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ARTICLES

CIRCUMSCRIBING THE “PROSECUTOR’S TICKET TO TAG THE ELITE”—A CRITIQUE OF THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

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The recent oil spill disaster in the Gulf of Mexico and ensuing questions of accountability have brought a controversial legal tool to the forefront, the “responsible corporate officer doctrine.” This doctrine allows courts to hold individuals who exercise control over business policies or activities personally liable for failing to prevent statutory offenses by subordinates, even if they themselves were not aware of any wrongdoing.

For corporate officials, the RCO doctrine is dangerous because of its ability to sidestep the usual requirements that apply to holding corporate agents responsible. Moreover, from their viewpoint, the doctrine is troubling in that it extends statutory duties of legal entities to their “responsible corporate officers” as an additional class of defendants. Examined from a broader perspective, the RCO doctrine may also result in additional costs, contribute to overdeterrence, and undermine the notion of limited liability.

This Article explains how the RCO doctrine runs contrary to established tort, criminal, and corporate law principles and why it represents an unwarranted augmentation of corporate agents’ duties. It then proceeds to explain that current justifications of the doctrine are not convincing and explores the doctrine’s negative effects. Finally, the Article advances the idea of a “cautious approach” to applying the RCO doctrine, arguing that legislatures and courts should reduce the RCO doctrine to

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rare and clearly delineated instances of statutory liability for intentional or knowing misconduct.

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I. INTRODUCTION

Whereas washed up tar balls and other environmental effects of the recent oil spill disaster in the Gulf of Mexico have been in plain view for everyone, only lawyers have

likely noticed one peculiar side effect: a more prominent role for the controversial legal tool that is the “responsible corporate officer doctrine.”¹ Enunciated by the Supreme Court over sixty years ago, the responsible corporate officer doctrine allows courts to hold individual corporate actors—such as officers, directors, or employees²—personally liable for corporate acts based on their control over business policies or activities and based on the theory that these individuals failed to prevent or correct a wide variety of public welfare offenses by their subordinates.

For prosecutors, the responsible corporate officer doctrine (hereinafter the “RCO doctrine” or the “doctrine”) serves as an idiosyncratic but effective tool to hold individuals liable who would not be normally responsible under traditional criminal, tort, or agency law principles.³ Thus, as one observer has put it, in the government’s criminal probe against British Petroleum (BP) and its officials for their role in the oil spill, the RCO doctrine “may be the prosecutor’s ticket to tag BP’s hierarchical elite while soothing the related political nightmare currently facing the U.S. government.”⁴

From the viewpoint of corporate officials, the RCO doctrine is dangerous because of its ability to sidestep various requirements that usually apply to holding corporate agents responsible.⁵ Although commentators have tended to focus on the doctrine’s alleged ability to dilute statutory culpability requirements and the ensuing danger of exposing individuals to liability regardless of their knowledge of any corporate wrongdoing, another aspect appears more troubling. In cases alleging misconduct by firms, the doctrine extends statutory duties that courts should properly treat as addressed exclusively to the legal entity to an additional class of defendants, the “responsible corporate officers.”

Despite its problematic nature, the doctrine’s scope is now expanding. Originally developed and applied in the context of food safety legislation, courts and commentators continue to identify new areas of application for the RCO doctrine. In addition, legislators have incorporated the doctrine into selected laws on both the

1. See, e.g., Dan Cogdell, *Focus on Executives in Spill Investigation*, HOUS. CHRON., Aug. 22, 2010, <http://www.chron.com/disp/story.mpl/editorial/outlook/7164227.html> (stating that the government will likely use the responsible corporate officer doctrine to prosecute British Petroleum’s top corporate officers); Tom Fowler, *Environmental Laws Could Snare Individuals at BP*, HOUS. CHRON., Aug. 30, 2010, <http://www.chron.com/disp/story.mpl/business/7175406.html> (recognizing that the responsible corporate officer doctrine has been used repeatedly in Clean Water Act violations to expose individual corporate actors to liability); Marie Gryphon, *Criminal Probe May Cripple Response to Gulf Crisis*, WASH. EXAMINER, June 9, 2010, <http://washingtonexaminer.com/node/79016> (stating that top corporate managers can be convicted for the acts of negligent subordinates); Ralph Lindeman, *Oil Spills: Criminal Charges Said Likely in Gulf Spill; Corporate Penalties, Prison Terms Possible*, 41 ENV’T REP. 1488 (2010) (stating that the responsible corporate officer doctrine could allow the government to cite one or more higher level corporate officials for criminal violations, even though the officials may not have been directly involved with British Petroleum’s operations).

2. For ease of discussion, individual corporate actors that fall under the RCO doctrine will hereinafter be collectively referred to as “corporate agents.” To be precise, however, namely, a director is not, by virtue of his position, a corporation’s agent. RESTATEMENT (SECOND) OF AGENCY § 14C cmt. a–b (1958).

3. Timothy P. Glynn, *Beyond “Unlimiting” Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 357–59 (2004).

4. Cogdell, *supra* note 1.

5. See *infra* Part III for a discussion of traditional requirements for holding corporate officers liable.

federal and state level.⁶ This development is misguided. In many cases, the RCO doctrine represents an unwarranted augmentation of corporate agents' duties and runs contrary to established tort, criminal, and corporate law principles. Legislatures and courts should therefore exercise caution in using the doctrine and apply a restrictive approach in order to curb the doctrine's negative effects.

This Article proceeds in five parts. Part II provides an overview of the RCO doctrine, tracing its origins and evolution, contemporary applications, and its basic requirements. Part III examines the doctrine within the context of the traditional legal framework for holding corporate actors personally liable and explains how it represents an unusual approach when compared to other methods of ascertaining tortious and criminal liability of corporate agents. Part III also highlights the uneasy relationship between the RCO doctrine and corporate law liability principles. Part IV discusses and critiques the doctrine's two main theoretical justifications, considerations of risk allocation and deterrence. Part V explores the RCO doctrine's negative effects, focusing on issues of costs, deterrence and overdeterrence, and the doctrine's potential clash with the principle of limited liability. Finally, Part VI outlines the modest proposal of a "cautious approach" to legislative and judicial application of the RCO doctrine.

II. BACKGROUND

A. *Origins*

Although rooted in earlier English and American case law, courts and commentators⁷ often trace the modern version of the RCO doctrine to two seminal Supreme Court decisions: *United States v. Dotterweich*⁸ and *United States v. Park*.⁹ Both cases concerned the question of personal liability of corporate executives under strict liability provisions of the Federal Food, Drug, and Cosmetic Act of 1938 (the "FDCA").

1. *Dotterweich*

In the 1943 *Dotterweich* case, the government charged Buffalo Pharmacal Company, Inc. and its president and general manager, Joseph Dotterweich, with criminal violations of the FDCA for shipping misbranded and adulterated drugs.¹⁰ Although the jury "[f]or some unexplainable reason . . . disagreed as to the

6. See *infra* Part II.B for a discussion of the evolution and contemporary applications of the RCO doctrine.

7. *E.g.*, *United States v. Ming Hong*, 242 F.3d 528, 531 (4th Cir. 2001); *United States v. Iverson*, 162 F.3d 1015, 1023–24 (9th Cir. 1998); *People v. Roscoe*, 87 Cal. Rptr. 3d 187, 191–92 (Ct. App. 2008); Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 *LOY. U. CHI. L.J.* 169, 172–76 (1994).

8. 320 U.S. 277 (1943). For a concise account of the RCO doctrine's history, see Noël Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 *STAN. ENVTL. L.J.* 283, 297–309 (2002).

9. 421 U.S. 658 (1975).

10. *Dotterweich*, 320 U.S. at 278.

corporation's guilt," it found Dotterweich guilty on all counts.¹¹ That finding of guilt was remarkable mainly because although Dotterweich, as president and general manager, was obviously in charge of Pharmacal's business, there was no showing that he had been personally involved in or had knowledge of any illegal activities.¹²

On appeal, the Second Circuit reversed the conviction.¹³ Based on its analysis of the FDCA's liability provision and the Act's definition of the term "person," which includes any "individual, partnership, corporation, and association," the court concluded that only the corporate principal, Buffalo Pharmacal, but not Dotterweich personally, could be liable under the Act.¹⁴ As the court explained:

It would be extremely harsh to charge [Dotterweich] criminally with the risks of the business as the drug dealer is himself charged. A majority of the court is of opinion that this cannot have been the congressional intent and that the statute must be construed to mean that only the drug dealer, whether corporation or individual, is the "person" who causes the "introduction" or "delivery for introduction" of misbranded or adulterated drugs into commerce.¹⁵

The Second Circuit's reading of the FDCA, however, did not carry the day with the Supreme Court. In an opinion by Justice Frankfurter, the Court reversed and upheld Dotterweich's personal liability, despite its recognition of the potential hardship arising out of penalizing an individual absent conscious wrongdoing.¹⁶ According to the majority's reasoning, individuals acting for their corporate employers fell well within the Act's definition of "person" and could thus be subject to personal liability.¹⁷

In reaching its conclusion, the Supreme Court relied mainly on the FDCA's broader purpose of protecting public welfare (namely health and safety),¹⁸ its strict liability nature (which "puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger"¹⁹), and the notion that a corporation can only act through the individuals who act on its behalf.²⁰ In sum, the

11. *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd sub nom. Dotterweich*, 320 U.S. 277.

12. *Id.*

13. *Id.* at 504.

14. *Id.* at 503.

15. *Id.* Nevertheless, the court did not wholly exclude the possibility of individual liability under the Act, albeit based on a veil piercing theory. *See id.* (explaining that "[i]f an individual operated a corporation as his 'alter ego' or agent he might be the principal").

16. *Dotterweich*, 320 U.S. at 284.

17. *Id.* at 281–85. In a dissenting opinion, Justice Murphy criticized the majority's reading of the Act, stating that there was no clear indication that Congress intended to impose upon corporate agents personal liability, and noting that it was inconsistent with established canons of criminal law. *Id.* at 285–93 (Murphy, J., dissenting).

18. *Id.* at 280; *see also Morissette v. United States*, 342 U.S. 246, 253–55 (1952) (connecting the need for legislation to protect the public welfare with the Industrial Revolution).

19. *Dotterweich*, 320 U.S. at 281.

20. *Id.*

Court concluded, “all who do have . . . a *responsible share* in the furtherance of the transaction which the statute outlaws” could be guilty of committing an offense.²¹

2. *Park*

More than thirty years later, in *Park*, the Supreme Court considered a case whose facts and procedural posture closely resembled those in *Dotterweich*.²² This time, the government used the FDCA as a basis to charge a large national retail food chain and its chief executive officer, John Park, with storing food under insanitary conditions.²³ Although the jury found Park guilty on all counts, the Fourth Circuit reversed.²⁴

The Fourth Circuit found the trial court’s jury instructions to be inappropriate, since they “left the jury with the erroneous impression that Park could be found guilty in the absence of ‘wrongful action’ on his part” and based solely on his position of authority and responsibility in his company’s business.²⁵ Citing Park’s responsibility of overseeing 36,000 employees in hundreds of geographically dispersed locations, the court found that “[t]o hold Park criminally liable for the wrongful actions of each and every one of these employees by merely showing his position with the corporation is manifestly unjust, unfair and beyond the realm of reasonableness.”²⁶

Again, the Supreme Court reversed and upheld the defendant’s conviction. Clarifying and extending its holding in *Dotterweich*, the Court explained:

[T]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.²⁷

Despite the Court’s seeming recognition of the FDCA’s strict liability character,²⁸ it referred to a “duty” of responsible corporate agents to exercise “the highest standard of foresight and vigilance,” and that a breach of this duty includes some measure of “blameworthiness,” “guilt,” and “culpability.”²⁹ In addressing the issue of culpability—

21. *Id.* at 284 (emphasis added). Interestingly, although *Dotterweich* is routinely credited with establishing the RCO doctrine, the Supreme Court in that particular case seemed to have a more traditional legal tool in mind: to wit, the concept of criminal aiding and abetting. “To speak with technical accuracy,” the Court noted, under the particular section of the FDCA at question in *Dotterweich*, “a corporation may commit an offense and all persons who aid and abet its commission are equally guilty.” *Id.* at 284.

22. In contrast to *Dotterweich*, however, there were indications in *Park* that the defendant had been on notice of the conditions that led to statutory violations. See *United States v. Park*, 421 U.S. 658, 663–64 (1975) (noting Park received and read a letter from the Food and Drug Administration concerning the insanitary conditions at the Baltimore warehouse).

23. *Id.* at 660.

24. *United States v. Park*, 499 F.2d 839, 843 (4th Cir. 1974), *rev’d*, 421 U.S. 658 (1975).

25. *Id.* at 841–42.

26. *Id.* at 841 n.5 (emphasis omitted).

27. *Park*, 421 U.S. at 673–74.

28. *Id.* at 672. The Court observed that liability did not require any “awareness of some wrongdoing or conscious fraud.” *Id.* at 672–73 (internal quotation marks omitted).

29. *Id.* at 673–74. Indeed, various courts and commentators have interpreted both *Park* and *Dotterweich* to impose a liability standard that is akin to negligence. See, e.g., *State v. Kailua Auto Wreckers, Inc.*, 615 P.2d 730, 739–40 (Haw. 1980) (using the RCO doctrine in the context of a strict liability provision but applying a

an element that would not be required under instances of strict liability—the Court further specified:

The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.³⁰

In a rather curious way, the Court thereby established a connection between the defendant's position within its business, statutory duties akin to strict liability, the requirement of causality, and culpability. Not surprisingly, this complex linkage later led to considerable confusion as to the requirements and scope of the RCO doctrine on the part of courts and commentators alike.

B. *Evolution and Contemporary Applications*

Following the Supreme Court's lead in *Dotterweich* and *Park*, courts gradually adopted the idea of liability based on a determination of a corporate officer's "responsible share"³¹ in or "responsible relation"³² to a statutory violation. Although the Supreme Court has never used the term, other courts and commentators coined this theory of liability the "responsible corporate officer doctrine."³³

Over time, courts broadened the scope of the doctrine in four important ways. First, they expanded its use beyond the FDCA, applying it to a broad spectrum of subject matters such as meat branding and meat inspection violations,³⁴ securities violations,³⁵ consumer fraud,³⁶ deceptive mortgage lending practices,³⁷ antitrust

negligence standard to determine the defendant director-officer's liability); Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 466 (1981) (stating that the responsible share idea "permits the introduction of a negligence approach more directly. . . . [and] waters down the concept of strict liability"); Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681, 696 (2003) (noting that "most commentators have assumed that the Supreme Court did not mean to impose a pure form of vicarious liability, but meant to impose liability only upon officers whose conduct was at least negligent"). *But cf.* *People v. Roscoe*, 87 Cal. Rptr. 3d 187, 192 (Ct. App. 2008) (noting that *Dotterweich* applied a statutory strict liability provision).

30. *Park*, 421 U.S. at 674.

31. *United States v. Dotterweich*, 320 U.S. 277, 284 (1943).

32. *Id.* at 281, 285.

33. The term "responsible corporate officer doctrine" seems to have been used for the first time in *United States v. Frezzo Bros.*, 602 F.2d 1123, 1130 n.11 (3d Cir. 1979). Commentators sometimes also refer to the RCO doctrine as the "responsible relation doctrine" or "responsible share doctrine." *E.g.*, Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1245 (2006); Charles J. Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L. & POL'Y F. 1, 28 (2004). In addition, some courts use the term "responsible corporate officer doctrine" to refer to the traditional theory of corporate agent liability that focuses on an individual's personal participation or approval of wrongful conduct. *See, e.g.*, *Dep't of Ecology v. Lundgren*, 971 P.2d 948, 952 (Wash. Ct. App. 1999) (treating an officer's control of a business with knowledge of statutory violations as a form of participation in wrongful conduct).

34. *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998); *United States v. Cattle King Packing Co.*, 793 F.2d 232, 240 (10th Cir. 1986).

