Catching the Rabbit: The Past, Present, and Future of California's Approach to Finding Corporate Officers Civilly Liable Under the Responsible Corporate Officer Doctrine

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INTRODUCTION

An old recipe for rabbit stew famously begins with the instruction: "First, catch the rabbit."[1] The Responsible Corporate Officer Doctrine ("RCOD") is an approach to corporate officer liability that enables the government to hold individual corporate officers personally accountable for their acts or omissions that violate a growing list of both criminal and civil statutes.[2] This doctrine provides a flexible alternative to the more heavily traveled avenues of establishing corporate officer liability, such as piercing the corporate veil or direct liability for tortious conduct. Although courts were initially fairly modest in their invocation of the RCOD,[3] over the past few decades, as the relationships among businesses, individuals, governments, and the environment have become increasingly complex, courts began using the doctrine in a growing number of situations.[4] California courts have largely followed the national trend in the criminal context, making use of the RCOD to impose criminal penalties upon corporate individuals. These same courts, however, have been inexplicably slow to utilize the doctrine in the civil arena.[5] A recent decision issued by California's Third Appellate District, *People v. Roscoe*, 87 Cal. Rptr. 3d 187, 190-91 (Ct. App. 2008), serves as a clear indication that the State's lethargic approach to civil application of the RCOD may soon be a relic of the past.

This paper begins, at Section I, by distinguishing the RCOD from other common types of corporate liability. Section II discusses the history and basic tenets of the modern day doctrine. Section III explains the benefits of civil use of the RCOD and provides examples of its growing acceptance. Section IV discusses California's meager use of the doctrine. Section V proposes that California courts employ a slightly divergent version of the standard test for civil RCOD application.

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[1] Kenneth C. Kettering, *Securitization and its Discontents: The Dynamics of Financial product Development*, 29 CARDOZO L. REV. 1553, 1671 (2008).

[2] *See* Randy J. Sutton, *"Responsible Corporate Officer" Doctrine or "Responsible Relationship" of Corporate Officer to Corporate Violation of Law*, 119 A.L.R.5th 205 (2004).

[3] The RCOD was used only a handful of times from the time the doctrine emerged into the public consciousness in the early 1940's through the end of the 1960's. *See, e.g.*, United States v. Wise, 370 U.S. 405 (1962); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. 3963 Bottles, More or Less, 265 F.2d 332 (7th Cir. 1959); Lelles v. United States, 241 F.2d 21 (9th Cir. 1957); United States v. 48 Jars, More or Less, 23 F.R.D. 192 (D. D.C. 1958); People v. Int'l Steel Corp., 226 P.2d 587 (Cal. App. Dep't Super. Ct. 1951).

[4] Courts have held officers criminally culpable for environmental violations, violations of the Federal Food, Drug, and Cosmetic Act, meat inspection violations, a petroleum allocation regulation, a state sales tax violation, a securities violation, an antitrust violation, and a state alcoholic beverage control violation. *See* Sutton, *supra* note 2.

[5] Courts have held officers civilly liable under the RCOD for a corporation's actions in cases involving violations of environmental laws, securities fraud, consumer fraud, a violation of the Public Health Service Act, an antitrust violation, Controlled Substances Act violations, and an injunction to prevent violations of the Federal Food, Drug, and Cosmetic Act. *See id.*

I. COMMON THEORIES OF CORPORATE LIABILITY: WHAT IS THE DIFFERENCE?

A. Hypothetically Speaking[6]

Imagine that you are a state official in charge of managing a government-run fund that provides monetary assistance to local businesses that have polluted the state's soil and must now comply with the government's demands for remediation. Your fund fronts the capital for these businesses' clean-up efforts with the expectation that the businesses will repay the loan. One afternoon, you are sitting in your office when the phone rings. On the line is a representative from the county of Dotter, who informs you that the county is overseeing remediation of a 1,943-gallon spill of hazardous pollutants into the county's soil. The admitted culprit is a popular local grocery store, Park Bros., Inc., which is a close corporation owned and operated by the two Park brothers, Moe and Curly. This family-owned corporation has always maintained respect for the necessary corporate formalities and, up until this point, has consistently been operated in accordance with all applicable laws. But Larry, a Park Bros. employee, recently discovered a leak in the store's cooling system that had been releasing hazardous material into the ground for a substantial amount of time. Larry promptly reported this violation to the county, which is the entity responsible for overseeing remediation efforts.

Park Bros., Inc. began accepting bids for the cleanup contract. However, in the interest of self-serving frugality, the store allowed the bidding to continue well past the deadlines set by the county. When Park Bros. finally did hire a contractor to begin remediation, the State began withdrawing checks from the state soil fund and mailing them to the brothers. Unfortunately, as time passed it became apparent that the Park Bros. remediation was chronically inadequate; the cleanup was behind schedule and fell well below both county and state regulatory standards. Dotter County persistently mailed Park Bros. numerous notices detailing these deficiencies. Moe and Curly received and skimmed these letters before passing them on to Larry with instructions to send them to the company's hired environmental expert. The brothers never contacted the county directly to discuss the ongoing cleanup efforts, nor did they attempt to hire a different contractor.

Some years later, the state initiated a lawsuit against the grocery store, seeking to recover the $1.4 million loaned to the store to facilitate immediate cleanup. Although the original spill, had it been dealt with promptly and properly, would have cost only $900,000 to fix, the company's interest in obtaining the cheapest services possible and its minimal oversight of the

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[6] This hypothetical situation is very similar to the actual facts found in *People v. Roscoe*, *87 Cal. Rptr. 3d 187*, 190-91 (Ct. App. 2008).

remediation process created an additional $500,000 worth of environmental damage requiring attention. Although theoretically it should be straightforward for the state to recover loaned funds from a debtor corporation, the negative publicity over the hazardous mess has driven Park Bros., Inc. nearly out of business. In reality, the corporation will be able to repay only a small portion of the remediation cost and your fund is now out a substantial amount of capital. You, however, remain confident that either the corporation or its officers (or both) will eventually be made to compensate the public for the unnecessary financial and environmental burdens resulting from the corporation's errors. But even with all the other avenues that are commonly used to find corporate officers responsible for corporate misdeeds, the validity of your optimistic presumption may well rest on the court's willingness to use the RCOD in a civil context.

B. Distinguishing the RCOD from Other Commonly Used Means of Finding Corporate Officer Liability

The idea of holding a corporate officer civilly liable for a corporation's failures under the RCOD is somewhat comparable to, but ultimately distinct from, several other more common forms of corporate officer liability. Other common means of attaching liability to corporate officers or employees are the doctrines of alter ego, direct participation in a tortious activity, and *respondeat superior*.[7] The ways in which these doctrines work, and the differences between them and the RCOD, are briefly discussed below.

1. Alter Ego (or Piercing the Corporate Veil)

California's alter ego doctrine allows courts, in rare circumstances, to disregard the separate entity status of a corporation and its officers or shareholders for liability purposes and effectively pierce the corporate veil. In such situations, the target officer or shareholder loses his or her limited liability shield and can be held personally responsible for the corporation's misconduct.[8] This doctrine is aimed at preventing corporate individuals and other corporations from using the corporate form as a means of committing offenses with impunity.[9]

California courts have established two conditions that must be met before application of the alter ego doctrine is appropriate: (1) "such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist"; and (2) "an inequitable result if the acts in question are treated as those of the

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[7] John Y. v. Chaparral Treatment Ctr., Inc., 124 Cal. Rptr. 2d 330, 337 (Ct. App. 2002).

[8] Postal Instant Press, Inc. v. Kaswa Corp., 77 Cal. Rptr. 3d 96, 97 (Ct. App. 2008).

