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Individual Liability of Agents for Corporate Crimes Under the Proposed Federal Criminal Code

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NOTES

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I. INTRODUCTION

Current congressional consideration of the Proposed Federal Criminal Code[1] comes at a time of increasing public concern over

concerning the Proposed Federal Criminal Code have been printed in thirteen parts. References in this Note to the following parts will be cited as *Subcommittee Hearings*, pt. ____: *Reform of the Federal Criminal Laws: Hearings on S.1437, S. 31, S. 45, S. 181, S. 204, S. 260, S. 888, S. 979, & S. 1221 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., pt. XIII (1977); *Reform of the Federal Criminal Laws: Hearings on S. 1 & S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., pt. XI (1974); *Reform of the Federal Criminal Laws: Hearings on S. 1 & S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. X (1974); *Reform of the Federal Criminal Laws: Hearings on S. 1, S. 716 & S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. VI (1973); *Reform of the Federal Criminal Laws: Hearings on S. 1, S. 716, S. 1400 & S. 1401 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. V (1973); *Reform of the Federal Criminal Laws: Hearings on Policy Questions Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., pt. III, subpts. A-D (1972); *Reform of the Federal Criminal Laws: Hearings on the Report of the National Commission on Reform of Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. I (1971).

1. Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. [hereinafter cited as Proposed Code], *reprinted in Subcommittee Hearings*, pt. XIII, at 9485. The Proposed Code represents the culmination of more than a decade of study, drafting, and debate to revise Title 18 and consolidate the scattered provisions of the United States Code dealing with criminal liability. In 1966 Congress established the National Commission on Reform of Federal Criminal Laws, composed of lawyers, judges, and legislators, and chaired by former Governor Edmund G. Brown. Charged with the responsibility of conducting a full and complete review of federal criminal law and submitting recommended legislation, the Commission, its Advisory Committee, consultants, and staff produced a study draft for a new Federal Criminal Code in 1970 (NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970) [hereinafter cited as STUDY DRAFT]), and later completed a recommended code which it forwarded to the President and Congress in 1971 (NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter cited as FINAL REPORT]). Over the next two years, the Suhcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee held several hearings on the Proposed Code, and legislation was introduced to the Senate on January 4, 1973. *See* S. 1, 93d Cong., 1st Sess. (1973), *reprinted in Subcommittee Hearings*, pt. V, at 4211. The Nixon Administration introduced its own proposed code on March 27, 1973. *See* S. 1400, 93d Cong., 1st Sess. (1973), *reprinted in Subcommittee Hearings*, pt. V, at 4862. The bills were eventually consolidated, and following two years of continued hearings, debate, and amendment, another Proposed Code was introduced on January 15, 1975. *See* S. 1, 94th Cong., 1st Sess. (1975) [hereinafter cited as S. 1 (1975)]. After two more years of controversy concerning the proposal's treatment of such issues as federal jurisdiction, gun control, wiretapping, capital punishment, sentencing procedures, and criminal sanctions against the media, Senators McClellan and Keunedy submitted the present Proposed Code as a compromise on May 2, 1977. For a discussion of the tortured history of the Proposed Code and the attendant politics,

corporate crime.[2] The societal harm resulting from criminal misuse and abuse of the corporate form is obvious,[3] but the proper allocation of criminal responsibility between the corporation and its individual agents[4] has proven to be an elusive goal.[5] Although an early reluctance by the law to accept the concept that a corporation could

see Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L.J. 171, 171-82, 220-24; Mathews & Sullivan, *Criminal Liability for Violations of the Federal Securities Laws: The National Commission's Proposed Federal Criminal Code, S. 1, and S. 1400*, 11 AM. CRIM. L. REV. 883, 883-86 (1973).

2. *See generally Symposium—White-Collar Crime*, 11 AM. CRIM. L. REV. 817 (1973). One commentator concludes that recent news accounts of corporate bribes, slush funds, and illegal political contrihutions indicate that corporate crime is a normal occurrence in the American business community. *See* Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 73 (1976) [hereinafter cited as Elkins]. According to consumer advocate Ralph Nader, the nation is suffering an "economic corporate crime wave." *See Subcommittee Hearings*, pt. III, subpt. D, at 2991.

3. The societal harms created by corporations include pollution; manufacture and distribution of dangerous consumer products; consumer frauds; and the harmful economic consequences of monopolistic practices, restraint of trade, and unfair trade practices. Professor Elkins concludes that higher consumer costs, increased pollution, and more frequent physical injuries produced by criminal corporate activities constitute a societal harm that far exceeds the harm caused by individual criminals. *See* Elkins, *supra* note 2, at 74-75.

4. "Agent" is defined by § 111 of the Proposed Code to include a partner, director, officer, manager, servant, employee, or any other person authorized to act on behalf of the organization. In civil corporation law, important distinctions exist between directors, officers, and other agents. Executive officers usually are required by the corporate charter and appointed by the board of directors to speak and act for the corporation in furthering its objectives. Employees are merely the agents hired by the officers. However, most courts use the terms "officers," "directors," "agents," and "employees" indiscriminately, and the Proposed Code generally makes no express distinctions between the legal significance of the various levels of "agents." *See* W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 266 (rev. perm. ed. 1975). This Note will primarily consider the liability of agents at the managerial and supervisory levels, including officers and directors.

5. Although it is settled that corporations are subject to criminal sanctions, see note 6 *infra*, debate continues concerning the propriety of criminal fines against corporations. Opponents of corporate criminal liability assert that criminal convictions against a corporation provide no deterrence for the conduct of individuals within the organization. In addition, imposing criminal penalties on the corporation results in a vicarious punishment of the shareholders and creditors, who hear the burden of paying the fine. Supporters of corporate liability contend that corporations are concerned about their "corporate image," and that the possibility of adverse publicity surrounding a criminal conviction may coerce individuals within the entity into controlling harmful conduct. In addition, prosecuting individuals but not corporations creates a double standard in law enforcement. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 33, at 232 (1972); Elkins, *supra* note 2, at 78-82; Note, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 917-27 (1975); MODEL PENAL CODE § 2.07, Comment (Tent. Draft No. 4, 1955).

The Proposed Code attempts to control corporate misconduct by providing sanctions against hoth the corporation and "responsible" officials. Of course, the challenge is to determine who the "responsible" officials are. Individuals responsible for illegal acts often do not leave sufficient evidence of their identity, and the tendency of corporate structures to mask and diffuse responsibility further complicates identification of the culpable parties. *See Subcommittee Hearings*, pt. XI, at 7873 (statement of Ralph Nader); Elkins, *supra* note 2, at 82-83.

be guilty of a crime has all but dissipated,[6] organizational culpability without corresponding criminal liability for the individuals within the corporate structure engaging in the illegal conduct ignores the common-sense observation that a corporation can act, illegally or otherwise, only through its agents. Nonetheless, juries have frequently found corporate defendants criminally culpable while acquitting agents who clearly committed the criminal acts.[7] This phenomenon perhaps reflects an intuitive feeling by jurors that individuals acting within the pressures of a bureaucratic and sometimes highly diffuse corporate structure are often unwitting or even unwilling participants in an illegal transaction, and that a criminal conviction is too harsh a sanction for business misconduct that is not of a highly immoral or detestable character.[8]

6. At early common law, a corporation could not be guilty of a crime because it had no mind capable of harboring criminal intent nor body capable of being imprisoned. Modern law overcomes this metaphysical obstacle by "imputing" both the acts and the criminal intent of corporate agents to the corporation. One theoretical basis of corporate culpability is the "superior agent" theory, which imputes to the corporation the acts and criminal intent of officers sufficiently high in the corporate structure that their actions may be considered the acts of the corporation itself. Courts seeking to impute to the corporation the conduct of lower officials and employees attempt to find some "link" between the subordinate agent and the "inner-circle" of managers and directors, such as authorization or acquiescence. *See generally* LAFAVE & SCOTT, *supra* note 5, § 33; Elkins, *supra* note 2, at 99-106; Note, *supra* note 5, at 908.

The trend in federal courts, however, reflects an abandonment of the "superior agent" theory. The general rule is that most acts and the accompanying *mens rea* of any agent acting within the scope of his employment and on behalf of the corporation may be imputed to the corporation. *See generally* LAFAVE & SCOTT, *supra* note 5, § 33; Elkins, *supra* note 2, at 105-19; Note, *supra* note 5, at 910-11. The Proposed Code continues the broad concept of corporate criminal liability that federal courts presently apply. Section 402(a)(1) holds the corporation liable for an offense if the conduct constituting the offense is the conduct of an agent occurring "in the performance of matters within the scope of the agent's employment or within the scope of the agent's actual, implied, or apparent authority." If the agent's acts are outside the scope of his employment or authority, the corporation nevertheless may be liable under § 402(a)(2) if the corporation ratifies or adopts the agent's conduct. Section 402(b), which imposes liability for the failure of the organization or its agent to "discharge a specific duty of conduct imposed on the organization by law," is discussed in connection with § 403(b) in the text accompanying notes 145-55 *infra*.

7. *E.g.*, United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir. 1941) ("We can not understand how the jury could have acquitted all of the individual defendants."). *See also* cases cited in Elkins, *supra* note 2, at 83 n.29. Occasionally, the individual defendant but not the organization is convicted. *See* United States v. Dotterweich, 320 U.S. 277 (1943).

8. The draftsmen of the Model Penal Code observed that the tendency of jurors to convict the corporate defendant but acquit the obviously guilty agents who committed the acts

> may reflect more than faulty or capricious judgment on the part of juries. It may represent a recognition that the social consequences of a criminal conviction may fall with a disproportionately heavy impact on the individual defendants where the conduct involved is not of a highly immoral character. It may also reflect a shrewd belief that the violation may have been produced by pressures on the subordinates created by corporate managerial officials even though the latter may not have intended or desired the crimi-

Recent events, however, indicate that prosecutorial policy and jury predilections will produce more prosecutions and convictions of individuals in the future.[9] Although the criminal law applies most readily to the individual actors performing the criminal conduct, effective deterrence of corporate crime often requires imposing liability upon supervisory and managerial corporate officials, but not upon subordinate agents who, although committing a proscribed activity, were in fact powerless to realize the results of or to prevent the blameworthy corporate conduct.[10] In identifying the appropriate individuals within the corporate structure who should bear the criminal responsibility for illegal conduct in furtherance of a corporate purpose, the Proposed Federal Criminal Code provides for criminal sanctions against agents who commit the particular acts constituting the offense as well as supervisory and managerial officials who are in a position to control the actions of their subordinates. Section 403 of the Proposed Code imposes responsibility for illegal organizational[11] conduct on individuals who actually perform the offensive acts,[12] who fail to insure that the corporation fulfills a duty imposed by law,[13] and who permit or contribute to an offense by their reckless failure to supervise corporate activities.[14]

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nal behavior and even though the pressures can only be sensed rather than demonstrated.

MODEL PENAL CODE, *supra* note 5, § 2.07, Comment at 149. Pointing out that all the cited cases in which the corporation is convicted but the obviously guilty agent goes free are violations of economic regulations, the Model Penal Code's official commentary suggests that a different verdict might be reached if the offenses involved a more obvious moral element. *Id.*

The National Commission on Reform of Federal Criminal Laws, *supra* note 1, expressed doubts about the efficacy of criminal sanctions against individuals involved in violations of regulatory statutes, especially in view of the great increase of regulations "commanding affirmative acts or forbidding behavior not condemned by generally recognized ethical standards." *See* FINAL REPORT, *supra* note 1, at § 1006, Comment, Declaration of Policy.

9. Federal prosecutions and convictions of corporate officials are increasing in response to judicial and public disfavor of "white-collar" crimes. *See* Curnow, *Economic Crimes: A High Standard of Care*, 35 FED. B.J. 21, 29 (1976).

10. The complexities, size, and bureaucratic structure of the modern corporation exacerbate the problem of identifying guilty individuals and establishing their criminal liability. MODEL PENAL CODE, *supra* note 5, § 2.07. *See also* note 5 *supra*. Although sufficient evidence for indictment of identifiable employees within the lower levels of the corporate hierarchy exists, it may be fundamentally unfair to proceed against subordinates but not their complicitous supervisors or management personnel. Elkins, *supra* note 2, at 83.

11. Section 403 of the Proposed Code covers the liability of an agent for the conduct of his "organization." Under § 111 of the Proposed Code, "organization" means any legal entity, other than a government, organized for any purpose, and includes corporations, companies, associations, partnerships, foundations, trusts, unions, clubs, churches, and "any other association of persons." Because the legislative history indicates that the primary target of § 403 is corporate crime, this Note focuses upon business organizations.

12. Proposed Code, *supra* note 1, § 403(a).

13. *Id.* § 403(b).

14. *Id.* § 403(c).

This Note will discuss the development and current status of state and federal law dealing with individual liability for corporate crime. Following a discussion of the goals of the general provisions describing individual liability in the Proposed Code, this Note will analyze each subsection of section 403, suggest standards for their application in light of the legislative goals, and finally propose possible defenses and limitations to individual culpability.

II. Culpability of Individuals Within the Corporation Under State Law

When the agent directly responsibile for the criminal conduct of the corporation can be easily identified, prosecution presents few conceptual problems, and only the propriety of imposing the criminal sanction on such an agent need be considered.[15] Additional attempts to impose liability on the superiors of the acting agents or to hold high-ranking corporate officials responsible for corporate activities in the absence of clearly identifiable actors presents the danger of introducing vicarious liability,[16] which is imposed on corporations[17] for the actions of subordinate agents, into the area of individual liability.[18] State courts strive to avoid vicarious liability by identifying indicia of participation by the corporate official in the criminal conduct of subordinates though the indicia identified are often somewhat fictional. Liability thus attaches because of the

15. *See* notes 8 & 10 *supra* and accompanying text. Often the easily identifiable actors clearly are not the appropriate targets of criminal prosecution. As the court said in State *ex rel.* Kropf v. Gilbert, 213 Wis. 196, 228, 251 N.W. 478, 489 (1933); "Responsibility for corporate acts rests with those who have the power to authorize and control such acts [of conversion] and not with those who, without knowledge of the fraud, upon the authorization of the corporation and at the direction of a superior officer, perform the physical acts which may result in conversion." This selectivity is probably more a matter of prosecutorial discretion, however, because it is no defense for an individual who commits an affirmative wrongful act that corporate management ordered him to perform the act. State v. Monteleone, 63 N.J. Super. 596, 600-01, 165 A.2d 39, 41 (1960), *aff'd*, 36 N.J. 93, 175 A.2d 207 (1961); People v. Trapp, 20 N.Y.2d 613, 617, 233 N.E.2d 110, 112, 286 N.Y.S.2d 11, 14 (1967).

16. Vicarious liability is liability imposed upon a defendant for the misconduct of another, even though the defendant neither possessed the *mens rea* nor committed the *actus reus* required for conviction. Statutes regulating businesses and holding employers culpable for the acts of their employees frequently employ vicarious liability. *See* LaFave & Scott, *supra* note 5, § 32.

17. *See* note 6 *supra*. Because the actions and criminal intent of agents are imputed to the corporate entity, corporate criminal liability is a form of vicarious liability. *See* LaFave & Scott, *supra* note 5, § 33. *See also* Lee, *Corporate Criminal Liability* (pt. 1), 28 Colum. L. Rev. 1, 13 (1928).

18. Because criminal liability is basically an individual and personal concern, courts demand an explicit statutory command before holding a person liable for the actions of another. *See* State v. Nelson, 83 S.D. 655, 660, 165 N.W.2d 55, 58 (1969); LaFave & Scott, *supra* note 5, § 32.

personal misconduct[19] of the defendant, manifested by: (1) active participation in the offense as an aider, abetter, or accomplice; (2) "passive" participation through knowledge, or the opportunity to gain knowledge, of the offense, and presumed subsequent acquiescence in the offense; or (3) failure to fulfill a duty to control corporate actions.[20]

A. Liability for Conduct in a Representative Capacity

State courts have always been hostile to pleas by corporate agents that they committed illegal conduct while acting for the corporation in a "representative capacity," rendering them nonculpable as individuals under criminal statutes.[21] Rejection of the representative capacity defense by the courts represents judicial recognition and disapproval of the attempts of sole proprietors or owners of small businesses to escape criminal liability by creating a corporate "alter ego" for use as an instrumentality for personally conducting illegal activity.[22] When the individual defendant is the "sole executing mind" of the corporation[23] or dominates the corporation and manipulates it for criminal purposes,[24] the courts have little trouble in applying criminal statutes to corporate officers and agents acting in their official or "representative" capacity. As a general rule, state courts will impose criminal liability on corporate agents who, having any requisite criminal intent, personally perform or direct[25] the acts constituting the offenses. The corporate

19. Of course, the misconduct need not always be accompanied by a criminal intent. Corporate officials as well as the corporation are liable without a culpable state of mind for violation of strict liability offenses. *See, e.g.*, State v. Burnam, 71 Wash. 199, 128 P. 218 (1912), discussed at notes 35-36 *infra* and accompanying text. *See also* note 31 *infra*.

20. There is a good summary of the law by the court in People v. Alrich Restaurant Corp. 53 Misc. 2d 574, 575-77, 279 N.Y.S.2d 624, 626-28 (Dist. Ct. 1967). *See also* FLETCHER, *supra* note 4, at §§ 1348-49.