35. *United States v. Rachal*, 473 F.2d 1338, 1341–42 (5th Cir. 1973); *Wittenberg v. Gallagher*, No. 1 CA-CV 01-0168, 2001 WL 34048121, at *2 (Ariz. Ct. App. Nov. 20, 2001). In this context, note that both the

violations,³⁸ failures in record keeping of controlled substances,³⁹ sales tax violations,⁴⁰ liability under the Sarbanes-Oxley Act,⁴¹ and others.⁴² Recently, commentators have also argued that the doctrine could apply to new areas, such as mortgage fraud⁴³ and violations of the Occupational Safety and Health Act.⁴⁴ In addition, some scholars have suggested that courts should expand the doctrine's use beyond public welfare or regulatory offenses.⁴⁵

The RCO doctrine's most important field of application, however, has become liability under environmental statutes on both the federal and state level.⁴⁶ Cementing

Securities Act of 1933 and the Securities Exchange Act of 1934 already impose liability for securities law violations not only on the person who actually commits the violation but also on "controlling persons," including corporate directors and officers, who control the violator. 15 U.S.C. §§ 77o, 78t(a) (2006).

36. *State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210, 216–17 (Iowa 1991).

37. *Nationscapital Mortg. Corp. v. State Dep't of Fin. Inst.*, 137 P.3d 78, 83 (Wash. Ct. App. 2006).

38. *United States v. Wise*, 370 U.S. 405, 409–16 (1962); *Monarch Marking Sys., Inc. v. Duncan Parking Meter Maint. Co.*, No. 82 C 2599, 1986 WL 3625, at *1–2 (N.D. Ill. Mar. 13, 1986).

39. *United States v. Poulin*, 926 F. Supp. 246, 253 (D. Mass. 1996), *superseded by statute*, 21 U.S.C. § 842(5), (10) (2006), *as recognized in* *United States v. Grab Bag Distrib.*, 189 F. Supp. 2d 1072, 1080 (E.D. Cal. 2002) (noting that the statute was amended in 1998 so that only negligent record keeping of controlled substances was punishable).

40. *State v. Longstreet*, 536 S.W.2d 185, 188–89 (Mo. Ct. App. 1976).

41. The interest in the RCO doctrine in connection with Sarbanes-Oxley stems from an ambiguity in section 304 of the Act, which provides that certain compensation and profits from the sale of company stock can be "reimburse[d]" from chief executive officers and chief financial officers of firms that are required to restate their financials as a result of financial misconduct. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 754, § 304 (2002) (codified at 15 U.S.C. § 7243 (2006)). The statutory language of section 304 does not specify whether clawbacks are restricted to instances of personal misconduct by CEOs or CFOs or whether they impose CEO and CFO liability for misconduct by subordinates. *Id.* However, analogies to the RCO doctrine in interpreting section 304 have allowed courts and the Securities and Exchange Commission to interpret the statute broadly, holding CEOs and CFOs liable even if the misconduct in question was not committed by the CFO and CEO personally. *See* *SEC v. Jenkins*, 718 F. Supp. 2d 1070 (D. Ariz. 2010) (holding that because the Sarbanes-Oxley Act did not require personal misconduct to trigger reimbursement obligations, a CEO was required to pay back bonuses exceeding \$4 million during a period in which the corporation's financial statements had to be restated). *Accord* John Patrick Kelsh, *Section 304 of the Sarbanes-Oxley Act of 2002: The Case for a Personal Culpability Requirement*, 59 BUS. LAW. 1005, 1022–23 (2004) (explaining that interpreting section 304 in such a broad manner "can be seen as consistent with the well-established body of law referred to as 'responsible corporate officer' doctrine"); Rachael E. Schwartz, *The Clawback Provision of Sarbanes-Oxley: An Underutilized Incentive to Keep the Corporate House Clean*, 64 BUS. LAW. 1, 21 (2008) (same). Nevertheless, section 304 has not been used by courts to extend the class of defendants beyond CEOs and CFOs, most likely because the wording of the statute specifically names CEOs and CFOs and therefore restricts liability to these covered officers. 15 U.S.C. § 7243.

42. A comprehensive compilation of cases involving the RCO doctrine can be found in Randy J. Sutton, Annotation, "*Responsible Corporate Officer*" Doctrine or "*Responsible Relationship*" of Corporate Officer to Corporate Violation of Law, 119 A.L.R. 5TH 205 (2004).

43. Christina M. Schuck, Comment, *A New Use for the Responsible Corporate Officer Doctrine: Prosecuting Industry Insiders for Mortgage Fraud*, 14 LEWIS & CLARK L. REV. 371, 373 (2010).

44. Joshua Goldberg, *Coming Soon to an OSHA Violation Near You: The Responsible Corporate Officer Doctrine*, 18 LAB. LAW. 263, 263–64 (2002).

45. Aagaard, *supra* note 33, at 1248, 1286–87; Kushner, *supra* note 29, at 683–84.

46. *See, e.g.*, Aagaard, *supra* note 33, at 1263 (noting that "by the late 1990s, the responsible corporate officer doctrine had developed in federal environmental law to the point that its validity as a basis for criminal liability was widely accepted").

the doctrine's success, legislatures even went as far as incorporating it explicitly into the liability provisions of numerous environmental statutes. For instance, on the federal level, Congress has amended both the Clean Water Act and the Clean Air Act to include "any responsible corporate officer[s]" in the definition of "person[s]" who face criminal penalties under each Act.⁴⁷ Similarly, the doctrine has now been encapsulated in a number of state environmental laws.⁴⁸

Second, whereas *Dotterweich* and *Park* concerned responsibility under a provision that provided for strict liability, later courts began to use the doctrine in connection with statutory offenses that have specific mens rea requirements.⁴⁹ Consequently, fears have surfaced that the doctrine may undermine statutory requirements of culpability.⁵⁰

Third, courts started to rely on the RCO doctrine to impose not only criminal but civil liability as well.⁵¹ One court explained that "the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty,"⁵² whereas another found that, for the purposes of applying the RCO doctrine, the distinction between civil and criminal liability is "irrelevant."⁵³

Finally, contrary to the doctrine's historical function,⁵⁴ courts may now impose substantial monetary fines and subject responsible corporate officers to liability for

47. 33 U.S.C. § 1319(c)(6) (2006); 42 U.S.C. § 7413(c)(6) (2006).

48. *E.g.*, Alabama Water Pollution Control Act, ALA. CODE § 22-22-1(b)(7) (2011).

49. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 214 n.84 (1991) (stating that the RCO doctrine has been applied to statutes requiring a knowing, reckless, or negligent level of mens rea requirements); Hustis & Gotanda, *supra* note 7, at 176–77 (noting attempts to extend the RCO doctrine "to felony prosecutions under federal environmental laws which, unlike the FDCA, require the government to establish a mens rea of knowledge as an element of the crime").

50. See *infra* Part II.C.2 for a discussion of the extent to which the RCO doctrine may eliminate statutory mens rea requirements.

51. *E.g.*, *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 561 (6th Cir. 1985); *People v. Roscoe*, 87 Cal. Rptr. 3d 187, 189 (Ct. App. 2008); *BEC Corp. v. Dep't of Env'tl. Prot.*, 775 A.2d 928, 940 (Conn. 2001); *Comm'r, Dep't of Env'tl. Mgmt. v. RLG, Inc.*, 775 N.E.2d 556, 558, 560 (Ind. 2001). Moreover, it is notable in this regard that although developed in the context of actions brought by the government, courts have occasionally relied on the doctrine in connection with lawsuits among private parties. *See, e.g.*, *Wittenberg v. Gallagher*, No. 1 CA-CV 01-0168, 2001 WL 34048121, at *2–3 (Ariz. Ct. App. Nov. 20, 2001) (applying the RCO doctrine to a suit brought by investors against the president of an investment company that employed a broker who engaged in securities violations); *Monarch Marking Sys., Inc. v. Duncan Parking Meter Maint. Co.*, No. 82 C 2599, 1986 WL 3625, at *1–2 (N.D. Ill. Mar. 13, 1986) (invoking the RCO Doctrine in a patent and trademark infringement and unfair competition suit between companies).

52. *Hodges X-Ray*, 759 F.2d at 561.

53. *Roscoe*, 87 Cal. Rptr. 3d at 193 n.4.

54. In early English common law, where courts developed the RCO doctrine's predecessors, judges extended liability only to crimes that were analogous to misdemeanors that did not involve the possibility of significant imprisonment, "an outcome that most likely made strict liability for unknowing defendants more palatable to the courts." Wise, *supra* note 8, at 299. Mirroring this sentiment, the United States Supreme Court once justified the imposition of strict criminal liability for public welfare offenses by stressing that the "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Morrisette v. United States*, 342 U.S. 246, 256 (1952). Indeed, both *Park* and *Dotterweich* imposed relatively

felony crimes that involve the threat of imprisonment.⁵⁵ A recent notable example of the doctrine's impact includes guilty pleas by three senior pharmaceutical executives that resulted in these individuals' payment of a combined fine of over \$34 million and their exclusion from participation in federal health care programs for twelve years each.⁵⁶ The most potentially drastic example yet, however, might still arise out of the government's legal proceedings in the wake of the Gulf of Mexico oil spill. Reportedly, individual BP officials, in the event of conviction as responsible corporate officers, are at risk of prison terms of up to fifteen years.⁵⁷

Recent case law suggests, however, that at least some courts have become reluctant to expand the RCO doctrine's reach.⁵⁸ In a particularly noteworthy

modest monetary fines for misdemeanors. *See* *United States v. Park*, 421 U.S. 658, 665–66 (1975) (defendant incurred a penalty of \$250); *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd sub nom.* *United States v. Dotterweich*, 320 U.S. 277 (1943) (defendant was obliged to pay fine of \$500 and serve sixty days probation).

55. *See, e.g.*, Babbitt et al., *supra* note 33, at 9, 56 (noting that the enforcement of environmental crimes increasingly entails substantial monetary penalties, incarceration of violators, and prison sentences for convicted defendants, and citing an example of a case in which a responsible corporate officer was sentenced to thirty-six months in prison, three years of probation, and a \$500,000 fine).

56. *Friedman v. Sebelius*, 755 F. Supp. 2d 98, 117 (D. D.C. 2010) (affirming executives' exclusion from participating in federal health care programs); *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569, 575–76 (W.D. Va. 2007) (approving plea agreements); *see also* Richard P. Kusserow & Thomas E. Herrmann, *More Health Care Executive and Board Accountability on the Way: Increased Compliance-Related Education and Training a Must*, J. HEALTH CARE COMPLIANCE, July–Aug. 2010, at 41; Brian Stimson & Kimyatta McClary, "Responsible Corporate Officer": Business Executives Face Strict Liability Under Novel Criminal Law Doctrine, LEGAL BACKGROUNDER, April 9, 2010, at 1, available at http://www.wlf.org/Upload/legalstudies/legalbackgrounder/4-9-20Stimson_LegalBackgrounder.pdf (both highlighting the government's recent efforts to increase health care executive or board member accountability based on the RCO doctrine). In another recent case, a California court held two individuals who were shareholders, directors, and officers of a family business liable for almost \$2.5 million for failing to prevent or remedy an environmental offense. *Roscoe*, 87 Cal. Rptr. 3d at 190–92.

57. Lindeman, *supra* note 1, at 1, 3. At this time, the United States government has only filed a civil lawsuit against BP. *See* Complaint, *United States v. BP Exploration & Prod. Inc.*, No. 2:10-cv-04536 (E.D. La. Dec. 15, 2010), 2010 WL 5094310. Criminal charges, however, are likely to follow. *See* John Schwartz, *U.S. Sues BP and Others for Damages in Gulf Spill*, N.Y. TIMES, Dec. 16, 2010, at A30 (citing Attorney General Eric Holder as saying that the government is "making progress" on their criminal investigation); Justin Blum & Alison Fitzgerald, *BP Is Said to Face U.S. Review for Manslaughter Charges*, BLOOMBERG, Mar. 29, 2011, <http://www.bloomberg.com/news/2011-03-29/bp-managers-said-to-face-u-s-review-for-manslaughter-charges.html> (reporting that federal prosecutors are considering whether to pursue manslaughter charges against BP managers).

58. *See, e.g.*, *Microsoft Corp. v. Ion Techs. Corp.*, 484 F. Supp. 2d 955, 962 (D. Minn. 2007) (declining to apply the doctrine outside the strict liability public welfare context to consider liability for copyright infringement); *Celentano v. Rocque*, 923 A.2d 709, 722–23 (Conn. 2007) (explaining that the RCO doctrine applies only to a narrow class of strict liability public welfare offenses); *Rocque v. Schiavone*, No. CV030825384, 2005 WL 1434812 (Conn. Super. Ct. May 24, 2005) (holding that RCO doctrine does not apply to statutory provision regulating environmental duties of transferors of properties); *State v. Arkell*, 672 N.W.2d 564, 569 (Minn. 2003) (holding that RCO doctrine does not apply to building code violations); Erik Gerding, *United States of America, in DIRECTORS' PERSONAL LIABILITY FOR CORPORATE FAULT: A COMPARATIVE ANALYSIS* 301, 316 (Helen Anderson ed., 2008) ("[R]ecent cases indicate that federal courts will demand that the language of a statute be very explicit for the responsible corporate officer doctrine to apply."); Leo M. Romero, *Punishment for Ecological Disasters: Punitive Damages and/or Criminal Sanctions*, 7 U. ST. THOMAS L.J. 154, 179 (2009) ("Courts are reluctant, however, to apply this doctrine where

development, the Supreme Court has now distanced itself from the very doctrine it once created. In *Meyer v. Holley*,⁵⁹ a 2003 decision declining to hold the president of a real estate corporation liable for an employee's violations of the Fair Housing Act, the Court expressed its desire to curb future judicial uses of the RCO doctrine. Suggesting that *Dotterweich* and *Park* established "unusually strict" and nontraditional principles of vicarious liability, the Supreme Court emphasized that this type of liability would only be justified in cases of clear congressional intent.⁶⁰

C. Requirements

1. Basic Elements

Despite its increasingly widespread use, the preconditions for applying the RCO doctrine, in both its common law as well as "statutory" versions, are far from clear.⁶¹ Generally, the doctrine applies only in the context of "public welfare statutes," that is, legislation intended to improve the common good.⁶² Beyond that, several courts⁶³ have adopted the test formulated by the Minnesota Court of Appeals in *In re Dougherty*.⁶⁴ *Dougherty* identified three essential elements that must be satisfied before liability will be imposed upon a "responsible corporate officer":

(1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.⁶⁵

there is no explicit congressional intent to include this type of liability or where the corporate officer has little or no culpability for the criminal violation.").

59. 537 U.S. 280 (2003).

60. *Meyer*, 537 U.S. at 287, 289. See also *infra* notes 119–20 and accompanying text, which analogize the Supreme Court's approach in *Meyer* to its restrictions on implied private causes of action. Note, however, that the Supreme Court's opinion does not prevent legislatures from drafting laws that impose strict liability on officers who are not morally responsible for corporate acts. Rather, *Meyer* solely restricts courts in their ability to impose liability on responsible corporate officers absent express statutory language to that effect. In addition, as one commentator notes, although *Meyer* will likely restrict federal courts' ability to apply the RCO doctrine in the context of new statutes, existing uses of the doctrine on the federal level and its application by state courts to state statutes remain unaffected. Gerding, *supra* note 58, at 317.

61. See Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 446 (2007) (noting that the doctrine "continues to generate substantial confusion and uncertainty concerning the extent to which corporate officers are strictly liable for corporate misconduct").

62. See *In re Dougherty*, 482 N.W.2d 485, 489 (Minn. Ct. App. 1992); Wise, *supra* note 8, at 316. In addition, some courts limit the use of the RCO doctrine to statutes imposing strict liability. *E.g.*, *Dougherty*, 482 N.W.2d at 489.

