Mack, *supra* note 125.

cost of doing business.¹⁴⁸

A. *Potential Due Process Problems*

The Fifth Amendment mandates that no person shall be "deprived of life, liberty or property without due process of law."¹⁴⁹ The Supreme Court, in order to ensure the protection of this Amendment, has held that it may review legislatively enacted criminal sanctions under a "rational basis" standard to determine if the sanction violates any notion of due process.¹⁵⁰ As of this date, however, the Supreme Court has limited its review of criminal sanctions in environmental statutes and thus has, for all intents and purposes, ignored the due process rights of defendants in these actions. A defendant, although found guilty of wrongdoing, may be subject to only minor penalties. However, by focusing on the actual penalty rather than on its criminal nature,¹⁵¹ the Court has failed to recognize the precedential value and due process implications of allowing criminal penalties to be imposed where a culpability requirement is missing.¹⁵²

148. See, e.g., Gordon McKibben, *Is Jail in the Future for Corporate Polluters?*, BOSTON GLOBE, April 22, 1990, at A1 (noting that there is a growing sense that civil penalties such as fines are often passed along as a cost of doing business, an acceptable business risk).

149. U.S. CONST. amend. V.

150. See Truxtun Hare, Comment, *Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. PA. L. REV. 935, 974-75 (1990).

151. See, e.g., *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985). In *Wulff*, the Court of Appeals stated that, according to *Holdridge*, the due process clause is not violated if the penalty is not severe and the conviction does not gravely besmirch the defendant's reputation. *Id.* at 1125. In this case, however, the court felt that the penalties under the Migratory Bird Act (MBA) were severe and did not meet the *Holdridge* criteria. *Id.* The court appeared to rely on the fact that a conviction under the MBA was a felony - which would irreparably damage the defendant's reputation. *Id.* at 1122. Because a felony conviction results in the loss of one's right to vote, to sit on a jury, and to possess a firearm, so the court held that the imposition of a felony penalty in this case would violate due process. *Id.* at 1125; see also Goldberg, *supra* note 1, at 362-63 (indicating that where the penalty is classified as a misdemeanor, or simply imposes monetary fines, no violation of due process occurs).

152. Hare, *supra* note 150, at 975; see also *Morissette v. United States*, 342 U.S. 246, 254-63 (1952). In allowing criminal penalties to exist in public welfare statutes, the court noted that "penalties commonly are relatively small, and conviction does no grave damage to an offenders reputation." *Morissette*, 342 U.S. at 256. Hare analyzes this viewpoint and notes that

Justice Jackson's analysis implies that one's sense of justice is not offended when the sanctions imposed are minimal. His analysis leaves unanswered the question of whether the term "relatively small" included the use of some finite amount of

Many argue that environmental statutes are public welfare statutes and thus, under the analysis utilized by the Supreme Court in *Morissette v. United States*,¹⁵³ sanctions under these statutes cannot violate the Due Process Clause.¹⁵⁴ This view that imposition of criminal penalties in a public welfare situation cannot violate the Due Process Clause was originally articulated by the Eighth Circuit Court of Appeals in the case of *Holdridge v. United States*,¹⁵⁵ which was later adopted by the Supreme Court in *United States v. Freed*.¹⁵⁶ According to the *Holdridge* court, a strict liability criminal statute does not require intent and does not violate the Due Process Clause when it involves a policy matter, imposes a reasonable standard and a small penalty, does not derive from the common law, has a supporting congressional purpose, and when the conviction does not gravely besmirch one's reputation.¹⁵⁷

Under the responsible officer doctrine, a corporate officer may be found culpable simply by reason of his status and position of responsibility, regardless of his lack of knowledge or awareness of any violation of the law.¹⁵⁸ This doctrine utilizes a strict negligence standard, which, when coupled with statutes which contain a mens rea provision, simply means that the offense must have occurred for someone to be found guilty. This abandonment of the mens rea standard "raises disturbing questions when these officers are incarcerated without reference to whether or not they possessed culpable states of mind."¹⁵⁹ Indeed, "[i]t's offensive to people's notion of fairness that you can be put in the state penitentiary for something you knew nothing about."¹⁶⁰

incarceration for strict liability offenses. Obviously, the term "relatively small" inures to the eye of the beholder. For corporate officers, thirty days in jail is likely to be a very long time.