21. *See, e.g.*, State v. Cooley, 141 Tenn. 33, 206 S.W. 182 (1918). The president of a grocery company was charged with violating a state law that penalized the fraudulent obtaining of goods and credit by means of a check backed by insufficient funds. The defendant claimed that the statute did not apply to him because he presented the check in his "official capacity" as president of the company. The court rejected the defense, noting that there is "no doctrine of agency in the criminal law which will permit an officer of a corporation to shield himself from criminal responsibility for his own act on the ground that it was the act of the corporation and not his personal act." *Id.* at 38, 206 S.W. at 184.

22. *See* State v. Picheco, 2 Conn. Cir. Ct. 584, 587, 203 A.2d 242, 244 (App. Div. 1964); State v. McBride, 215 Minn. 123, 130-31, 9 N.W.2d 416, 420 (1943).

23. *See* State v. Picheco, 2 Conn. Cir. Ct. 584, 587, 203 A.2d 242, 244 (App. Div. 1964) (defendant was the president, treasurer, and majority steckholder of the corporation, and he controlled its operations); State v. Pincus, 41 N.J. Super. 454, 458, 125 A.2d 420, 422 (1956).

24. *See* State v. McBride, 215 Minn. 123, 130-31, 9 N.W.2d 416, 420 (1943).

25. *See* State v. Thomas, 123 Wash. 299, 212 P. 253 (1923). Unlike State v. Cooley, 141 Tenn. 33, 206 S.W. 182 (1918), in which the defendant had personally passed a bad check,

official who is the "actual, present, and efficient actor"[26] within the corporate hierarchy incurs liability despite his attempts to describe his conduct as that of the corporation.[27]

B. *Liability as a Participant*

When prosecution reaches corporate officials other than agents who are the easily identifiable actors, or when the prosecution charges superiors for the actions of subordinates, state courts have preferred to base liability upon a showing of the individual defendant's "participation" in the offense, often relying upon concepts of accessory or accomplice liability, especially aiding and abetting.[28] In *State v. McBride,*[29] for example, the court held that the manager of the corporation owning a drug store could be liable as "an aider, abettor, or accessory" in the illegal sale of intoxicating liquor by a store clerk despite the defendant's ignorance of the sale and despite

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the corporate officer in *State v. Thomas* did not personally receive funds that he allegedly arranged to be misappropriated, but instead employees acting under his general directions received the funds. *Id.* at 303, 212 P. at 254. The corporate official's direction that an act be performed might be inferred from his acquiescence in the act by suhordinates. *See* State *ex rel.* Kropf v. Gilbert, 213 Wis. 196, 216-17, 251 N.W. 478, 485 (1933).

26. State v. Picheco, 2 Conn. Cir. Ct. 584, 587, 203 A.2d 242, 244 (App. Div. 1964).

27. *See* People v. Alrich Restaurant Corp., 53 Misc. 2d 574, 575, 279 N.Y.S.2d 624, 627 (Dist. Ct. 1967) ("man in charge" who is actually conducting the business cannot escape responsibility for a crime by pleading agency).

28. In felony cases the common law distinguished the criminal actor (principal in the first degree) from those who ordered, counseled, encouraged, or otherwise aided or abetted the act. All aiders and abettors of misdemeanors were indictable for the offense as principals. The distinction has been abolished in most states and in federal law. *See* 18 U.S.C. § 2(a) (1976); Proposed Code, *supra* note 1, § 404(a); LAFAVE & SCOTT, *supra* note 5, § 63, at 496, Lee, *supra* note 17, at 24-28. Professor Lee described the doctrine that an individual might aid and abet or conspire with a nonhuman entity as "one of those peculiar judicial fancies that, were it not for the desirable results often achieved by their use, would be unqualifiedly condemned by all save those whose naive faith in the metaphysician's logic cannot be disturbed by earthly facts." *Id.* at 25.

The theory of accessory liability proved useful when a statute purportedly applied only to the corporation. For example, in State v. Fraser, 105 Or. 589, 209 P. 467 (1922), a corporation offered for public sale unregistered stock in violation of the State's Blue Sky law. Although the court apparently assumed that the statute fixed liability only upon the corporation, the court noted that the corporation's president had acted "jointly and together" with the offending corporation, and had "actively participated" in the proscribed sales. Because Oregon law specifically provided that all persons concerned in the commission of a crime, either by directly committing the act or by aiding and abetting, had to be indicted as "principals," the court stated that "a person who cannot alone commit a crime defined by the statute may, by aiding and abetting a person within the class against which the statute is directed, render himself criminally liable." *Id.* at 593, 209 P. at 468. Section 404(b)(1) of the Proposed Code reflects this rule by providing that it is not a defense to a prosecution under the complicity provisions that the defendant "does not belong to the category of persons who by definition are the only persons capable of committing the offense directly." *See* text accompanying note 225 *infra.*

29. 215 Minn. 123, 9 N.W.2d 416 (1943).

his absence from the store at the time of the illegal transaction. Because the defendant was the active manager of the business, the court charged him with constructive knowledge of, and thus participation in, the offense.[30]

Cases enforcing public welfare statutes that seek to protect health or safety and dispense with the requirement of criminal intent[31] often find individual defendants liable without discussing the indicia of their participation in the offense or the inference of knowledge of the misconduct of subordinate agents.[32] The source of such liability for criminal corporate activity is the failure to fulfill a duty, concomitant with an authoritative position in the corporate hierarchy, to learn of and prevent violations occurring in the corporation.[33] State courts reason that nonaction constitutes, in theory at least, a type of participation in the offense.[34] For example, in *State v. Burnam*,[35] the court held that a state statute prohibiting the sale of watered milk encompassed the managing agent of the corporate producer of the milk, without proof of his participation or presence at the time of the shipment of the offending milk. The court reasoned that the manager had "practical control" of the plant operations and thus had a duty to see that the corporation obeyed the law.[36]

Some cases represent a hybrid between the concept that responsible corporate officials have a duty to act to prevent corporate violations of the law and the notion that the law charges them with knowledge of and thus participation in illegal activity by subordi-

30. *Id.* at 129-31, 9 N.W.2d at 419-20. The court's suspicion that the defendant used the company as his criminal "alter ego" was an acknowledged factor in its resolution of the case. *Id.* at 131, 9 N.W.2d at 420. *See* text accompanying note 22 *supra.*

31. Public welfare offenses are an outgrowth of the burgeoning mass of statutory regulations imposed on businesses dealing with food and drugs, selling intoxicating liquors, or threatening the safety or health of the community. *See generally* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 70-73 (1933). This Note will describe offenses in which no proof of motive, intent, wilfulness, knowledge, or other culpable state of mind is required as "strict liability" offenses. *See* LAFAVE & SCOTT, *supra* note 5, § 20, at 144.

32. For example, in People v. Detroit White Lead Works, 82 Mich. 471, 46 N.W. 735 (1890), a criminal nuisance action, the court held that the high-level corporate officers as well as the corporation were culpable even though the officers may not have been present on the premises or engaged in any activity when the nuisance was created. The court reasoned that the directors and officers were the persons "primarily responsible" for work carried on by employees, and therefore were the "proper ones" to be prosecuted. *Id.* at 479, 46 N.W. at 737.

33. *See generally* Lee, *supra* note 17, at 18-22, and cases cited therein.

34. At common law a defendant could become an accomplice by failing to prevent a crime when he had a duty to do so. LAFAVE & SCOTT, *supra* note 5, § 64.

35. 71 Wash. 199, 128 P. 218 (1912).

36. *Id.* at 200-02, 128 P. at 219-20. Evidence of defendant's practical control included his position as general manager, his power to hire and discharge all employees, and his general supervision over the mixing of the milk. *Id.* at 200, 128 P. at 219.

nates.[37] The twin elements of duty and knowledge appear in cases dealing with both strict liability and *mens rea* offenses. In *State* ex rel. *Kropf v. Gilbert*,[38] the court discussed the potential liability of the directors of an investment house for criminal charges stemming from the misappropriation of proceeds entrusted by a customer.[39] Seeking indicia of participation by the individual defendants in the conversion,[40] the court examined the corporate charter and bylaws and concluded that the board of directors had authority over and responsibility for the proper disbursement of all funds.[41] The basis

37. *See, e.g.*, United States v. Laffal, 83 A.2d 871 (D.C. 1951). The court held that the president of a corporation owning a restaurant alleged to be a disorderly house could be prosecuted despite the lack of any evidence that he was present when the violations occurred or had knowledge of them. Recognizing the "general rule" that an officer is not liable for acts of the corporation performed through agents not acting under his direction or with his permission, the court cited *People v. Detroit White Lead Works*, discussed at note 32 *supra*, and *State v. McBride*, discussed in text accompanying notes 29-30 *supra*, for the proposition that a directing head of a corporation engaged in an unlawful business may be liable for acts of subordinates done in the normal course of business, without evidence of the defendant's supervision or presence. There was a "fair inference," according to the court, that the president of the corporation, as its chief executive officer, was acquainted with the illegal conduct of the business.

In Overland Cotton Mill Co. v. People, 32 Colo. 263, 75 P. 924 (1904), lower echelon personnel had hired a child in violation of the state child labor law. The court affirmed the conviction of the assistant superintendent of the mill where the child was employed because of his active involvement in the management of the mill and his authority to hire and discharge employees. The court said:

> It thus appears from the testimony that by reason of his relationship to the company, and the performance of his duties, he either knew, or, by the exercise of due diligence upon his part, should have known, that a minor under the prohibited age was in the employ of the company. For this reason he must be held as having violated the statute, for it was within his power, by virtue of the relationship he bore to the company, to have prevented the employment.

Id. at 269, 75 P. at 926. *But see* Commonwealth v. Morakis, 208 Pa. Super. 180, 220 A.2d 900 (1966) (in which the court, on similar facts, articulated the issue in terms of vicarious liability and exonerated the owner of an enterprise who was out of town when the minor was hired). *See also* note 16 *supra*.

38. 213 Wis. 196, 251 N.W. 479 (1933).

39. The charge originally included an allegation of aiding and abetting the conversion and embezzlement perpetrated by the president of the company. The court concluded that the president had not committed the crime and that the statute did not apply to the corporation because the corporation could not commit a felony under existing state law. *See* note 6 *supra*. Therefore, the directors and other officers charged could not be liable under the principles of accessory liability because there was no culpable principal. 213 Wis. at 210-13, 251 N.W. at 483-84. *See also* note 28 *supra*. Having rejected accessory liability, the court went on to discuss the possibility that the defendants were liable individually for conversion. 213 Wis. at 213, 251 N.W. at 484.

40. The court carefully distinguished their holding from cases imposing liability for aiding and abetting, in which "something more than a mere standing by, or a mere failure to attempt to prevent the commission of a crime" is required. *Id.* at 222-23, 251 N.W. at 487.

41. *Id.* at 217, 251 N.W. at 485. The court observed:

> Because they as directors had that controlling power and responsibility, whatever was done by subordinate officers, agents, or employees of the corporation, in the usual and

of liability was the "participation" that results "when there is an act or omission on [the director's] part which logically leads to the inference that he has had a share in the wrongful acts of the corporation which constitute the offense. There must be, at least, evidence for which acquiescence, if not active aid, may be inferred."[42]

As a general rule, however, proof of position in the corporate structure, standing alone, is not determinative of the issue of participation in a proscribed transaction. Courts require that the prosecution prove some personal involvement by the senior corporate official in the offense.[43] For example, in *McCollum v. State*,[44] the vice president in charge of the corporation's storage depot was convicted of polluting public waters after a defective or improperly operated piece of equipment allowed oil to escape into the harbor. The evidence established that the defendant had delegated to subordinates the responsibility for the operation of the device. Noting the absence of any testimony showing that the defendant was actually in charge of the machinery, or that he was in any manner personally connected with the pollution or knowingly permitted it, the court dismissed the conviction.[45] Thus, although different courts may require varying degrees of "participation" by the corporate official, all appear to agree that the mere occupation of an important position in the corporate hierarchy is insufficient to incur liability.

C. *Statutes Explicitly Identifying Culpable Individuals*

Although state courts utilize judicially created standards to

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ordinary course of its business or affairs, after the directors had knowledge thereof, or were chargeable with such knowledge, may be deemed to have been done with the approval or at the direction of the board of directors, either expressly or by necessary implication by way of acquiescence.

Id at 216-17, 251 N.W. at 485.

42. *Id.* at 223, 251 N.W. at 488. Without knowledge or opportunity to discover the conversions, however, the court stated that criminal liability would not lie. *Id.* at 218, 251 N.W. at 486. Here the defendants were chargeable with knowledge because the questionable transactions had been discussed at board meetings. *Id.* at 222, 251 N.W. at 487. *But see* State v. Nelson, 83 S.D. 655, 165 N.W.2d 55 (1969) (holding that, on similar facts, the circumstantial evidence of the corporate officer's participation was insufficient absent evidence of his direct participation in the illegal transactions or mention of them at board meetings).

43. In both *Burnam*, discussed in text accompanying notes 35-36 *supra*, and *Overland Cotton Mill*, discussed in note 37 *supra*, the courts emphasized that the individual defendants were responsible for the areas of the organizations in which the offenses occurred.

44. 165 Tex. Crim. 241, 305 S.W.2d 612 (1957).

45. *Id.* at 243-44, 305 S.W.2d at 613-14. The court was persuaded by defendant's argument that he would not be liable in a civil action because he had delegated the operation of the machinery to subordinates. In dictum the court went on to suggest that the corporation could be prosecuted.

identify corporate officials liable for a corporation's violation of criminal laws, some statutory schemes specify the superior officials who will be held responsible for the crimes of the corporation. For example, a New York statute provides that criminal liability for the failure of a corporate employer to pay contributions required by a labor agreement to a union pension fund will attach to the president, secretary, treasurer, or "officers exercising corresponding functions."[46] In *People v. Trapp*,[47] defendant, the president of a corporation that had failed to make the required payments, argued that the statute was unconstitutional on its face because it subjected to criminal penalties corporate officers who might have been unaware of the corporate noncompliance and who also might not have possessed the requisite authority to effectuate compliance with the statute. The court held that the statute was a legitimate attempt by the legislature to impose upon officers the responsibility of insuring corporate compliance with the legislative mandate and to criminalize a failure to perform that duty.[48] The court neverthe-

46. N.Y. LABOR LAW (McKinney) § 198-c (1977-1978 Cum. Supp.). A violation results in a misdemeanor.

47. 20 N.Y.2d 613, 233 N.E.2d 110, 286 N.Y.S.2d 11 (1967).

48. *Id.* at 616, 233 N.E.2d at 112, 286 N.Y.S.2d at 14. *See also* People v. Mancuso, 255 N.Y. 463, 175 N.E. 177 (1931) (upholding a statute making directors of moneyed corporations liable for failure to exercise care and diligence in the administration of the corporation).

Failure to perform a legislatively mandated duty running only to the corporation and not directly to the individual agents presented problems in early cases. In People v. Clark, 8 N.Y. Crim. 179, 14 N.Y.S. 642 (1891), the court upheld an indictment of the president and directors of a railroad for tbeir "participation" in a violation of a law forbidding the operation of trains witb open stoves in the cars. Characterizing the alleged offense as an "affirmative act," the court distinguished early railroad cases holding that statutory duties imposed upon companies such as railroads to use due care to protect travelers were not duties running directly to the corporate officers, and therefore, that no individual liability could arise from the corporation's negligent failure to comply with the requirements of the legislature. *See id.* at 189-93, 14 N.Y.S. at 650-53. The court observed that "mere neglect to act does not constitute a crime, except against the class upon whom the duty is imposed." *Id.* at 195, 14 N.Y.S. at 655. *See* Lee, *supra* note 17, at 25.

The Model Penal Code avoids the dictum in *People v. Clark* by providing:

> Whenever a duty to act is imposed by law upon a corporation . . . any agent of the corporation . . . having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

MODEL PENAL CODE, *supra* note 5, § 2.07 (6)(b). *See also* People v. Strong, 363 Ill. 602, 2 N.E.2d 942 (1936) (a statutory duty to execute and submit reports of collection of sales tax did not devolve to the individual defendant).

One court has held that the duty violated must be a statutory duty, and not a common-law fiduciary duty. Although stating that no liability would lie for a violation of an oath to deal honestly and diligently on behalf of the corporation, the court noted in dictum that, when a statute forbids a corporation to do an act, the prohibition extends to the board of directors and each director individually. People v. Knapp, 206 N.Y. 373, 381, 99 N.E. 841, 844 (1912). It appears, therefore, that a statutory prohibition, but not an affirmative duty to act, imposed on tbe corporation may devolve to individual agents.

less construed the statute to exculpate nominal corporate officials who were not actually involved in the violation: "We hold that . . . an officer may not be convicted of violating the statute unless he stood in such a relation to the corporate affairs that it may be presumed that he knew or should have known of and taken some steps to prevent the non-payment."[49] Further identification of those officers who stand in such a relation to the corporation was unnecessary in this case because the defendant was the only active officer and the principal shareholder.[50] As *People v. Trapp* suggests, state courts frequently add judicial gloss to statutes to require that some evidence of individual misconduct exists before individual defendants are convicted.[51]

III. Culpability of Individuals Within the Corporation Under Present Federal Law

Often relying on state law precedent, the federal judiciary and statutes also impose liability for participation,[52] actual or constructive knowledge,[53] and failure to control corporate misconduct.[54] Like their state counterparts, federal courts avoid imposing vicarious

49. 20 N.Y.2d at 618, 233 N.E.2d at 113, 286 N.Y.S.2d at 15.