63. *E.g.*, *BEC Corp. v. Dep't of Env'tl. Prot.*, 775 A.2d 928, 937–38 (Conn. 2001); *Comm'r, Dep't of Env'tl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 561 (Ind. 2001); *Wittenberg v. Gallagher*, 2001 WL 34048121, at *2 (Ariz. Ct. App. Nov. 20, 2001); *People v. Roscoe*, 87 Cal. Rptr. 3d 187, 195 (Ct. App. 2008).

64. 482 N.W.2d 485 (Minn. Ct. App. 1992).

65. *Dougherty*, 482 N.W.2d at 490. For a discussion of these elements, see Valorie Cogswell, *Catching the Rabbit: The Past, Present, and Future of California's Approach to Finding Corporate Officers Civilly*

Despite its reference to responsible “corporate officers,” the RCO doctrine is neither limited to corporate entities (as opposed to other organizational forms) nor to individuals who are technically considered officers.⁶⁶ The *Dotterweich* Court did not attempt to define the class of employees that stands in a “responsible relation” to certain violations.⁶⁷ Instead, it opined that “[i]n such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.”⁶⁸ Thus, the Court made clear that actors other than corporate officers, namely directors or lower-level employees, may become defendants and incur personal liability under the doctrine.⁶⁹

2. The Question of Mental State

There is still confusion over the state of mind, or *mens rea*, that is necessary to impose liability under the RCO doctrine. The uncertainty stems in great part from the fact that the Supreme Court initially articulated the doctrine in the context of strict liability offenses, and, in addition, remained vague as to the relationship between the doctrine and requirements regarding a defendant’s state of mind.⁷⁰ Due to this lack of guidance, subsequent decisions that applied the doctrine to violations requiring culpable conduct resulted in mixed outcomes and left enough room for commentators to interpret the case law in diverging manners.⁷¹

Even today, the extent to which the RCO doctrine may eliminate statutory *mens rea* requirements remains unsettled.⁷² Some commentators argue that the doctrine may dispense with or—because a court or jury may infer an individual’s state of mind based

Liability Under the Responsible Corporate Officer Doctrine, 33 ENVIRONS ENVTL. L. & POL’Y J. 343, 363–65 (2010).

66. See *United States v. Ming Hong*, 242 F.3d 528, 531 (4th Cir. 2001) (holding that liability under the doctrine is not dependent on a finding that defendant was a formally designated corporate officer); Aagaard, *supra* note 33, at 1286 (opining that even independent contractors may fall under the definition of “responsible corporate officers”). *But see* Wise, *supra* note 8, at 316 n.175 (noting that although the doctrine may apply to corporate agents other than officers, corporate officers have emerged as the primary defendants under the doctrine). The definition of “responsible corporate officer” may also encompass individuals who in fact do not actively exercise any corporate responsibility but only serve in those capacities as an “accommodation.” *State v. Kailua Auto Wreckers, Inc.*, 615 P.2d 730, 737 n.10 (Haw. 1980). Thus, in at least one case, a corporate officer was personally liable for an environmental offense even though she did not take an active part in the business operations and never set company policy. *Id.* at 737–38.

67. *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

68. *Id.*

69. *But see* Gerding, *supra* note 58, at 315–16 (finding that cases holding directors liable under the doctrine where those directors are not also officers of the company are rare).

70. See *supra* Part II.A for a discussion of the origins of the RCO doctrine.

71. An older, but particularly helpful discussion of the issue is provided in Hustis & Gotanda, *supra* note 7, at 184–96.

72. See Jennifer Bragg et al., *Onus of Responsibility: The Changing Responsible Corporate Officer Doctrine*, 65 FOOD & DRUG L.J. 525, 528 (2010) (“The mental state that must be proven to justify an RCO conviction, if any, has been the subject of much commentary and consternation. It remains unclear whether the RCO doctrine alters the *mens rea* of the underlying crime . . . or leaves it unchanged.”); Andrew H. Costinett et al., *Environmental Crimes*, 47 AM. CRIM. L. REV. 441, 449 (2010) (“The degree to which the responsible corporate officer doctrine eliminates the *mens rea* requirement of various environmental statutes is currently unclear.”).

on his or her corporate position—erode such requirements.⁷³ According to this view, a corporate official's status within a firm is enough to put him at risk of a felony conviction and a substantial jail sentence based on illegal conduct by subordinates. The opposing view disputes such propositions, with commentators opining that the RCO doctrine does not influence the state of mind that is necessary to incur liability under a given statute.⁷⁴

As evidenced by the extensive and longstanding discussion surrounding the issue, reasonable minds can differ as to the RCO doctrine's effects on statutory mens rea. Nevertheless, a case survey suggests that the truth lies somewhere in the middle of the spectrum of opinions. Both the claim that the RCO doctrine *abolishes* mens rea requirements as well as the contrary position that it *negates* any impact on statutory culpability are, although not wholly unsupported by case law, overly broad and therefore incorrect. For example, supporters of the theory that the RCO doctrine negates culpability requirements may point to the Tenth Circuit's dictum that a

73. See Abrams, *supra* note 29, at 477 (opining that the RCO doctrine “verbalizes a less extreme standard but nevertheless in practice produces the equivalent of a strict liability result”); Babbitt et al., *supra* note 33, at 8, 28–29 (asserting that liability may be imputed to corporate officers with no knowledge of illegal conduct and characterizing the doctrine as comprising both strict and vicarious liability); Ronald M. Brody, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 KY. L.J. 1055, 1072–73 (1992) (finding that courts have attempted to avoid the requirement of proving actual knowledge “by applying the RCO doctrine to establish proof of ‘constructive’ knowledge, based neither on direct, indirect, or circumstantial evidence”); Costinett et al., *supra* note 72, at 450 (discussing how some courts in utilizing the doctrine have adopted “liberal interpretations of the knowledge requirement”); David C. Fortney, Note, *Thinking Outside the “Black Box”: Tailored Enforcement in Environmental Criminal Law*, 81 TEX. L. REV. 1609, 1624 (2003) (contending that the “responsible corporate officer doctrine is nothing more than a theory of strict criminal liability” and that “all that needs to be shown is that the individual charged with a crime committed by an employee was in fact in a position of ultimate (or nearly ultimate) authority within a corporation”); Keith A. Onsdorff & James M. Mesnard, *The Responsible Corporate Officer Doctrine in RCRA Criminal Enforcement: What You Don't Know Can Hurt You*, 22 ENVTL. L. REP. 10099, 10102–04 (1992) (suggesting that the doctrine allows prosecution of corporate officials for acts that they did not know were occurring); Ruth Ann Weidel et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100, 1105 (1991) (stating that the doctrine gives prosecutors “a means for reducing the required mens rea, to convict corporate officers who do not have actual knowledge of the violation but are in a position to prevent or remedy a violation”).

74. See Aagaard, *supra* note 33, at 1247, 1253, 1265–66 (“[A]t some point in the mid-1990s, after courts overwhelmingly had concluded that the responsible corporate officer doctrine did not circumvent statutory mental state requirements, commentators should have stopped characterizing the responsible corporate officer doctrine in terms of mental state.”); Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 123–25 (1998) (characterizing the claim that the government has a reduced burden of proof in environmental prosecutions as a “myth”); Hustis & Gotanda, *supra* note 7, at 193–96 (rejecting theories that the doctrine creates strict liability or reduces mens rea requirements); J.T. Morgan, *The Mythical Erosion of Mens Rea*, 23 NAT. RESOURCES & ENV'T 29, 29 (2009) (characterizing claims about the erosion of mens rea in the prosecution of environmental crimes as “greatly exaggerated”); David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1241 (2009) (stating that except in cases of willful blindness, responsible corporate officers cannot be found liable under the felony provisions of the environmental laws if they lack knowledge of the facts); see also Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L.J. 1077, 1134 (2001) (finding that empirical data shows that hazardous waste prosecution does not tend to target inadvertent or unintentional violations).

responsible corporate officer could be criminally liable for a willful or negligent violation of the Clean Water Act even where he or she did not act with the required mens rea because “the willfulness or negligence of the actor would be *imputed* to him by virtue of his position of responsibility.”⁷⁵ In contrast, those who deny the doctrine’s impact on mens rea can rely on the First Circuit’s statement that “[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge.”⁷⁶

Thus, the moderate view that the RCO doctrine has an *eroding* effect on the element of mens rea appears the most accurate. In practice, it is probably too tempting for courts and juries not to infer knowledge or other levels of culpability based solely or mainly on an individual’s standing within a business,⁷⁷ even though this process surpasses the usual manner in which circumstantial evidence is properly used in proving an actor’s state of mind.⁷⁸ Although courts sometimes state that the doctrine does not impose liability based solely on an individual’s corporate status, a fairer assessment is that the doctrine “focuses more on the individuals’ statuses and only secondarily on their culpable conduct.”⁷⁹

3. Delegation as a Defense?

As early as the *Park* decision, the defendant officer attempted to avoid liability by showing that he had reasonably assigned the tasks that he allegedly failed to properly carry out to lower-level employees. *Park* asserted that he had no choice but to delegate certain duties, that he had no reason to suspect his subordinates were failing to ensure legal compliance, and that, once violations were brought to his attention, he gave instructions to correct them.⁸⁰

Dictum in *Park* introduced the idea of a defense of impossibility, in that a defendant could avoid liability for causing statutory violations by forwarding as a defense that he was “powerless to prevent or correct the violation.”⁸¹ However, the Supreme Court did not decide to which extent delegation of corporate tasks to

75. *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991) (emphasis added).

76. *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 55 (1st Cir. 1991).

77. *See United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984) (concluding that knowledge of the elements of an offense “may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant”); Costinett et al., *supra* note 72, at 450 & nn.49–50 (citing case law that demonstrates courts’ willingness to allow juries to infer a responsible corporate officer’s mens rea based on circumstantial evidence).

78. *But see* Hustis & Gotanda, *supra* note 7, at 190 (arguing that the language in *Johnson & Towers* is consistent with the traditional use of circumstantial evidence to prove mens rea, “since the court did not state that liability *must* be inferred, but only that it *may* be inferred”).

79. *State v. Markowitz*, 710 N.Y.S.2d 407, 412 n.4 (App. Div. 2000).

80. *United States v. Park*, 421 U.S. 658, 677 (1975). *Park* testified that upon notification of contaminations in a company warehouse, he had conferred with an in-house lawyer, who informed him that a vice president “was investigating the situation immediately and would be taking corrective action.” *Id.* at 663–64.

81. *Id.* at 673 (internal quotation marks omitted) (quoting *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964)); *see also* *United States v. Y. Hata & Co.*, 535 F.2d 508, 509–11 (9th Cir. 1976) (recognizing the possibility of an “objective impossibility defense” under appropriate circumstances).

trustworthy subordinates would satisfy the requirements of a defense of “lack of power.”⁸²

Courts that later had the opportunity to address the issue of delegation as a defense proved unsympathetic toward such attempts. The Ninth Circuit, for example, affirmed a corporate officer’s conviction for allowing contamination of food stored in a corporate warehouse despite the defendant having instructed a janitor to rectify the insanitary conditions, which the janitor intentionally failed to do.⁸³ In the court’s opinion, the officer should have followed up in short order and, in any event, should have anticipated the subordinate’s failure.⁸⁴ Similarly, a California court applied the RCO doctrine to officials of a corporation that operated a leaking underground storage system, even though one of the defendants had delegated the task to address the leak to an employee and had hired an outside consultant to oversee the remedial measures.⁸⁵

Although a defense based on a reasonable delegation of tasks would seem legitimate, courts’ hostility toward it is not surprising. After all, the basic premise of the RCO doctrine is the exact opposite—that is, to impose liability on corporate agents precisely for misconduct by subordinates that they oversee. In fact, delegation of duties may even bolster a claim that someone was a “responsible corporate officer.” In a somewhat ironic twist, at least one court reasoned that “since delegation is done by those with a broad range of responsibilities, the delegation shows that the defendant was responsible for the overall operation of [the company’s] facility.”⁸⁶

III. THE RCO DOCTRINE WITHIN THE TRADITIONAL LEGAL FRAMEWORK

A. *Liability of Corporate Agents Under Tort and Criminal Law*

1. Basic Principles

It has long been settled that corporate agents—namely directors, officers, and employees—remain personally liable for the torts that they commit in their official capacities.⁸⁷ Yet, these individuals are not liable based solely on their corporate

82. *Park*, 421 U.S. at 677.

83. *United States v. Starr*, 535 F.2d 512, 515–16 (9th Cir. 1976).

84. *See id.* (finding that too much time passed between the giving of the order and a subsequent inspection and that the results were foreseeable).

85. *People v. Roscoe*, 87 Cal. Rptr. 3d 187, 190 (Ct. App. 2008).

86. *State v. Rollfink*, 475 N.W.2d 575, 580 (Wis. 1991). *But cf.* *Gerding*, *supra* note 58, at 317–18 (stating that courts have recently required that a responsible corporate officer have more direct oversight to qualify as such, suggesting that delegation of one’s responsibilities may be a sign that the person is not a responsible corporate officer in the sense of the doctrine).

87. *See, e.g.*, *Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 195 F.3d 953, 956 (7th Cir. 1999) (explaining that the defendant would be liable if he personally operated the landfill in question); *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999) (noting that a corporate officer is liable regardless of whether he “acted as an agent of the corporation”); *Faulk v. Milton*, 268 N.Y.S.2d 844, 847 (App. Div. 1966) (holding that corporate liability exception did not apply in a case where the action was against both a corporation and its directors as individuals); *Schaefer v. D & J Produce, Inc.*, 403 N.E.2d 1015, 1019 (Ohio Ct. App. 1978) (explaining that the existence of an agency relationship is not a defense when the actor would otherwise be liable). Conversely, some courts have deviated from this principle,

position. Rather, under common law principles, there must be a specific connection linking the agent with the tort.⁸⁸

Courts have developed various approaches to assess a corporate agent's personal liability. Most commonly, courts rely on, first, whether a defendant directed, sanctioned, or participated in a tort;⁸⁹ second, whether the defendant breached a personal duty; or third, whether there are grounds present that allow the court to pierce the corporate veil.⁹⁰ Moreover, some courts identify negligence in management and supervision of corporate affairs and subordinates as an additional, separate basis of personal liability.⁹¹

Corporate agents are also liable for criminal misconduct. Under traditional criminal law concepts, a director, officer, or other agent's personal liability will generally lie where that individual directed, permitted, or participated—be it directly or as an aider, abettor, or accessory—in acts that constitute a criminal offense.⁹² However, the flip side of courts' reliance on these factors to establish personal liability is that a corporate agent is ordinarily not criminally liable for misconduct in acts that are performed not by him, but by other agents.⁹³

Moreover, criminal law has two additional notable features. First, criminal liability is ordinarily incurred as a consequence of positive acts, not omissions. Although conceivable in certain cases, criminal liability for omissions continues to be a rare occurrence.⁹⁴ Second, much more so than in tort law, strict liability in criminal law is highly controversial.⁹⁵ Following these principles, under conventional rules of criminal law, corporate agents will not normally incur criminal liability for failures to act and will not be held responsible in the absence of a culpable state of mind.

holding that an agent may not be held personally liable for torts committed in the scope of his employment. *E.g.*, *Cantwell v. City of Boise*, 191 P.3d 205, 216 (Idaho 2008). Normally, however, an agent who committed a tort in his scope of employment will be jointly and severally liable together with the corporation or other legal entity that employs him. *E.g.*, *Palomino Mills v. Davidson Mills Corp.*, 52 S.E.2d 915, 918–19 (N.C. 1949).

88. *Bowling v. Holdeman*, 413 N.E.2d 1010, 1014 (Ind. Ct. App. 1980).

89. For a recent application and discussion of this principle, see *Prive v. Vermont Asbestos Group*, 992 A.2d 1035, 1041–42 (Vt. 2010).