Hare, *supra* note 150, at 975 n.267 (citing *Morissette*, 342 U.S. at 256).

153. 342 U.S. 246 (1953).

154. See, e.g., Goldberg, *supra* note 1, at 362-63.

155. 282 F.2d 302 (8th Cir. 1960).

156. 410 U.S. 601, 607-08 (1971).

157. 282 F.2d at 310.

158. See *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943). For a general discussion as to whether or not the mere status of a corporate officer is sufficient for culpability to attach, see Hare, *supra* note 150, at 960-61.

159. Hare, *supra* note 150, at 936; see also JEROME HALL, GENERAL PRINCIPALS OF CRIMINAL LAW 348 (2d ed. 1960) (noting that when the principles of the criminal law system are violated by strict liability provisions, "[w]hat then remains but the myth that through devious, unknown ways some good results from strict liability in 'penal law'").

160. Weber, *supra* note 144, at A-1.

The Exxon Valdez incident is one clear example of how harsh and stringent this standard can be. Certainly, if Exxon had intended to despoil Prince William Sound, even the imposition of the most severe criminal penalties would not constitute justice. However, the March 1989 spill was an accident, a tragic accident, but an accident nonetheless and "the important issues in this clearly accidental disaster [were identified as] safety and clean-up, not criminality and revenge."¹⁶¹ Some even characterized the criminal charges against Exxon as "silly" and "disturbing."¹⁶² Nonetheless, they were imposed because the perception of many is that environmental violations do not require any proof that the defendant knowingly committed a crime, resulting from the belief that the primary purpose of the statute is to protect the public health and welfare.¹⁶³ The mere fact that environmental damage occurred allows the imposition of liability on someone and that liability is, more often than not, criminal liability. Many feel that this is not right or just: "There's a difference between deliberate pollution and accidental spills. Not every environmental mishap represents a crime against nature."¹⁶⁴

Former Los Angeles City Attorney, Burt Pines, a pioneer in the environmental crime area, notes that "I strongly disagree with prosecuting people on felony charges for mistakes or ordi-

161. Editorial, OIL & GAS J., May 6, 1991, at 25.

162. Commentary, WASH. TIMES, Oct. 1, 1991, at D3. The commentary goes on to explore the charges against Exxon noting that

Exxon is charged under the Migratory Bird Treaty Act with killing migratory birds without a permit, under the Refuse Act for discharging refuse matter without a permit and under the Clean Water Act for the negligent discharge of a pollutant - laws obviously designed to prevent the dumping of waste and hunting without a license.

Id. Since this accident occurred, Congress has enacted legislation specifically designed to address these types of environmental disasters. See, e.g., Oil Pollution Control Act of 1991, Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C.A. §§ 2701-61 and in scatter titles of West Supp. 1991). However, this commentary does serve to illustrate the tremendous lengths to which prosecutors have gone in order to impose criminal sanctions on corporate officers and the corporation itself. Commentary, WASH. TIMES, Oct. 1, 1991, at D3.

163. See, e.g., Loren Feldman, *Defending Polluters: It's a Dirty Business, But...*, Amer. Law., July/August 1990, at 92. Feldman goes on to quote the sentiment that this state of affairs is "ludicrous." *Id.* Citing to the Exxon Valdez case, Feldman expresses frustration with the current status of criminal actions in environmental law. "Even if the first mate, who pleaded not guilty, was indeed drunk, should he be blamed for not spotting an underwater rock? And if it wasn't his fault, was it the captain's if the boat strayed outside the narrow channel between Bayonne and Staten Island? And if so, does that make him a criminal?" *Id.*

164. Editorial, OIL & GAS J., May 6, 1991, at 25.

nary negligence Felony charges are only appropriate when you have deliberate intention or a record of prior violations."¹⁶⁵ It is argued that, to impose criminal liability for accidents is not only in contravention of our general notions of justice and fairness but will actually lead to a disrespect of the law itself.¹⁶⁶ Furthermore, to punish an offender regardless of whether or not he possesses a culpable state of mind will not deter others from behaving similarly in the future.¹⁶⁷ After all, if one does not intend to initiate a certain action or to cause a specific harm, how can one be deterred?