50. *Id. See also* City of St. Louis v. Boos, 503 S.W.2d 133 (Mo. App. 1973), in which a city ordinance made it unlawful for any "person" to fail to repair or demolish a building found by the building commission to be unsafe. "Person" was further defined by the ordinance to include "officers, agents, or members of a corporation" responsible for the violation. The court held that a nominal officer who never went to board meetings or performed any functions could not be liable absent a showing of knowledge or participation. *Id.* at 135.

51. *See, e.g.*, State v. Monteleone, 63 N.J. Super. 596, 165 A.2d 39 (1960), *aff'd*, 36 N.J. 93, 175 A.2d 207 (1961). The individual defendants argued that a statute holding agents of a corporation liable for the payment of fines for a business' violation of a Sunday closing law constituted cruel and unusual punishment. The court disagreed, empbasizing that the statute did not impose vicarious liability; rather, the court construed the statute to apply only when the individuals as well as the corporation were charged and convicted of violating the closing law.

An interesting problem dealing with statutory presumptions arose in People v. Lieber, 146 Cal. App. 2d Supp. 910, 304 P.2d 869 (App. Dep't Super. Ct. 1956). During an inspection of a pharmacy a state narcotics agent discovered that the number of vials of a certain drug actually in supply was less than the number that the records showed should have been on hand. The president of the company was charged with dispensing drugs without making a proper record, and the prosecution attempted to apply a statute that provided for prima facie guilt if a defendant had in his possession a lesser amount of narcotics than the amount accounted for in his records. The court held tbat although the presumption might properly apply to one who in his individual capacity possesses narcotics, the presumption was "unreasonable and indeed unconstitutional" when applied to a corporate officer or employee without further proof that such defendant had access to the drugs, or that the shortage was "occasioned by some act" of the defendant. *Id.* at 914, 304 P.2d at 872.

52. *See* text accompanying note 28 *supra* and notes 85-92 *infra*.

53. *See* text accompanying notes 30, 37-41 *supra* and notes 80-82 *infra*.

54. *See* text accompanying note 33 *supra* and notes 63-84 *infra*.

liability on corporate officials by articulating standards of culpability that require either defendant's personal misconduct or the presence of illegal corporate activity that defendant is charged by law to prevent. Many of the factors and standards of culpability discussed in the state decisions also have appeared in federal decisions. For example, corporate agents in federal courts have no more success than do defendants in state courts in urging that criminal statutes invoked against them as individuals do not reach conduct that they engage in for the corporation in a representative capacity.[55] Federal courts similarly reject the use of corporate entities as criminal "alter egos" by proprietors seeking to avoid identification under the criminal statutes.[56]

Many federal statutes contain provisions specifically identifying those agents who are liable for the corporation's crimes.[57] For example, section 14 of the Clayton Act[58] provides that whenever a corporation violates any of the penal provisions of the antitrust laws, "such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation." Thus, the statute describes those individuals who are liable as well as the conduct producing liability.[59]

55. *See* text accompanying note 21 *supra*. In United States v. Bach, 151 F.2d 177 (7th Cir. 1945), the agent who knowingly and intentionally sold whiskey at a price in excess of the ceiling established by federal regulations was convicted despite payment of the money directly to the corporation and despite the defendant's acting in a representative capacity at the time of the sale.

56. *See, e.g.*, United States v. H. Wool & Sons, Inc., 215 F.2d 95 (2d Cir. 1954). The corporation and its principal owner were convicted of violations of federal food and drug laws. The corporation was a family-owned enterprise, and the dividing line between the "company" and the individual defendant was "shadowy." The court found that defendant was active in the corporation's management and was the "dominating factor" behind its transactions. *Id.* at 99.

57. Such statutes appear both within and outside Title 18. For an exhaustive list of these statutes, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, I WORKING PAPERS 176 n.39, 209-13 (Appendix B) (1970) [hereinafter cited as WORKING PAPERS].

58. 15 U.S.C. § 24 (1976).

59. Apparently, § 14 does not displace the provisions of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976), holding "every person" guilty who makes a contract or engages in a combination in restraint of trade. Thus, § 14 does not describe the universe of possible defendants. *See* United States v. Wise, 370 U.S. 405, 414-15 (1962), discussed at note 129 *infra*.

18 U.S.C. § 1115 (1976) provides for fine and imprisonment for a shipowner whose neglect or misconduct results in the death of any person. The statute further provides that when such owner is a corporation, "any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such . . . vessel, who has knowingly and willfully caused or allowed . . . neglect" shall be liable. Thus, the statute identifies both the individual defendant and the required culpability. The Proposed Code contains similar provisions in specific areas. For example, when a political

Criminal statutes, however, often provide sanctions against "any person"[60] violating the law, without further reference to the identification of the culpable individual actor. Problems arise when the most identifiable "person" violating the statute is a corporation, or when only subordinate employees engage in the proscribed conduct, but prosecution of superior officials causing or allowing the conduct is clearly appropriate.[61] Primarily in the area of public welfare offenses,[62] the federal judiciary attempts to describe the officials within the corporate hierarchy who should bear the criminal responsibility for the criminal acts of the corporation.

A. Dotterweich *Liability*

The preeminent United States Supreme Court case addressing the proper identification of corporate officials liable for corporate crimes, *United States v. Dotterweich,*[63] arose over two interstate shipments of drugs by the Buffalo Pharmacal Company.[64] Both shipments, which were prepared by the company's employees in response to an order received by the company from a physician, required the repackaging of drugs that the company had received from the wholesale manufacturer. Dotterweich, the president and general manager of the company, had no personal connection with either shipment, but as the officer in charge of the company's business, he had given general instructions to fill orders received from physicians. Charging that the shipments contained misbranded and adulterated drugs, the government prosecuted both the company and Dotterweich for violating the Federal Food, Drug and Cosmetic Act (Food and Drug Act).[65] The jury convicted Dotterweich, but

candidate violates campaign expense limitations, any officer or member of the candidate's political committee who "consents" to the expenditure is guilty of an offense. *See* Proposed Code, *supra* note 1, § 1518(a)(2).

60. 1 U.S.C. § 1 (1976) provides that use of the word "person" in any statute includes corporations unless the context indicates otherwise. Section 111 of the Proposed Code continues this rule of statutory construction.

61. Many of the cases discussed in this Note present criminal situations in which the diffusion of responsibility and action created by corporate bureaucracy makes it difficult to identify a single agent or group of agents who actually commit the criminal act. Cases under discussion also present those situations in which prosecution of high-level officials instead of the subordinate employees who actually perform the conduct is the more prudent prosecutorial tactic. *See* notes 8 & 10 *supra* and accompanying text.

62. *See* note 31 *supra.*

63. 320 U.S. 277, *rehearing denied,* 320 U.S. 815 (1943), *rev'g* United States v. Buffalo Pharmacal Co., 131 F.2d 500 (2d Cir. 1942).

64. The statement of facts is taken from the appellate court's opinion. *See* United States v. Buffalo Pharmacal Co., 131 F.2d 500, 501-02 (2d Cir. 1942), *rev'd sub nom.* United States v. Dotterweich, 320 U.S. 277 (1943).

65. Food and Drug Act § 301(a), 21 U.S.C. § 331(a) (1976).

"[f]or some unexplainable reason,"[66] acquitted the company.

On appeal to the Second Circuit, the defendant argued that the statute provided punishment only for the corporation and not for an innocent agent who, ignorant of the misbranding or adulteration, takes part in an interstate shipment of food or drugs.[67] Although recognizing that the Food and Drug Act defined "person" to include an individual as well as a corporation, and that the Act imposed liability on "any person" who caused the introduction of illegal drugs into commerce, the court nevertheless refused to construe the statute literally to include all persons having any part in causing the shipment, such as the clerk who performs the packaging.[68] The court held that the criminal provision included only the "drug dealer, whether corporation or individual" and reversed Dotterweich's conviction for lack of evidence showing that he was the "principal" who operated the corporation as a criminal "alter ego."[69]

The Supreme Court reversed the appellate court and affirmed the conviction, holding that all persons having a "responsible share in the furtherance of the transaction which the statute outlaws" violate the Act.[70] Finding no congressional intent to punish the corporation while exculpating individuals within the corporate hierarchy,[71] the Court emphasized that the statute was enacted as a

66. 131 F.2d at 501.

67. *Id.* at 502. The appellate court, having found that there was sufficient evidence to support the charge that the drugs were misbranded and adulterated, rejected Dotterweich's argument that the jury's failure to convict the corporation was so inconsistent with the finding of his guilt that the verdict must be reversed: "We think the usual principle is applicable that error cannot be asserted for inconsistency in the jury's verdict." *Id.* at 502.

68. *Id.* at 503. "[W]e can find no basis in the statutory language for drawing a distinction between agents of high or low rank." *Id.* In support of its limited construction, the court pointed to the "guaranty" clause of the Food and Drug Act, which provided immunity from prosecution for any retailer who had received a guaranty from the wholesaler that the drugs were not adulterated or misbranded. Food and Drug Act § 303(c), 21 U.S.C. § 333(c) (1976). Reasoning that any such guaranty would go to the principal in the transaction, such as the company itself, the court concluded that Congress could not have contemplated criminal guilt for all employees in the company, such as shipping clerks. 131 F.2d at 503.

69. *Id.* at 503. *See* note 56 *supra* and accompanying text. A dissenting opinion, rejecting the majority's fears that prosecutions of insiguificant agents rather than their bosses would result from a literal reading of the statute, would have read the statute to "render liable all persons who take part in causing" the shipment. 131 F.2d at 503 (Swan, J., dissenting).

70. 320 U.S. at 284. The Court agreed with the appellate court's rejection of Dotterweich's argument concerning the inconsistency of the exoneration of the company with his individual conviction. *Id.* at 279. *See* note 67 *supra.* The Court rejected the appellate court's reliance on the "guaranty clause" for support for a narrow reading of individual liability under the Act. 320 U.S. at 280, 283-84. *See* note 68 *supra.*

71. The Court reasoned that if Dotterweich were not subject to penalties under the Act, it must be because individuals were immune from prosecution when the "person" violating the Act was a corporation. The Court found that such a reading of the statute would defeat the legislative desigu "to enlarge and stiffen the penal net" of defendants. 320 U.S. at 281-

regulatory measure to protect public health and welfare, and that by dispensing with the conventional requirement of awareness of some wrongdoing, the statute "puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[72] The Court concluded that there was sufficient evidence for the jury to decide that Dotterweich had sufficient responsibility for the shipment. The Court failed, however, to identify the evidence it thought decisive, nor did it offer any guidelines for identifying the individuals in a business organization who stand in such a "responsible relation" to the offense or who have the necessary "responsible share" in the commission of the offense to incur liability. Instead, the Court left that determination to the "good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."[73] Although the majority did not dispute the appellate court's finding that Dotterweich had no personal connection with the illegal shipments, it further supported its reinstatement of the conviction by citing the traditional criminal concept that all persons "responsible for" a misdemeanor, or who "aid and abet" in a misdemeanor, are guilty of the offense.[74]

A vigorous dissent pointed to the lack of any "personal guilt" or active participation by Dotterweich in the offensive shipment and concluded that the majority had imputed guilt to Dotterweich solely because of his position as president and general manager of the company. Finding no legislative intent to impose vicarious liability, the dissent maintained that policy arguments leading to the imposition of strict liability in matters of public health and welfare should not be used to eliminate the requirement that the legislature specify "with reasonable certainty" the individuals liable under the Act.[75]

Despite language in the majority opinion indicating that the prosecution should prove some degree of action or wrongful nonaction by the corporate executive,[76] many lower court decisions apply-

82. In view of the fact that noncorporate proprietors who could violate the Act were relatively small in number, the Court rejected the argument that Congress intended to create individual liability only when the corporation was merely the individual's "alter ego," as the appellate court had held. *Id.* at 282-83. *See* text accompanying note 69 *supra.*

72. 320 U.S. at 280-81.

73. *Id.* at 285.

74. *Id.* at 281, 284. *See* notes 28 *supra* and 76 *infra.*

75. 320 U.S. at 286-88. *Dotterweich* was a 5-4 decision, with Justice Murphy writing for the dissent. Some commentators agree with Justice Murphy's suggestion that the majority opinion confused strict liability and vicarious liability. *See* LAFAVE & SCOTT, *supra* note 5, § 32, at 226; Packer, *Mens Rea and the Supreme Court,* 1962 SUP. CT. REV. 107, 116-18.

76. The Court had relied partially on the theory of aiding and abetting: "To speak with technical accuracy, under § 301 [of the Act] a corporation may commit an offense and all persons who aid and abet its commission are equally guilty." 320 U.S. at 284. Aiding and

ing the *Dotterweich* standard of liability to senior officials for offenses committed by subordinates[77] have not required evidence of participation in the offensive transaction[78] or of the accused's presence at the time the proscribed activity took place.[79] For example, in *Carolene Products Co. v. United States*,[80] the Fourth Circuit affirmed the conviction of a corporation, its president, and its vice president for interstate shipment of adulterated milk despite the protestations of the individual defendants that they had no personal part in the eight specific illegal shipments alleged in the indictment. The court charged the defendants with "knowledge" of the shipments,[81] citing numerous cases holding directing heads of a corporation liable without evidence of personal supervision of the illegal corporate activity.[82] The language in cases such as *Carolene Products* seems to support the *Dotterweich* dissent's assertion that the Court had introduced a statutorily unauthorized species of vicarious liability holding the executive officers of a corporation liable for crimes committed by employees merely because of the officer's position within the corporation.[83] *Dotterweich* and its progeny, how-

abetting usually encompasses some type of wrongful conduct, such as direct participation or acquiescence. *See* notes 28-30 & 42 *supra* and accompanying text. In addition, the Court's use of the phrase "responsible share in the furtherance of the transaction" indicates some action or wrongful inaction by defendant. 320 U.S. at 284.

77. Most cases involve the prosecution of owners, presidents, and managers for strict liability offenses when suhordinate employees consummate the actual commission of the offense, such as the shipping of illegal drugs. *But see* United States v. Siler Drug Store Co., 376 F.2d 89 (6th Cir. 1967) (per curiam), in which the government prosecuted the company, its president, and a store clerk.

78. *See* United States v. Shapiro, 491 F.2d 335, 337 (6th Cir. 1974); United States v. Kaadt, 171 F.2d 600, 604 (7th Cir. 1948); Carolene Prods. Co. v. United States, 140 F.2d 61, 66, *aff'd on other grounds*, 323 U.S. 18 (1944).

79. United States v. Shapiro, 491 F.2d 335, 337 (6th Cir. 1974); Golden Grain Macaroni Co. v. United States, 209 F.2d 166, 168 (9th Cir. 1953).

80. 140 F.2d 61 (4th Cir.), *aff'd on other grounds*, 323 U.S. 18 (1944).

81. *Id.* at 66. In strict liability offenses, such as violations of the Food and Drug Act, awareness of wrongdoing is not required. *But see* United States v. Abbott Laboratories, 505 F.2d 565 (4th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975) (indicating that knowledge of an impurity in the drugs shipped is necessary). The only "knowledge" required under the Food and Drug Act is knowledge by defendant that his subordinates cause drugs to be introduced into interstate commerce in the regular course of business. *See* United States v. Parfait Powder Puff Co., 163 F.2d 1008, 1010 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948). The reliance of the court in *Carolene Products* on the defendant's "knowledge" resembles the use of constructive knowledge as a form of "participation" in state cases imposing individual liability. *See* note 30 *supra* and accompanying text.

82. 140 F.2d at 66. The court cited *Dotterweich*, *Detroit White Lead Works* (discussed at note 32 *supra*), *Gilbert* (discussed in text accompanying notes 38-42 *supra*), and *Burnam* (discussed in text accompanying note 35 *supra*). The trial court, though apparently not the appellate court, had relied on the "aiding and abetting" language in *Dotterweich*. *See* text accompanying note 74 *supra*.

83. *See* text accompanying note 75 *supra*. *See also* WORKING PAPERS, *supra* note 57, at 184 n.61.

ever, were based on statutes reflecting a congressional concern for the *results* of corporate activity, and not any particular acts of misconduct by employees leading to the violation. The liability of senior officials, therefore, is not classically "vicarious" because culpability does not derive from the commission of the offense by a particular employee; a result rather than an act is the basis of liability.[84]

Although the issue in *Dotterweich* was the proper statutory construction of "person" in the Food and Drug Act, courts generally recognize the *Dotterweich* standard for liability—a "responsible share in the furtherance of the transactions"—as controlling case law on the limits of individual liability for corporate offenses under other statutes, unless the statute expressly provides otherwise. In cases not applying the Food and Drug Act or in cases dealing with *mens rea* offenses, federal courts appear to require some affirmative act, direction, participation, authorization, or at least acquiescence in the offense before imposing individual liability for corporate crimes.[85] For example, in *Nye & Nissen v. United States*,[86] the Supreme Court relied on the aiding and abetting language of *Dotterweich*[87] to hold that conviction of the president of a company charged with knowingly filing false invoices for payment with the government required that defendant be shown to have associated himself with the venture or to have participated in the illegal scheme.[88] The circumstantial evidence approved by the Court to support aiding and abetting resembled the indicia of "responsible share" or "responsible relation" that federal courts developed in the area of public welfare offenses after *Dotterweich*.[89] This development suggests that courts assessing the individual liability of corporate officials might properly focus on the nature of the officials'

84. *See id.* at 186 n.69, 188. The concept of vicarious liability usually attributes the acts of an employee directly to his employer. *See* note 16 *supra*. *See generally* LAFAVE & SCOTT, *supra* note 5, § 32.