90. See Martin Petrin, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 AM. U. L. REV. 1661, 1666–75 (2010) (providing a detailed discussion of these approaches).

91. *Jabzenski v. S. Pac. Mem'l Hosps., Inc.*, 579 P.2d 53, 58 (Ariz. Ct. App. 1978); *accord Avery v. Solargizer Int'l, Inc.*, 427 N.W.2d 675, 681 (Minn. Ct. App. 1988).

92. See *United States v. Amrep Corp.*, 560 F.2d 539, 545 (2d Cir. 1977) (holding that where the proof shows “active and knowing” participation in criminal conduct by corporate officers, “they are equally liable with the corporation”); *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1372 (D.C. Cir. 1975) (quoting *United States v. N. Am. Van Lines, Inc.*, 202 F. Supp. 639, 644 (D.D.C. 1962)) (same); *State v. Flake*, 165 N.W.2d 55, 58 (S.D. 1969) (same); *Hustis & Gotanda*, *supra* note 7, at 171–72 (same).

93. *E.g.*, *Flake*, 165 N.W.2d at 58–59 (citing *State v. Carmean*, 102 N.W. 97, 99 (Iowa 1905)).

94. Aagaard, *supra* note 33, at 1275–80 (noting the persisting “historical tradition in Western European and American law that disfavors making a failure to act a criminal offense”).

95. Babbitt et al., *supra* note 33, at 25–26.

2. Relaxing Traditional Requirements for Liability

The RCO doctrine departs in many ways from traditional tort and criminal law principles that determine corporate agents' personal liability. Indeed, the doctrine does not build upon these principles, but rather establishes its own separate theory of liability.⁹⁶ In the process, however, it also considerably augments corporate agents' duties—and liability risks—vis-à-vis third parties.

Contrary to a common approach to establishing individual liability under both tort and criminal law, liability under the RCO doctrine does not require any personal participation, commission, or authorization of any wrongful conduct. Thus, the doctrine is unusual because of the way it abolishes the traditional requirements to show a connection between the individual and a particular wrong. Specifically, the doctrine also departs from ordinary criminal law principles, since it may create instances of strict liability and liability for omissions.

Although the doctrine is loosely comparable to corporate agents' liability under general tort law for failures in the supervision of corporate affairs and subordinates,⁹⁷ the RCO doctrine turns out to be far stricter. Namely, the doctrine relaxes requirements of causality and culpability—even allowing for strict liability—and is hostile toward a defense based on the delegation of tasks to other corporate agents.⁹⁸ As a result, the doctrine creates non-delegable supervision duties for corporate managers. In the corporate context, however, non-delegable duties are normally restricted to principals (i.e., the business entity itself, not its agents).⁹⁹

Because proof of causality is replaced by the vague notion of a “responsible relationship” or a “nexus” between the individual's position and a violation, the doctrine also reduces the requirement that a defendant's conduct must be the proximate cause for the harm that is attributed to him.¹⁰⁰ Although the doctrine's requirement to show that a defendant “facilitated the violations” has the potential to serve as a protective device for responsible corporate officers, this element can be so easily met that it generally does not serve as a barrier to holding corporate agents liable. With the benefit of hindsight, plaintiffs and courts can construe almost every instance of

96. *Celentano v. Rocque*, 923 A.2d 709, 721 n.11 (Conn. 2007) (“The responsible corporate officer doctrine is a common-law theory of liability that is similar to, but separate and distinct from, piercing the corporate veil or personal liability for direct participation in tortious conduct.”); *see also* *United States v. Dotterweich*, 320 U.S. 277, 282 (1943) (distinguishing the RCO doctrine from liability under “alter ego” or veil piercing approaches); *Comm’r, Dep’t of Envtl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 559 (Ind. 2001) (explaining that “an individual, though acting in a corporate capacity as an officer, director, or employee, may be individually liable either as a responsible corporate officer, as a direct participant under general legal principles, or under specific statutes or provisions”).

97. *See* *Petrin*, *supra* note 90, at 1676–81 (discussing liability under general tort law for failure to supervise corporate affairs and subordinates).

98. In addition, it should be noted that corporate agents' liability to third parties for supervision failures under tort law is itself fraught with problems. *See id.* at 1683–1707.

99. *See, e.g., Meyer v. Holley*, 537 U.S. 280, 281, 289–91 (2003) (rejecting the idea of a corporate owner or officer's non-delegable duty); *Huddleston ex rel. Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282, 287–89 (Colo. 1992) (discussing an employer's non-delegable duties for inherently dangerous activities). For a broader discussion of the concept of non-delegable duties, *see* W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 511–12 (5th ed. 1984).

100. *Kushner*, *supra* note 29, at 698–99.

corporate wrongdoing to be connected to some sort of mistake or lack of attention by corporate managers. The RCO doctrine may therefore expose individuals to liability for corporate misconduct regardless of a tangible connection to any wrongdoing.

In sum, the RCO doctrine establishes a highly unfortunate species of liability: in its most extreme form, the doctrine creates a rare type of strict *and* vicarious liability in which an individual can be guilty through the acts of others with no culpable state of mind.¹⁰¹ Not surprisingly, therefore, the RCO doctrine may raise constitutional due process concerns, especially in cases where the doctrine results in an imposition of significant criminal penalties.¹⁰²

3. Creating a New Class of Defendants

Although commentators have spilled much ink over the still unresolved question of whether and how the RCO doctrine affects statutory mens rea requirements,¹⁰³ liability under the doctrine is troubling even if we accept the disputed assertion that it does not undermine culpability requirements. First, courts often use the doctrine in connection with strict liability provisions, in which case a responsible corporate officer's liability is independent of any degree of wrongdoing. In these cases, the debate over the doctrine's effects on mens rea requirements is irrelevant.¹⁰⁴ Second, the doctrine assigns or creates *new* instances of personal liability. By adding responsible corporate officers to the class of potential defendants in cases of statutory violations, the RCO doctrine exposes them to liability where, without the doctrine, only the responsible corporate officers' corporate employers,¹⁰⁵ as legal entities, would have fallen within a statute's ambit.¹⁰⁶

101. See Bragg et al., *supra* note 72, at 529–31 (explaining that the doctrine may unduly create instances of strict and vicarious criminal liability); Glynn, *supra* note 3, at 360 (noting that the RCO doctrine “imposes a form of liability on controlling persons that . . . is akin to vicarious liability”). Some courts contend that the RCO doctrine is not tantamount to vicarious liability due to the requirement of a “responsible relationship,” for example, *BEC Corp. v. Dep’t of Environmental Protection*, 775 A.2d 928, 938 (Conn. 2001), but other courts—most notably the Supreme Court in *Meyer*—have disagreed and referred to liability under the RCO doctrine as “vicarious.” See *supra* notes 58–60 and accompanying text for a discussion of *Meyer* and an analysis of the Supreme Court's decisions regarding the RCO doctrine and nontraditional principles of vicarious liability. See also *United States v. Reis*, 366 F. App'x 781, 782 (9th Cir. 2010) (referring to the RCO doctrine as a form of “derivative liability”).

102. Hustis & Gotanda, *supra* note 7, 193–94.

103. See *supra* Part II.C.2 for a discussion of the relationship between mens rea and liability under the RCO doctrine.

104. According to some courts and commentators, however, the doctrine imposes something less than a strict liability standard, even if applied in connection with provisions that do not require a specific mens rea. See *supra* note 29 for a discussion of some courts' and commentators' interpretation of the RCO doctrine liability standard after *Dotterweich* and *Park*.

105. In addition, the subordinate employee directly responsible for acts that constitute a statutory violation may also incur personal liability.

106. To be sure, a defendant could often also be prosecuted on the basis of general tort or criminal law principles. These options, however, are far less favorable for prosecutors and plaintiffs because of stricter requirements with regard to the elements that need to be proven. See *infra* Part III.B for a discussion of the dichotomy between liability under tort and criminal law versus liability under corporate law and the RCO doctrine.

Although courts sometimes pretend to use the RCO doctrine as a tool to sanction the violation of a personal duty of a responsible corporate officer,¹⁰⁷ this does not reflect the doctrine's true nature. In reality, the doctrine will not often target the breach of actual pre-existing duties of responsible corporate officers. Rather, the doctrine extends statutory duties that should be properly seen as addressed exclusively to a legal entity to its "responsible corporate officers." Only then, upon a court's finding that these newly created individual duties have been breached, does the doctrine impose liability on the responsible corporate officers.¹⁰⁸

A myriad of cases illustrate the problem of extension of duties. For example, *Dotterweich* extended a pharmaceutical company's obligations under the FDCA to its responsible corporate officers by including the latter in the statutory definition of a "person" who causes the introduction of misbranded or adulterated drugs into commerce.¹⁰⁹ Similarly, in *United States v. Hodges X-Ray, Inc.*,¹¹⁰ the court concluded that it was "self-evident" that a major shareholder and president of an x-ray manufacturing business fell within a statutory definition of the term "manufacturer" and should thus personally bear the duties that health legislation imposed upon manufacturers of x-ray machines.¹¹¹ In the recent decision of *People v. Roscoe*,¹¹² the court found that a statutory strict liability provision pertaining to "operators" of underground storage tanks was applicable to corporate officers, even though the corporation owned the tank and was also found to be its operator.¹¹³ Finally, in yet another case, the court declined to dismiss an indictment against the president of an oil refining company for alleged violations of petroleum allocation regulations, finding that the president was, in the sense of an applicable statute, an "oil refiner."¹¹⁴

In these and other cases, however, only the business itself, not an individual in a position of corporate authority, should have been treated as a "person," "manufacturer," "operator," "oil refiner," etc. Officers and other "responsible persons" do not necessarily have the same duties toward third parties as the organizational entity that employs them. Instead, as demonstrated by modern tort law, corporations and other

107. See *United States v. Park*, 421 U.S. 658, 672 (1975) ("*Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission . . . the [FDCA] imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur."); Uhlmann, *supra* note 74, at 1241 (claiming that the RCO doctrine is properly understood as a tool imposing a duty to act, which undermines the possibility that it could lead to the prosecution of corporate officials based on status alone).

108. Utterly absurd are situations such as those in *United States v. Dotterweich*, 320 U.S. 277, 282–83 (1943) and *Lelles v. United States*, 241 F.2d 21, 23 (9th Cir. 1957), where responsible corporate officers are held liable, while, at the same time, their corporations are acquitted from liability for the same offenses. In those cases, the idea of vicarious liability is ignored and the individual bears more responsibility than its employer.

109. *Dotterweich*, 320 U.S. at 281–85.

110. 759 F.2d 557 (6th Cir. 1985).

111. *Hodges X-Ray*, 759 F.2d at 560.

112. 87 Cal. Rptr. 3d 187 (Ct. App. 2008).

113. *Roscoe*, 87 Cal. Rptr. 3d at 190.

114. *United States v. Gulf Oil Corp.*, 408 F. Supp. 450, 470–72 (W.D. Pa. 1975).

businesses can owe certain duties, statutory or otherwise, to third parties that are exclusive to them and do not extend to their agents.¹¹⁵

This idea also seems to underlie the Supreme Court's decision in *Meyer*. There, the Court found that although the Fair Housing Act forbids discriminatory acts by "any person," and includes in its definition of person "individuals, corporations, partnerships, associations, labor unions, and other organizations," the Act does not create personal vicarious liability of responsible corporate officers for unlawful acts by employees.¹¹⁶ Rather, liability for violations of the Act by corporate employees was found to be restricted to the corporate entity as their employer.¹¹⁷ As the Supreme Court explained, absent specific legislative intent, there is no "special duty of protection upon individual officers or owners of corporations . . . who are not principals (or contracting parties) in respect to the corporation's unlawfully acting employee[s]."¹¹⁸

The *Meyer* Court's approach to curbing the RCO doctrine is reminiscent of the Supreme Court's treatment of implied private rights of action. In both instances, absent clear congressional intent, the Court has been reluctant to extend personal liability or grant rights of action.¹¹⁹ Indeed, the parallels in the Court's treatment of the RCO doctrine where the underlying statute is silent as to the class of defendants and implied private rights is not surprising given that a strong analogy emerges between the two. In both cases, courts can create a new cause of action: for a new class of defendants with the RCO doctrine and for a new class of plaintiffs with implied private rights of action.¹²⁰ Conceptually, therefore, the RCO doctrine is the mirror image of instances where courts find implied private rights, since both create additional liability that may be inconsistent with legislative intent. Thus, with respect to the RCO doctrine, courts should carefully consider whether extending the class of defendants does not unduly impinge on legislative authority.

In sum, the point is not that corporate agents should never be liable for misconduct committed in their official capacities, including their failures in preventing or correcting statutory violations by others.¹²¹ Rather, the important point here is that

115. Petrin, *supra* note 90, at 1689–93 (discussing the concept of the corporation as exclusive bearer of duties).

116. *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citing 42 U.S.C. § 3602(d) (2000)).

117. *Id.* at 286.

118. *Id.* at 290.

119. Although there are now several decisions that evidence the Supreme Court's cautious approach to implied private rights of action, the most important cases remain *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979) and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). In addition, notable newer cases include *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and *Alexander v. Sandoval*, 532 U.S. 275 (2001). For an in-depth discussion of judicially inferred causes of action, see generally Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175 (2010).

120. A seminal case with regards to the latter is *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), *abrogation recognized by Sandoval*, 532 U.S. 275, in which the Supreme Court found an inferred cause of action for violations of § 14(a) of the Securities Exchange Act of 1934.

121. See *infra* Part VI for a suggestion on a revised approach to applying the RCO doctrine. See also Petrin, *supra* note 90, at 1707–14 (outlining the limited instances in which corporate agents should remain personally liable for torts committed in their scope of employment).

courts should not construe *additional* instances of individual liability by extending duties that are properly assigned to a corporate or business entity to that entity's executives or other agents.

B. Directors' and Officers' Liability Under Corporate Law

As we have seen in the preceding Section, the RCO doctrine represents an outlier within the traditional tort and criminal law framework that governs the liability of corporate agents. Yet, the gap between the doctrine's workings and established principles of corporate law and corporate liability is even wider.

1. The Dichotomy Between Corporate and Non-Corporate Liability Standards

Liability standards in tort and criminal law on the one hand and corporate law on the other hand remain largely unaligned. Tort and criminal law usually do not distinguish between unaffiliated individuals and individuals acting on behalf of a corporate entity, such as directors, officers, and employees. Instead, for both classes of defendants, the same general principles for ascertaining liability apply. As any other individual, corporate agents remain fully and personally responsible for their own torts and criminal acts, even if committed while acting in their official capacities and for the benefit of their employer.¹²²

Conversely, corporate law tends to limit personal liability of directors and officers. In the absence of intentional or bad faith misconduct, corporate laws largely insulate these individuals from claims by shareholders and from the corporation itself. Under the corporate law of Delaware and many other states, the business judgment rule broadly protects directors and officers against liability for business decisions.¹²³ In addition, exculpatory charter provisions may limit or eliminate directors' monetary liability for breaches of their duty of care.¹²⁴ Moreover, in cases where neither the business judgment rule nor exculpatory charter provisions are applicable, the relevant standard of care is not ordinary negligence, but gross negligence.¹²⁵ Finally, in order to prevail under a theory that directors—or, less commonly, officers—failed to properly oversee their corporation and ensure legal compliance, plaintiffs have to show that the defendants consciously abdicated their respective duties in this regard.¹²⁶

122. See *supra* Part III.A for a discussion of the liability of corporate agents under tort and criminal law.

123. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 46 n.38 (Del. 2006) (applying the business judgment rule to corporate officers); *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000) (“[D]irectors’ decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available.”).

124. Delaware General Corporation Law section 102(b)(7) permits a corporation to include in its certificate of incorporation a provision that, inter alia, eliminates or limits directors’ liability for acts or omissions not in good faith or which involve intentional misconduct or knowing violations of law. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2011).