[9] *See* Webber v. Inland Empire Investments, Inc., 88 Cal. Rptr. 2d 594, 604 (Ct. App. 1999).

corporation alone."[10] Though these two conditions dominate the inquiry, the courts may also consider other factors. Such secondary factors include the commingling of assets, use of the same employees and facilities, disregard of corporate formalities, or proof that the corporation is serving as a mere shell for operations occurring behind the corporate veil.[11] The ability of an alter ego analysis to flexibly consider a combination of these factors may make such an approach to civil liability seem essentially as effective or far-reaching as the RCOD. This, however, is not always true. RCOD analyses are substantially more flexible than alter ego inquiries, and the RCOD explicitly expands liability beyond veil-piercing.[12]

In the case of Park Bros., Inc., the state would probably not prevail on an alter ego theory without more significant evidence of an exceptional unity of interest between Park Bros., Inc. and Moe and Curly. In our hypothetical, the Park brothers have not comingled their assets with those of the corporation and there is no substantial evidence of a unity of interest between the corporation and the brothers. The store does not serve as a front for ongoing misdeeds. The facts of the case point to self-interested obliviousness on the part of the officers, but this is not typically a sufficient reason to pierce the veil. While the alter ego doctrine can be an effective tool when properly invoked, the situations in which it provides a meaningful remedy are few, and it does not provide relief in many instances where the RCOD has been successfully utilized.[13]

2. Direct Participation in Tortious Activity

Pursuing a claim against the Park brothers for direct participation in a tortious activity is another potentially viable avenue for relief. This doctrine dictates that if corporate officers directly participate in tortious activity—even while acting in their official business capacities—they may be held personally responsible under common tort law.[14] Stripping an officer of his or her limited liability protection under this theory is straightforward enough once the officer's active role in the tort has been established.[15] The tricky part, of course, is establishing just that.

Presumably most corporate officials are interested in running a law-abiding and reputable business, and as such tend to avoid situations in which they actively commit torts. Such conscientious officers will not be subject to

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[10] Sonora Diamond Corp. v. Superior Court, 99 Cal. Rptr. 2d 824, 836 (Ct. App. 2000) (internal citations omitted).

[11] *Id.* (internal citations omitted).

[12] *See, e.g.*, Comm'r, Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001).

[13] *See, e.g., id.* at 563 (refusing to pierce the corporate veil, but upholding liability under the RCOD).

[14] Michaelis v. Benavides, 71 Cal. Rptr. 776, 779 (Ct. App. 1998).

[15] Frances T. v. Village Green Owners Ass'n, 723 P.2d 573, 586 (Cal. 1986).

personal liability under the theory of direct participation in tortious conduct, no matter how heinous the actions of their company. Depending on one's viewpoint, this may or may not be the right result. A more universally distasteful scenario, however, arises when a corporate officer is able to 'unknowingly' pass the burden of directly committing a tort down the chain of command without incurring personal liability. If a direct link between the officer and the tort cannot be made, such antics fall outside the scope of the direct participation doctrine.[16] Even though a tortious corporation may itself be liable, an individual officer or director remains immune under the doctrine "unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct."[17] The odds that tortfeasors who distance themselves from their tortious activity will ever be caught in the act of committing or authorizing the tort—and therefore incur the vulnerability to be held personally liable as direct participants—are unsatisfyingly low.

Although the Park brothers from our hypothetical scenario oversaw operation of a store that eventually fell out of compliance with local regulations, there is no evidence that Moe and Curly knew about the hazardous leak prior to reporting it to Dotter County. Nor is there any evidence that the brothers could have done anything to prevent the initial mishap. Many courts, in all likelihood, would be quite hesitant to disregard the corporate form of Park Bros., Inc. and hold Larry, Moe, and Curly accountable for what could potentially be labeled good-faith corporate bungling.

3. *Respondeat Superior*

The state's attorneys might also consider using the common law tort doctrine of *respondeat superior* to hold Park Bros., Inc.—as opposed to the Park brothers themselves—responsible for actions of its employees. The doctrine of *respondeat superior* differs from the doctrines already discussed, primarily because it is not a means by which a third party can bypass the usual protections of limited liability for corporate officers. It is a doctrine that holds an employer vicariously liable for the torts committed by his or her employees when these employees act within the scope of employment.[18] Thus, although it is sometimes confused with the RCOD, the objectives and outcomes of the two doctrines are quite different. *Respondeat superior* liability would be useless to the state attorneys in our hypothetical both because (1) it may be hard to prove that any employees committed any tort, and (2) even if they had, the largely insolvent Park Bros., Inc. (not Larry and Moe personally) would be the only party subject to liability.

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[16] *Id.* at 583-84.

[17] PMC, Inc. v. Kadisha, 93 Cal. Rptr. 2d 663, 670 (Ct. App. 2000) (citation omitted).

[18] Yamaguchi v. Harnsmut, 130 Cal. Rptr. 2d 706, 712-13 (Ct. App. 2003).

4. The Responsible Corporate Officer Doctrine

Civil use of the RCOD in our hypothetical situation would constitute the most promising means of recovering the state's loan. The RCOD is similar to alter ego and direct participation in tortious activities in that it would enable a third party to hold Larry and Moe personally accountable for their acts or omissions that violated the law. The means by which the RCOD achieves this end, however, are unique. Courts can use the RCOD to hold a corporate officer personally liable for the acts of the corporation, even acts in which the officer took no affirmative part, based primarily on the officer's relationship to the violation.[19] Authorizing the civil use of the RCOD arms the government with a powerful and unique tool, as the doctrine can be used to impose penalties on an individual in the absence of any act or intent on the part of the corporate officer.[20]

II. HISTORICAL DEVELOPMENT OF THE RESPONSIBLE CORPORATE OFFICER DOCTRINE: THE DOCTRINE'S CRIMINAL PAST

To grasp the implications of civil RCOD use, one must first examine the doctrine's development within the criminal realm. The RCOD began as a criminal doctrine and remained exclusively so for several decades.[21]

A. Early RCOD Cases

While the concept of *mens rea* has long been an integral part of our criminal justice system,[22] it has not always served as the insurmountable prerequisite to criminal culpability that some RCOD critics suggest. Though the rhetoric extolling the need for a finding of criminal *mens rea* prior to conviction is nearly relentless, the reality is not always so definite.

English courts, for instance, repeatedly held corporate officials strictly liable for their actions in spite of Sir William Blackstone's sweeping declaration that "to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will."[23] In *The*

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[19] Noel Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Cases*, 21 STAN. ENVTL. L.J. 283, 314 (2002)

[20] For example, in *United States v. Johnson & Towers, Inc.* 741 F.2d 662, 669-70 (3rd Cir. 1984), the court held a jury may infer an individual's knowledge based on that individual's position of corporate responsibility.

[21] Wise, *supra* note 19, at 289.

[22] "[S]trict criminal liability ignores the hallmark of criminal law: the defendant must have acted with an 'evil' or 'guilty' mind before criminal punishment is warranted." Joshua Safran Reed, *Reconciling Environmental Liability Standards after* Iverson *and* Bestfoods, 27 ECOLOGY L.Q. 673, 682 (2000).

[23] 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

Queen v. Woodrow,[24] the Court held a tobacco dealer who unknowingly possessed a contaminated product criminally responsible for negatively affecting the public health.[25] Shortly thereafter, in *The Queen v. Stephens*,[26] the Court found a quarry owner who specifically forbade company employees from depositing waste in a nearby navigable river nevertheless guilty of clogging the river with rubbish and thus creating a public nuisance.[27] American courts developed similar officer liability case law soon after Oliver W. Holmes noted that the law should react primarily to intentional harm, as "even a dog distinguishes between being stumbled over and being kicked."[28]

In fact, the colonial conceptualization of the RCOD initially followed closely in the footsteps of its English predecessor and maintained the criminal law form of the original English decisions for decades after crossing the Atlantic. One of the earliest American cases involving the RCOD was *State v. Burnham*,[29] a case in which the Supreme Court of Washington discussed the conviction of a corporate officer for possessing and intending to sell milk at a grade below the standard fixed by law.[30] The officer in question was both secretary-treasurer and manager of Northwestern Dairy Company, but had not been present at the time the violation occurred. He actually explicitly instructed all corporate employees to keep the milk up to legal standards.[31] Yet the court found the officer in violation of a public welfare police regulation, and it penalized him "without regard to any wrongful intention, in order to insure such diligence as will render a violation of the law practically impossible."[32] Similarly, in *Hegglund v. United States*,[33] the Fifth Circuit convicted the master of a tanker ship owned by Sun Oil Company of discharging oil contrary to the Oil Pollution Act of 1924.[34] While the ship-master admitted to dealing with instances of unintentional discharge in the past, there was no evidence that he authorized or was even aware of the oil leak at issue.[35] The court, however, affirmed his conviction on the theory that "[o]il upon the water is as harmful if its presence be due to inattention as if due to design."[36]

These historic cases are notable because they establish an anchor for this country's now-increasing use of the RCOD. They demonstrate that the criminal

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[24] 15 M. & M. 404 (Exch. 1846).