85. *See, e.g.*, United States v. Sherpix, Inc., 512 F.2d 1361, 1372 (D.C. Cir. 1975) (prosecution of the president of a corporation for violation of obscenity laws); United States v. North Am. Van Lines, Inc., 202 F. Supp. 639, 644 (D.D.C. 1962) (prosecution of corporate officer in an antitrust case). The Senate Judiciary Committee has asserted that active participation should be a prerequisite for individual liability for a non-strict liability offense under present federal case law. *See* SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., REPORT ON THE CRIMINAL JUSTICE REFORM ACT OF 1975, 74 (Comm. Print 1975) [hereinafter cited as COMMITTEE PRINT].

86. 336 U.S. 613 (1949).

87. *See* text accompanying note 74 *supra*.

88. 336 U.S. at 618-19.

89. Defendant was the manager of a family-owned business, and was in charge of the office where the fraudulent invoices were executed. *Id.* at 614; *see* text accompanying note 95 *infra*. The language of the Court resembles that of state cases dealing with the use of the corporate form to mask individual liability. *See* text accompanying notes 22-24 *supra*.

position and responsibilities rather than on their conduct. In *United States v. Wise,*[90] however, the Court indicated that the prosecution must establish something more than the relationship between the corporation and the individual defendant. The *Wise* Court cited *Dotterweich* as authority to construe "person[s]" subject to penalties under the Sherman Act to include "all officers who have a responsible share in the proscribed transaction."[91] In clarifying "responsible share," the Court apparently restricted liability to those officers who actively promote the illegal scheme and who participate in effecting the illegal transactions by authorizing, ordering, or helping to perpetuate the crime.[92]

The majority of cases in the federal circuit courts of appeals dealing with *Dotterweich* liability appear to apply a standard of culpability that falls between the *Carolene Products* emphasis on liability of corporate managers for illegal results and the *Wise* emphasis on actual participation in the illegal conduct. An excellent exposition of the proof required to establish a "reponsible share" in the corporation's crime appears in *United States v. Klehman,*[93] in which the president of a chemicals corporation was charged with violation of a statute penalizing "any person" who ships or causes to be shipped in interstate commerce any misbranded or banned hazardous substances.[94] The court pointed to evidence showing that, during the period the shipments were made, defendant exercised close control of all details of the corporate activity: he was president and owner of all stock, and was one of only two directors the corporation had ever had; the corporation had only a handful of employees at the time of the shipments; the defendant hired all employees; he had actual control of the company and gave all operating instructions; he formulated company policy and personally supervised the advertising used to promote a water repellant that did not carry the required precautionary instructions and warning. The Seventh Circuit concluded that the evidence showing that he "formulates, directs and controls the acts and practices of the corporation" was sufficient to support a conviction.[95]

90. 370 U.S. 405 (1962).

91. *Id.* at 409; *see* note 59 *supra.*

92. 370 U.S. at 416. *See also* WORKING PAPERS, *supra* note 57, at 179-80.

93. 397 F.2d 406 (7th Cir. 1968).

94. Federal Hazardous Substances Act §§ 4(a), 5(a), 15 U.S.C. §§ 1263(a), 1264(a) (1976). The corporation was also charged and convicted.

95. 397 F.2d at 408. The conviction of the president, nevertheless, was invalid because he had gained immunity from prosecution by testifying before the Federal Trade Commission under a subpoena, rendering his testimony unusable against him. *Id.* at 409. Of course, the indicia of control and direction of the company's affairs will vary according to the corpora-

Indicia of actual control and direction of corporate activity, therefore, constitute the basis of individual culpability of corporate officials under the *Dotterweich* standard.[96] The authority of executive officials to devise measures necessary to insure corporate compliance with regulatory statutes and their failure to implement adequate safeguards are further grounds for establishing a "responsible share" in corporate violations of the law.[97]

B. Dotterweich *Liability Revisited* — United States v. Park

The Supreme Court most recently reviewed *Dotterweich* liability in *United States v. Park,*[98] another case arising from the Food and Drug Act. The defendant corporation, unlike the small enterprise in *Dotterweich,*[99] was a national retail food chain with 36,000 employees, 874 retail outlets, and sixteen warehouses. The charges against the corporation and codefendant Park, the president and chief executive officer of the corporation, stemmed from inspections at the corporation's Baltimore warehouse, which was found to be accessible to rodents. Evidence produced at trial included testimony that, according to the bylaws of the corporation, the president had "general and active supervision of the affairs, business, officers and employees of the company,"[100] but that Park had delegated normal operating duties, including the maintenance of sanitation. The testimony also established that both Park and the corporation's division vice president in Baltimore had received letters from the

tion's size and complexity. For an example of *Dotterweich* liability applied in a larger corporate structure, see United States v. Park, 421 U.S. 658 (1975), discussed in text accompanying notes 98-112 *infra.*

96. *See, e.g.,* Hamilton v. United States, 219 F.2d 364 (10th Cir. 1955) (mere ownership of 51% of a drugstore, without proof of control of its management, is insufficient to incur liability for the company's violation of the law). *See also* United States v. Kaadt, 171 F.2d 600 (7th Cir. 1948) (prosecution under the Food and Drug Act, in which the court approved a jury instruction charging that the determination of a sufficient "responsible share" must take into consideration the work performed by defendant, his duties and responsibilities, and the extent to which he controlled and directed the conduct of the business).

97. *See, e.g.,* United States v. Shapiro, 491 F.2d 335, 337 (6th Cir. 1974) (per curiam).

98. 421 U.S. 658 (1975). For a thorough discussion of the facts adduced at trial in *Park,* see Note, *Decisionmaking Models and the Control of Corporate Crime,* 85 YALE L.J. 1091, 1116-20 (1976).

99. The Supreme Court gave little information about the corporate setting in *Dotterweich.* A later case in the Fourth Circuit reviewed the *Dotterweich* trial transcript and reported that the company prosecuted in that case was small, and that all the employees worked on one floor of the building. Dotterweich was the direct supervisor of all employees. He made every executive decision and had direct supervisory responsibility over the physical acts of all employees. United States v. Park, 499 F.2d 839 (4th Cir. 1974), *rev'd,* 421 U.S. 658 (1975).

100. 421 U.S. at 663 n.7. Park was assigned to the corporate headquarters in Philadelphia. *Id.* at 660.

Food and Drug Administration concerning past infractions. Although Park contended that he had properly assigned certain functions to dependable subordinates, he nevertheless conceded that he was responsible for the entire operation of the corporation. Relying on *Dotterweich,* the trial judge rejected Park's motion for a directed acquittal, which asserted that no evidence showed that he was personally connected with the violations. The judge's charge instructed the jury that they must find beyond a reasonable doubt that Park had a "responsible relation to the situation, even though he may not have participated personally."[101] The jury returned a guilty verdict, but the Fourth Circuit reversed and remanded, holding that the jury instruction did not mention the requirement that some type of "wrongful action" in the form of an act of commission or omission is an essential element of every crime.[102] According to the appellate court, the defendant's position in the company was not a sufficient basis for imposing liability: "It is the defendant's relation to the criminal acts, not merely his relation to the corporation, which the jury must consider."[103]

Although the Supreme Court affirmed the conviction and rejected the appellate court's requirement that the jury be instructed that the government must establish "wrongful action,"[104] the Court was careful to point out that liability did not rest solely on the defendant's position in the corporation. The Court characterized *Dotterweich* liability as the criminal accountability of persons who have failed to exercise the authority and supervisory responsibility reposed in them by the business organization and have thus committed a violation.[105] Apparently not relying on Park's prior notice that the Baltimore warehouse was substandard, the Court noted that the Food and Drug Act "imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur."[106] In this case, the Court found the prosecu-

101. *Id.* at 665 n.9.

102. 499 F.2d at 841-42.

103. *Id.* at 841. The court relied on the aiding and abetting language of *Dotterweich,* concluding that there must be proof that Park participated either "directly or constructively" in the criminal acts. *Id.*

104. 421 U.S. at 673.

105. *Id.* at 671.

106. *Id.* at 672. In its exposition of the facts, the Court revealed that the Food and Drug Administration had informed Park by letter of insanitary conditions at the corporation's Philadelphia and Baltimore warehouses. *Id.* at 661-62, 664-65. The Court, however, did not seem to rely on Park's actual notice of violations of the law within the corporation. Instead, the Court articulated the basis of liability as the failure to seek out and remedy violations and to implement measures to insure that violations did not occur. *Id.* at 672. The prosecutor

tion's evidence and the judge's instructions sufficient to allow the jury properly to determine that the defendant's culpability rested not only on his position in the corporate hierarchy, but also on his responsibility to prevent the conditions giving rise to the violations.[107] The Court noted, however, that the duty imposed by Congress on responsible corporate agents to seek out and remedy potential and existing violations does not impose absolute liability on corporate officials for all violations within the corporation. Because the defendant is being held accountable for "causing" a violation of the law, he must be allowed to raise the defense that he was powerless to correct or to prevent the violation. Absent this rebuttal evidence, however, the failure of the defendant to fulfill a duty "imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link."[108]

Although the Court expressly rejected the requirement of "wrongful action" for criminal accountability, *Park's* explanation of the basis of culpability of corporate officials not directly involved in the corporate offense resembles the approach taken by previous state and federal decisions.[109] This approach perceives a legal duty placed upon corporate managers to prevent corporate violations and a resulting criminal liability for failure to do so. *Park* appears, however, to narrow *Dotterweich* in at least two respects. First, *Park* emphasizes that liability attaches because of the defendant's relationship to the violation itself, and not merely because of his relationship to the corporation.[110] This required nexus seems to limit the expansiveness of cases such as *Carolene Products* and to necessitate some showing of responsibility for that segment of the corporate

at trial had emphasized that Park was responsible for changing the sanitation systems which he knew had been maintained insufficiently by his delegates. *Id.* at 675 n.16. The Court mentioned Park's notice of substandard conditions in discussing his defense of delegation of authority to the Baltimore personnel. *See* note 252 *infra.* Of course, because of its strict liability nature, the Food and Drug Act does not require that the defendant have notice or knowledge of unsanitary conditions. It is hard to believe, however, that Park's failure to correct his corporation's procedures after notice of continuing violations was not an important factor in the prosecutorial decision to proceed against Park and in the Court's subsequent opinion. *See* Note, *supra* note 98, at 1116-17.

107. 421 U.S. at 675.

108. *Id.* at 674.

109. *See* text accompanying notes 33-36, 97 *supra.*

110. In *Dotterweich* the Court explained that liability accompanied a "responsible share" in the business as well as a "responsible share" in the illegal transaction itself, or a "responsible relation" to the public danger that the statute seeks to control. 320 U.S. at 281, 284. Although *Dotterweich* itself is ambiguous about the need to connect the defendant with the violation, many cases have concentrated solely on the relationship of the defendant to the corporation, with little inquiry into the defendant's responsibility for the part of the enterprise in which the violation occurred. *See* text accompanying notes 80-83 *supra.*

activity in which the violation of the law occurs.[111] Second, *Park* suggests that *Dotterweich* "responsible share" liability may have been restricted to strict liability statutes, such as the Food and Drug Act, which impose a "duty" to protect public health and welfare.[112] Thus, without further statutory guidance, the continued vitality of the *Dotterweich* approach to identify the proper individual defendants responsible for corporate crime remains unclear.

IV. SECTION 403 OF THE PROPOSED FEDERAL CRIMINAL CODE

Although the primary aim of the Proposed Code is to revise and consolidate all federal felony provisions into a single title of the United States Code,[113] the Senate Judiciary Committee admits that some criminal law reform has been undertaken in addition to the recodification of existing statutes.[114] The need for reform in the area of individual liability for corporate criminality became evident during the deliberations of the National Commission on Reform of Federal Criminal Laws,[115] which grappled with the difficulties of defining the culpability of individuals for organizational misconduct while preparing the early draft of the Proposed Code. The Commission stated the objectives of a general statute describing individual responsibility as: (1) deterring individual misconduct, and (2) coercing affirmative action by corporate agents to prevent harmful corporate activity.[116] Furtherance of these objectives requires a statute addressed not only to the actors who engage in the conduct but also to the officials who have control over or influence upon the actors' conduct. The National Commission faced the challenge of

111. The *Park* Court was careful to point out that, as general manager of the corporation, the defendant was specifically responsible for the sanitation of the warehouses. *See* 421 U.S. at 663. *See also* text accompanying notes 250-52 *infra* for a discussion of the "delegation" defense.

In United States v. Starr, 535 F.2d 512 (9th Cir. 1976), the appellate court approved the trial judge's ruling that criminal responsibility of a corporate official requires a consideration of the defendant's relationship to the violation as well as his relationship to the corporation. *Id.* at 514.

112. This is the opinion of the Senate Judiciary Committee. *See* COMMITTEE PRINT, *supra* note 85, at 74 n.88.

113. Title I of the Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. (Proposed Code) will replace the present Title 18 and will include all felonies chargeable under federal law. Offenses described elsewhere and not amended by Title II of S. 1437 or other amending acts may be retained as misdemeanors.

114. COMMITTEE PRINT, *supra* note 85, at 7. The Proposed Code has been criticized for attempting changes in suhstantive law. *See Subcommittee Hearings,* pt. III, subpt. B, at 1649.

115. The so-called Brown Commission prepared the original draft of the Proposed Code. *See* note 1 *supra.*

116. WORKING PAPERS, *supra* note 57, at 181-82.

recommending provisions that locate and properly decide the level of corporate management at which high-ranking officials should be liable.[117] The Commission discussed the need to impose liability on officials for neglect of their general duties of supervision and management, although such liability was a departure from the more traditional concepts of culpability as an actor or accomplice. One possible avenue to reach managers and supervisors was to impose vicarious liability on management for the misconduct of subordinate employees.[118] A second approach would have "pin[ned] their [criminal] responsibility upon their own fault" by providing liability for offenses that management could have prevented had they properly managed and supervised.[119] A third suggestion was to impose a duty on all corporate officials to prevent all types of criminal conduct occurring on behalf of the corporation.[120] The present sections of the Proposed Code dealing with individual liability, which are substantially similar to their predecessors in the Commission's draft,[121] indicate a rejection of vicarious liability in favor of criminal responsibility based on a failure of managers and supervisors to adequately perform their corporate duties.

During the legislative hearings on the Proposed Code, representatives of both the bar and business questioned the wisdom of a general statute on individual liability. Some witnesses believed that case law should determine corporate and individual liability, or that specific statutory provisions should control areas, such as antitrust, in which Congress has seen a special need to identify culpable individuals.[122] Because the general provisions for liability will apply to such diverse areas as tax, labor relations, securities, civil and consumer rights, and environmental protection, opponents preferred a statute-by-statute approach that would allow Congress to define corporate and individual liability "in a manner consistent with the nature and severity of the offense and the goals to be achieved" by penal sanctions.[123] Proponents of a general statute argued that the

117. *Id.* at 182-83.

118. *Id.* at 186; *see* note 16 *supra.*

119. *Id.* The National Commission stated that no such liability existed under present federal law. Such liability, however, has precedents in both state and federal cases. *See* text accompanying notes 31-36, 106 *supra.*

120. WORKING PAPERS, *supra* note 57, at 187.

121. *Compare* Proposed Code, *supra* note 1, § 403 *with* FINAL REPORT, *supra* note 1, § 403.

122. *See Subcommittee Hearings,* pt. XI, at 7677; *Subcommittee Hearings,* pt. III, subpt. B, at 1649 (statement of Charles S. Maddock). *See also* text accompanying notes 57-59 *supra.*

123. *See Subcommittee Hearings,* pt. III, subpt. B, at 1780-81 (statement of the National Association of Manufacturers).

extent and severity of corporate crime dispensed with the need for any further congressional determination that the criminal law dealing with individual liability needed to be strengthened.[124] The prevailing view thought it desirable to give some statutory structure to the entire area to guide the courts and the individuals potentially subject to liability.[125]

Section 403, the product of the deliberations of the draftsmen of the Proposed Code, states three general principles of individual liability for crime in the corporate setting.[126] Section 403 applies when a corporation commits an offense[127] defined elsewhere in the Proposed Code or in any other statute[128] and the statute or Code provision defining the offense does not specify the individuals

124. *See Subcommittee Hearings*, pt. XI, at 7864-66, 7899-939 (statement of Ralph Nader).

125. *Subcommittee Hearings*, pt. XI, at 7677 (statement of Senator Roman L. Hruska).