125. See, e.g., *McMullin v. Beran*, 765 A.2d 910, 921 (Del. 2000).

126. See *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967, 971 (Del. Ch. 1996). Typically, oversight duties under *Caremark* and its progeny apply to directors. *Bridgeport Holdings Inc. Liquidating Trust v. Boyer (In re*

Yet, none of corporate law's protections for directors and officers are applicable under tort and criminal actions brought by the government or non-shareholder private plaintiffs. For example, tort and criminal law can impose personal liability on a director or officer for conduct that is neither intentional nor in bad faith, which cannot be "saved" by the business judgment rule or exculpatory charter provisions.¹²⁷ Thus, under tort and criminal law, directors and officers can be held responsible for behavior that would not lead to personal liability for claims brought under corporate law by shareholders.

The diverging standards of tort, criminal, and corporate liability result in a dilemma for directors and officers. To insulate themselves from liability, directors and officers must adhere to the stricter standards imposed by tort and criminal law. Consequently, tort and criminal law can weaken or undermine the protections that corporate law provides to directors and officers.¹²⁸

2. RCO Doctrine Versus Protections Provided by Corporate Law

The dichotomy between liability under tort and criminal law versus liability under corporate law triggers a host of concerns. The RCO doctrine, with its stringent standards that allow for liability for negligent as well as non-negligent acts and omissions, only exacerbates existing problems in this area.

In *Park*, the Supreme Court opined that "individuals who execute the corporate mission" have a "positive duty to seek out and remedy violations [of the Federal Food, Drug, and Cosmetic Act] when they occur" and "a duty to implement measures that will insure that violations will not occur."¹²⁹ The Court's description of these obligations strongly resembles the duty of oversight prescribed by corporate law as established in the landmark *Caremark* case and its progeny.¹³⁰ These decisions have made it clear that directors—and, according to at least one court, officers¹³¹—of a

Bridgeport Holdings, Inc.), 388 B.R. 548, 574 (Bankr. D. Del. 2008). At least one court, however, has expanded these duties to officers as well. *Miller v. McDonald (In re World Health Alternatives, Inc.)*, 385 B.R. 576, 591–92 (Bankr. D. Del. 2008); see also *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009) (en banc) (clarifying that the fiduciary duties of officers of Delaware corporations are the same as those of directors).

127. See *Frances T. v. Vill. Green Owners Ass'n*, 723 P.2d 573, 582–83 (Cal. 1986) (explaining that the business judgment rule is inapplicable to third party tort claims); *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 794 (Del. Ch. 2004) (finding that exculpatory clauses only restrict third parties to the extent that they seek to enforce rights on behalf of the corporation itself, whereas any claims that creditors possess against directors personally, such as claims for common law or statutory torts, are not barred by exculpatory charter provisions).

128. See *Frances T.*, 723 P.2d at 591–99 (Mosk, J., concurring & dissenting) (arguing that courts should hold directors faced with third party tort claims to the statutory liability standard that governs their internal duties to the corporation, but not to the common law standard).

129. *United States v. Park*, 421 U.S. 658, 672 (1975).

130. *Stone*, 911 A.2d at 369–70 (explaining that plaintiffs must demonstrate a director's conscious disregard for his duties as a precondition of oversight liability), *aff'g* No. Civ. A. 1570-N, 2006 WL 302558 (Del. Ch. Jan. 26, 2006); *Caremark*, 698 A.2d at 970 (holding that boards of directors are obliged to assure themselves that reasonably designed information and reporting systems with regard to "the corporation's compliance with law and its business performance" are in place).

131. *Miller*, 385 B.R. at 591.

Delaware corporation have a duty to implement appropriate control systems that enable them to monitor and ensure corporate compliance with applicable laws.¹³²

Due to the overlap between obligations under the RCO doctrine and corporate oversight duties, “responsible corporate officers” may incur liability for failures to prevent statutory violations by firm employees under both the RCO doctrine (in the case of third party claims)¹³³ and *Caremark* liability principles (in the case of shareholder derivative actions).¹³⁴ One recent commentator even went as far as stating that a breach of the corporate duty of oversight could “logically” lead to criminal liability as well.¹³⁵

Yet, the requirements for liability under the RCO doctrine and the *Caremark* line of cases are very different. Under the latter, a defendant will only incur liability for failing to prevent compliance breaches where he or she *knowingly* failed to discharge fiduciary obligations.¹³⁶ In addition, at least in the case of directors, corporate law recognizes the need to delegate monitoring tasks and protects reliance on periodic reports by subordinates.¹³⁷

In contrast, the RCO doctrine may dispense with these protections. Because courts often apply the doctrine in connection with strict liability statutory provisions, and because the doctrine can further erode mens rea requirements, liability is not necessarily dependent on a conscious or “knowing” breach of a defendant’s duties. Rather, it suffices to establish a connection between the defendant’s corporate position and the violation in question, paired with a finding that the defendant’s conduct “facilitated” the violation.¹³⁸ Moreover, the RCO doctrine, as discussed above, is nearly incompatible with a defense based on the delegation of tasks by corporate managers.¹³⁹

Consequently, a responsible corporate officer may well satisfy his internal corporate duties with regard to oversight and be safe from shareholder claims but still incur civil and criminal liability under RCO doctrine principles. As a result, the RCO doctrine partially undermines the liability protections that corporate laws, with good

132. *Caremark*, 698 A.2d at 970.

133. See *Frances T.*, 723 P.2d at 582–83 (stating that business judgment rule is not applicable to third party tort claims).

134. *Caremark*, 698 A.2d at 971.

135. Nancy Mullikin, Comment, *Holding the “Responsible Corporate Officer” Responsible: Addressing the Need for Expansion of Criminal Liability for Corporate Environmental Violators*, 3 GOLDEN GATE U. ENVTL. L.J. 395, 426 (2010).

136. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006). For a defense of Delaware’s strict limits on oversight liability, see Martin Petrin, *Assessing Delaware’s Oversight Jurisprudence: A Policy and Theory Perspective*, 5 VA. L. & BUS. REV. 433 (2011).

137. See *Stone*, 911 A.2d at 372–73 (stating that the board of directors properly exercised its oversight by relying on periodic reports from employees and departments). In addition, Delaware corporate law, and many other jurisdictions, allow directors to delegate a host of responsibilities to board committees, management, and others, and protects their reliance upon information, opinions, reports, or statements by board committees, officers, employees, and certain external advisors. *E.g.*, DEL. CODE ANN. tit. 8, § 141(c)(2), (e) (West 2011).

138. *In re Dougherty*, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992).

139. See *supra* Part II.C.3 for a discussion of delegation as a defense to corporate officer liability.

reason, provide to directors and officers.¹⁴⁰ The result, from the perspective of the potential defendants, is an unfortunate state of relative legal uncertainty and heightened liability risks.

IV. THE RCO DOCTRINE'S JUSTIFICATIONS AND THEIR INADEQUACIES

Courts and commentators typically justify the RCO doctrine and its potentially harsh effects based on two broad principles: (1) the notion of allocating public welfare risks to the party that is in a better position to avoid harm; and (2) the doctrine's deterrent effect on corporate misconduct. The following Sections discuss whether these arguments can sufficiently justify the doctrine's current use.

A. Risk Allocation

One of the RCO doctrine's guiding principles is the broader idea that liability risks should fall on the party that, albeit innocent, is in greater proximity to the source of a harmful activity.¹⁴¹ The *Dotterweich* Court, for example, drew a connection between strict liability of responsible corporate officers and a legislative interest to put "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."¹⁴² Implicit in this approach is the idea that even absent negligent behavior, corporate agents are, as compared to the public at large, in a better position to prevent harm stemming from materialized risks of corporate activities.¹⁴³ Therefore—or so the argument goes—personal liability under the doctrine is justified or "fair."¹⁴⁴

Both variations of this idea are familiar concepts that are already deeply rooted in other areas of the law. Notably, the idea that where one of two innocent persons—the principal or the third party injured by the principal's agent—must bear a loss, it should be the innocent principal who enabled the tort to be committed that bears the loss has been engrained in vicarious liability theory for over 300 years.¹⁴⁵ Similarly, vicarious

140. See Petrin, *supra* note 136, at 461–73 (stating that restraints on oversight liability are important to protect directors' ability to exercise business judgment, encourage risk taking, and prevent directors from becoming insurers of business decisions).

141. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

142. *Id.*

143. See *id.* at 280 ("The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.").

144. See Cogswell, *supra* note 65, at 369 (citing the need to shift the burden from the public to officers who assumed control of a public danger); John Gibson, *The Crime of "Knowing Endangerment" Under the Clean Air Act Amendments of 1990: Is It More "Bark Than Bite" as a Watchdog to Help Safeguard a Workplace Free From Life-Threatening Hazardous Air Pollutant Releases?*, 6 FORDHAM ENVTL. L.J. 197, 206 (1995) (positing that the doctrine is viewed as fair "because the defendant official was often in a position to prevent the violation, especially when the subordinate's conduct is within the officer's area of supervision or control, . . . [and u]nder these circumstances, officials should not be able to delegate criminal responsibility for the conduct of their subordinates"); Wise, *supra* note 8, at 287 (referring to equitable principles that justify the doctrine).

145. *S.C. Ins. Co. v. Greene*, 348 S.E.2d 617, 622 (S.C. Ct. App. 1986) (citing Lord Chief Justice Holt for the proposition that not the third party victim but rather the principal, although innocent, should be liable); KEETON ET AL., *supra* note 99, at 500.

and enterprise liability are in part based on the ability of one party—the principal—to take loss-prevention measures.¹⁴⁶ In addition, both liability principles have been justified by drawing on considerations of fairness.¹⁴⁷

Although the idea of “appropriate” risk allocation is correctly used as a basis to justify vicarious and enterprise liability, it is misguided in the context of the RCO doctrine. Risk allocation based on a theory of placing the burden on the party that is innocent but “closer” to the roots of the harm, or based on considerations of superior loss prevention, is an important but, by itself, not a decisive factor for allocating liability.¹⁴⁸ Thus, vicarious and enterprise liability are not justified by only reference to allocation of harm between two innocent parties and/or the ability to prevent harm. Rather, these forms of liability do not lend themselves to monocausal explanations.¹⁴⁹ Because no single reason is persuasive per se, they are justified by the persuasive power of the interplay of various explanatory theories as a whole.¹⁵⁰ Chief among these reasons are, apart from loss prevention, the well-understood concepts of cost-benefit alignment, cost internalization, and loss distribution.¹⁵¹

Returning to the RCO doctrine and its underlying justifications, it becomes apparent that the ideas of cost-benefit alignment, cost internalization, and loss distribution are not helpful in explaining the doctrine. As applied to statutory violations by corporations, these principles tend to call for liability of the corporate entity, but not the individuals that act on its behalf. Individual corporate agents do not (directly) reap the monetary benefits of doing business, and they, as opposed to the corporate entity, are not in a superior position to distribute losses caused by personal liability.¹⁵² In

146. Traditionally, vicarious liability has rested on the idea of the principal’s control over its agents. *Nat’l Convenience Stores, Inc. v. Fantauzzi*, 584 P.2d 689, 691 (Nev. 1978). More recently, however, proponents of law and economics have sharpened this point, analyzing principal-agent liability through an efficiency lens that includes loss-prevention as one among several factors. *See, e.g., Alan O. Sykes, The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231, 1246 (1984) (“[W]hen vicarious liability forces the enterprise to ‘internalize’ the full cost of its actions, the result is a socially efficient level of loss-avoidance investment by the agent . . .”).

147. Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 *MICH. L. REV.* 1266, 1269 (1997).

148. *See, e.g., State, Dep’t of Env’tl. Prot. v. Standard Tank Cleaning Corp.*, 665 A.2d 753, 764 (N.J. Super. Ct. App. Div. 1995) (listing other relevant factors to be considered in determining liability of corporate officials for violation of a state environmental statute, including those actors’ “economic benefits from the violation,” their “degree of cooperation . . . in remedying the violation,” and “any measures taken . . . to avoid a repetition of the violation”).

149. *See KEETON ET AL., supra* note 99, at 500 (observing that none of the various individual justifications for vicarious liability are conclusively determinate).

150. *Id.* at 500–01.

151. *Id.*; *see also Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1343 (Cal. 1991) (articulating that one of the “reasons for applying the doctrine of respondeat superior” is “to ensure that the victim’s losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury”); *Rogers v. J. B. Hunt Transp., Inc.*, 624 N.W.2d 532, 537–38 (Mich. Ct. App. 2001), *rev’d on other grounds*, 649 N.W.2d 23 (Mich. 2002) (“Employers are held vicariously liable not because of their ability to control their employees’ conduct, but because they stand to profit from their employees’ conduct.”).

152. *See Standard Tank*, 665 A.2d at 764 (“[E]ven if it can be shown that [the penalized officers] were ‘responsible corporate officials,’ the penalties that may be properly assessed against each of them depended, among other things, on the economic benefits [gained] from the violation” (internal quotation marks omitted)).

addition, it is the enterprise, and not the individual, that should absorb and internalize the cost of doing business. In other words, vicarious and enterprise liability, in contrast to the RCO doctrine, reflect a decision to force businesses, not individuals, to bear the liability risks of doing business.¹⁵³

In *Meyer*, the Supreme Court rejected the idea that liability under RCO doctrine principles may be justified based on the notion of assigning public risks to a guiltless but otherwise “responsible” person.¹⁵⁴ Even where a statute addresses an overriding societal priority, the Court stated that such characterization does not imply “a legal rule that would hold every corporate supervisor personally liable without fault for the unlawful act of every corporate employee whom he or she has the right to supervise.”¹⁵⁵ Rather, because the question of “which ‘of two innocent people must suffer’ . . . is a complex matter,” courts should, absent different instructions from legislatures, “ordinarily . . . determine that matter in accordance with traditional principles of vicarious liability.”¹⁵⁶

In other words, since “traditional principles of vicarious liability” imply liability of the corporate principal, not its agents, the Court indicated that applying the RCO doctrine is inappropriate in most cases.¹⁵⁷ In doing so, the Court also echoed Justice Murphy’s dissent in *Dotterweich*. Murphy argued that in view of the “fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who . . . has no evil intention or consciousness of wrongdoing,” criminal liability absent personal participation and mens rea is only proper when imposed on the basis of a clear and unambiguous legislative mandate.¹⁵⁸

B. Deterrence

Another important justification brought forward in support of the RCO doctrine is its deterrent effect.¹⁵⁹ The idea is that fear of legal sanctions will incentivize corporate officials to ensure that their firm is compliant with applicable laws and regulations. As one commentator stated:

153. Babbitt et al., *supra* note 33, at 25; *see also Meyer v. Holley*, 537 U.S. 280, 286 (2003) (stating that “in the absence of special circumstances it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents”).

154. *Meyer*, 537 U.S. at 286 (stating that “a corporate employee typically acts on behalf of the corporation, not its owner or officer,” and therefore the officer should not be subject to vicarious liability for the employee’s torts).

155. *Id.* at 290.

156. *Id.* at 290–91.

157. *Id.* at 286, 290–91.

158. *United States v. Dotterweich*, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting).

159. The case for the deterrent effect of possible liability under the RCO doctrine is commonly made in relation to environmental misconduct. *See People v. Matthews*, 9 Cal. Rptr. 2d 348, 354 (Ct. App. 1992) (“It is therefore appropriate as a practical matter and consistent with *Dotterweich* and *Park* to prosecute a person at the highest levels of a corporation as the best way to insure the adoption of corporate policies and practices which will avoid violations of strict liability public welfare and regulatory offenses.”); Cogswell, *supra* note 65, at 358–59 (citing deterrence, punishment, and compensation as bases of the doctrine); Hustis & Gotanda, *supra* note 7, at 169 (connecting the RCO doctrine to “the powerful deterrent effect of personal liability for corporate wrongdoing”); Wise, *supra* note 8, at 287 (positing that “equitable principles and society’s goal of deterring environmental violations necessitate the application of the RCO doctrine”).