[25] Wise, *supra* note 19, at 298.

[26] L.R. 1 Q.B.D. 702 (1866).

[27] Wise, *supra* note 19, at 298-99.

[28] 1 OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1881).

[29] State v. Burnham, 128 P. 218 (Wash. 1912).

[30] *Id.* at 219.

[31] *Id.*

[32] *Id.*

[33] Hegglund v. United States, 100 F.2d 68 (5th Cir. 1938).

[34] *Id.* at 69.

[35] *Id.* at 70.

[36] *Id.* at 69.

arm of the doctrine is both long-standing and historically well respected. Yet these early cases routinely go unnoticed in RCOD proponents' rush to address the country's seminal authorities on the issue and in critics' attempts to brand the doctrine as a newfangled invention that first appeared, without rhyme or reason, in the 1940s.[37]

B. United States v. Dotterweich (1943)

The United States Supreme Court's ruling in *United States v. Dotterweich*[38] is prominently cited as the origin of the modern RCOD. In this case, the Court upheld the conviction of Dotterweich, the president and general manager of a pharmaceutical company, for shipping misbranded drugs in violation of the Food, Drug, and Cosmetic Act ("FDCA").[39] Although *Dotterweich* involved a criminal prosecution under the FDCA, it establishes two fundamental concepts that lay the groundwork for nearly all RCOD cases, both civil and criminal.

First, *Dotterweich* teaches that the RCOD is a unique enforcement tool. The doctrine is independent of, though similar to, the previously discussed theories of individual liability: alter ego, *respondeat superior,* and personal liability for direct participation in tortious conduct. The Supreme Court took great care to distinguish between a successful RCOD prosecution and "the rare case where the corporation is merely an individual's alter ego."[40] Additionally, the government in *Dotterweich* did not prove, nor even claim, that Dotterweich personally interacted with or knew about the drug shipments, but prosecuted him on the theory that "guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation."[41] Thus, the case helped highlight the RCOD as unique among prosecutorial devices, applicable even to unknowing violations of the law.

Second, *Dotterweich* recognized that in cases calling for extensive statutory interpretation, the purposes of the statute "should infuse construction of the legislation."[42] Portions of the statute "cannot be read in isolation."[43] The Supreme Court led by example, placing particular emphasis on the public interests embodied in the Act designed to "touch phases of the lives and health

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[37] *See, e.g.*, United States v. Iverson, 162 F.3d 1015, 1023 (9th Cir. 1998) ("The 'responsible corporate officer' doctrine originated in a Supreme Court case interpreting the Federal Food, Drug, and Cosmetic Act (FFDCA), *United States v. Dotterweich*"); United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir.1991) ("The Supreme Court ... first recognized the concept of 'responsible corporate officer' in 1943"); United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 51 (1st Cir.1991) (citing *Dotterweich* as the "seminal" case involving the RCOD).

[38] United States v. Dotterweich, 320 U.S. 277 (1943).

[39] *Id.* at 278.

[40] *Id.* at 282.

[41] *Id.* at 286.

[42] *Id.* at 280.

[43] *Id.*

of people which, in the circumstances of modern industrialism, are largely beyond self-protection."[44] The Court then surmised that it was Congress' intent to penalize those with an "opportunity of informing themselves of the existence of conditions imposed for the protection of consumers" instead of "throw[ing] the hazard on the innocent public who are wholly helpless."[45] Recognizing that "the only way in which a corporation can act is through the individuals who act on its behalf," the Court famously concluded that managers of a corporation, as well as—and apart from—the corporation itself, may face prosecution under the FDCA.[46] Modern RCOD decisions continue to reflect the importance of the purposes behind the interpreted statutes. A recent Ninth Circuit decision expanding RCOD applicability to the Clean Water Act appears to acknowledge the intent apparent in "Congress' recent broad additions to a number of environmental statutes of criminal penalties with a reduced knowledge requirement."[47]

C. *United States v. Park (1975)*

More than 30 years after the *Dotterweich* decision, the Supreme Court again tackled the issue of individual culpability under the RCOD in *United States v. Park*.[48] In *Park*, the government prosecuted John Park, the president and CEO of an expansive national grocery store chain, for storing food in conditions that violated the FDCA.[49] Both Park and the corporation were ultimately found criminally responsible for the misdemeanor violations.[50] The Court relied heavily upon the foundation laid by *Dotterweich* to reach its conclusion,[51] but it also clarified and extended the parameters of the RCOD in two substantial ways.

First, *Park* elaborated on the Supreme Court's provocative warning in *Dotterweich* that "[i]t would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in . . . responsible relation" to the public welfare.[52] *Park* more carefully explained that RCOD liability hinges not on official title, but on actual authority. The appropriate inquiry is whether the individual occupied a position in the corporation that placed on that individual "responsibility and authority either to prevent in the

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[44] *Id.* at 280.

[45] *Id.* at 285.

[46] *Id.* at 281.

[47] Reed, *supra* note 22, at 694 (*citing* Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 39, 40 n.6 (1999) (noting, for example, the introduction of the novel offense of "negligent endangerment" into the CAA)).

[48] United States v. Park, 421 U.S. 658 (1975).

[49] *Id.* at 660.

[50] *Id.* at 677-78.

[51] *Id.* at 660.

[52] United States v. Dotterweich, 320 U.S. 277, 285 (1943).

first place, or promptly to correct, the violation complained of."[53]

Second, *Park* held that delegation of duties will not relieve RCOD liability.[54] Acme Markets, Inc., of which Park was president and CEO, boasted "approximately 36,000 employees, 874 retail outlets, 12 general warehouses, and 4 special warehouses."[55] Providing sanitary storage conditions for publicly sold food was something that Park was "responsible for in the entire operation of the company" and was "one of many phases of the company that he assigned to 'dependable subordinates.'"[56] As the president of a national corporation, Park had "no choice but to delegate duties to those in whom he reposed confidence."[57] Such a scenario is a perfectly normal, necessary, and acceptable aspect of running a modern-day business. But, as the Court noted, delegation of duty is not deletion of responsibility.[58]

Park argued that he had "no reason to suspect his subordinates were failing to insure compliance with the Act," and that "once violations were unearthed, acting through those subordinates he did everything possible to correct them."[59] However, the Supreme Court concluded that the responsible corporate officer had been "informed. . . by letter of the [unlawful] conditions."[60] Park himself admitted that such letters "indicated the system for handling sanitation 'wasn't working perfectly.'"[61] Thus, Park "was on notice that he could not rely on his system of delegation to subordinates to prevent or correct [unlawful] conditions."[62]

III. WHY THE RCOD IS GAINING ACCELERATED ACCEPTANCE AS A MEANS OF FINDING INDIVIDUAL CIVIL LIABILITY

A. Expanding Civil Precedent

All of the early applications of the RCOD, as exemplified in the seminal *Dotterweich* and *Park* cases, involve criminal charges. Courts throughout the country, however, have been continuously sanctioning the doctrine's civil use for over 30 years.

Two of the earliest civil cases to apply the RCOD did so within the context of injunctive orders. In *United States v. Johnson*, the Eighth Circuit upheld a fine imposed against an individual corporate officer for violation of a cease and

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[53] *Park*, 421 U.S. at 673-74.