126. Section 403 is part of Chapter Four of the Proposed Code, entitled "Complicity," which is intended to "establish the general principles whereby an individual or organization can be held criminally liable for the conduct of another." COMMITTEE PRINT, *supra* note 85, at 63. Section 402 deals with the criminal liability of the corporation and is discussed at note 6 *supra*. Section 404 details general provisions for Cbapter Four and is discussed at note 28 *supra* and text accompanying notes 224-25 *infra*. Section 401 covers liability as an accomplice or conspirator and is discussed at text accompanying notes 227-30 *infra*. Many state and federal cases suggest accomplice liability as the basis for bolding individuals liable for corporate criminal conduct. *See* text accompanying notes 28 & 74 *supra*. With the more specific provisions of § 403 available, bowever, it would be inappropriate for federal courts in the future to resort to § 401 to explain the liability of individuals within the corporate hierarcby. As the Senate Judiciary Committee pointed out, each provision of Chapter Four has been drafted with particular precision to deal with the "special and difficult problems of criminal responsibility in an organizational setting." COMMITTEE PRINT, *supra* note 85, at 63.

127. Because Chapter Four generally defines liability of an individual for tbe conduct of another, see note 126 *supra*, § 403 contemplates the existence of an offense by the corporation as provided by the principles of § 402. *See* note 6 *supra*. Except for prosecutions under § 403(a), see note 132 *infra*, the prosecution must prove, beyond a reasonable doubt, the existence of the underlying corporate offense for which it seeks to hold the individual defendant liable. Section 404(b)(2), however, specifically provides that the corporation need not be convicted or even charged. In addition, § 404(b)(1) provides tbat the individual defendant need not "belong to the category of persons who by definition are the only persons capable of committing the offense directly." Thus, if a statute specifically affixed liability only on the corporation, the prosecution arguably could rely on § 404(b)(1) to implicate individual defendants as well. *See* discussion of State v. Fraser, 105 Or. 589, 209 P. 467 (1922), at note 28 *supra*. Use of this provision, however, would be inappropriate because § 404(b)(1) is intended to complement § 401, which deals with accomplice liability. *See* COMMITTEE PRINT, *supra* note 85, at 68. As note 126 *supra* pointed out, § 401 should not apply to the situations contemplated by this Note, and a statute that prohibits conduct by a "corporation" rather than a "person" (which would include a corporation) suggests a congressional decision to punish the corporation instead of individual agents. *Compare* United States v. Dotterweich, 320 U.S. 277 (1943) ("person" includes corporation and individuals) *with* Sherman v. United States, 282 U.S. 25 (1930) ("common carrier" does not include individuals).

128. Section 103 of the Proposed Code makes the provisions of § 403 applicable to prosecutions under "any Act of Congress," except as otherwise provided. Thus § 403 may be utilized in misdemeanor prosecutions outside Title 18. *See* notes 113 *supra* and 129 *infra*.

within the organization who should bear the criminal responsibility.[129]

A. *Section 403(a)—Conduct on Behalf of an Organization*

Section 403(a) of the Proposed Code provides:

> A person is criminally liable for an offense based upon conduct that he engages in or causes in the name of an organization or on behalf of an organization to the same extent as if he engaged in or caused the conduct in his own name or on his own behalf.

Section 403(a) codifies case law established in both state[130] and federal[131] courts in rejecting the defense of acting in a "representative capacity." The Senate Judiciary Committee stated that section 403(a) "merely set[s] forth the basic rule that a person

129. Section 103 of the Proposed Code makes the principles of § 403 applicable to all federal prosecutions "[e]xcept as otherwise provided." Apparently, a statute that independently identifies the culpable individuals supersedes § 403. *See* notes 57-59 *supra* and accompanying text. *See also* § 403(b) of the Proposed Code, *supra* note 1, which contains a similar excepting proviso.

In United States v. Wise, 370 U.S. 405 (1962), discussed in text accompanying notes 90-92 *supra*, the Court held that a provision of the antitrust laws specifying that officers of a corporation participating in or authorizing violations of the law were culpable in addition to the corporation did not restrict the prosecution of any person responsible under a *Dotterweich* analysis. 370 U.S. at 412-15. In *Wise* the government charged the individual defendants under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976), which holds liable "every person" engaging in a restraint of trade. In 1955 Congress had added § 14 of the Clayton Act, 15 U.S.C. § 24 (1976), which provides that when the "person" referred to in § 1 is a corporation, the violation "shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation." The defendants argued that § 14 of the Clayton Act applies to individuals acting in a "representative capacity," but that § 1 of the Sherman Act applies only to officers acting on their own behalf. The Court, studying the legislative history of § 14, concluded that Congress had intended no such distinction and held that § 14 was merely a "reaffirmation" of the judicial construction of § 1 that allowed prosecution of all participating officers. 370 U.S. at 412-15. *Wise*, however, should not be read to indicate that the general principles of § 403 are available despite provisions in a particular statutory scheme identifying the properly indictable individuals. Because § 403 will hereafter codify general principles of individual accountability, Congress need not address the issue unless it desires a broader or narrower scope of prosecution. In any event, courts should heed the comments of the Senate Judiciary Committee accompanying § 103 of the Proposed Code: "The title is not. . . . co-extensive with the need for congressional enactment of criminal laws, and the Committee recoguizes that application of the provisions in this title to certain places or in certain contexts would be inappropriate as compared with existing sets of laws governing such areas or contexts." COMMITTEE PRINT, *supra* note 85, at 21. Although the Committee was specifically referring to areas of separate legislation dealing with the District of Columbia, the Canal Zone, and the Uniform Code of Military Justice, the Committee recognizes the need to legislate in more detail in certain areas, and thus would allay the criticism of opponents of the provision that it handcuffs more specific congressional treatment of business crimes. *See* text accompanying notes 122-23 *supra*.

130. *See* text accompanying notes 21-27 *supra*.

131. *See* text accompanying note 56 *supra*.

may not escape liability because his actions were not for himself but for an organization."[132] The most obvious application of section 403(a) is to cases in which the easily identifiable criminal actor is the corporate official against whom prosecution is sought.[133] Section 403(a) also will apply to an individual engaging in illegal conduct while attempting to utilize a corporate form to mask his personal liability,[134] or in situations when the defendant may not be the clearly identifiable criminal actor, but he nevertheless "caused" the conduct.[135] An example of the latter situation appears in a recent state case employing a penal provision similar to section 403(a).[136] In *People v. Dean*[137] a corporation and its principal officer[138] were convicted of issuing a corporate check backed by insufficient funds. Because another corporate agent had signed the check, the defendant claimed that he could not be found guilty because he was neither the drawer nor the representative drawer. The court held that, although the defendant had not personally signed and issued the check, he had "caused" the corporation to issue the check. The court noted that the defendant was the only active principal in the business and controlled the course of corporate conduct leading to the overdraft.[139] As *People v. Dean* indicates, section 403(a) codifies

132. COMMITTEE PRINT, *supra* note 85, at 75. Because the purpose of § 403(a) is to remove a defense rather than to establish liability for the offense of the corporation, the prosecution may not be required to establish the existence of a corporate crime for which it seeks to hold the individual liable. The defendant's conduct may directly contravene the statute. *See* note 127 *supra.*

133. *See, e.g.,* United States v. Bach, 151 F.2d 177 (7th Cir. 1945), discussed at note 55 *supra.*

134. *See* the "alter ego" cases in text accompanying notes 22-24, 56 *supra.*

135. The problem of "causation" in § 403(a) is discussed in text accompanying notes 227-30 *infra.* The dissent in *Park* advocated a concept of liability based on negligence. 421 U.S. at 678-79 (Stewart, J., dissenting).

Because of the strict liability nature of the Food and Drug Act, the prosecution in *Park* did not have to establish that the individual's acts or omissions were either intentional or negligent. *Dotterweich* liability arises, however, only when a corporate duty to act is imposed by law. *See* text accompanying note 106 *supra* & notes 145-55 *infra.* Section 403(b), and not § 403(a), contemplates cases in which there is a corporate duty to act and should apply to future *Dotterweich*-type prosecutions. Furthermore, the use in § 403(a) of the word "caused" seems to require a "wrongful action," as the appellate court had suggested in *Park. See* text accompanying notes 227-30 *infra.* In the absence of a duty to act, a failure to act, whether the result of negligence or intention, probably will not produce liability under § 403(a). *See* text accompanying notes 234-35 *infra.*

136. N.Y. PENAL LAW (McKinney) § 20.25 (1975) provides: "A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf."

137. 48 App. Div. 2d 223, 368 N.Y.S.2d 349 (1975).

138. The individual defendant was one of only three shareholders and was the only one who actually participated in the business. *Id.* at 224, 368 N.Y.S.2d at 350.

139. *Id.* at 225-26, 368 N.Y.S.2d at 351.

the principle that a corporate official who directs employee conduct that constitutes a criminal act is liable as an actor himself.

Because the Court in *Park,* relying on *Dotterweich,* emphasized that the individual defendant was liable for "causing" the corporate violation, a future *Dotterweich*-type prosecution could be brought under section 403(a) on the theory that senior officials "caused" a violation of the law by failing to prevent the corporation from committing it.[140] The goal of section 403, however, is to codify a more precise identification of culpable individuals at various levels of the corporate hierarchy than case law presently affords.[141] Sections 403(b) and 403(c) provide the necessary guidance for proper identification. The primary purpose of section 403(a) appears to be merely the codification of the rule that individuals are responsible for their conduct even when acting in a representative capacity. Section 403(a) offers little guidance in deciding how high in the corporate hierarchy criminal responsibility should be imposed or how to identify responsible senior officials.[142]

B. Section 403(b)—Failure To Perform a Duty of an Organization

Section 403(b) of the Proposed Code provides:

> Except as otherwise expressly provided, whenever a duty to act is imposed upon an organization by a statute, or by a regulation, rule, or order issued pursuant thereto, an agent of the organization having significant responsibility for the subject matter to which the duty relates is criminally liable for an offense based upon an omission to perform the duty, if he has the state of mind required for the commission of the offense, to the same extent as if the duty were imposed upon him directly.

The Senate Judiciary Committee believes that section 403(b),

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140. The Fourth Circuit in *Park* had held that, although the Food and Drug Act requires no culpable state of mind, some act or omission is an essential element of every crime. The court stated that, absent proof of Park's direct participation in the illegal conduct, the jury on remand might find that Park's gross negligence and inattention in discharging his corporate duties constituted "wrongful action" which "caused" the contamination of the food. 499 F.2d at 841-42. *See also* text accompanying note 102 *supra.* The Supreme Court rejected the Fourth Circuit's requirement of "wrongful action" or a minimal showing of negligence, holding that the failure of a responsible official to fulfill the corporate duty to prevent or correct violations creates liability. 421 U.S. at 673-74. *See also* text accompanying notes 104-05 *supra.*

141. *See* text accompanying note 117 *supra.*

142. The Proposed Code is vague in its use of the term "caused" in § 403(a). *See* text accompanying notes 227-30 *infra.* People v. Dean, 48 App. Div. 2d 223, 362 N.Y.S.2d 349 (1975), suggests that § 403(a) would contemplate a direct instead of a remote causation; that is, a participatory act by the defendant in a specific violation rather than culpability based on his "causing" the various corporate functions. If the draftsmen of the Proposed Code had included only subsection (a), the courts would have only *Dotterweich* and its progeny as guidance for identifying the corporate managers who can fairly be said to "cause" corporate misconduct. The inclusion of subsections (b) and (c) argues against stretching subsection (a) beyond a mere restatement of the law concerning the defense of "representative capacity."

in combination with section 403(a), "essentially covers and continues the teachings of *Dotterweich*."[143] The language of the subsection resembles the *Park* Court's articulation of *Dotterweich* liability,[144] which emphasized that the culpability of responsible corporate managers rests upon their violation of a statutory duty to discover and remedy violations of the law within the corporation. Section 403(b) thus serves to identify those corporate officials who are not the immediate criminal actors but who should nonetheless bear criminal responsibility for certain corporate violations contemplated by the subsection. The precise application of section 403(b) is unclear, however, as will be demonstrated by discussion of the two key elements of the subsection: "duty to act" and "significant responsibility."

(1) Duty To Act

Section 403(b) applies only when "a duty to act is imposed upon an organization by a statute, or by a regulation, rule, or order issued pursuant thereto." Section 403(b) thus constitutes an analogue to section 402(b) of the Proposed Code, which imposes criminal liability on a corporation when its agents fail to discharge "a specific duty of conduct imposed on the organization by law."[145] The effect of section 403(b) is to impose this corporate duty directly on a responsible corporate agent, a step which avoids any conceptual problems presented by holding an individual liable for the breach of a duty imposed only upon the corporation.[146] A statute or regulation may prescribe explicitly the duty of the corporation (and, by virtue of section 403(b), of the individual agent) to act, such as a duty to file a report or income tax return.[147] *Dotterweich* and its

143. COMMITTEE PRINT, *supra* note 85, at 75.

144. *See* text accompanying notes 105-07 *supra*. *Park* was decided after the basic formulation of § 403(b) in S. 1 (1975), *supra* note 1, but the Senate Judiciary Committee considered the impact of the case during its deliberations on § 403(b). *See* COMMITTEE PRINT, *supra* note 85, at 74 nn.85 & 88, 75 n.89.

145. *See* note 6 *supra*. Under § 111 of the Proposed Code, "conduct" includes both acts and omissions. Under § 402(b), therefore, the duty of the corporation could include a duty to refrain from acting. *See* COMMITTEE PRINT, *supra* note 85, at 73 n.77. Section 403(b), however, refers only to a "duty to act." Arguably, a corporate duty to refrain from acting will not devolve upon an individual under § 403(b), although nothing in the legislative history of the two subsections suggests a difference in the intended scope of the duty. Perhaps it is merely a problem of characterization. For instance, if the Food and Drug Act imposes a duty on a corporation to refrain from introducing adulterated foods into interstate commerce, the corporation also has a duty to take the necessary action to prevent violations of the Act. The teaching of *Park* is that corporations and individuals have a duty to act. *See also* note 48 *supra*.

146. *See* note 48 *supra*.

147. *See, e.g.*, People v. Strong, 363 Ill. 602, 2 N.E.2d 942 (1936) (duty to report collec-

progeny, however, clearly indicate that a statute can impose duties without expressly stating so.[148] For example, in *United States v. Parfait Powder Puff Co.*[149] a prosecution under the Food and Drug Act,[150] the court observed that the corporation "owes a certain duty to the public."[151] *Park* also relied on the Food and Drug Act's imposition of a "positive duty to seek out and remedy violations . . . and . . . a duty to implement measures that will insure that violations will not occur."[152] However, the Food and Drug Act makes no mention of any such specific duties.

The Senate Judiciary Committee noted that the duty to act usually is associated with a statute imposing strict liability.[153] This conclusion reflects the current notion that strict liability regulatory offenses impose upon the corporation and its officers the duty to insure the quality of corporate products and activities and to refrain from conduct that would endanger public health, safety, or welfare.[154]

At least in the realm of statutes regulating activities posing imminent danger to the public welfare, such as food and drug laws, the prosecutor should utilize section 403(b) to identify culpable individuals in the corporate hierarchy, even though the statute violated does not specifically refer to a "duty" to act. Courts generally will have to examine the purposes of the statutory scheme on which

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tion of state fuel tax). The Model Penal Code, which contains provisions similar to §§ 402(b) and 403(b), would cover violations of specific duties of affirmative action, and not offenses such as negligent homicide, when the duty violated is one that the law imposes generally. *See* MODEL PENAL CODE § 2.07, Comment 1 (Proposed Official Draft 1962). S. 1400, *supra* note 1, contained an additional provision dealing with violations of a legal duty and providing that a corporation was guilty of an offense if its agent failed to perform a "nondelegable duty of the organization." S. 1400, 93d Cong., 1st Sess. § 402(a)(1)(D) (1973). This provision was apparently an attempt to codify rulings to the effect that the failure of an employee to carry out a nondelegable duty will create criminal liability on the part of the corporation. *See, e.g.*, United States v. Illinois Cent. R.R., 303 U.S. 239 (1938) (yardmaster's failure to insure that cattle in transport were properly cared for, as required by statute, constitutes a corporate failure to comply with the statute because it is a duty owed by the corporation to the public, and neglect of employee is no defense). *See also* United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814 (D. Md. 1957); 68 NW. L. REV. 870, 878-81 (1973). The present Proposed Code does not contain this provision. It is doubtful that the term "nondelegable" adds anything to the duty to act.

148. The legislative history clearly demonstrates that § 403(b) has adopted the implicit duties established by such cases. The Senate Judiciary Committee's discussion of § 403(b) expressly approved *Dotterweich*. *See* COMMITTEE PRINT, *supra* note 85, at 75.

149. 163 F.2d 1008 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

150. Only the corporation was prosecuted. *Id.* at 1009.

151. *Id.* at 1010.

152. 421 U.S. at 672.