Punishment is more likely to have a deterrent effect when an individual such as a corporate officer, as compared to a legal entity like a corporation, is held responsible for violating the law. Being named in a pleading, put on trial, forced to make a public apology, required to pay a fine, or serve time in jail, are often expensive, professionally damning and personally humiliating consequences—results most individuals, including corporate officers, prefer to avoid.¹⁶⁰

Although the deterrence argument seems compelling at first blush, there is reason to be critical. First, although the doctrine's supporters rely often on its supposed deterrent effect in justifying corporate officers' personal liability, there is no empirical evidence suggesting if, or to what extent, there is such an effect. Instead, supporters have simply assumed that personal liability for corporate officers under the RCO doctrine provides for increased deterrence (and, therefore, compliance) as compared to liability of the corporate entity alone. This is especially true for the environmental area, where this assumption is routinely made but not supported by any data.¹⁶¹

Existing empirical studies on the deterrent effect of environmental monitoring and enforcement, although still rare and limited in scope and coverage,¹⁶² show that these measures tend to have, albeit in varying degrees, general and specific deterrent value.¹⁶³ Yet, these studies do not examine or provide evidence as to whether holding corporate managers personally liable, in addition to or instead of firms themselves, results in firms' increased deterrence from violating environmental laws.¹⁶⁴

160. Wise, *supra* note 8, at 285–86 (footnote omitted).

161. See *supra* note 159 for materials supporting the RCO doctrine's deterrent effect in the environmental context.

162. A decade ago, Professor Cohen observed that there had been surprisingly few empirical studies of environmental enforcement and that, due to limited data availability, existing studies tended to focus on either the oil transport or paper pulp industries. Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement*, 30 ENVTL. L. REP. 10245, 10245 (2000). Cohen's finding as to the relative scarcity of data in this area was confirmed in a 2007 study. Robert L. Glicksman & Dietrich H. Earnhart, *The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry*, 26 STAN. ENVTL. L.J. 317, 320 (2007) (noting also that “[d]espite the central role of enforcement in the implementation of environmental legislation, relatively little is known about why regulated entities either do or do not comply with their regulatory obligations”). Note, however, that data availability has significantly improved since the Environmental Protection Agency has made its data on enforcement and compliance publicly available. *Enforcement & Compliance History Online (ECHO)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa-echo.gov/echo> (last updated Feb. 14, 2012).

163. See Cohen, *supra* note 162, at 10251 (finding that existing empirical studies demonstrated that increased monitoring and enforcement can deter violations and improve environmental performance, but also noting that previous studies had found little deterrent effect of penalties); Victor B. Flatt & Paul M. Collins, Jr., *Environmental Enforcement in Dire Straits: There Is No Protection for Nothing and No Data for Free*, 85 NOTRE DAME L. REV. 55, 83 (2009) (concluding that, at least with regard to the Clean Air Act, “the more a state spends per capita on its environmental budget, the higher the fines levied against polluters” and thus, presumably, the better the environmental performance); Glicksman & Earnhart, *supra* note 162, at 332–33 (finding that federal and state inspections and monetary fines generally have a deterrent effect that results in improved Clean Water Act related performance by firms in the chemical industry).

164. In addition, in the environmental area, there is an ongoing debate between proponents of so-called coercive (or deterrence-based) approaches on the one hand and cooperative approaches on the other. As Professors Glicksman and Earnhart explain:

Even if we assume that there is evidence that personal liability under the RCO doctrine improves regulatory compliance, it would be necessary to analyze the cost-benefit adequacy or efficiency of doing so. Thus, it may well be that any deterrent effects of the RCO doctrine are outweighed by the costs that they produce. In addition, a particular concern with holding responsible corporate officers liable is the potential for overdeterrence. Managers are generally regarded as risk-averse and therefore inefficient bearers of liability risks.¹⁶⁵ More broadly, since violations of environmental and other public welfare statutes are often by-products of socially beneficial activities, there is a concern that increased personal liability could unduly chill or suppress such activities.¹⁶⁶ The following Part will discuss these issues in more detail. As we will see, deterrence is, at best, a shaky foundation for justifying the harsh effects of the RCO doctrine.

V. THE RCO DOCTRINE'S NEGATIVE EFFECTS

The preceding discussion of the RCO doctrine's justifications has already introduced some of the potentially negative effects of holding responsible corporate officers personally liable. This Part provides a more thorough discussion of the problems associated with holding individuals liable under the RCO doctrine.

A. Costs

The RCO doctrine entails various costs, the most obvious of which is on the firm level. On the one hand, senior executives, in an effort to protect themselves from

Supporters of the coercive model regard the deterrence of violations as the fundamental purpose of enforcement. They regard the imposition of sanctions, which make it less costly for regulated entities to comply with their regulatory responsibilities and avoid enforcement than to fail to comply and run the risk of enforcement, as the most effective way for inducing regulated entities to comply with their regulatory obligations. Proponents of the cooperative approach to environmental enforcement focus more on compliance than deterrence. The cooperative approach emphasizes the provision of compliance assistance and incentives by regulatory agencies. They contend that a coercive approach to enforcement may even be counterproductive if it engenders intransigence and ill will on the part of regulated entities.

Robert L. Glicksman & Dietrich H. Earnhart, *Depiction of the Regulator-Regulated Entity Relationship in the Chemical Industry: Deterrence-Based vs. Cooperative Enforcement*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 603, 603 (2007). Although a discussion of these approaches is beyond the scope of this Article, suffice it to say that, assuming that proponents of cooperative mechanisms are correct, the case for personal liability of responsible corporate officers would appear (even more) counterproductive.

165. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 61–62 (1991) (noting that managerial liability may lead to higher wages and a potentially suboptimal shift away from risky activities); see also Joshua Safran Reed, *Reconciling Environmental Liability Standards After Iverson and Bestfoods*, 27 ECOLOGY L.Q. 673, 697 (2000) (arguing that increased threats of personal liability will diminish the number of qualified officers and result in lower stock prices and higher product prices).

166. See Cohen, *supra* note 162, at 10245–46, 10249, 10251 (discussing the risk of overdeterrence in general, without specific treatment of the effects of personal liability); Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 319 (1991) (“[C]orporate officers and directors have a natural proclivity to refrain from taking risks. Engaging in criminal activity is a form of risk-taking. Excessive enforcement can exacerbate this proclivity toward excessive risk avoidance, in turn, stifling innovation and creativity and leading to a general decline in social wealth.”).

liability under the doctrine, are likely to step up costly legal compliance programs and acquire additional liability insurance. On the other hand, as one commentator points out, there is also a cost involved in the manner in which the RCO doctrine incentivizes senior executives to increase their efforts in personally supervising—or even micro-managing—corporate activities.¹⁶⁷

Moreover, prosecution of responsible corporate officers entails various costs on the part of the government. Arguably, it requires more resources in terms of time and personnel to prosecute individuals as opposed to firms. Under the RCO doctrine, it is not enough to show a statutory violation, but it is also necessary to prove each element of the doctrine. Thus, prosecutors need to locate, within a complex corporate entity, a suitable defendant and show that he or she was a “responsible corporate officer.” In addition, they need to establish that the individual could have influenced the corporation’s actions and that his actions or inactions facilitated the violations. This task becomes increasingly difficult as the size and complexity of the corporation increases. Finally, if the individual is incarcerated as a result of the prosecution under the RCO doctrine, the government will incur further costs.

From an economic viewpoint, the RCO doctrine is justifiable only if its costs are outweighed by its benefits. For example, in the environmental arena, the doctrine would have to result in benefits such as improved environmental performance (and related positive effects, namely health benefits for society at large) and increased governmental revenue in fines and penalties that are greater than the combined costs of prosecuting individual corporate actors. Currently, however, there is no evidence that the RCO doctrine achieves those goals. On the contrary, in environmental law, an important area of application for the RCO doctrine, commentators question whether enforcement is done in a cost-effective and efficient manner.¹⁶⁸

B. The Problem of Optimal Deterrence

Law and economics scholars have long grappled with the question of whether and under what circumstances individual corporate agents should incur personal liability in connection with corporate torts and crimes. The discussions tend to revolve around one central issue: To what extent, if at all, should the law hold corporate agents personally liable in order to provide optimal deterrence of corporate misconduct? In other words, to what extent, if at all, should the law shift liability to corporate agents if the goal is to avoid unnecessary cost and overdeterrence (i.e., a suboptimal reduction in risk-taking)? The literature in this field is plentiful, yet often difficult to reconcile due to critical differences in the focus and assumption of the underlying theoretical models.¹⁶⁹

167. See Hamdani, *supra* note 61, at 448 (explaining that the lack of a uniform and “optimal allocation of authority within firms” will lead to the continuation of “uncertainty concerning the reach of the RCO doctrine”).

168. Flatt & Collins, *supra* note 163, at 56–57; see also Cohen, *supra* note 162, at 10251 (calling for further cost-benefit analyses of environmental monitoring and enforcement programs and pointing to the need to consider the effects of possible overdeterrence caused by sanctions for environmental offenses).

169. See, e.g., Wallace P. Mullin & Christopher M. Snyder, *Corporate Crime*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS, VOLUME 11: CRIMINAL LAW AND ECONOMICS* 220 (Nuno Garoupa ed., 2009) (explaining the breadth and range of law and economics literature that falls under the category of corporate crime); C.Y. Cyrus Chu & Yingyi Qian, *Vicarious Liability Under a Negligence Rule*, 15 *INT’L REV. L. &*

Generally, economic analyses of traditional vicarious tort liability have indicated that where the agent's wealth is insufficient to induce an optimal level of care, and where the principal, such as a corporation, can be effective in monitoring the employee, it is efficient to focus liability for torts committed by agents of the principal.¹⁷⁰ On the other hand, these analyses also suggest that in instances where the principal has fewer assets than the agent, due to limited liability or because he is otherwise "judgment proof," or where sanctions on the firm level provide insufficient deterrence or are difficult to impose, holding the agent personally liable may be more beneficial.¹⁷¹

These insights have been applied to liability for criminal conduct by agents, leading to similar results.¹⁷² Thus, commentators have found that focusing sanctions on the firm, but not its agents, can lead to optimal deterrence where the agent holds fewer assets than the principal and/or where the firm is in a better position than the government to monitor and sanction the agent. Conversely, where this is not the case, the preferable approach is to target the agent personally.¹⁷³

ECON. 305, 305 (1995) (focusing on the effects of vicarious liability on business principals responsible for monitoring and maintaining evidence of subordinates' negligence); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 304-05 (2008) (claiming that investigation costs associated with finding a culpable officer within an entity accused of wrongdoing is more justified if prosecution could lead to entity's dissolution); Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45, 54 (1986) (recognizing vicarious liability as potential remedy for victims when injurer is judgment proof).

170. See, e.g., Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1345-46 (1982) (suggesting that where an enterprise is in a better position to monitor its employees' behavior, and where employees' assets are insufficient to satisfy a judgment against them entirely, a system of enterprise liability for torts is preferable over a system of agent liability); Sykes, *supra* note 146, at 1246-59 (demonstrating that the efficiency of applying a regime of joint and several liability to the principal and its agent for wrongs committed by the agent, as opposed to a system of exclusive agent liability, depends on whether the agent has sufficient assets, whether the principal can monitor the agent's behavior, and the cost of allocating risk between principal and agent). Nevertheless, the common assumption that an agent with insufficient assets is likely to act with less care is debatable. One commentator has even suggested that "it is implausible to suggest that an employee, who can lose substantially all personal assets if held liable for some large loss, will not take all possible care to avoid this loss simply because he or she has insufficient collectible assets to cover the full amount of the liability." Bruce Chapman, *Corporate Tort Liability and the Problem of Overcompliance*, 69 S. CAL. L. REV. 1679, 1681 (1996).

171. See Kornhauser, *supra* note 170, at 1366 ("If the principal has fewer assets than the agent, one would expect, in general, enterprise liability to lead to more accidents than agent liability."); see also EASTERBROOK & FISCHER, *supra* note 165, at 61 (noting that managerial liability will create incentives for managers to monitor the firm's capitalization and insurance coverage to escape the risks of incomplete risk shifting); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 858, 868-88 (1984) (arguing that firm liability should be the dominant regime in most cases, whereas managerial liability is appropriate where (1) the firm's assets are insufficient, (2) sanctions on the firm level provide insufficient deterrence, or (3) it is not possible to detect or prosecute a significant proportion of firm offenses).

172. See Wallace P. Mullin & Christopher M. Snyder, *Should Firms Be Allowed to Indemnify Their Employees for Sanctions?*, 26 J.L. ECON. & ORG. 30, 40-42 (2010) (summarizing the literature in this field).

173. See, e.g., A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239, 239-41 (1993) (arguing that where firm-imposed sanctions are insufficient, the threat of publicly imposed sanctions on employees can lead to greater levels of care).

For example, Professors Polinsky and Shavell have argued that, in addition to the possibility of corporate liability, public imposition of direct sanctions, namely fines and imprisonment, on employees may be beneficial. Whereas firms are limited in their ability to discipline their employees, the state may impose stricter monetary and non-monetary sanctions on employees than firms, thereby inducing the employees to exercise greater levels of care.¹⁷⁴ In an important wrinkle, however, these authors have also posited that although the liability of firms should be strict, employees' personal liability should, in order to induce greater care, be governed by a negligence standard and employees should be permitted to insure themselves or to be indemnified by their firms.¹⁷⁵

More recently, two studies have examined the efficiency of liability regimes for crimes by corporate agents that benefit their corporate principal (i.e., crimes that are not only in the agent's own interest). In this respect, Professor Privileggi and his co-authors have found that holding only the agent liable may provide for increased deterrence of corporate crimes and may be more beneficial compared to a system where the corporation alone is liable.¹⁷⁶ This, they posit, is true because the agent will demand increased compensation for taking on the risk of personal liability, which in turn increases the principal's expected cost of illegal behavior and thus reduces the occurrence of illegal behavior.¹⁷⁷ Nevertheless, the authors concede that the case for shifting responsibility onto agents is not clear-cut.¹⁷⁸ Namely, they point out that the beneficial effects of agent liability must be "assessed against the costs of burdening a risk averse agent" with liability risks.¹⁷⁹ In addition, it is worth noting that their model is based on the assumption that neither the corporation nor the agent are judgment proof and that both have sufficient assets to pay for sanctions imposed upon them.

Conversely, Professors Mullin and Snyder have reached different results in a 2010 study.¹⁸⁰ Where misconduct by corporate agents benefits the firm, they find, sanctioning the firm alone typically achieves deterrence more efficiently than a system that imposes additional sanctions on employees.¹⁸¹ This proposition flows from the authors' main finding that in order to reduce employees' risk of mistaken government prosecution, firms should be allowed in most cases to indemnify their employees for personal sanctions for corporate crimes.¹⁸² Contrary to the Privileggi study, Mullin and

174. *Id.*; accord Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 835 n.8 (1994); see also Kathleen Segerson & Tom Tietenberg, *The Structure of Penalties in Environmental Enforcement: An Economic Analysis*, 23 J. ENVTL. ECON. & MGMT. 179, 179-80 (1992) (discussing various reasons why direct imposition of liability on employees might be socially desirable).

175. Polinsky & Shavell, *supra* note 173, at 252-54.

176. Fabio Privileggi et al., *Agent's Liability Versus Principal's Liability when Attitudes Toward Risk Differ*, 21 INT'L REV. L. & ECON. 181, 183-85 (2001).

177. *Id.*

178. *Id.* at 194.

179. *Id.*

180. Mullin & Snyder, *supra* note 172, at 42-43.

181. *Id.* The authors posit that sanctioning the agent is only valuable in limited circumstances. Thus, "[i]f deterrence is especially difficult, it may be optimal to hit the agent with a sanction large enough to bankrupt him." *Id.* at 32.