The requirement that an accused possess a culpable mind is firmly imbedded in our criminal justice system and is vital to our notion of due process: "No one should be sentenced to imprisonment or its equivalent without being afforded the opportunity to litigate the issue of *mens rea* or, to use the term adopted by the framers of the Model Penal Code, culpability."¹⁶⁸

B. *The Fragility of the Deterrence Theory*

It is difficult to determine if criminal prosecutions are effective in deterring violations of environmental laws. In general, corporate crime is greatly misunderstood, if understood at all.¹⁶⁹ Apply this confusion to the complex area of environmental law and a few problems are presented. First, there is a basic assumption that imposing prison sentences on individual corporate executives will deter other potential violators, both specifically and generally. In the case of a specific deterrent, it is thought that the threat of punishment will cause a corporate executive to

165. Weber, *supra* note 119, at A1.

166. See Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933) (stating that "to inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.").

167. Hare, *supra* note 150, at 965 (quoting Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 150-51 (1962)).

168. Packer, *supra* note 167, at 150-51.

169. See generally Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501 (1980) (evaluating the major criminological studies which measure corporate crime and discussing the effectiveness of such sanctions); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) (describing criminal sanctions used with economic regulatory legislation and discussing the potential problems with this); *Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979) (describing the problems encountered by using criminal sanctions in the regulatory field and in involving corporate entities).

think about any potentially illegal conduct and to exert pressure on subordinates to stop this conduct; this can be seen as a kind of "trickle down theory."¹⁷⁰ Others argue that by making examples out of certain individuals or corporations, others will begin to re-examine their own behavior and will be deterred from committing their own violations.¹⁷¹ Whether this threat of criminal sanctions is indeed effective is uncertain. Some argue that the experience of imprisonment will lessen recidivism.¹⁷² However, others take issue with this fact, noting that the idea that "crime pays" is still alive and well in corporate America.¹⁷³

Second, there is a great deal of inconsistency in determining which violations will be pursued criminally and which will be pursued civilly. EPA uses no type of "screening system" to decide which cases will be targeted as criminal matters, and which will be designated as administrative or civil matters.¹⁷⁴ At present, some believe that "the way a case is handled depends on whose desk the case first arrives."¹⁷⁵ According to certain sources, whether a case will be pursued criminally or civilly, depends on the investigator.¹⁷⁶ Arguably, "this approach is unfair to the regulated community. Unable to predict how EPA will handle a violation, the regulated community is faced with uncertainties that further complicate its efforts at self-policing. Worse, the present system enhances the risk that different courts

170. S. Prakash Sethi, *Liability without Fault? The Corporate Executive as an Unwitting Criminal*, 4 EMPLOYEE REL. L.J. 185, 203 (1980).

171. Kadish, *supra* note 169 at 430-35. The theory of general deterrence is that one will be deterred from illegal activity as a result of the punishment of another for a similar offense.

172. *Id.* Sethi cites a study of 275 shoe manufacturing firms in New England which supports this trickle-down theory. "The experience of conviction, it appears, leads to more law abiding behavior. . . . Creating a climate of moral revulsion toward certain types of business activity by labeling the conduct criminal and imposing prison sentences may help to decrease recidivism." *Id.*

173. See Orland, *supra* note 169, at 514-15. Orland cites a number of studies conducted in the 1970s and 1980s. One study found that "most of the 21 business executives who admitted their guilt" to the Watergate Special Prosecutor in 1973 and 1974 were, in 1975, "still presiding over their companies." *Id.* (citing Jensen, *Watergate Donors Still Riding High*, N.Y. TIMES, Aug. 24, 1975, § 3 (Business and Finance), at 1). Furthermore, the study revealed that the chairmen of the boards of Braniff, Ashland Oil, and Carnation, each of whom had suffered criminal felony convictions, continued in their positions for years after the event, with annual salaries in the quarter million dollar range. *Id.*

174. Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 913 (1991).