153. COMMITTEE PRINT, *supra* note 85, at 73 n.76.

154. *See* LAFAVE & SCOTT, *supra* note 5, § 33, at 233; WORKING PAPERS, *supra* note 57, at 188; Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958).

the prosecution is based, as did the Court in *Dotterweich* and *Park*, to determine if a duty is created requiring the highest standard of corporate and individual diligence and care.[155]

Agencies regulating corporate activities may insure the availability of section 403(b) for future prosecutions by issuing regulations explicitly describing the circumstances in which corporations have a duty to act.[156] Without further guidance by either statute or regulation as to the existence of a duty to act, however, courts will be unwilling to allow prosecutions under section 403(b),[157] and prosecutors will have to resort to section 403(a), which offers little guidance in identifying proper defendants,[158] or to section 403(c), which requires the prosecution to marshal evidence of a greater degree of misconduct.[159]

Closely associated with the existence of a duty to act is the possible existence of a constitutional requirement that individuals convicted of failure to insure fulfillment of a corporate duty be aware of the existence of that duty.[160] In *Lambert v. California*,[161] the Supreme Court held that a conviction under a municipal ordinance requiring convicted felons to register violates due process when the defendant had no knowledge of the duty to register and when the prosecution made no showing of the probability of such knowledge. Carefully limiting its ruling to laws penalizing a failure to act as opposed to laws penalizing the commission of acts, the Court suggested that a different result might follow if the failure to act occurs "under circumstances that should alert the doer to the consequences of his deed,"[162] or if circumstances might move an individual to inquire as to his duty to act.[163]

155. 320 U.S. at 285. *See also* E.K. Hardison Seed Co. v. Jones, 149 F.2d 252 (6th Cir. 1945). Determination of a duty to act to prevent violations because of the dangerousness of noncompliance with regulatory standards would be consistent with common law cases imposing a duty to safeguard the public upon individuals creating a peril. *See generally* LAFAVE & SCOTT, *supra* note 5, § 26, at 186.

156. Section 403(b) applies to duties imposed by regulation as well as by statute. The provision has been criticized because it fails to specify who might promulgate the rules and regulations upon which liability may rest. *See Subcommittee Hearings*, pt. III, subpt. B, at 1635 (statement of Charles S. Maddock).

157. In cases dealing with criminal liability for omissions, most courts hold that the existence of a legal duty to act is a question of law. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367, 369 (1965).

158. *See* text accompanying note 142 *supra*.

159. *See* text accompanying notes 211-15 *infra*.

160. Although § 303(d)(1)(A) of the Proposed Code specifically provides that proof of knowledge of the fact that particular conduct is required by law is not necessary to sustain a conviction, the Code, of course, must defer to constitutional requirements.

161. 355 U.S. 225 (1957).

162. *Id.* at 228.

163. *Id.* at 229.

Although section 403(b) punishes a failure of the defendant to insure that a corporate duty is performed—a failure to act under *Lambert*,—businesspersons will normally be operating under circumstances requiring them to suspect that regulatory statutes and regulations exist, especially in industries engaged in activities that concern or endanger public welfare.[164] In *United States v. International Minerals & Chemical Corp.*,[165] a chemical company was convicted for violating a regulation requiring that shipping papers sufficiently describe hazardous materials. The Court rejected a defense based on ignorance of the requirement, noting that the "probability of regulation" in the corporation's industry was great enough to presume awareness of the regulation.[166] Although awareness of regulations imposing a duty to act may or may not be required by the Constitution, the issuance of widely publicized regulations by regulatory agencies would serve the purposes of establishing the existence of duties to act and insuring maximum compliance through the awareness of all corporate officials affected.[167]

(2) Significant Responsibility

When a failure by the corporation to perform a duty to act imposed by law has been established, section 403(b) holds liable "an agent of the organization having significant responsibility for the subject matter to which the duty relates." This language has its roots in the Model Penal Code, which holds an agent having "primary responsibility" for the discharge of the duty liable for a reckless omission to perform that duty.[168] Early versions of the Proposed Code[169] used the phrase "primary responsibility," which was thought to narrow current law.[170] However, S. 1[171] and S. 1437[172]

164. Such industries are those upon which §§ 402(b) and 403(b) impose a duty to act. *See* note 155 *supra* and accompanying text.

165. 402 U.S. 558 (1971). Justice Douglas authored both *Lambert* and *International Minerals*.

166. *Id.* at 563-64. The statute's requirement of a "knowing" violation of the regulations did not affect the outcome of the case. The Court held that "knowingly" refers only to the requirement that the defendant knowingly acted; *i.e.*, that he knew what he was shipping. *Id.*

167. Many regulatory statutes require notice and comment rulemaking under § 4 of tbe Administrative Procedure Act, 5 U.S.C. § 553 (1976). *See, e.g.*, Food and Drug Act § 701, 21 U.S.C. § 371(e) (1976); National Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1975), *cert. denied sub nom.* National Nutritional Foods Ass'n v. Mathews, 423 U.S. 827 (1975).

168. MODEL PENAL CODE, *supra* note 5, § 2.07(6)(b).

169. FINAL REPORT, *supra* note 1, § 403(2); Criminal Justice Codification, Revision, and Reform Act of 1974, § 403(b), *reprinted in* SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REPORT ON THE CRIMINAL JUSTICE CODIFICATION, REVISION, AND REFORM ACT OF 1974, at 37 (Comm. Print 1974) [hereinafter cited as JUD. COMM. 1974 PRINT].

170. 2 JUD. COMM. 1974 PRINT, *supra* note 169, at 71.

171. S. 1 (1975), *supra* note 1, § 403(b).

172. Proposed Code, *supra* note 1, § 403(b).

changed the terminology to "significant responsibility," perhaps intending to broaden the scope of culpability.[173] The Senate Judiciary Committee admits that the "phrase is designedly rather amorphous, in order to leave to prosecutors, judges, and juries the basic task of defining the class of persons who stand in such a relation to an organization that criminal responsibility for its actions may rightfully be imposed upon them."[174] A threshold issue in the exercise of prosecutorial discretion,[175] therefore, is to identify the defendants in the corporate hierarchy standing in "such a relation to the organization" that they bear the responsibility for corporate crimes.

In consultations with the National Commission on Reform of Federal Criminal Laws, representatives of the Administrative Regulations Section of the Criminal Division of the Department of Justice stated that under official departmental policy, corporate prosecutions include individual defendants whenever they have a "responsible and proximate relation to the violation," but that individuals in the lower echelons are not prosecuted when a responsible individual higher up in the hierarchy can be found.[176] The case precedent and legislative history of section 403(b) evidence a similar view that lower echelon personnel without managerial powers are not agents having "significant responsibility." Section 403(b) developed from strict liability statutes, which encourage effective management of corporate activities.[177] Section 403(b) attempts to induce policymakers to implement procedures to prevent illegal corporate activities.[178] To establish that an agent is significantly responsible for the performance of a corporate duty, the prosecution should be required to introduce evidence regarding the nature of the corporation and the defendant's duties and responsibilities within the corporation,[179] and to demonstrate that the agent had actual authority

173. Other rationales for the change in language are discussed at note 257 *infra.*

174. COMMITTEE PRINT, *supra* note 85, at 75. The Court in *Dotterweich* indicated a similar reluctance to elaborate on the basis of liability. *See* text accompanying note 73 *supra.*

175. Draftsmen and legislators alike are concerned about the breadth of prosecutorial discretion in the corporate criminal area. As Senator Roman L. Hruska observed during the hearings: "After all, prosecutors are men and women just like anybody else. They can be possessed of a liability of vindication in their souls, and maybe they will be frustrated in one area and they will say, oh, but I got you now, I got you now." *Subcommittee Hearings,* pt. X, at 7366.

176. WORKING PAPERS, *supra* note 57, at 180. Proponents of the criminal provisions point to government policy under the antitrust prosecutions to allay fears that widespread prosecution of innocent businesspersons will result from enactment of the Proposed Code. Ralph Nader testified that suits were filed only in clearly established "per se" cases against individuals who knowingly violated the law. *Subcommittee Hearings,* pt. III, subpt. D, at 2994.

177. WORKING PAPERS, *supra* note 57, at 188.

178. *See* text accompanying note 119 *supra.*

179. *See* notes 93-97 *supra* and accompanying text.

to insure proper discharge of the corporate duty.[180]

Proof concerning the nature of the corporation and its operations will ensure that the jury has an accurate and complete understanding of the management process within that particular organization. Such an understanding is crucial because various organizations employ different corporate decisionmaking models.[181] For example, the influence that an executive officer exercises over the operations and conduct of a family-owned, close corporation will be significantly greater than the influence of an executive officer in a large, publicly-held corporation.[182] The nature of the defendant's duties and responsibilities might be shown by corporate charters, bylaws, and organizational charts,[183] but tangible evidence of actual individual responsibility rarely exists and may be misleading.[184] More reliable evidence would include testimony concerning the defendant's daily activities on behalf of the corporation and the finality of his decisionmaking powers.[185] Finally, evidence should be adduced to show that the defendant was in actual control and pos-

180. The Court of Appeals of New York, in applying a "substantial relationship to the offense" test, sought to exculpate nominal officers who had no actual control over corporate affairs by demanding that the defendants be in such a position that they presumably knew or should have known of the violation and therefore should have taken steps to prevent it. *See* People v. Trapp, 20 N.Y.2d 613, 233 N.E.2d 110, 286 N.Y.S.2d 11 (1967), discussed in text accompanying notes 46-51 *supra*. As noted previously, numerous state and federal decisions have charged corporate officials with constructive knowledge to find participation in a corporate offense. *See* text accompanying notes 30, 37, & 81 *supra*. Section 403(b) emphasizes the criminal liahility for omission of a legal duty rather than participation in the offense, but constructive knowledge may be important in cases requiring a showing of *mens rea*. *See* text accompanying notes 191-98 *infra*.

181. *See generally* Note, *supra* note 98, at 1091.

182. *See* Lee, *Corporate Criminal Liability* (pt. 2), 28 COLUM. L. REV. 181, 194 (1928).

183. *See, e.g.*, State *ex rel.* Kropf v. Gilbert, 213 Wis. 196, 251 N.W. 479 (1953), discussed in text accompanying notes 38-42 *supra*.

184. One court has observed:

> In a large corporation, with many numerous and distinct departments, a high ranking corporate officer or agent may have no authority or involvement in a particular sphere of corporate activity, whereas a lower ranking corporate executive might have much broader power in dealing with a matter peculiarly within the scope of his authority. Employees who are in the lower echelon of the corporate hierarchy often exercise more responsibility in the *everyday operations* of the corporation than the directors or officers.

Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 275, 275 N.E.2d 33, 83 (1971) (emphasis by the court), *cert. denied*, 407 U.S. 910, 914 (1972).

On the other hand, senior officials might attempt to make "scapegoats" out of subordinate agents by vesting them with "paper" authority, but in fact granting no actual power to insure compliance with the law. *See Subcommittee Hearings*, pt. III, subpt. D, at 3013 (Comment by Mark Silbergeld).

185. Lower-echelon managers who only make recommendations to superiors would not he liable under this articulation. Section 403(b) contemplates officials vested with management discretion.

sessed sufficient authority to direct and control the conduct of subordinates.[186]

Section 403(b) further requires that the individual have significant responsibility "for the subject matter to which the duty relates." Thus the prosecution must demonstrate a connection between the corporate duty and the defendant's individual area of responsibility. This language reflects the concern in *Park* that the defendant have some responsibility for the offense beyond the mere fact of his position within the corporation.[187] In *United States v. H.B. Gregory Co.*[188] the offense arose from rodent infestation of a warehouse. The individual defendant, who was president and treasurer of the company, had general responsibility for the operation of the warehouse, but at trial the government presented testimony emphasizing that the corporation specifically charged the defendant with responsibility for rodent control problems.[189] Such evidence clearly is helpful in identifying the proper defendants.[190]

(3) State of Mind

Section 403(b) imposes liability on the individual defendant "if he has the state of mind required for the commission of the offense." Although *Dotterweich* and many subsequent cases discussed strict liability offenses dispensing with any state of mind requirement,[191] section 403(b) also imposes *Dotterweich* liability on individuals in cases requiring an intentional, knowing, negligent, or reckless state

186. *See* text accompanying note 95 *supra*. *See also* United States v. Acri Wholesale Grocery Co., 409 F. Supp. 529, 535 (S.D. Iowa 1976).

Of course, the sufficiency of proof on this point will vary according to the size and complexity of the organization. *Park* serves as a guide to the type of proof to be adduced at trial for a crime arising in a large corporate setting. *See* text accompanying notes 100-01 *supra*.

187. *See, e.g.*, United States v. Y. Hata & Co., 535 F.2d 508 (9th Cir.) (per curiam), *cert. denied*, 429 U.S. 828 (1976) (judge instructed the jury that they must find that the defendants occupied responsible positions related to the part of the business which caused the adulteration). *See also* text accompanying notes 110-11 *supra*.

188. 502 F.2d 700 (7th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975).

189. *Id.* at 704.

190. The Senate Judiciary Committee points out that more than one individual may be found to have "significant responsibility." *See* COMMITTEE PRINT, *supra* note 85, at 75. This view raises the unpleasant possibility of unduly broad prosecutions encompassing several corporate officials. The requirement that the criminal omission occur in the defendant's specific area of responsibility will provide some protection against prosecution of several managers at the same level of the hierarchy, unless it is clear that they share joint responsibility. A prosecutor and a jury could possibly select a proper defendant, however, and then go higher into the corporate structure to ensnare more defendants. Once the level of management at which the necessary significant responsibility rests is established, "bootstrapping" should not be allowed. *See also* discussion at notes 256-57 *infra* and accompanying text.

191. *See* text accompanying notes 72, 80-84 *supra*.

of mind.[192] Thus, when a corporate offense occurs as a result of a corporation's failure to act, the courts and counsel must consult Chapter Three of the Proposed Code, which describes the culpable states of mind, to determine if the corporate offense occasioned by the corporate failure to act requires a particular state of mind.[193] Because statutes imposing a duty to act usually impose strict liability,[194] situations in which there is a corporate duty to act as well as a requirement for a culpable state of mind should not arise frequently. If a culpable state of mind must accompany the failure to act, however, section 403(b) imposes liability on the agent who has not only the significant responsibility for the subject matter to which the duty relates[195] but also the state of mind required for the offense.[196] The majority of cases dealing with corporate crime committed with a culpable state of mind, however, will not fall under section 403(b) because of the absence of a corporate duty to act. In such cases, sections 403(a)[197] and 403(c)[198] will provide the means of imposing criminal responsibility on corporate agents and their superiors.

192. Section 301 of the Proposed Code provides for only these four states of mind. *See also* note 212 *infra.*

193. Section 303(a)(2) provides that no state of mind must be proved with respect to any element of an offense descibed outside of Title 18, or described in Title 18 as a violation of a statute outside Title 18, or described in a regulation or rule issued pursuant to such a statute, "if the description of the offense does not specify any state of mind with respect to that element and the legislative purpose of the statute does not compel a contrary interpetation." Because most business regulatory schemes derive from statutes outside Title 18 and the regulations issued pursuant thereto, most business offenses within the ambit of § 403(b) will not require proof of a state of mind. *See* note 31 and text accompanying notes 153-55 *supra.* The corporation's omission to perform a duty to act, which is chargeable to the individual significantly responsible under § 403(b), probably will not require proof of a knowing, intentional, reckless, or even negligent failure to act to prevent a violation. *See* notes 196 & 212 *infra. See generally* MODEL PENAL CODE, *supra* note 5, § 2.07(6)(b) (holding that an agent of the corporation having primary responsibility for the discharge of the duty legally accountable for a "reckless omission to perform the required act"). The Proposed Code does not limit liability to "reckless" omissions.

194. *See* note 31 and text accompanying notes 153-55 *supra.*

195. *See* text accompanying notes 168-90 *supra.*

196. For example, § 1401(a)(3) of the Proposed Code provides that a person is guilty of an offense if, with intent to evade liability for a tax, he fails to account for or pay over taxes withheld for wages. If an agent acting on behalf of the corporation fails to account for taxes and possesses the requisite intent, the corporation incurs liability under the principles of § 402. *See* note 6 *supra.* The agent is liable under § 403(a). *See* text accompanying note 132 *supra.* Prosecution of the agent's superior would require a finding that the superior also had the necessary criminal intent to accompany the omission of the corporate duty. If the superior official did have siguificant responsibility for the proper filing of corporate taxes but did not have the culpable state of mind, no liability would lie under § 403(b). A prosecution might proceed, however, under § 403(c) for reckless failure to supervise adequately. *See* text accompanying notes 199-220 *infra.*

197. *See* text accompanying note 133 *supra.*

198. *See* text accompanying note 221 *infra.*

C. *Section 403(c)—Reckless Failure To Supervise Conduct of an Organization*

Sections 403(a) and 403(b) substantially codify present case law by punishing individual conduct on behalf of the corporation and by identifying proper defendants when a corporation fails to perform an act required by law. Section 403(c), however, establishes a basis for inculpating more corporate officials for more types of corporate offenses than presently exists in federal criminal law.[199] Section 403(c) provides:

> A person responsible for supervising particular activities on behalf of an organization who, by his reckless failure to supervise adequately those activities, permits or contributes to the commission of an offense by the organization is criminally liable for the offense, except that if the offense committed by the organizaton is a felony the person is liahle under this subsection only for a Class A misdemeanor.