[54] *Id.* at 671, 677-78.

[55] *Id.* at 660.

[56] *Id.* at 664.

[57] *Id.* at 677.

[58] *Id.* at 677-78.

[59] *Id.* at 677.

[60] *Id.* at 661.

[61] *Id.* at 664-65.

[62] *Id.* at 678.

desist order,[63] and in *United States v. Sene X Eleemosynary*, a Florida district court held that an injunction could be properly issued against corporate officers to prevent FDCA violations.[64] However, it was not until the 1980s that the federal government's civil use of the RCOD began to garner widespread attention.

In *United States v. Hodges X-Ray*, the Sixth Circuit found the president of an X-ray machine manufacturer personally liable for corporate violations of the Public Health Service Act.[65] Since the *Hodges* decision, a growing number of federal courts have found the RCOD applicable to civil cases.[66] Such courts readily embrace *Hodges*' common-sense theory that "the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty."[67]

Several states have taken the Sixth Circuit's lead and are now using the doctrine in civil cases. The Supreme Court of Indiana, for instance, used the RCOD to fine a landfill's corporate owner—who also served as the corporation's sole officer and shareholder—$3,175,000 for violations of the Indiana Environmental Management Act.[68] The Supreme Court of Wisconsin held a corporate officer who was "responsible for the overall operation of the corporation's facility which violated the law" personally liable for his corporation's violations of state solid and hazardous waste laws.[69] The Supreme Court of Connecticut held two corporate officers personally liable under the RCOD for violations of the state's Water Pollution Control Act.[70] The Court of Appeals of Minnesota used the doctrine to impose a $7,075 penalty upon a corporation's president for the corporation's hazardous waste violations.[71] The Court of Appeals of Washington, Division Two, used the RCOD to hold the sole shareholder of a corporation individually liable for payment of $250,000 because the corporation discharged pollutants without a permit.[72] And the California Court of Appeal, Third Division, recently followed suit, upholding a $2,493,250 civil penalty levied against a father and son who were the sole officers, directors, and shareholders of a corporation responsible for leaking over

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[63] United States v. Johnson, 541 F.2d 710 (8th Cir. 1976).

[64] United States v. Sene X Eleemosynary Corp., Inc., 479 F.Supp. 970 (S.D. Fla. 1979).

[65] United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985).

[66] *See, e.g.*, United States v. Pollution Abatement Services of Oswego, Inc., 763 F.2d 133, 135 (2nd Cir. 1985); Waterkeepers N. Cal. v. AG Indus. Mfg., Inc., 2005 WL 2001037 at *13 (E.D. Cal. 2005); United States. v. Undetermined Quantities of Articles of Drug, 145 F.Supp.2d 692, 704-05 (D. Md. 2001); United States v. Shelton Wholesale, Inc., 1999 WL 825483 at *3 (W.D. Mo. 1999).

[67] *Hodges X-Ray*, 759 F.2d at 561.

[68] Comm'r, Ind. Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556 (Ind. 2001).

[69] State v. Rollfink, 475 N.W.2d 575, 576 (Wis. 1991).

[70] BEC Corp. v. Dep't of Envtl. Prot., 775 A.2d 928 (Conn. 2001).

[71] Matter of Dougherty, 482 N.W.2d 485 (Minn. 1992).

[72] Dep't of Ecology v. Lundgren, 971 P.2d 948 (Wash. Ct. App. 1999).

3,000 gallons of gasoline into the ground.[73]

Not all circuits, states, or individual courts have endorsed civil use of the RCOD with equal vigor. However, the majority of the jurisdictions resisting the progressive RCOD movement display a superficial or convoluted understanding of the subject matter when it comes to explaining their rejection of the RCOD's civil application. For instance, a New York appellate court rejected, without reason, the applicability of the RCOD to the state's Navigation Law, dismissing it in three sentences as an inappropriate standard based on outdated federal case law.[74] The Commonwealth Court of Pennsylvania misconstrued the RCOD as a tool only appropriate for federal courts to use in cases involving criminal violations of the FDCA.[75] And the Fifth Circuit held, at least somewhat more convincingly, that a corporate officer may not be held civilly liable for the corporation's violation of the Rivers and Harbors Act unless the statute itself authorizes such liability or there is reason to pierce the corporate veil.[76]

This Fifth Circuit decision would likely be more influential had it not come down just as other courts were taking their first steps toward civil application of the RCOD.[77] In light of its timing, however, it can hardly qualify as a coherent condemnation of the doctrine's civil use. And neither of the state cases following the Fifth Circuit's decision discussed the doctrine's civil use in other numerous states, nor did they indicate a clear understanding of the doctrine's origins, policy, or implications.[78] The precedent that such cases have set in a few states should not, therefore, be viewed as persuasive when compared with the national trend toward civil incorporation of the RCOD.

B. Civil Use of the RCOD Makes More Sense than the Doctrine's Criminal Use

California courts' tendency to allow government entities to make vigorous criminal use of the RCOD while–up until the recent *Roscoe* decision –shying away from condoning the doctrine's civil use borders on nonsensical. Much of the criticism aimed at the RCOD centers around the doctrine's application in the criminal context, and could easily be avoided by employing the doctrine in a civil capacity. The doctrine's civil use has a much less abrasive impact on

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[73] People v. Roscoe, 87 Cal. Rptr. 3d 187 (Ct. App. 2008).

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

[75] Kaites v. Dep't of Envtl. Res., 529 A.2d 1148, 1552 (Pa. Commw. Ct. 1987).

[76] United States v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1300-01(5th Cir. 1976).

[77] The doctrine's popularity accelerated appreciably during the 1970's. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975); United States v. Frezzo Bros., Inc., 602 F.2d 1123 (3d Cir. 1979); United States v. Starr, 535 F.2d 512 (9th Cir. 1976); United States v. Rachal, 473 F.2d 1338 (5th Cir. 1973); United States v. Cassaro, Inc., 443 F.2d 153 (1st Cir. 1971); United States v. Sene X Eleemosynary Corp., Inc., 479 F. Supp. 970 (S.D. Fla. 1979); United States v. Acri Wholesale Grocery Co., 409 F. Supp. 529 (S.D. Iowa 1976); State v. Longstreet, 536 S.W.2d 185 (Mo. Ct. App. 1976); United States v. Gulf Oil Corp., 408 F. Supp. 450 (W.D. Pa. 1975).

[78] *See Markowitz*, 710 N.Y.S.2d 407; *Kaites*, 529 A.2d 1148.

individual rights than does its criminal use, and proper civil application can benefit the public in ways wholly neglected by the doctrine's criminal arm.

Perhaps the most significant criticism of criminal RCOD use focuses on the fact that the doctrine "displace[s] or dilut[es] the *mens rea* requirement."[79] This concern, however, is significantly assuaged when the RCOD is used to impose only civil penalties. Even some of the doctrine's most vocal critics suggest forgoing criminal prosecutions in favor of "simply applying strict civil liability since . . . civil liability does not carry the stigma of a criminal conviction" and does not commonly involve a loss of physical freedom.[80] Although many people find civil use of the doctrine comparatively palatable, recognizing that it entails less interference with traditional notions of responsibility and fairness than does its criminal counterpart, the doctrine still continues to struggle for widespread recognition by California courts.

The different evidentiary burdens that the government must bear in order to successfully achieve a criminal versus a civil conviction also make civil RCOD application more appropriate. The RCOD's disregard for a corporate officer's intent is substantially more appropriate under the lesser burden of proof required in civil cases than under the heightened threshold required in criminal cases. Allowing the prosecution to avoid what is typically an essential element of a crime that must be proved beyond a reasonable doubt is a much greater departure from the norm than permitting the government to bypass that element in circumstances requiring proof by only a preponderance of the evidence.