175. *Id.*

176. See *id.* at 906-910.

will apply inconsistent sanctions to identical violations."¹⁷⁷

There are others who point out that certain factors may be considered in determining whether or not a criminal action will be brought.¹⁷⁸ Prosecutors are to look at the seriousness of the actual or potential harm to human health and the environment.¹⁷⁹ They are also to examine the operating history of the company to determine whether a single violation has occurred, or a pattern of continual violations, if there have been any previous warnings issued, and if there have been any previous civil or criminal actions brought in the past.¹⁸⁰ The amount of waste involved is also to be a factor, as is the existence of any economic gain on the part of the violator.¹⁸¹ Finally, the prosecutor is to take into account whether or not the offender has cooperated with the agency, and tried to remedy the harm, or if the offender has misled the agency or falsified any information given to the agency.¹⁸²

As the government does not, and never will, possess the resources necessary to police and monitor every permittee, self-reporting and voluntary compliance are the keystones to an effective regulatory program.¹⁸³ Only if the goals are attainable, however, will any real compliance be achieved. At present, the inconsistency with which environmental prosecutions are pursued provides corporate executives with no clear mandates to follow. Although many will admit that the existing fines and penalties do scare corporate executives, it is not certain that compliance results from that fear, largely because the corporate executive "may still not know what to do because of the com-

177. *Id.* at 914. Others argue that this situation "introduces a new element of uncertainty into a chief executive's discretion in dealing with corporate internal affairs" and could "result in otherwise unintended and socially undesirable consequences." Sethi, *supra* note 170, at 213.

178. Michelle D. Jordon, *Avoiding and Minimizing Criminal Environmental Liability*, in *THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS* 1990, at 535 (P.L.I. Litig. & Admin. Practice Course Handbook Series No. 716, 1990); see also Memorandum from Thomas L. Adams, Assistant Administrator, EPA, to Assistant Administrators & Regional Administrators (Sept. 21, 1987) (on file with the *Tulane Environmental Law Journal*); ROGER MORZALLA, U.S. DEP'T OF JUSTICE, LAND AND NATURAL RESOURCE DIVISION, *GUIDELINES FOR CIVIL AND CRIMINAL PARALLEL PROCEEDINGS*, Directive No. 5-87 (issued Oct. 13, 1987).

179. *Id.*

180. *Id.*

181. *Id.* at 544.

182. *Id.* at 546.

183. McMurry & Ramsey, *supra* note 4, at 1162.

plexity of environmental regulations."¹⁸⁴ And, as one environmental attorney noted, it is a long way from "being scared to being educated."¹⁸⁵ Only by educating the corporate community, will the long range goals of the environmental regulations be realized. Therefore, environmental enforcement should be geared towards changing behavior, rather than criminalizing conduct, which will require a focus on efforts to encourage voluntary compliance.¹⁸⁶ Although the "carrot and stick" approach may appear to work in the short term, "this advantage is brought at the cost of an additional, and perhaps faster-growing, need for policing."¹⁸⁷

C. Other Potential Pitfalls

Corporate officers who find themselves charged personally with a criminal violation may also find themselves without counsel. Although generally the corporation itself is represented by counsel in these actions, a great deal of debate surrounds whether or not the same counsel should represent a director or officer who is also charged with the same violation.¹⁸⁸ Potential complications in multiple representations are fairly numerous. For one, the corporate client may present a different version of the facts than the individual officer, which may pose problems for defense counsel in determining a defense strategy and a theory of the case. It is also difficult for counsel in a multiple representation to portray one client as less culpable to the prosecutor

184. Michael A. Verespej, *The Newest Environmental Risk: Jail*, *INDUSTRY WEEK*, Jan. 22, 1990, at 47.

185. *Id.*

186. See Gene S. Anderson, *Exercising Prosecutorial Discretion: Civil v. Criminal Enforcement of Environmental Violations. What Policies?*, in *CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS 1991*, at 7 (A.L.I.-A.B.A. Course of Study Series No. C617, 1991) for a discussion of a more workable, less confusing system of compliance. Anderson discusses the corporation as a rational actor and one who does have a desire to comply. However, if the costs of compliance are too high or if compliance is difficult or impossible to achieve, then the structure may need to be refined. *Id.*

187. Sethi, *supra* note 170, at 202. This situation may "also retard potential technological innovation and result in greater social costs." *Id.* In such a manner, this system will actually harm the environmental movement. Only if corporations are given the freedom to experiment will any actual advances in pollution control and reduction be made. Those types of technological advances must come from the corporate sector. With that caveat in mind, it is obvious that the underlying cause of much pollution will also be the eventual cure. See *id.*