The Senate Judiciary Committee remarked that criminal liability based on a failure to supervise is new to federal law and is a "modest extension" of federal criminal liability;[200] in fact, such liability has been an unarticulated influence in both state and federal cases dealing with individual liability for corporate crime.[201] The Committee intends section 403(c) to "place an affirmative duty to exercise reasonable supervision on responsible supervisory personnel" to punish the "do it but don't tell me about it" attitude of senior officials, and to establish "a basis for punishment of those who could and should control the illegal activities of their subordinates but choose instead to condone those activities."[202]

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199. Section 403(c), unlike § 403(b), does not require the existence of a corporate duty to act.

200. COMMITTEE PRINT, *supra* note 85, at 76. Opponents of the subsection called it a "dangerous experiment of uncertain consequences." *Subcommittee Hearings*, pt. III, subpt. B, at 1782 (statement of the National Association of Manufacturers).

201. *See* Belsinger v. District of Columbia, 436 F.2d 214, 220 (D.C. Cir. 1970). *See also* note 37 *supra* and text accompanying notes 33-42 *supra*.

In Rizzo v. Goode, 423 U.S. 362 (1976), the Supreme Court held that 42 U.S.C. § 1983 (1970) requires some evidence of an affirmative link between police misconduct and the authorization or approval of the defendant city and police officials before liability will lie. In dissent, Justice Blackmun cited *Park* as recent approval by the Court for "the imposition of criminal liability without 'consciousness of wrongdoing' for failure to supervise subordinates." 423 U.S. at 385 n.1.

Prior cases sometimes remarked that the senior corporate officials were liable because they knew or "should have known" of misconduct by agents. *See* Belsinger v. District of Columbia, 436 F.2d 214 (D.C. Cir. 1970), and cases at note 37 *supra*. Section 403(c) requires recklessness, a much more demanding standard of culpability than prior case law has prescribed.

202. COMMITTEE PRINT, *supra* note 85, at 75.

(1) Identifying Responsible Supervisors

Section 403(c) selects for prosecution "person[s] responsible for supervising particular activities on behalf of an organization." Much of the discussion of "significant responsibility" under section 403(b) is relevant to a determination of persons responsible under section 403(c).[203] As the Senate Judiciary Committee emphasized, the target of the provision is the corporate official who should control the conduct of subordinate employees. Section 403(c) does not refer to individuals with "primary" or "significant" responsibility, however, and the pool of possible defendants culpable for a particular corporate offense is apparently larger under section 403(c) than under section 403(b). In addition, when a statute imposes a duty on the corporation that is not discharged, which invokes section 403(b), liability for that offense could extend not only to the manager possessing significant responsibility but also to the lower echelon supervisors responsible under section 403(c) for employees in that area of corporate activity. Furthermore, the culpability of any individual defendant under the provisions of sections 403(a), (b), or (c) automatically could implicate that defendant's supervisor under section 403(c) for inadequate supervision of the lower echelon defendants. Although the language of section 403(c) does not expressly prevent either a "bootstrapping" procedure that could extend all the way to the board of directors of large corporations or a broad prosecution encompassing lower echelon supervisors, such expansive notions of liability would be inconsistent with the goal of a more precise identification of corporate officials who should bear the responsibility for corporate crime.[204] Prosecutions of lower echelon supervisors should be initiated under section 403(c) only when the activities under their control pose a particular threat to the general welfare and when the need for individual deterrence is strong.[205] In the absence of such considerations, section 403(c), like section 403(b), should be directed only at upper echelon corporate officials who occupy positions in which reckless failure to supervise poses the greatest public danger, and prosecution provides the greatest deterrence. Moreover, in identifying only persons responsible for supervising "particular activities on behalf of an organization," section 403(c) repeats the

203. *See* text accompanying notes 168-86 *supra.*

204. *See* text accompanying note 117 *supra.* When the defendant has made a proper delegation, the language of § 403(c) may be read to prevent bootstrapping. *See* discussion of the effect of delegation at text accompanying notes 258-60 *infra.*

205. Deterrence of individual misconduct is one of the twin goals of imposing individual liahility for corporate crime. *See* text accompanying note 116 *supra.*

intent expressed in section 403(b)[206] to restrict the scope of liability to defendants in the specific area of corporate activity giving rise to the offense.[207]

(2) Reckless Failure To Supervise Adequately

Although the concept of criminal liability of corporate officials stemming from reckless behavior has some precedent in federal criminal law,[208] the concept of liability of high-ranking agents for reckless failure to supervise and reckless mismanagement generally developed in the course of civil litigation. In civil law, directors and corporate officers are liable to the corporation and its shareholders for injuries to the corporation resulting from their negligence in management. Directors and officers must therefore use due care in conducting the affairs of the corporation. One authority reviewing the state and federal decisions concludes that an officer will be held liable for failure to exercise the care required by the nature of the corporate business, his own particular duties, and the time, place, and circumstances in which he is expected to perform those duties.[209] Although the issue remains in conflict, considerable federal authority holds that the degree of care required of a director in managing corporate affairs differs from the degree of care he must

206. *See* text accompanying notes 187-90 *supra*.

207. The predecessor of § 403(c), § 403(4) of the Final Report, *supra* note 1, held a person "responsible for supervising relevant activities" liable for a default in supervision "within the range of that responsibility which contributes to the occurrence of that offense." Because this language was criticized as overly vague, the drafters of S. 1 substituted the phrase "particular activities." *See Subcommittee Hearings*, pt. III, subpt. B, at 163 (statement of Charles S. Maddock); S. 1 (1975), *supra* note 1, § 403(c).

208. Substantial federal case law holds that criminal intent or wilful conduct may be established if the defendant engaged in the conduct with reckless or indifferent disregard as to the facts, or with a conscious intent to avoid learning the truth. For example, in Spurr v. United States, 174 U.S. 728 (1899), the Court articulated the following rule in holding a bank officer liable for falsely certifying checks: "[E]vil desigu may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact." *Id.* at 735. More than "gross negligence" is required to establish culpability; the standard, although vague, is closer to a showing of intent. The evolution of this standard is reviewed in Curnow, *Economic Crimes: A High Standard of Care*, 35 FED. B.J. 21 (1976). Of course, § 403(c) does not require criminal intent. The only state of mind required is recklessness. *See* text accompanying notes 212-15 *infra*.

209. *See* FLETCHER, *supra* note 4, § 1029. The standard, however, is far from clear:

> In determining whether directors are liable for negligent mismanagement, the courts have been prone to use fine-sounding phrases in defining the duties of directors, and then proceed to decide the case without reference thereto—the rules laid down being such glittering generalities that the case could be decided either way thereunder without violating the rules.

Id. at 12. Although some courts require a showing of gross negligence, the general rule is that want of ordinary care creates liability. *Id.* § 1034.

take in his own affairs, that is, the care required is that of the "ordinary director" rather than the "ordinary man."[210]

Section 403(c) translates the civil liability of directors for breach of a duty of adequate supervision owed to the corporation into criminal liability for breach of a duty owed to the general public. Indicia of a tortious failure to supervise gleaned from civil cases, however, cannot be applied uncritically in prosecutions under section 403(c). Both the language of section 403(c) and the legislative history of the Proposed Code emphasize that criminal liability requires a neglect greater than that producing civil liability.[211] Section 403(c) requires a "reckless" failure to supervise adequately. Section 302(c) of the Proposed Code defines "reckless" as an awareness and disregard of a risk that a circumstance exists or that a result of conduct will occur.[212] This risk, in turn, "must be of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation."[213] The standard of recklessness in section 403(c) indicates that the prosecution's burden is heavy, and fears expressed in the legislative hearings concerning the expansiveness of such liability seem unfounded.[214] As pointed out by a proponent of section 403(c), the standard of conduct required is not rigorous, and if American businesspersons do not meet the standard, section 403(c) clearly is needed to compel effective supervision.[215]

Following proof of the corporate offense and identification of

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210. *Id.* § 1038. Lower echelon supervisors who are neither officers nor directors are also subject to § 403(c). *See* text accompanying note 204 *supra.* An "ordinary man" standard might be more appropriate in such prosecutions. *See* text accompanying note 217 *infra.*

211. Courts often recognize that civil negligence differs from criminal negligence. *See, e.g.,* People v. Knapp, 206 N.Y. 373, 99 N.E. 841 (1912). The analogy is nevertheless made. *See* State *ex rel.* Kropf v. Gilbert, 213 Wis. 196, 217, 251 N.W. 478, 485 (1933). *See* also note 201 *supra.*

212. Section 301(a) of the Proposed Code provides that a "state of mind" may be pertinent with respect to conduct, an existing circumstance, and a result. Except as otherwise provided in § 303(a), if the statute under which the defendant is charged does not specify the required states of mind, the defendant's conduct must be "knowing," and he must be "reckless" with regard to an existing circumstance or a result of his conduct. *See* Proposed Code, *supra* note 1, § 303(b). Although § 403(c) seems to describe a state of mind with respect to conduct (reckless failure), conduct is not defined by the Code as "reckless." *See id.* § 301(c). Therefore § 403(c) requires a showing of "knowing" conduct. *See id.* § 302(b)(1). As to the existing circumstances or the results of conduct, a reckless state of mind must be shown.

213. *Id.* § 302(c).

214. *See generally Subcommittee Hearings,* pt. I, at 71-76 (statement of Stephen Feldman), *quoting* Liebmann, *Chartering a National Police Force* (pt. 2), 56 A.B.A.J. 1176 (1970); *Subcommittee Hearings,* pt. III, subpt. B, at 1635-36 (statement of Charles S. Maddock).

215. *Subcommittee Hearings,* pt. III, subpt. D, at 3012-13 (statement of Mark Silbergard).

the supervisors of the criminal actors, conviction under section 403(c) appears to require a two-step process.[216] First, the prosecution must show that the defendant in fact failed to supervise adequately. Civil analogues may be instructive here, such as the failure to adopt generally approved systems designed to prevent misconduct by subordinates.[217] Second, the prosecution must show that the defendant was aware that his failure would create a substantial and unjustifiable risk of subordinate misconduct, and that he ignored that risk.[218] At this second stage, the nature of the supervisor's duties and the nature of the activities he supervises are critical. For example, in a highly competitive business in which the temptation to engage in illegal conduct is strong, executive officers in charge of salespersons must be aware that circumstances are such that failure to supervise adequately creates a substantial risk of subordinate misconduct. Disregard of that risk creates liability under section 403(c) if subordinate misconduct occurs.

Section 403(c) is the most innovative, and therefore most uncertain, basis of individual liability for corporate crime provided by the Proposed Code. Although it has been criticized for vagueness regarding the standard of conduct expected of corporate executives,[219] section 403(c) requires only a minimal adherence to responsible business practices and procedures.[220]

(3) Ameliorative Sentencing Procedures

Unlike sections 403(a) and (b), section 403(c) does not require that the individual defendant possessed the culpable state of mind necessary in the underlying offense. For example, subordinate agents might commit a serious felony requiring an intentional state of mind, but prosecution of their supervisor under section 403(c) would require only a showing of his recklessness rather than in-

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216. The necessity of proof of causation is discussed separately in text accompanying notes 245-48 *infra*.

217. *See* FLETCHER, *supra* note 4, § 1076.

218. Recklessness under § 302(c) must include "conscious risk creation," but need not include any desire that the risk occur. *See* COMMITTEE PRINT, *supra* note 85, at 56.

219. *See Subcommittee Hearings*, pt. III, subpt. B, at 1633-42 (statement of Charles S. Maddock).

220. At least one court has upheld a statute imposing criminal liability for negligence in business enterprises against a challenge of vagueness and failure to give notice of the required conduct. In People v. Mancuso, 255 N.Y. 463, 175 N.E. 177 (1931), a criminal statute applying a standard of the "same care and diligence that agents receiving a compensation are bound . . . to observe" was held to give sufficient notice of the required duty of a director of a moneyed corporation because the statute utilized common law standards that were well-known to businesspersons. In view of the long civil history of liability for mismanagement, the criminal provisions were deemed to be sufficiently precise.

tent.[221] However, section 403(c) imposes only misdemeanor sanctions upon corporate supervisors, even though the underlying corporate offense resulting from the defendants' failure to supervise might be a felony.[222] This ameliorative sentencing provision is intended to reduce any harsh results that might flow from section 403(c)[223] and indicates a congressional reluctance to impose the most severe felony penalties on the basis of a liability new to the law and as yet unclear in impact.

V. Defenses and Limitations on Liability

For the individual defendant charged with responsibility for a corporate crime, the Proposed Code denies more defenses than it specifically grants. Section 404(b) provides that it is no defense that the corporation has not been prosecuted or convicted;[224] nor may the individual defendant escape responsibility because the statute describes only corporations as the persons capable of directly committing the offense.[225] Possible defenses articulated in the cases dealing with individual liability, however, will survive adoption of the Proposed Code,[226] and a separate examination of such defenses will be helpful in determining the contours of individual liability under section 403.

A. Causation and the Park *Defense*

Although the issue of causation is present in all three subsections of section 403, only section 403(a), which holds an individual liable for his conduct or conduct he "causes" in the name of the organization, contains the verb "causes." The Proposed Code does not define "cause," but the Senate Judiciary Committee has stated that "causes" in section 403(a) carries the same meaning as "causes" in section 401(a)(2).[227] Section 401(a)(2) holds a person criminally liable if, acting with the state of mind required for the

221. "Recklessness" differs from "intent" in that a reckless defendant need not have desired the criminal result nor have had it as a conscious objective. *See* Committee Print, *supra* note 85, at 56.

222. A Class A misdemeanor carries penalties of up to a one year imprisonment and a $10,000 fine. *See* Proposed Code, *supra* note 1, §§ 2201(b)(1)(B) & 2301(b)(6).

223. Committee Print, *supra* note 85, at 76.

224. Proposed Code, *supra* note 1, § 404(b)(1). *See* note 127 *supra.*

225. Proposed Code, *supra* note 1, § 404(b)(2). *But see* note 127 *supra.*

226. Proposed Code § 501 provides that, except as the Constitution or federal statutes otherwise require, all defenses and bars to prosecution "shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience."

227. Committee Print, *supra* note 85, at 75. Section 401 enunciates general principles of accomplice liability.

commission of the offense, "he causes the other person to engage in conduct that would constitute an offense if engaged in personally by the defendant or any other person."[228] "Causes" in section 401(a)(2), in turn, retains its current case-law definition of "bringing about a result that is reasonably foreseeable, through an agent, or by instigation or procurement."[229] Causation in its current usage appears to connote a deliberate or calculated manipulation of agents to produce a foreseeable criminal offense.[230]

Cases developing individual liability for offenses imposing strict liability, such as *Dotterweich* and its progeny, applied a broader concept of causation.[231] To be liable for causing an adulterated drug to travel in interstate commerce, for example, a senior corporate official apparently need only have had a responsible position in a business that regularly ships drugs in interstate commerce.[232] Section 403(a), however, appears to contemplate those instances in a corporate setting when a senior official instigates the corporate offense, or directs subordinates to commit a specific offense in order to avoid personal criminal liability as an actor, or operates a business as his criminal "alter ego" or instrumentality for

228. Section 401(a)(2) recodifies 18 U.S.C. § 2(b) (1976), which provides: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." The Proposed Code deletes "willfully" because of the confusion caused by the term. *See* COMMITTEE PRINT, *supra* note 85, at 68.

229. *See id.* at 64, 68 n.43.

230. *See* United States v. Kenofskey, 243 U.S. 440, 443 (1917) (by submitting a false insurance claim, the defendant "caused to be placed" in the mail a letter pursuant to a scheme to defraud, in violation of federal law, because he knew that all claims were mailed after approval by the superintendent); United States v. Maselli, 534 F.2d 1197, 1200 (6th Cir. 1976) (operation of a prostitution ring "causes" the interstate travel of prostitutes); United States v. Scandifia, 390 F.2d 244, 249 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969) (the defendant caused the illegal interstate transportation of counterfeit bonds even though his agent was the party carrying the bonds across state lines).

18 U.S.C. § 2(b) (1976), discussed at note 228 *supra*, "removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense." *See* 18 U.S.C. § 2(b) (Revisor's Note) (1976).

231. Causation is a problem of proper attribution of criminal responsibility. As the severity of the violation increases, the tribunal will be more willing to attribute blame even though the causal relationship is not clear. *See* Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367, 387-90 (1965).

232. *Cf.* discussion at note 81 *supra* (knowledge of the nature of the business is sufficient to generate liability). Courts imposing liability for "causing" the shipment of adulterated or misbranded food or drugs rarely discussed the "causal relation" between the defendant's conduct and the violation. In United States v. H.B. Gregory Co., 502 F.2d 700 (7th Cir. 1974), the court suggested that the finding of a "responsible share" mooted the defendant's argument of a lack of a "causal relation." *Id.* at 706. *See also* Lelles v. United States, 241 F.2d 21, 24 (9th Cir. 1957).

conducting an illegal business.[233] Thus a corporate officer charged under section 403(a) could show that he did not in fact authorize, direct, instigate, or otherwise "cause" the subordinate conduct or the corporate crime. It is by no means clear that a senior official who knows of misconduct but merely acquiesces in it incurs liability under section 403(a). Of course, if the official has a duty to act because of a statutory duty imposed on the corporation, he can be prosecuted under section 403(b). In addition, section 403(c) could apply to acquiescence cases because of the existence of a reckless failure to supervise adequately. Nevertheless, state courts have held corporate officials liable for "directing" a crime by acquiescence.[234] The target of section 403(a), however, appears to be the participating official; either section 403(b) or section 403(c) is the proper basis of liability for "knowing but nonacting"[235] superior officials.