Critics of the use of the RCOD in a criminal context further assert that "[f]or corporations to hire and retain qualified officers, they must protect them from criminal liability. To the extent that they are unable to provide this protection, well qualified officers will become scarcer and consumers will suffer as stock prices go down and product prices go up."[81] This line of reasoning is probably just as persuasive within the civil arena as it is within the criminal, which is to say, not terribly persuasive at all. It may be true that, "for many executives, the risks that accompany a position of corporate authority have come to outweigh the rewards associated with the job."[82] These risks, however, stem not only from government prosecution, but from potential shareholder and creditor actions. It makes little sense to argue that simply because corporate officers do not wish to bear the risks entailed in their own company's acts and omissions justice would be better served by shifting this burden from the active officer to the unknowing, non-consenting, and uncompensated public. Furthermore, there appear to be no statistics illuminating what effect, if any, RCOD actions have

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[79] Cynthia H. Finn, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 AM. U. L. REV. 543, 573 (1996).

[80] Reed, *supra* note 22, at 683.

[81] *Id.* at 697.

[82] Seth Van Aalten, *D&O Insurance in the Age of Enron: Protecting Officers and Directors in Corporate Bankruptcies*, 22 ANN. REV. BANKING & FIN. L. 457, 457 (2002).

had on the availability of competent corporate management.[83] The prophecy foretelling a dearth of qualified corporate officer candidates as a result of the RCOD remains unfulfilled nearly 100 years after the doctrine set its first criminal precedents and more than 30 years since its first civil applications.

Finally, one of the strongest arguments in favor of civil RCOD use is that it makes far more sense from a utilitarian perspective than criminal use of the doctrine. This is especially true when a company's actions have injured the public welfare. Instead of simply punishing the responsible officer, civil remedies help restore the public to at least some semblance of the position it enjoyed before the harm occurred. If, for instance, Larry and Moe were convicted under the RCOD of an environmental crime and thrown into jail, the state would lose a substantial amount of money. The money that the state loaned to Park Bros., Inc. to aid in remediation would likely be unrecoverable, as would the funds spent to conduct a trial and ultimately incarcerate the officers. The financial burden for the corporation's misdeeds would rest squarely upon the taxpayers and the state. If, however, the three brothers were held civilly liable under the RCOD for the corporation's outstanding debt, the state would stand a substantially better chance of recovering some or all of its initial loss. The government could seek repayment from both officers individually as well as from the defunct corporate entity. Even if the state were unable to recover any of its past losses, it could at least avoid the added burden of paying to impose criminal penalties upon the corporate officers. Since the burden of doling out punishment itself harms society,[84] it makes sense to allow courts and prosecutors the option of avoiding such harm in favor of more socially desirable goals.

Admittedly, this final point is more or less convincing depending upon the context in which the civil or criminal application of the RCOD is invoked. Criminal use of the RCOD makes the most sense in cases involving large public corporations that can afford to break public welfare laws and pay large fines or litigate issues to the extreme. Here, "civil liability does not sufficiently deter because corporate officers can externalize penalties by demanding that the

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[83] While plenty of scholarly literature laments the rising insurance costs for corporate officers, and some even suggests that this may or could or probably might be linked to the increasing use of the RCOD, none of the articles make any solid statistical connection between RCOD use and increasing rates, or between RCOD use and officer recruitment and retention trends. *See, e.g.*, Heidi Stark Wells, *Inserting the Responsible Corporate Officer Doctrine into the Resource Conservation and Recovery Act – and the Mess that Ensues*, 21 AM. J. TRIAL ADVOC. 167 (1997); Reed, *supra* note 22, at 697.

[84] Simply initiating criminal proceedings forces law-abiding taxpayers to pay for a criminal defendant's trial, plus it can result in the removal of able-bodied people from the workforce and the breaking apart of families and other social networks. And, if society chooses to actually imprison a defendant, this not only forces taxpayers to pay for that person's incarceration as well as for the support of any of his or her dependants, but it also increases the likelihood that that defendant will reoffend upon release. The Honorable Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1410 (2008).

corporation either insulate them from personal liability or increase their compensation for bearing the increased risk."[85] It is the criminal arm of the RCOD that gives corporate sanctions the tangible bite they would otherwise lack in such a scenario. But criminal punishment should not preclude civil recovery. The primary object of civil awards is not to punish but to compensate. Big companies that can afford to bear the economic burden of their officers' clumsy oversight are likely in the best position to quickly and fully reimburse the public. Utilizing both components of the RCOD in conjunction could be the most effective way of simultaneously punishing and compensating when dealing with larger, financially robust companies.

Officers of more intimate corporations, on the other hand, may well feel the effects of even modest civil penalties as acutely as they would criminal sanctions. Imposition of civil penalties under the RCOD is a practical way to secure monetary judgments against the officers of close corporations whose businesses may be unable to pay out large figures, but who have individually accrued substantial wealth. Such personal debts, however, also threaten severe inconvenience and embarrassment for small business' officers to a degree often unrealized in the upper echelons of larger public corporations. Both the small business and its operators could easily face bankruptcy and loss of credit, credibility, customers, and dependable employees if saddled with a civil suit. Thus, use of the RCOD's civil arm can deter lax corporate oversight within smaller companies while simultaneously offering a means of compensating the public for the harmful mistakes of both small and large corporations.

IV. CALIFORNIA'S GRADUAL APPROACH TO CIVIL USE OF THE RCOD

A. California's Pre-Roscoe Precedent was Scant and Unclear

One of the first times a California state court mentioned using the RCOD in the civil context occurred in *People v. Wilmshurst*.[86] In *Wilmshurst*, the California Court of Appeals, Third Appellate District, reviewed a "double fines" argument advanced by defendant officers of a car dealer that sold numerous vehicles in violation of the state's Health and Safety Code.[87] The court simply mentioned *Park* in an observation on theoretical underpinnings of corporate officer liability without passing directly on its application: "[i]f both [the officer and corporation] may be liable for the violations, then each must suffer the consequences."[88]

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[85] Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case for Criminal Prosecution of Federal Employees*, 18 HARV. ENVTL. L. REV. 137, 146 (1994).

[86] 81 Cal. Rptr. 2d 221 (Ct. App. 1999).

[87] *Id.* at 230.

[88] *Id.*

Aside from the passing reference in *Wilmshurst*, the California Court of Appeal, Fifth Appellate District, is the highest authority to touch upon civil application of the RCOD prior to *Roscoe*. In *Liquid Chemical Corp. v. Department of Health Services* the court found Dr. Garrett, the president and shareholder of Liquid Chemical Corporation, personally liable under the RCOD for violations of the California's Health and Safety and Administrative Codes.[89] The court upheld a $250,000 penalty against both the corporation and Dr. Garrett after determining that Dr. Garrett was "'the person responsible for the overall operation' of the . . . facility."[90] As the court explained: "imposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with [the legislature's] intent to impose liability upon the persons who are involved in handling and disposal of hazardous substances."[91]

The *Liquid Chemical* decision did not refer to the RCOD by name, but the court apparently understood that it was freeing the doctrine's civil arm. After citing to *Park*, the opinion asserted that "[w]hether a proceeding is criminal, civil, or administrative in nature does not vary the meaning of terms such as 'corporate agent' or 'operator'" and should not vary the court's determination of who should be held personally responsible at such.[92] While *Liquid Chemical* had the potential to provoke a significant shift in the direction of California's RCOD case law, the state legal community failed to take note of the decision for nearly two decades. This is probably because *Liquid Chemical* did not do much to clarify the scope or intricacies of the doctrine, and clearly failed to encourage or enable its widespread use.

While the implications of the *Liquid Chemical* ruling may have been lost on the majority of California courts and commentators, at least one administrative agency caught on and has been utilizing its holding for years. California's State Water Resources Control Board ("SWRCB") apparently interpreted the *Liquid Chemical* decision liberally, and began applying the RCOD civilly prior to explicit state court approval. In *In re Original Sixteen to One Mine*, the Board announced its "support" for "the extension of the responsible corporate officer doctrine to civil matters."[93] The Board also affirmed RCOD civil liability in *Tehama Market Associates, LLC v. Central Valley Regional Water Quality Control Board*.[94] In that case, a regional water board imposed a $250,000

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[89] Liquid Chemical Corp. v. Dep't of Health Serv., 279 Cal. Rptr. 103, 105-6, 110, 114-16 (1991).