182. *Id.* at 42.

Snyder's model assumes that although the firm has sufficient assets to pay its obligations, the agent does not and is thus constrained by limited liability.

In sum, as this brief survey of economic approaches to corporate liability shows, the case for holding corporate agents personally liable is, at best, ambiguous. The various models suggest that the efficiency of holding these individuals liable depends on a number of different criteria—such as availability of assets, levels of risk tolerance, strict liability versus negligence, the probability of actually incurring liability, etc.—and does not lend itself to generalized answers. In the absence of empirical data on the effects of liability under the RCO doctrine, any unqualified claims that the doctrine provides for better deterrence, let alone efficient deterrence, must be viewed with suspicion.

C. *End-Running Limited Liability*

In addition to the uncertainties surrounding its deterrent effect, another of the RCO doctrine's troubling characteristics is its interference with a bedrock principle of corporate law: limited liability.¹⁸³ The principle of limited liability restricts shareholders' personal liability for the debts and liabilities of the corporation to the extent of their investment.¹⁸⁴ For the most part, scholars believe that this principle leads to economically efficient outcomes. Limited liability reduces the risks for shareholders, lowers their monitoring costs, facilitates the aggregation of capital, and encourages investments in riskier, but lucrative, ventures.¹⁸⁵ Ultimately, limited liability lowers the cost of capital and translates into economic growth.¹⁸⁶ It is difficult, however, to reconcile the RCO doctrine with limited liability.¹⁸⁷

183. Scholars have generally noted the RCO doctrine's eroding effect on limited liability and other traditional corporate law concepts in connection with environmental liability. *See, e.g.*, Tom McMahon & Katie Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T 29, 31 (1988) (discussing, inter alia, how liability based on an individual's control over a business contributes to an erosion of corporate law principles). *But cf.* Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 263 (1992) (acknowledging that CERCLA cases have been perceived as eroding limited liability and other traditional corporate law concepts, but finding that courts have not dismissed general corporate law principles in deciding cases under CERCLA).

184. *See* MODEL BUS. CORP. ACT § 6.22(b) (2005) [hereinafter "MBCA"].

185. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 425–26 (2007) (discussing the role of limited liability in protecting a corporate shareholder from risks incurred by the corporation); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 94–98 (1985) (arguing that the rules and exceptions of limited liability serve valuable and beneficial functions). However, limited liability and its externalities are also routinely criticized. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1880 (1991) (advocating a regime of pro rata shareholder liability for corporate torts); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1568–69 (1991) (concluding that the case for limited liability has been overestimated and that limited liability may be more justified in closely held firms); Robert J. Rhee, *Bonding Limited Liability*, 51 WM. & MARY L. REV. 1417, 1422–23 (2010) (advancing the idea of limited liability that is "bonded" by requiring enterprises to capitalize a compensation fund for tort victims).

186. *See* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 491 (2001) (illustrating how limited liability shields investors from huge financial losses in the event of a corporate collapse).

187. In fact, one commentator has been very open about the doctrine's role in eradicating what he perceives as "fundamentally inequitable" differences between the personal liability of owners of

To be sure, as it stands today, the principle of limited liability only protects shareholders from liability in excess of their investment in the company.¹⁸⁸ Directors, officers, and other agents do not fall within the principle's ambit,¹⁸⁹ as they normally enjoy immunity from only contractual claims.¹⁹⁰ Nevertheless, the RCO doctrine may still undermine the protections provided by limited liability. On the one hand, responsible corporate officers are in many cases not only corporate managers, but, at the same time, also shareholders.¹⁹¹ In these cases, the doctrine may allow courts to hold shareholders fully liable for corporate obligations without regard to and above the amount of their investment in the corporation.¹⁹² In addition, the strict requirements of veil piercing, a highly problematic theory of liability in itself,¹⁹³ need not be met.

On the other hand, the RCO doctrine may disturb limited liability even where the person held liable is not a shareholder. Because the doctrine assigns statutory duties that are normally owed by the corporate entity to responsible corporate officers, and because it imposes liability on them independent of any misconduct on their part, the idea of limited liability is weakened. At its core, limited liability is about the externalization of risk (i.e., shifting of potential liabilities away from shareholders to creditors and the public at large).¹⁹⁴ Externalization (and liability avoidance) is not the

unincorporated businesses and officers of incorporated entities. Wise, *supra* note 8, at 340–42. According to this view, “[t]he RCO doctrine is the legal theory that equalizes what is otherwise grossly disparate treatment of a corporate officer versus the owner of an unincorporated business.” *Id.* at 296.

188. The principle does not protect shareholders from personal liability for their own tortious acts. *E.g.*, *Smith v. Isaacs*, 777 S.W.2d 912, 914–15 (Ky. 1989).

189. *See, e.g.*, *Frances T. v. Vill. Green Owners Ass’n*, 723 P.2d 573, 582–83 (Cal. 1986) (noting that the corporate fiction was not intended to insulate officers from liability for their torts); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 7 (1994) (discussing how legislatures have passed regulatory acts “so that a person who, as a corporate official, violates a specific federal or state regulation is not shielded by the corporate entity”). The wisdom of excluding corporate agents from limited liability is, however, debatable. Recently, Professor Grantham has made a convincing case that the economic justifications for limited liability for shareholders apply by analogy with equal force to directors. Ross Grantham, *The Limited Liability of Company Directors*, 2007 LLOYD’S MAR. & COM. L.Q. 362, 390–91 (arguing that providing directors with limited liability facilitates the recruitment of well-qualified individuals to serve in this role, encourages directors to invest in riskier, but lucrative, projects, and leads to reduced monitoring costs for shareholders).

190. *See In re JWP Inc. Sec. Litig.*, 928 F. Supp. 1239, 1262–63 (S.D.N.Y. 1996) (stating that a New York corporation’s officer or director cannot be found liable for the entity’s breach of contract if he acted in good faith; however, if he did act in bad faith, there can be liability but only as long as he was acting outside the scope of his employment or he received personal profit from the conduct).

191. *E.g.*, *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 557, 560 (6th Cir. 1985); *People v. Roscoe*, 87 Cal. Rptr. 3d 187, 189–90 (Ct. App. 2008).

192. Because of the overlap in function, it is often not clear which of the individual’s capacities were decisive in a court’s decision to categorize the defendant as a “responsible corporate officer.”

193. *See Bainbridge*, *supra* note 186 at 506–09.

194. *See* Stephen M. Bainbridge, *Much Ado About Little? Directors’ Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335, 355 (2006) (“Limited liability effectively allows shareholders to externalize risk onto creditors.”); Easterbrook & Fischel, *supra* note 185, at 103–04 (“Because limited liability increases the probability that there will be insufficient assets to pay creditors’ claims, shareholders of a firm reap all of the benefits of risky activities but do not bear all of the costs. These are borne in part by creditors.”); David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1316 (2007) (“Limited liability is supposed to allow shareholders to externalize the risk of corporate insolvency that they would otherwise have to bear themselves.”).

purpose of limited liability, but rather its most visible—and sometimes ugly—effect.¹⁹⁵ Contrary to that idea, the RCO doctrine can cause risk to be externalized not to unrelated third parties, but, rather, to responsible corporate officers, without the need for the latter to have been aware of or involved in corporate misconduct. In these cases, instead of capping third party claims at whatever amount a party can recover from the corporation, as would be proper under limited liability, the doctrine enlarges the pool of assets for plaintiffs to recover from by the personal assets of responsible corporate officers. This effect is of particular concern in smaller, thinly capitalized firms where the responsible corporate officers' individual or combined assets exceed the firm's capital.

D. The Role of Indemnification and Insurance

To avoid the effects of the RCO doctrine, directors, officers, and certain employees may enter into indemnification agreements that shift these individuals' liability risks back to the corporate entity. In addition, the corporation may arrange for insurance that protects its executives against liability risks. In theory, private ordering of this kind would channel liability (or the cost of insuring against it) to the corporation. In that case, the RCO doctrine's imbalance of business risks—which are borne by the responsible corporate officers—and benefits—which remain with the legal entity—are restored. The catch is that, in practice, insurance policies and indemnification arrangements are only helpful as long as their beneficiaries can enforce them and the corporate entity and/or insurer remain solvent. In effect, the RCO doctrine has the potential to transfer the risk of corporate insolvency to responsible corporate officers, undermining limited liability and leading to risk allocation failures.

1. Indemnification

All states have indemnification statutes in place, usually in their corporate laws, which provide for instances of permissive and mandatory indemnification.¹⁹⁶ In addition, individual corporate actors—namely directors and officers—may have broader indemnification rights under a corporation's charter or by-laws, or under contractual agreements with the corporation or a third party, such as a controlling shareholder.¹⁹⁷

Statutory indemnification is dependent on a number of factors. Delaware law, for example, allows, but does not require, a corporation to indemnify its directors, officers, employees, or agents for expenses, judgments, fines, and amounts paid in settlement as a result of any “action, suit or proceeding, whether civil, criminal, administrative or

195. See Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice During a National Crisis*, 17 GEO. MASON L. REV. 661, 725 (2010) (“[The purpose of limited liability] is not to facilitate liability avoidance and risk externalization; rather, limited liability is justified because its many benefits outweigh the cost of risk externalization.”).

196. See JAMES A. FANTO, PRACTISING LAW INSTITUTE, DIRECTORS' AND OFFICERS' LIABILITY § 8:3.1, at 1 (2010).

197. See DEL. CODE ANN. tit. 8, § 145(f) (West 2011) (detailing corporate actors' indemnification rights); MBCA § 8.58 (2005) (same); FANTO, *supra* note 196, at § 8:3.2 (same).

investigative (other than an action by or in the right of the corporation).”¹⁹⁸ As a precondition for indemnification, the person must have acted in good faith and have reasonably believed his act was in, or at least not opposed to, the best interests of the corporation.¹⁹⁹ Moreover, with respect to criminal actions or proceedings, the person must not have had reasonable cause to believe that his conduct was unlawful.²⁰⁰ Finally, a corporation *must* indemnify a present or former director or officer who “has been successful on the merits or otherwise in defense of any action, suit or proceeding” against his expenses, without regard to whether the director or officer acted in good faith or not.²⁰¹

Similarly, the Model Business Corporation Act (MBCA) allows a corporation to indemnify a director if he acted in good faith and reasonably believed that his conduct was in, or not opposed to, the best interests of the corporation.²⁰² The MBCA also provides that permissive indemnification for criminal proceedings is dependent on the director’s reasonable belief that his conduct was not unlawful.²⁰³ A corporation may also indemnify an officer under the same circumstances in which it would be allowed to indemnify a director and to such further extent as the corporation chooses provided that indemnification does not extend to acts or omissions not in good faith, intentional misconduct, or knowing violations of law.²⁰⁴ The MBCA, however, is stricter than Delaware law with regards to mandatory indemnification, providing that indemnification for the expenses arising out of a proceeding is mandatory only where the director or officer is “wholly successful.”²⁰⁵ Thus, indemnification for litigation expenses is mandatory only if there is no finding of liability. Partial success—such as dismissal of some, but not all counts of a criminal indictment—is not enough.²⁰⁶

Given these broad indemnification rights, it would seem as if directors, officers, and employees facing personal liability under the RCO doctrine have good reason to hope that the corporation will deem their conduct indemnifiable. Upon closer examination, however, there are various hurdles to overcome.

In a civil action or proceeding, the decisive question will be likely whether the person acted in “good faith,” and the outcome will strongly hinge on the decision-making body’s²⁰⁷ interpretation of that term.²⁰⁸ In this respect, a company might look

198. DEL. CODE ANN. tit. 8, § 145(a).

199. *Id.*

200. *Id.*

201. *Id.* § 145(c); *see also* *Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 95–97 (2d Cir. 1996) (applying section 145(c) to the settlement of civil litigation).

202. MBCA § 8.51.

203. *Id.*

204. *Id.* § 8.56(a)(1). Indemnification can be broadened, as well as extended to employees and agents, if the articles of incorporation so provide. *See id.* §§ 8.51 cmt. 1, 8.58(e).

205. *Id.* §§ 8.52, 8.56(c).

206. *See* Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 760–62 (2001) (discussing the differences between the Delaware General Corporation Law and the MBCA’s indemnification provisions).

207. In the case of non-derivative suits, the determination as to whether a person meets the requirements for indemnification is made either by the board, by special legal counsel, or the stockholders. *E.g.*, DEL. CODE ANN. tit. 8, § 145(d); MBCA § 8.55.

to the Delaware Chancery Court, which has held that a failure to act in “good faith” requires conduct that is more culpable than that giving rise to a violation of the fiduciary duty of care, namely where the fiduciary intentionally fails to act in the face of a known duty to do so, demonstrating a conscious disregard for his duties.²⁰⁹ In turn, it will be important to establish whether a person was aware of, but did not adhere to, his or her duty to ensure corporate compliance with applicable laws as set forth by the Delaware courts and, specifically in connection with the RCO doctrine, the Supreme Court in *Park*.²¹⁰ Indemnification, according to the *Park* Court, will only be possible where a person did not knowingly violate his or her “positive duty to seek out and remedy [statutory] violations” and “implement measures that will insure that violations will not occur.”²¹¹

In addition, in the context of criminal actions or proceedings, a person must not have had reasonable cause to believe that his or her conduct was unlawful. In case of responsibility under a strict liability provision, a responsible corporate officer likely will meet the requirements. Since the state can prove a violation of a strict liability statute simply by showing that the accused engaged in a certain voluntary act, or omitted to perform an act or duty,²¹² a person’s belief as to the legality of his conduct is immaterial. As such, a finding on this issue will often not be reached. In contrast, the RCO doctrine may cause special problems when it comes to criminal liability that requires mens rea. In these cases, the responsible corporate officer is at a heightened risk of not qualifying for indemnification. This is true because, according to some courts and commentators, a responsible corporate officer’s culpability and, by extension, reason to suspect an act’s unlawfulness may be inferred based on circumstantial evidence, including the person’s corporate position and authority.²¹³ In sum, even if a person did not commit and was not aware of any unlawful conduct, and would therefore normally qualify for indemnification, the RCO doctrine may both serve as a basis to infer the disqualifying knowledge and for a corporation’s decision not to indemnify certain conduct.

A second hurdle is that a corporation can refuse to authorize indemnification payments even if a person’s conduct falls under the statutory requirements. For example, a corporation could decide against indemnification based on its own financial inability or a determination that its limited financial resources should be devoted to

208. See Bernard Black et al., *Legal Liability of Directors and Company Officials Part 2: Court Procedures, Indemnification and Insurance, and Administrative and Criminal Liability (Report to the Russian Securities Agency)*, 2008 COLUM. BUS. L. REV. 1, 66, 68 (2008) (highlighting a lack of good faith as one of the scenarios in which a director may not be indemnified in a suit by third parties).

209. See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66–67 (Del. 2006) (upholding “the Chancellor’s definition of bad faith—intentional dereliction of duty, a conscious disregard for one’s responsibilities”—as “properly treated as a nonexculpable, nonindemnifiable violation of the fiduciary duty to act in good faith”).

210. See *supra* notes 129–37 and accompanying text for a discussion of *Park* and the overlap between the RCO doctrine and corporate fiduciary duties.

211. *United States v. Park*, 421 U.S. 658, 672 (1975).

212. See, e.g., *State v. Olson*, 356 N.W.2d 110, 112–13 (N.D. 1984) (finding that a strict liability offense is punishable without regard to “intent, knowledge, willfulness, or negligence” so long as action is voluntary).