Dotterweich liability as codified in section 403(b) provides that an agent significantly responsible for a corporate duty is liable for an offense "based upon" an omission to perform the duty. *Park* emphasized that, because *Dotterweich* liability rests on a duty to act to prevent the offense, the defendant may come forward with evidence showing that he was powerless to prevent or correct the violation.[236] In a recent case considering the "objective impossibility" defense, *United States v. Y. Hata & Co.*,[237] the company and its president were charged under the Food and Drug Act because of bird infestation in the company's warehouse. Evidence showed that defendant was aware of the problem and had intended to design a wire cage that would enclose the warehouse. At the time of the government inspection leading to the prosecution, however, the

233. *See* text accompanying notes 22-24, 56, & 134 *supra*. One case distinguished "causation" in the Food and Drug Act from "causation" under 18 U.S.C. § 2(b) (1976). Palmer v. United States, 340 F.2d 48 (5th Cir. 1964). *See* notes 227-30 *supra* and accompanying text.

234. *See* note 25 and text accompanying note 20 *supra*.

235. *See* COMMITTEE PRINT, *supra* note 85, at 74.

236. 421 U.S. at 673. The Court said that the issue of "powerlessness" was "to 'be raised defensively at a trial on the merits.' " *Id.*, *quoting* United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964). The defendant probably does not carry a burden of establishing, by a preponderance of the evidence, powerlessness as an affirmative defense. The presentation of evidence should force the prosecution to prove the nonexistence of the defense beyond a reasonable doubt. *See* Proposed Rule of Criminal Procedure Rule 25.1(a)(2) & (3), Title II, pt. B, § 211 of S. 1437, at 295. In *Park* the Court stated that the defendant, if he presents evidence, may request a charge that the government must prove beyond a reasonable doubt that the defendant "was not without the power or capacity to affect the conditions which founded the charges in the information." 421 U.S. at 676.

The Senate Judiciary Committee considers the objective impossibility defense to be of "constitutional dimensions." COMMITTEE PRINT, *supra* note 85, at 75 n.89.

237. 535 F.2d 508 (9th Cir.) (per curiam), *cert. denied*, 429 U.S. 828 (1976).

materials for the cage had not yet arrived. In deciding whether the evidence justified a jury charge concerning objective impossibility,[238] the court noted that the defendant had discovered the problem in sufficient time to insure the receipt of materials and construction of the cage.[239]

The decision in *Hata* revealed an uncertainty created by *Park*'s discussion of "powerlessness." The individual defendant in *Hata* argued that the objective impossibility defense should be available to "anyone, organization or individual, offering to prove inability to prevent or correct in timely fashion a violation despite maintenance of the highest standard of foresight and vigilance."[240] The government contended that the defense should be allowed only to the corporate officer, not the corporation, and should apply only when the officer is in fact powerless to prevent or correct the violation, even by suspending the corporation's food warehousing activity if necessary.[241] The defendant's interpretation of the objective impossibility defense suggests that proof of the corporation's inability to avoid violating the statute should provide a defense to strict liability. The government's argument, on the other hand, suggests that the objective impossibility defense should consider only the powerlessness of the individual to control the corporate enterprise or to correct corporate practices to prevent the offense. In light of the goals behind imposing criminal sanctions on individuals in the corporate hierarchy—deterrence of individual misconduct and encouragement of effective management practices to prevent public harm by corporations[242]—the individual defendant should be allowed to present evidence of his inability to effect corporate changes or to fully control all corporate activity. Such evidence, of course, would also be relevant in an attack on the required element of "significant responsibility" under section 403(b).[243] In addition, the individual defendant should present evidence tending to show that the corporation's compliance with the statute was impossible despite its best

238. *See* note 236 *supra*. The court used the standards established in entrapment cases as a guide for determining if the evidence justified the charge; that is, "some evidence." 535 F.2d at 511.

239. Defendant knew of the problem in 1971, but did not consider the wire cage scheme until the spring of 1972. 535 F.2d at 511.

240. *Id.*

241. *Id.* The court found it unnecessary to choose between these interpretations because the individual defendant had failed to exercise the highest standard of diligence and would therefore be liable even under his reading of *Park*. *Id.*

242. *See* text accompanying note 116 *supra*.

243. *See* text accompanying notes 168-90 *supra*. In *Park* the Court recognized that it could be objectively impossible for a senior corporate official to control fully a corporation's daily operations. 421 U.S. at 677 n.19.

efforts. Although the corporation arguably should not escape liability for a strict liability offense because of objective impossibility, use of a criminal sanction against an individual who has made all possible efforts to avoid a violation serves neither of the objectives of section 403.[244]

Causation is also a factor in section 403(c) because the prosecution must show that the defendant's reckless failure to supervise adequately "permits or contributes" to the offense. Because section 403(c) reflects concepts of civil negligence in its reliance on recklessness as a basis of liability,[245] the issue of proximate cause may become a focal point for the defense. Just as civil liability of corporate directors must be predicated on a causal connection between the negligence of the defendant and the resulting loss to the corporation,[246] the prosecution under section 403(c) must show that the defendant's failure to supervise was a proximate cause of the corporate offense. If the defendant's adequate supervision would not have prevented or remedied the misconduct of subordinate employees, no liability will lie under section 403(c). Furthermore, the burden and allocation of proof under section 403(c) may be different from that under section 403(b)'s objective impossibility defense, which requires defendant to produce evidence showing insufficient causation.[247] Because the plaintiff has the burden of demonstrating proximate cause in civil cases, the prosecution likewise should carry the burden of proving beyond a reasonable doubt that the failure to supervise at least contributed to the commission of the offense.[248] The legislative history, however, is silent on the issues of causation and the burden and allocation of proof.

B. Delegation

During the legislative hearings on the Proposed Code, critics voiced concern that both sections 403(b) and (c) would deter the delegation of authority by senior corporate officials who, because of increased exposure to criminal liability for the actions of subor-

244. Although using penal sanctions against the corporation might produce the development of new methods to insure compliance with the law, imposing criminal penalties against individuals within the corporation could result in disproportionately harsh punishment when the individual has performed to the best of his ability.

245. *See* text accompanying notes 208-11 *supra.*

246. The cases are collected in FLETCHER, *supra* note 4, §§ 1063.1, 1087, 1090.1.

247. *See* note 236 *supra.*

248. The test under § 403(c) is whether the failure to supervise "permits or contributes" to the offense. "Contributes" seems to provide for broader liability than does "permits." "Permits" suggests a "but for" test whereas "contributes" suggests the necessity of only partial causation. Both words, however, mandate the establishment of a causal nexus.

dinates, would be reluctant to allow managing agents discretionary and supervisory powers.[249] Of critical importance to defendants in the corporate hierarchy is the availability of a defense based on their proper delegation of authority to subordinate officials.

(1) Delegation and Section 403(b)

An early commentator, citing state case precedent as authority, asserted that when there is a failure to perform a corporate statutory duty, the chief executive should "not be made the sacrifice for the corporate sins" if he had properly delegated the responsibility for performance of the duty.[250] In *McCollum v. State,*[251] the corporation's vice president in charge of a storage depot successfully defended a pollution charge on the ground that he had properly delegated responsibility for the operation and maintenance of certain machinery to subordinates. The Court in *Park,* however, rejected the defendant's argument that he had delegated authority for warehouse operations to the local executive officer.[252] The Ninth Circuit similarly has rejected delegation as a defense to charges under the Food and Drug Act.[253]

Because section 403(b) applies to statutes imposing special burdens on corporate ventures to protect the public,[254] allowing the defense of delegation could obstruct the goal of coercing affirmative management action to prevent harm to the public.[255] The defen-

249. *See Subcommittee Hearings,* pt. VI, at 5609-10; *id.* pt. III, subpt. B, at 1635 (statement of Charles S. Maddock). *But see id.* pt. III, subpt. D, at 3014 (in which Mark Silbergeld argued that there could be no such effect because it is impossible not to delegate in the modern corporation). *See also id.* pt. XI, at 7873 (statement of Ralph Nader).

250. Lee, *supra* note 182, at 187-88. If the duty has not been assigned, the liability should rest upon those higher officers who have the duty to apportion the executive functions. *Id.*

251. 165 Tex. Crim. 241, 305 S.W.2d 612 (1957), discussed in text accompanying notes 44-45 *supra.*

252. 421 U.S. at 664-65, 677. *See also* discussion at note 106 *supra.* Through letters from the Food and Drug Administration concerning violations in both the Philadelphia and Baltimore warehouses, Park knew that the sanitation systems were undependable, thus rebutting his contention that he had relied justifiably upon subordinates to handle sanitation matters. The fact that Park had notice that his delegation of responsibility was ineffective to insure compliance with the law prevents a reading of *Park* that would foreclose delegation as a defense in all cases. When the executive officer has no prior notice that his delegates have not done their jobs, delegation should be a potential defense. *See* text accompanying note 256 *infra.*

253. United States v. Starr, 535 F.2d 512, 515-16 (9th Cir. 1976).

254. *See* text accompanying notes 153-55 *supra.*

255. *See* note 244 *supra.* The special legal burden of a specific statutory duty under § 403(b) would tend to militate against the delegation defense to a greater extent than does the general duty of corporate supervision under § 403(c). *See* text accompanying notes 258-62 *infra.*

dant's proper delegation of responsibility for performance of the corporate duty, however, would be extremely relevant to his proper identification as the person "significantly responsible" for the duty, especially when the defendant has no reason to believe that his system of delegation is not adequate.[256] High-ranking officials might remain "ultimately" responsible under traditional principles of corporation law, but lower echelon managers to whom authority has been delegated should be the officials "significantly responsible" for purposes of section 403(b).[257]

(2) Delegation and Section 403(c)

When a senior corporate official charged with a corporate offense pleads that he properly delegated authority to a lower echelon supervisor, serious doubts surround the defendant's proper identification as a "person responsible for supervising particular activities" under section 403(c). If a senior official properly delegates supervisory responsibility, both the official and his delegate arguably are "responsible,"[258] but an appropriate application of section 403(c) would inculpate only the delegate when a corporate offense results from inadequate supervision of employees within the area of the delegated responsibility. "Bootstrapping" defendants in successive levels of supervisory authority would ignore the necessity of delegation in a large corporation and would approach the imposition of vicarious liability, which the Proposed Code seeks to avoid.[259] In addition, section 403(c) provides liability only for persons responsible for supervising "particular activities." Thus, the statutory language of section 403(c) indicates that the provision is directed at the delegates responsible for particular areas rather than higher officials

256. *See* note 252 *supra*. Allowing proper delegation as evidence of a lack of "significant responsibility" lessens the danger of "bootstrapping" successive levels of management officials who have some contact with the subject matter to which the offense relates. *See* note 190 *supra*.

257. *See* text accompanying notes 168-90 *supra*. Changes in the language of § 403(b) during its development support the view that the officials ultimately responsible are not always subject to liability under § 403(b). Early drafts of the Proposed Code used the term "primary responsibility." *See* notes 168-73 *supra* and accompanying text. One critic pointed out that the directors are always "primarily" responsible for everything in the corporation and thus would always be liable. *Subcommittee Hearings*, pt. III, subpt. B, at 1635 (statement of Charles S. Maddock). The language was changed to read "significant responsibility." Although the legislative history offers no explanation for the change, the above criticism could have prompted revision.

258. Statutes and corporate charters and bylaws generally allow delegation of authority by the board of directors as well as by officers and managing agents. Ultimate responsibility for control and supervision of corporate activities, however, remains with the board of directors. *See generally* FLETCHER, *supra* note 4, §§ 494-504. *See also* note 257 *supra*.

259. *See* text accompanying notes 118-21 & 204 *supra*.

ultimately responsible for all corporate activities.[260]

The fact that the defendant had delegated the supervision of a particular corporate activity to a subordinate does not foreclose other theories of liability under section 403(c). The impropriety of the delegation in view of the attendant circumstances could be evidence of a reckless failure by the senior official to supervise adequately activities that are part of his general responsibilities. For example, if a particular corporate activity creates a substantial risk of illegal activity by subordinates in the absence of close supervision by higher echelon personnel, any attempted delegation could represent a reckless abdication of the senior official's corporate responsibility. In addition, although the supervision of the particular activity in question might properly be subject to delegation, recklessness in the selection or supervision of the delegate could result in liability for the senior official if corporate misconduct results.[261] The prosecution's burden of proving recklessness under section 403(c), however, will prevent frequent use of improper delegation as a theory for liability.[262]

C. *Conduct Not Occurring in the Normal Course of Business*

Many cases discussing the liability of corporate officials for the misconduct of agents indicate that the violation of the law occurred during the "normal course of business."[263] For example, in *Belsinger v. District of Columbia,*[264] the court held that the president of a company could not be held liable for failure to supervise properly a particular contracting job when the project was so small that it would not have drawn his attention in the course of performing his "normal responsibilities."[265] Because section 403 strives to deter in-

260. *See* text accompanying notes 203-07 *supra.*

261. Under civil standards of liability, directors must exercise reasonable care in the selection and supervision of delegates. *See generally* FLETCHER, *supra* note 4, §§ 1067, 1070-71, 1079. *Park* presented a situation in which a possible action could lie for reckless selection and supervision of delegates. *See* note 252 *supra.*

262. *See* text accompanying notes 216-20 *supra.* In view of the standard of liability imposed by § 403(c), one proponent of the subsection allayed fears expressed by critics during the legislative hearings by pointing out that only "mindless" delegation that "exalt[s] results over methods" would produce penalties under § 403(c). *See Subcommittee Hearings,* pt. XI, at 7873 (statement of Ralph Nader).

263. *See, e.g.,* Carolene Prods. Co. v. United States, 140 F.2d 61, 66 (4th Cir.), *aff'd on other grounds,* 323 U.S. 18 (1944); United States v. Laffal, 83 A.2d 871, 872 (D.C. 1951).

264. 436 F.2d 214 (D.C. Cir. 1970).

265. *Id.* at 220. In *Carolene Products,* discussed at text accompanying notes 80-82 *supra,* in which the defendants were charged with the shipment of adulterated milk, the court observed: "We do not here have the case of a corporation engaged in a proper and legal enterprise with an occasional violation of Federal law resulting therefrom." 140 F.2d at 65. In both *Belsinger* and *Carolene Products* the normal course of business was relevant to the court's attempt to infer knowledge of the violations. *See* note 201 *supra.*

dividual misconduct and encourage sound corporate management,[266] punishment of supervisors and managers for the misconduct of employees acting in abnormal or unforeseeable circumstances would not serve the purposes of imposing individual criminal liability. *Belsinger* properly recognized that proper allocation of supervisory resources often reduces the opportunities to direct mundane or minor transactions. In addition, high-ranking officials should not bear criminal responsibility when the corporate offense results from abnormal business conditions.[267] The uniqueness of the circumstances giving rise to the offense is also relevant to the defense of objective impossibility under section 403(b) if the offense occurred despite the best efforts of the corporate managers to control corporate activity.[268]

In a prosecution under section 403(c), the uniqueness of the circumstances or the unforeseeability of the agent's misconduct would be relevant to rebut a charge of reckless failure to supervise adequately because "adequate" supervision suggests that an official need only provide for reasonably foreseeable or common occurrences.[69] In any event, a failure in supervision probably would not have "permitted or contributed to" the commission of an offense occurring in unusual circumstances because the supervisor would be unprepared or unable to direct subordinates properly if he were in fact exercising the minimal standard of supervision required by section 403(c).[270]

VI. CONCLUSION

In discussing the contours of individual liability under section 403, this Note has not attempted to criticize the section's draftsmanship or counsel against its adoption. The philosophy of liability reflected in section 403 wisely avoids the imposition of vicarious liability on corporate officials. The defendant's personal misconduct, failure to act, or reckless failure to supervise invoke the sanctions of the provisions. In addition, subsections (b) and (c) provide a theoretical underpinning for punishing omissions that is prefera-

266. *See* text accompanying note 116 *supra.*

267. For example, a statute might require a corporation to act in a set of circumstances that rarely arises in its normal business. Although § 403(b) would impose liability on a responsible official for the corporation's failure to act, the extenuating circumstances militate against imposing individual liability. The corporation, nevertheless, might be liable. *See* note 6 *supra.*

266. *See* text accompanying notes 240-44 *supra.*

269. *See* text accompanying note 209 *supra.*

270. *See* text accompanying notes 245-48 *supra.*

ble to the indicia of artificial "participation" relied upon in former state and federal cases.

This Note has also attempted to establish some limitations against an expansive reading of section 403. The Proposed Code's modest extension of individual criminal culpability is secondary to its attempt to properly "locate the point [in the corporate hierarchy] at which extended responsibility for various crimes reaches optimum effectiveness and should, therefore, terminate."[271] The Proposed Code faces the challenge of properly identifying individual defendants in a corporate setting. Prosecutors who select the defendants and courts who adjudge the standards of liability will accomplish that proper identification by constant reference to the twin goals of section 403—deterrence of individual misconduct and coercion of affirmative management of corporate activity to avoid public harm.

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271. WORKING PAPERS, *supra* note 57, at 183.