[90] *Id.* at 114-16.

[91] *Id.* at 115 (citing United States v. Northeastern Pharmaceutical, 810 F.2d 726, 745 (8th Cir. 1986)).

[92] *Id.*

[93] *In re* Original Sixteen to One Mine, Inc., Order No. WQO 2003-0006, at 4 (SWRCB 2003).

[94] Tehama Mkt. Assoc., LLC v. Cent. Valley Reg'l Water Quality Control Bd., Super. Ct. Butte County, No. 141395, filed 2007 (challenging Administrative Civil Liability Order No.

penalty against a responsible corporate officer who failed to obtain a storm water permit.[95] Thus, the recent expansion of the civil arm of the RCOD not only comports with California appellate authority, but it also facilitates continued civil use of the RCOD by the state's administrative agencies as an important enforcement tool.

B. *Roscoe Modernized California's RCOD Law*

The California Court of Appeal, Third Appellate District, recently affirmed the civil applicability of the RCOD to California's environmental laws in *People v. Roscoe*.[96] In that case, John and Ned Roscoe (the Roscoes) were shareholders, officers, and operators of a family-run business, The Customer Company ("TCC").[97] At some point in 1994, one of TCC's underground storage tanks released over 3,000 gallons of gasoline into the ground in a small city outside Sacramento.[98] A TCC employee notified the Sacramento County Environmental Management Department of the spill and the company hired an environmental consultant to assist with remediation.[99] Cleanup, however, did not occur in a timely or adequate manner, and the County sent several notices to TCC stating that the company was consistently violating state and federal regulations.[100] John Roscoe opened all of these notices, but dismissed them as mere "form letters" and passed them on to a company employee, who in turn passed them on to TCC's environmental consultant.[101] Despite continuing notification of noncompliance, no one at TCC took any further action.[102]

Sacramento County eventually sued TCC and the Roscoes. The Superior Court, Sacramento County, found the Roscoes and TCC jointly and severally liable for $2,493,250 million in penalties.[103] The lower court noted that if timely cleanup occurred, the cost would have been approximately $400,000 instead of the $1.5 million already expended to date. It also noted that 'the officers' of The Customer Company 'did not take seriously the multiple notices of violations,' 'did nothing other than refer one or two of the notices to [a lower employee],' and made no attempt 'to make sure the problems were addressed.'[104]

The Roscoes appealed this judgment to the California Court of Appeal, Third

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R5-2007-0054), *available at* http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/0706/index.shtml.

[95] *Id.*

[96] People v. Roscoe, 87 Cal. Rptr. 3d 187, 191 (Ct. App. 2008).

[97] *Id.* at 189.

[98] *Id.*

[99] *Id.*

[100] *Id* at 190.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id* at 191.

Appellate District, arguing, among other things, that the RCOD should not be applied to civil cases.[105] The appellate court disagreed with the Roscoes and affirmed the lower court's ruling, holding that the RCOD is both a criminal and civil doctrine.[106] Even more importantly, the appellate court finally established the general parameters for the doctrine's civil use in California.[107] Prior to the *Roscoe* decision, no California court had ever expressly delineated the "elements" necessary to properly establish individual liability under the civil RCOD. *Roscoe*, however, did so in a way that realigned California case law with that of other progressive states and with at least one California administrative agency.[108] By embracing the approach to civil RCOD use that is already recognized nationwide, the court ensured future civil application of the RCOD will be easier for other state courts, that the outcomes of similar RCOD claims will be more predictable, and that responsible corporate officers will be uniformly alerted to the legal boundaries of the doctrine.

The formulation for proper civil application of the RCOD now adopted by at least four states is embodied in a list of the three essential elements required to impose civil liability upon a corporate officer under the RCOD. Namely:

> (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.[109]

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[105] *Id.*

[106] *Id.*

[107] *See id.* at 195.

[108] Minnesota has long used California's newly-adopted 3-pronged test, (*see* Matter of Dougherty, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992)), as have Connecticut, (*see* BEC Corp. v. Dep't of Envtl. Prot., 775 A.2d 928, 937 (Conn. 2001)), and Indiana (*see* Comm'r, Ind. Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 561 (Ind. 2001)). Even California's own regional and state water boards applied this test administratively prior to the *Roscoe* decision. *See, e.g.*, Administrative Civil Liability Order No. R5-2007-0054, *In the Matter of Tehama Market Associates, et al.* ¶ 12, http://www.swrcb.ca.gov/centralvalley/board_decisions/adopted_orders/butte/r5-2007-0054-enf.pdf (last visited Mar. 3, 2010).

[109] People v. Roscoe, 87 Cal. Rptr. 3d 187, 195 (Ct. App. 2008) (citing *Matter of Dougherty*, 482 N.W.2d at 490, *BEC Corp.*, 775 A.2d at 937 and *RLG, Inc.*, 755 N.E.2d at 561).

V. THE 3-PRONGED TEST FOR FINDING CIVIL RCOD LIABILITY

A. The Established Approach

1. An Individual Must Hold a Position of Responsibility that Allows Them to Influence Corporate Policies or Activities

The first prong of the civil RCOD test embodies the "responsible corporate" portion of the doctrine. Although the state government bears the burden of proving that it has met this prong by a preponderance of the evidence,[110] the threshold of proof required to meet this first prong does not appear to be particularly high.[111] The requirement that a corporate individual hold a position of responsibility such that he or she could influence the policies or activities of the corporation indicates that the individual need only conduct a minimal level of corporate oversight to meet this first prong. To determine whether a particular individual holds the requisite corporate responsibility to satisfy this element, courts must generally engage in highly fact-sensitive inquiries.[112] After this inquiry, if the court believes the individual holds a position of responsibility such that he or she could influence the policies or activities of the corporation, the first requirement is satisfied.

2. There Must Be a Nexus Between the Individual's Corporate Position and the Violation in Question Such that the Individual Could Have Influenced the Corporate Actions that Constituted the Violations

The second prong of the civil RCOD test embodies the notion that, for RCOD liability to lie under any given statute, there must be a concrete connection between the responsible corporate individual and the corporate violation. In determining whether this requisite nexus exists, courts may consider a number of factors.

One of the most visible factors courts consider is the official title under which a corporate officer is operating. Although corporate titles do not themselves impute responsibility, there is frequently a high correlation between an employee's official position and the scope of his or her actual power. Thus, while corporate designations do not alone create a nexus, it is generally reasonable to draw a "fair inference" that a high-ranking corporate official "is

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[110] CAL. EVID. CODE § 115 (2009).

[111] For instance, the court in *Matter of Dougherty* found the defendant was "in a position of responsibility as president and primary emergency coordinator" of the offending company. *Matter of Dougherty*, 42 N.W. 2d at 490. And in *RLG, Inc.*, the Indiana Supreme Court found that the defendant "plainly had a position that allowed him to influence RLG's policies and functions" based on the facts that the defendant served as his corporation's only corporate officer, shareholder and director, that he was involved in operating the landfill that this corporation owned, and that he represented to third parties that he was the responsible party. *RLG, Inc.* 755 N.E. 2d at 561.