213. See *supra* Part II.C.2 for an analysis of the effect of the RCO doctrine on statutory mens rea requirements.

some other use.²¹⁴ This scenario is most likely to arise in closely held companies, since most public companies have now turned permissive indemnification into mandatory indemnification by way of customized bylaws and/or agreements with individual directors, officers, and employees.²¹⁵

Finally, and most pertinent from a practical point of view, a corporation's insolvency or insufficient solvency may prevent it from indemnifying a corporate agent for his or her damages.²¹⁶ Thus, a responsible corporate officer who meets the preconditions for indemnification and in whose case payments have been authorized may still be forced to pay expenses and liabilities out of his own pocket. In that case, only an agreement providing for indemnification by a third party, such as a controlling shareholder that is still solvent, may provide recourse for the responsible corporate officer.

2. Insurance

Corporations may purchase insurance to protect their directors, officers, employees, or agents against personal liability arising out of "wrongful acts" for which they are not indemnified.²¹⁷ For instance, virtually all public companies purchase directors and officers ("D&O") insurance.²¹⁸ Insurance can provide for broader protection than indemnification, as corporate law does not place any limitations on the permissible scope of D&O coverage.²¹⁹ Yet, even insurance cannot completely insulate corporate actors from potential out-of-pocket payments. This is especially true in cases involving the RCO doctrine.

Among the many other weaknesses of insurance, one expert has pointed out that typical D&O liability insurance policies likely provide only limited coverage for liability under the RCO doctrine. Ordinarily, a D&O liability insurance policy will cover only expenses incurred in defending against any claims relating to liability of responsible corporate officers without actually covering judgments, fines, amounts paid in settlement, etc.²²⁰ This results because the RCO doctrine concerns conduct and liability for subject matters that are often excluded from coverage under insurance policies. For example, most standard policies exclude environmental violations and

214. See MBCA § 8.55 cmt. (2005).

215. Such documents will often provide that a company is obliged to indemnify these persons to the fullest extent permitted by law. Black et al., *supra* note 208, at 66.

216. *Id.* at 68.

217. See DEL. CODE ANN. tit. 8, § 145(g) (West 2011); FANTO, *supra* note 196, at § 8:4; Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' & Officers' Liability Insurer*, 95 GEO. L.J. 1795, 1801-06 (2007).

218. Black et al., *supra* note 208, at 86.

219. *Id.* at 87.

220. See Kevin LaCroix, *New Exposure for Corporate Officials: Control Person Liability for FCPA Violations*, THE D & O DIARY (Aug. 24, 2009), <http://www.dandodiary.com/2009/08/articles/foreign-corrupt-practices-act/new-exposure-for-corporate-officials-control-person-liability-for-fcpa-violations>. LaCroix notes, however, that a typical policy is likely to cover the defense expenses and any settlements or judgments against responsible corporate officers in case of any follow-on civil litigation. *Id.*

finances and penalties stemming from criminal conduct.²²¹ Yet, as it happens, the RCO doctrine routinely touches upon both areas of exclusion, as it is frequently applied in connection with environmental liability and used to impose criminal liability.²²²

Beside issues pertaining to coverage, D&O insurance (and other types of insurance) may fail to protect directors or officers from the hardships of personal liability under the RCO doctrine for several additional reasons. First, not all companies—particularly closely held companies—arrange for insurance or sufficient insurance.²²³ Second, even if insurance is in place, it is capped at a certain amount, and therefore it may not be sufficient to capture the extent of the liability.²²⁴ Third, there is a risk that an insurer will refuse to pay, forcing the insured persons to sue the insurer. Finally, it is also possible that an insurer itself will go bankrupt and will thus be unable to pay any proceeds owed under an insurance policy.²²⁵

3. Summation

The RCO doctrine assigns initial liability to corporate individuals, resulting in the defendants having to bear the full risk of the insolvency (or unwillingness to pay) of those who have agreed to indemnify them. He or she also bears the risk of any exemptions in insurance coverage, in addition to an insurer's insolvency, provided that insurance is in place at all.

Given the negative effects of liability under the RCO doctrine, it is preferable in most cases to allocate the initial liability risk to the corporation, alleviating the responsible corporate officer of potentially harsh consequences and leaving it up to a firm's internal mechanisms to sanction misconduct by corporate agents. Finally, even in instances where the risk can be shifted away from managers and agents via indemnification and/or insurance, the process of risk-shifting entails transactions costs, adding to the inefficiency of targeting executives in the first place.

VI. A "CAUTIOUS APPROACH" TO APPLYING THE RCO DOCTRINE

Given that its effects can be harsh and its efficacy, efficiency, and proportionality remain uncertain, a cautious approach to applying the RCO doctrine is warranted. Both legislatures and courts play important roles in this endeavor.

221. Black et al., *supra* note 208, at 88. For analyses specifically with a view to liability under the RCO doctrine, see Heidi Stark Wells, *Inserting the Responsible Corporate Officer Doctrine into the Resource Conservation and Recovery Act—And the Mess that Ensues*, 21 AM. J. TRIAL ADVOC. 167, 184–88 (1997) (discussing insurance for environmental violations); Kevin LaCroix, *The Responsible Corporate Officer Doctrine*, THE D & O DIARY (Jan. 19, 2009), <http://www.dandodiary.com/2009/01/articles/environmental-liability/the-responsible-corporate-officer-doctrine> (discussing exclusions in case of environmental and criminal misconduct).

222. *E.g.*, Wells, *supra* note 221, at 168; LaCroix, *supra* note 221.

223. *See* Black et al., *supra* note 208, at 77.

224. *See, e.g.*, Anthony K. Greene, *New Risks for Directors and Officers*, in D&O LIABILITY & INSURANCE IN A SARBANES-OXLEY WORLD 251, 253 (Practising Law Inst. 2003) (noting that, if an insurance policy "provides a certain amount of coverage for the [corporate] entity and the rest for the directors and officers," a "potential problem" arises when "payments under the policy on behalf of the entity . . . deplete the policy limits, leaving insufficient protection for the directors and officers").

225. *See* Black et al., *supra* note 208, at 77–78.

In light of the doctrine's singular position within the traditional legal framework and its uneasy fit with corporate law principles, courts should heed the Supreme Court's call in *Meyer* and refrain from extending the duties of a corporate entity to its "responsible officers" in absence of a clear legislative mandate.²²⁶ As in the case of implied private rights of action, application of the RCO doctrine in connection with a particular statute should be determined by statutory interpretation based on the language and focus of the statute, its legislative history, and its purpose.²²⁷ Moreover, where consideration of these factors leads to an ambiguous result, a cautious approach to the application of this doctrine suggests that there should be a presumption against its application.²²⁸

For example, a restrictive application of the RCO doctrine would have resulted in a contrary result in *Roscoe*.²²⁹ In *Roscoe*, the court held that the RCO doctrine was applicable to a provision in the California Health and Safety Code that imposes liability on "[a]ny operator of an underground tank system."²³⁰ The court, however, observed that "[t]he plain language of the statutes does not readily answer" whether the doctrine is, in fact, applicable.²³¹ For the court, the ambiguity in the statute stemmed from its definition of "operator" as "any person" in control of or having daily responsibility for a tank—which the court found would not preclude liability for corporate officers—and the definition of "person," which did not include corporate officers.²³² Nevertheless, based on a finding that the statute's intent and history indicated that it was to serve the public welfare, the court concluded that the RCO doctrine was applicable.²³³

A strict construction of the language of the California Health and Safety Code, however, suggests a contrary result to that reached in *Roscoe*. As the court itself noted, the statute does not specify an intention to encapsulate liability for corporate directors or officers within its ambit.²³⁴ Most notably, the definition of "person" in the statute does not include corporate officers or employees.²³⁵ Conversely, several statutes, including the Clean Water Act and the Clean Air Act, expressly indicate that responsible corporate officers are included within the definition of persons in the

226. See *supra* note 60 and accompanying text for an explanation of the restrictions on courts laid down in *Meyer*.

227. See, e.g., *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 91 (1981) (discussing the requirements for judicial inference of a private right of action). In addition, courts must be careful to not allow the doctrine to undermine statutory culpability requirements. For a similar proposition, see Michael Dore & Rosemary E. Ramsay, *Limiting the Designated Felon Rule: The Proper Role of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of New Jersey's Environmental Laws*, 53 RUTGERS L. REV. 181 (2000) (arguing for a narrow application of the RCO doctrine that should be limited to circumstances where a statute clearly identifies responsible corporate officers as potential defendants and urging courts to be mindful of the mens rea requirements for criminal offenses).

228. See *Maldonado v. Dominguez*, 137 F.3d 1, 7 (1st Cir. 1998) (discussing the presumption against finding private rights of action in statutes).

229. *People v. Roscoe*, 87 Cal. Rptr. 3d 187 (Ct. App. 2008).

230. CAL. HEALTH & SAFETY CODE § 25299(a) (West 2011).

231. *Roscoe*, 87 Cal. Rptr. 3d at 194.

232. *Id.* at 194–95 (emphasis added).

233. *Id.* at 195.

234. *Id.* at 194.

235. *Id.*

statute.²³⁶ Thus, the statutory language did not support application of the RCO doctrine to the California Health and Safety Code.

The court's determination of the applicability of the RCO doctrine by virtue of the public welfare nature of the statute—an approach that mirrors the majority's main argument for finding personal liability in *Dotterweich*—is similarly flawed. Under this reasoning, *any* statute somehow connected to serving the public welfare can be extended to encompass liability for responsible corporate officers. However, in a reversal from *Dotterweich*, the Supreme Court has now warned that assigning public risks to individuals based solely on a statute's focus on overriding societal priorities is unfounded.²³⁷ Thus, the public welfare nature of a statute should not, by itself, serve as a substitute for finding clear legislative intent that justifies application of the RCO doctrine.

The decision in *State v. Markowitz*²³⁸ provides a useful contrast to *Roscoe*. In *Markowitz*, a New York court, in a factual scenario similar to *Roscoe*, found that the RCO doctrine was not applicable to a provision in the state's navigation law that, in the interest of environmental protection, targeted petroleum spills.²³⁹ Although the law's relevant provision provides that “[a]ny person who has discharged petroleum shall be strictly liable . . . for all cleanup and removal costs and all direct and indirect damages,”²⁴⁰ the court found that because “the Navigation Law does not address personal liability of officers and managers,” the RCO doctrine was not an appropriate standard to extend personal liability.²⁴¹

In short, without clear legislative intent, courts should refrain from applying the RCO doctrine. What exactly constitutes clear intent depends, of course, on the individual statute in question. Generally, however, there should be either language referencing responsible corporate officers or legislative history indicating the consideration of the extension of the statute to corporate officers, employees, or other individuals in charge of a business.

Legislatures, on the other hand, when writing the doctrine into existing or new laws, should be mindful of its effects on corporate agents. Use of the doctrine should be limited to core areas of public welfare and only upon a careful consideration of the resulting costs and benefits. Ideally, the necessary assessments should rest on empirical data or, at the least, be based on recognized theoretical models, taking into account their various qualifiers.

For instance, the doctrine's application could be narrowly restricted to entities with limited liability²⁴² and certain industries and/or activities in which there is clear

236. 33 U.S.C. § 1319(c)(6) (2006); 42 U.S.C. § 7413(c)(6) (2006).

237. See *supra* notes 154–58 and accompanying text for a discussion of the Supreme Court's opinion in *Meyer*.

238. 710 N.Y.S.2d 407 (App. Div. 2000).

239. *Markowitz*, 710 N.Y.S.2d at 411.

240. N.Y. NAV. LAW § 181(1) (McKinney 2011).

241. *Markowitz*, 710 N.Y.S.2d at 412 n.4.

242. This requirement would address one of the major findings in the literature that posits personal liability may be useful in instances where the firm has insufficient assets to meet its liabilities in case of monetary sanctions imposed against it.

evidence of a beneficial effect of personal liability. These can include situations in which sanctions at the firm level provide insufficient deterrence or in which the government is in a better position to monitor corporate agents.²⁴³ In addition, one could imagine the doctrine's application conditioned on a finding of systematic and willful undercapitalization or other "judgment proofing" of a corporate entity by responsible corporate officers. Moreover, in view of concerns of "overcriminalization"—an undue extension of criminal law²⁴⁴—lawmakers should consider restricting personal liability under the doctrine to civil sanctions and rely on criminal liability only in exceptional circumstances.

Finally, legislatures and courts should refrain from using the RCO doctrine in connection with statutory provisions that provide for strict liability. In order to mitigate the doctrine's shortcomings, personal liability should be possible for only intentional or knowing misconduct,²⁴⁵ that is where a responsible corporate officer knew of imminent or ongoing violations and decided not to take any preventive or corrective measures. Knowing misconduct should also be broad enough to encompass the concept of "willful blindness," where a responsible corporate officer deliberately avoids gaining knowledge of unlawful acts.²⁴⁶ For example, where responsible corporate officers ignore obvious "red flags" and fail to take investigative steps, or where they take affirmative steps to shield themselves from relevant information, courts and juries may reasonably infer a defendant's willful blindness. Yet, although circumstantial evidence of such kind can be a legitimate and necessary way to prove culpability,²⁴⁷ the mere showing of a defendant's corporate position and the ability to influence corporate policies or activities that accompanies that position, is not.

VII. CONCLUSION

A commentator once observed that "[i]t is always tempting to think that the problem with corporate responsibility is that there is not enough of it" and "that a particular individual, rather than some faceless corporation, should be held accountable."²⁴⁸ An important part of the problem with the RCO doctrine also appears

243. See *supra* Part V.B. for a discussion of economic models that suggest, inter alia, that individual liability may be justified under such circumstances.

244. See Babbitt et al., *supra* note 33, at 59–61 (finding that environmental law may be overcriminalized); Uhlmann, *supra* note 74, at 1228–31 (discussing overcriminalization in general and specifically in the context of environmental enforcement).

245. A few courts have already advocated limiting the doctrine's use to more culpable levels of mens rea. See *Markowitz*, 710 N.Y.S.2d at 411–12 (explaining that in order to strike the appropriate balance between holding only culpable individuals personally liable for wrongful corporate activities leading to a discharge and protecting those individual stockholders and officers who were uninvolved in corporate wrongdoing and who were entitled to rely on the corporate form to insulate them from personal liability, the RCO doctrine should only apply where an individual has been directly, actively, and knowingly involved in the culpable activities or inaction that led to the statutory violation); *Kaites v. Dep't of Env'tl. Res.*, 529 A.2d 1148, 1152 (Pa. Commw. Ct. 1987) (holding that "under Pennsylvania law, the public interest will not be violated by requiring specific evidence of acts of intentional neglect or misconduct before imposing individual liability on a corporate officer for abating a public nuisance" under the applicable state laws).

246. See *Hustis & Gotanda*, *supra* note 7, at 178–79.

247. *Id.*

248. *Chapman*, *supra* note 170, at 1679.

to be that the idea of increased managerial liability is intuitively more appealing than the idea of having less of it.²⁴⁹ Given the lack of empirical data evidencing its deterrent effect and misguided notions of risk allocation, legislatures and courts should be careful not to give in to such intuition and should be cautious in their use of the RCO doctrine. They should, as this Article suggests, reduce the RCO doctrine to rare and clearly delineated instances of statutory liability of responsible corporate officers' intentional or knowing misconduct. The suggested limitations on the RCO doctrine and individual liability, however, should not be confused with a proposal to limit liability of corporate entities themselves.²⁵⁰

249. For example, one commentator described the RCO doctrine as a necessary tool to force corporate officers "out of their rabbit holes and into the open where they can be made to bear some burden of proving their own innocence." Cogswell, *supra* note 65, at 370.

250. As this Article points out, particularly in *supra* Parts III.A.3 and IV.A, it is appropriate to channel liability to legal entities and to force businesses to bear the risks of doing business. In this regard, for a proposal outlining a new two-tier liability system for deep-sea oil drilling and for catastrophic risks, see generally W. Kip Viscusi & Richard J. Zeckhauser, *Detering and Compensating Oil-Spill Catastrophes: The Need for Strict and Two-Tier Liability*, 64 VAND. L. REV. 1717 (2011).