188. See, e.g., Stanley S. Arkin, *Ethical Issues Raised During Criminal Defense Representation: Environmental Cases*, in *PERSONAL LIABILITY FOR ENVIRONMENTAL VIOLATIONS: AVOIDING AND DEFENDING CIVIL SUITS AND CRIMINAL PROSECUTIONS 1991*, at 279, 283 (P.L.I. Litig. & Admin. Practice Course Handbook Series No. 409, 1991).

or the jury. Consequently, the idea of "guilt by association" may even come to mind.¹⁸⁹ Furthermore, any plea bargaining arrangement that might resolve the controversy is subject to pitfalls as a result of the multiple clients' conflicting interests. This conflict of interests stems from the fact that counsel cannot advise one client to cooperate with the government if the result would be disclosure of information harmful to the other client.¹⁹⁰ Multiple representation "should be absolutely avoided where corporate strategy may dictate 'serving up' an employee to avoid prosecution of top management or the corporation itself."¹⁹¹

In addition, the comments to the Model Code of Professional Responsibility raise the possibility of a conflict of interest that could disqualify corporate counsel from representing the officer or director in the same action.¹⁹² If competing interests do in fact exist, the Code recommends that the corporation provide the funding for separate legal representation for the directors or employees.¹⁹³ Therefore, it is wise for the parties involved to examine the potential conflicts that may arise in a situation of multiple representation.

Because many of the actions in this criminal enforcement system often end in settlement, other problems arise. The defendants in these cases often plea bargain for a variety of reasons.¹⁹⁴ "With less and less required to prove criminal violations and more and more public enmity of pollution in any form, there are few defenses that motivate trial."¹⁹⁵ Of those cases that are

189. James J. Dragna, *Ethical Considerations in Corporate Responsibility*, in PERSONAL LIABILITY FOR ENVIRONMENTAL VIOLATIONS: AVOIDING AND DEFENDING CIVIL SUITS AND CRIMINAL PROSECUTIONS 1991, at 129, 134-35 (P.L.I. Litig. & Admin. Practice Series No. 409, 1991).

190. *Id.* at 134-35; see also *Developments in the Law - Conflicts of Interest in the Legal Profession*, *supra* note 169, at 1381-83.

191. Arkin, *supra* note 188, at 283.

192. "The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt (1987).

193. *Id.*

194. See Weber, *supra* note 144, at A1 (noting that many defendants are actually small businessmen who cannot pay the \$500,000 to \$1,000,000 needed to successfully defend a complicated felony case. As a result, many of them are forced to plea bargain); see also Anderson, *supra* note 186, at 9 (stating that "[w]ith enhanced sentencing and business threatening listing and debarment remedies, the pressure, particularly upon the image conscious corporation is to settle, to negotiate, to plead out with the best deal it can make.").

195. Anderson, *supra* note 186, at 10.

actually litigated, many are only reported in the specialized trade journals and are not widely published or disseminated; as a result, the latest caselaw may be difficult to discern.

It has also been argued that defendants in criminal actions are faced with a conflict between the self-reporting requirements under many environmental statutes and their personal right under the Fifth Amendment of the United States Constitution not to incriminate themselves.¹⁹⁶ In addition, as stated in a recent opinion by the Supreme Court: where a subsequent civil action follows a criminal conviction, double jeopardy problems may arise.¹⁹⁷

V. CONCLUSION

Criminal sanctions are quickly becoming the punishment of choice in environmental actions. More and more frequently, corporate officers and directors will find themselves in front of a grand jury for a crime they may or may not have known occurred. A critical review of this area of law by the legal community would serve us all well. A determination of what we may be giving up in order to hold a chief executive officer personally liable should be made. No one denies the value of our health, environment, and natural resources. However, surely we can achieve compliance with environmental regulations without giving up all of our hard fought rights and liberties necessary to protect us in criminal proceedings. An attempt should be made to accommodate both.

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196. See, e.g., Masha S. Croninger & Eric P. Berezin, *Environmental Reporting and the Fifth Amendment Under California's New Corporate Criminal Liability Act*, in CRIMINAL LIABILITY FOR ENVIRONMENTAL VIOLATIONS 1991, at 113 (P.L.I. Litig. & Admin. Practice Course Handbook Series No. 409, 1991).

197. *United States v. Halper*, 490 U.S. 435, 449 (1989); see also, Lauren Orchard Claff, *United States v. Halper: Remedial Justice and Double Jeopardy*, 68 N.C. L. REV. 979, 979 (1990).