[112] *See* United States v. Dotterweich, 320 U.S. 277, 285 (1943).

acquainted with the conduct of business of the corporation."[113]

The *Roscoe* case was decided as a judgment roll appeal, and was necessarily limited to the facts contained in the lower court's decision.[114] Thus, the Court of Appeal spent almost no time discussing the facts that comprised the 'nexus' between the officers and the violation at issue.[115] The court merely noted and affirmed the language of the lower court: "The Roscoes retained 'overall authority of company affairs.' They could have prevented or remedied promptly the noticed violation of the regulation. And they did not 'exercise their responsibilities and power to use all objectively possible means to discover, prevent, and remedy any and all violations.'"[116]

The civil RCOD decisions of out-of-state courts provide more concrete examples of additional factors that may satisfy the second prong's nexus requirement. These additional factors include: whether an officer possessed day-to-day decision-making authority over the corporation's operations;[117] was regularly present at the site of the incident;[118] had hands-on control of the site;[119] was responsible for on-site management;[120] responded authoritatively to the incident in question;[121] had sufficient personal involvement in the decision that resulted in the violation;[122] was the primary contact with all regulatory bodies involved in the incident;[123] assumed responsibility for the usual oversight of the operations that caused the incident;[124] was aware of the occurrence of the violation at issue;[125] or designated him or herself as the responsible party on permit applications.[126] Though it is not yet entirely clear how many factors must be present to constitute a nexus or which, if any, factors carry more weight than others, such intricacies will undoubtedly be fleshed out as the doctrine enjoys increased use.

3. The Individual's Actions or Inactions Must Facilitate the Violations

The final prong of the civil RCOD test requires a showing that a responsible individual was able to exert some level of control over the actions (or inactions)

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[113] People v. Conway, 117 Cal. Rptr. 251, 258 (Ct. App. 1974) (citation omitted).

[114] *Roscoe*, 87 Cal. Rptr. 3d at 195.

[115] *Id.*

[116] *Id.*

[117] BEC Corp. v. Dep't of Envtl. Prot., 775 A.2d 928, 941 (Conn. 2001).

[118] *Id.* at 942.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Matter of Dougherty, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992).

[124] *BEC Corp.*, 775 A.2d at 942.

[125] *Matter of Dougherty*, 482 N.W.2d at 490.

[126] Comm'r, Ind. Dep't of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 561-2 (Ind. 2001).

that caused the violations at issue. This requirement ensures that civil use of the RCOD does not unduly undermine the corporate structure's highly revered promise of limited liability. It embodies the notion that the corporate individual must have not only have a theoretical responsibility for, or connection to, the violation at issue, but that this individual's actions or inactions actually allowed these violations to occur.[127] It also offers relatively high-ranking, active corporate officers, those most susceptible to easily meeting the first prongs of the test, some peace of mind. Most individuals, potentially excepting the corporation's president and similarly-situated officers, who do everything within their corporate power to ensure compliance with the law, will have a colorable defense to RCOD liability.[128]

The fact-sensitive inquiry necessitated by addressing any mitigating factors or affirmative defenses pays appropriate homage to the case-by-case analysis that must accompany any invocation of the RCOD. As the Supreme Court noted,

> [t]o attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of [the legislature]. . . would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.[129]

B. *Variation on a Theme: Reworking the Established Approach by Shifting the Burden of Persuasion for the Nexus Requirement*

Although the *Roscoe* decision is admirable for its long-overdue recognition and clarification of civil use of the RCOD, the precedent *Roscoe* sets is neither clear nor broad enough. California currently enjoys the unique opportunity to clarify and strengthen the decade-and-a-half-old civil RCOD test while it is still in its formative stages within the state. Courts should take this chance to dispel the confusion concerning whether and how the three prongs of the test interact with strict liability and public welfare statutes, as well as how they interact with each other. Courts could do this by explicitly adopting a regime in which the second prong of the civil RCOD test (the nexus requirement) is presumptively

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[127] *See, e.g.*, *Matter of Dougherty*, 482 N.W.2d at 490.

[128] To further explore the objective impossibility defense, consider *United States v. Park*, 421 U.S. 658, 673 (1975) ("[t]he duty imposed . . . on responsible corporate agents is . . . one that requires the highest standard of foresight and vigilance, but . . . does not require that which is objectively impossible") and *United States v. Y. Hata*, 535 F.2d 508, 509-12 (9th Cir. 1976) (discussing at length the potential "objective impossibility" defense). *But see* People v. Matthews, 9 Cal. Rptr. 2d 348, 353 (Ct. App. 1992) (company president with responsibility covering all aspects of a corporation's operations is presumptively able to control and remedy corporate actions, and thus is not privy to the objective impossibility defense).

[129] United States v. Dotterweich, 320 U.S. 277, 285 (1943).

satisfied in either of the two following situations: (1) when a corporation violates a public welfare statute, or (2) when a corporation violates a strict liability statute. Such a stance would prevent any excuses involving an officer's subjective knowledge or intent to alleviate the individual from responsibility for corporate actions that violated strict liability or public welfare statutes. As the California Court of Appeal, Second Appellate District, noted:

> It is therefore appropriate as a practical matter and consistent with *Dotterweich* and *Park* to prosecute a person at the highest levels of a corporation as the best way to insure the adoption of corporate policies and practices which will avoid violations of strict liability public welfare and regulatory offenses.[130]

One should not overlook the fact that California already recognizes what might initially appear to be a contradictory presumption: one in favor of upholding the limited liability conferred by incorporation.[131] However, this presumption is general in nature and courts are traditionally encouraged to disregard the corporate entity in "extreme" or "exceptional" circumstances.[132] The very structure of public welfare and strict liability statues indicate that they comprise two such exceptional circumstances. Although strict liability statutes conferring civil penalties may not be exceptional in their scarcity, the fact that the legislature chose to automatically place the "burden of acting at hazard" on the acting party signals that it has chosen, for whatever reason, to treat these particular violations as extreme.[133] "[I]n a hierarchically organized corporation, with its defined divisions and delegations of authority, it makes. . . sense to create a presumption that officers in a responsible relationship know some facts about the activity of their subordinates."[134] If California courts officially recognized a presumption that the second prong of the RCOD test is met when a corporation violates a public welfare or strict liability statute, this would force individuals who hold positions of corporate responsibility to realize that the corporate form will not shield accountable officers when such violations occur.

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[130] People v. Matthews, 9 Cal. Rptr. 2d 348, 354 (Ct. App. 1992).

[131] Calvert v. Huckins, 875 F.Supp. 674, 678 (E.D. Cal. 1995).

[132] *Id.* (citing *National Precast Crypt Co. v. Dy-Core of Pennsylvania, Inc.*, 785 F.Supp. 1186, 1192 (W.D. Pa.1992)).

[133] *Dotterweich*, 320 U.S. at 281.

[134] Amiad Kushner, Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context, 93 J. CRIM. L. & CRIMINOLOGY 681, 704 (2003).

Evidentiary presumptions serve several purposes:

> One purpose is to allocate the burden of production or persuasion to the party in the better position to have the evidence . . . [a] second purpose is "to avoid an impasse, to reach some result, even though it is an arbitrary one" . . . [f]inally, most presumptions coincide with what probably is true.[135]

All of the above rationales support presuming the existence of the RCOD's second prong in both strict liability and public welfare cases. The corporate officer, for instance, is in a better position than the government to access evidence relating his or her official business duties. In a society replete with all shapes and sizes of corporate structures, individual officers can all too easily shield themselves with bureaucratic classifications and convoluted business models. Thus, the individual officer is realistically the party with ready access to the evidence of the facts supporting or rejecting the second and third prongs of the RCOD test. Similarly, presuming the existence of a nexus between a violation and an officer will undoubtedly assist the court in reaching "some result," though whether this result is the either desirable or fair is certainly a topic of debate. Finally, the presumption of a nexus almost certainly would coincide with what is true. As the Supreme Court has already noted with respect to strict liability offenses, "[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[136] It therefore seems reasonable to presume some sort of nexus between top corporate officials and any and all of the corporation's more significant actions.

Although the creation of a presumption may sound unfair or harsh, such an evidentiary shift will occur only when the corporate officer is identified in connection with a breach of two of the most serious types of statutes: public welfare and strict liability. Arming the government and its citizens with an unusually strong tool to uncover and remedy such violations simply forces these individuals, individuals who knowingly took on a weighty responsibility at the time they became a corporate officer, to bear some burden of proving their own compliance with the law. It is important to remember that the presumed existence of a nexus, though undeniably providing the prosecution with a powerful tool, will not conclusively end the inquiry into RCOD liability in public welfare and strict liability cases. Defendants will still be given the opportunity, under the test's third prong, to present any concrete mitigating

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[135] Kieth B. Hall, *Evidentiary Presumptions*, 72 TUL. L. REV. 1321, 1325-26 (1998).

[136] Morissette v. United States, 342 U.S. 246, 256 (1952).

factors or affirmative defenses that dispute the propriety of civil RCOD application in their individual case.

1. The Burden Should Shift in Public Welfare Cases

Many have branded the RCOD as a peripheral doctrine that ought to be applicable only to public welfare offenses.[137] This traditional argument likely stems from the fact that both *Dotterweich* and *Park* dealt with food and drug violations and discussed at length the public welfare nature of the offenses. Modern courts entangle their discussions of RCOD applicability with their discussions regarding public welfare laws so often that the resulting confusion is not surprising.[138] Although perusal of the text of many recent RCOD decisions, including *Roscoe*, would likely convince many that the RCOD can or should only be invoked when a public welfare statute has been violated,[139] this is not the case. State courts have never actually included the issue of public welfare in the RCOD's three-pronged test. And "[t]he vast expansion of the modern economy, combined with the proliferation of large international corporations, suggests that the classical public welfare doctrine is outdated as a controlling concept of an expanded officer liability regime."[140] While public welfare statutes are the types of laws most often implicated in RCOD cases, the reasoning behind the doctrine suggests that this is not a prerequisite for the doctrine's use.

Structuring application of the RCOD wholly around the type of situation to be remedied (i.e. public welfare offenses), as opposed to the type of individual to be held accountable, does not make practical sense. This is because "[t]he strongest rationale for the doctrine does not lie in the activity sought to be regulated, but in the elusiveness of the defendant sought to be persecuted."[141] The RCOD is nothing if not a tool designed specifically to cut through corporate bureaucracy with the ultimate objective of ferreting out and holding the appropriate corporate personnel responsible. In order to fully achieve this goal amidst the complexities of our modern social, political and economic structures, the doctrine cannot remain superficially tethered to the limited definition of

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[137] *See, e.g.*, Finn, *supra* note 79, at 545-46 (arguing that the RCO doctrine should be limited to "true" public welfare offenses).

[138] *See, e.g., People v. Roscoe, 87 Cal. Rptr. 3d 187, 192 (Ct. App. 2008)* (stressing that "[c]entral to the court's holding [in *Dotterweich*] was that the Act was public welfare legislation and the statute imposed strict liability").

[139] The court in *Roscoe* concludes that the underground storage tank laws at issue were "the type of strict liability public welfare statute about which the court in *Dotterweich* was concerned when articulating that a corporate officer can be held 'responsible' without 'awareness of some wrongdoing.'" *Roscoe*, 87 Cal. Rptr. 3d at 195 (citing *Dotterweich*, 320 U.S. at 280-81). The court therefore holds that the RCOD applied to the tank laws at hand. *Id.*

[140] Kushner, *supra* note 134, at 683.

[141] *Id.*

public welfare offenses.[142] However, in those cases when the RCOD is utilized to remedy the violation of a public welfare statue, the burden should rest with the corporate officer.

2. The Burden Should Shift in Strict Liability Cases

Strict liability laws, much like public welfare statutes, are so frequently involved in RCOD cases that strict liability itself almost seems to be another undisclosed 'requirement' of the doctrine's proper use. Again, this is not actually the case. Much to the chagrin of some commentators,[143] the reach of the RCOD already extends well beyond strict liability statutes. Federal case law long ago established that when a statute does contain a heightened level of *mens rea*, "willfulness or negligence [may] be imputed to [a responsible corporate officer] by virtue of his position of responsibility."[144] The prevailing trend within the judiciary is actually recognition of the fact "that the RCO[D] may be applied in . . . cases that have a heightened scienter requirement."[145]

In the numerous instances when the RCOD is civilly applied to a strict liability statute, courts should presume the second prong of the civil liability test has been satisfied. This is because such statutes, "[i]n the interest of the larger good . . . put[] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[146] The legislature, by enacting laws that require no *mens rea*, signals its intent to shift the hazard of violation to those assuming control of a public danger.[147] Presuming that a nexus exists between a responsible corporate officer and his or her corporation's strict liability violation will shift the burden from the public to the company's officers, thus effectuating the legislature's overt goal and lifting from the public an unwarranted and cumbersome burden.

Finally, one should bear in mind that the individuals running small, close

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[142] The Court has famously defined public welfare offenses as those statutory violations involving such "dangerous or deleterious devices or products or obnoxious waste materials [over which] the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." United States v. Int'l Minerals & Chemical Corp., 402 U.S. 558, 565 (1971). Although such a broad definition could be stretched to cover a fairly wide array of activities, courts have typically reserved the public welfare title for those statutes regulating "dangerous narcotics, hazardous substances, and impure and adulterated foods and drugs." Staples v. United States, 511 U.S. 600, 629 (1994) (holding that the National Firearms Act is not a public welfare statute). Most environmental laws will fit within this rubric as well.

[143] Reed, *supra* note 22.

[144] United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991). *See also* Johnson & Towers, 741 F.2d 662 (3rd Cir. 1984) (holding that an individual's knowledge may be inferred by the jury from individual's position of corporate responsibility).

[145] Wise, *supra* note 19, at 319 n.187. *See also* United States v. Iverson, 162 F.3d 1015, 1027 (9th Cir. 1998).

[146] United States v. Dotterweich, 320 U.S. 277, 281 (1943).

[147] *See, e.g.*, Wise, *supra* note 19, at 307.

corporations most probably do have a fairly comprehensive knowledge of the intricacies of both their company and its business model. If the company incurs liability because it violated a strict liability law, it may well be fitting, for all the reasons previously addressed, to presume that the individual officers are liable to the extent the company cannot pay. Additionally, the individual officers likely to be most frequently burdened with the threat of civil RCOD liability—those officers responsibility for overseeing extremely large corporations—will also be the individuals most likely to work for corporations willing and able to provide their top officers with insurance or indemnification for any civil liability they may encounter in the course of their work. Although this cycles back to the previous discussion of when to effectively use civil versus criminal liability, as well as to the apparently unfounded accusation that RCOD suits negatively impact officer hiring and retention, it is a practical consideration that is noteworthy when trying to gauge the effects that the civil arm of the doctrine may or may not have on future corporations and their officers.

CONCLUSION

Although California's modernized stance on civil RCOD applicability will undoubtedly garner reinvigorated criticism from many of the doctrine's naysayers, this criticism should be consumed only in conjunction with a healthy dose of reality. It is not the RCOD, but the legislature, that creates the basic laws under which corporate officers are being incarcerated and sued. The RCOD is nothing more than a tool used by the government to hold individual corporate officers, as opposed to the corporate entity, accountable under the legislature's preexisting laws. Considering that "the only way in which a corporation can act is though the individuals who act on its behalf,"[148] it would be wholly nonsensical to let such active individuals avoid the same responsibilities that other citizens must almost uniformly bear. And, although both state and federal governments already have some ways to hold corporate officers individually accountable for corporate actions, like the alter ego and direct participation in tortious activity doctrines, these tools are largely impotent and outdated when it comes to dealing with many of the more complex and sensitive situations that frequently arise in modern society. The easier it is for an officer to hide his or her mistakes (intentional or otherwise) behind bureaucratic compartmentalization and complex business structures, the stronger a tool the government will need to force these individuals out of their rabbit holes and into the open where they can be made to bear some burden of proving their own innocence. Although the civil test for the RCOD that *Roscoe* has recently outlined is admittedly an underdeveloped fix for such a slippery situation, at least the citizenry of California has finally been given an effective

[148] *Dotterweich*, 320 U.S. at 281.

device with which to defend themselves and their treasury. Perhaps this shift in the status quo will finally inspire enough debate on the issue to lead to a more mutually agreeable, though hopefully still aggressive, approach to officer liability. In the meantime, it's wabbit season.[149]

[149] RABBIT SEASONING (1952), LOONEY TUNES GOLDEN COLLECTION, VOL. I (Warner Home Video 2003).

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