7. MANAGERIAL LIABILITY

Perhaps the most commonly expressed public frustration with the problem of corporate crime is the infrequency with which senior corporate managers face criminal prosecution even after serious and widespread crimes have been committed within a corporation. As the materials in this chapter will explore, the difficulty of such prosecutions primarily results from (1) the nature of the large corporation, and (2) fundamental principles about the limits of criminal law, which current debates about corporate responsibility may or may not cause to be altered in the longer run.[21]

A. "Responsible Corporate Officer" Liability

The "responsible corporate officer" (RCO) doctrine is a special criminal law doctrine that, for corporate officers, relaxes requirements on two dimensions: (1) mens rea and (2) accessorial liability. Think about the first-year criminal law course and consider whether the RCO doctrine is consistent with foundational principles in criminal law, including the mens rea and actus reus requirements traditionally associated with accomplice and conspiracy liability. Also, pay attention to the limits of RCO doctrine even under existing law—it is far from a vehicle for prosecutors to widely lock up corporate executives for scandals that occur on their watches.

The following case, *United States v. Park*, is the central Supreme Court decision that is cited for the existence of the RCO doctrine in criminal law. Following *Park* are a couple of cases from the circuit courts of appeals that show that the RCO doctrine is alive in other statutes and contemporary prosecutions as well. Note that the RCO doctrine is a *statutory* doctrine, and thus the cases that follow are exercises in statutory interpretation. Which statutes have the courts held to impose RCO liability? What are the doctrine's contours and requirements? What kinds of facts are needed for managerial liability on this theory?

UNITED STATES v. PARK, 421 U.S. 658 (1975)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the jury instructions in the prosecution of a corporate officer under § 301(k) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1042, as amended, 21 U.S.C. § 331 (k), were appropriate under *United States* v. *Dotterweich*.

Acme Markets, Inc., is a national retail food chain with approximately 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses. Its headquarters, including the office of the president, respondent Park, who is chief

[21] For extended treatment of the problem, see Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIMINAL LAW & PHILOSOPHY 471 (2018); Samuel W. Buell, *Criminally Bad Management* in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (J. Arlen ed. 2018).

executive officer of the corporation, are located in Philadelphia, Pa. In a five-count information filed in the United States District Court for the District of Maryland, the Government charged Acme and respondent with violations of the Federal Food, Drug, and Cosmetic Act. Each count of the information alleged that the defendants had received food that had been shipped in interstate commerce and that, while the food was being held for sale in Acme's Baltimore warehouse following shipment in interstate commerce, they caused it to be held in a building accessible to rodents and to be exposed to contamination by rodents. These acts were alleged to have resulted in the food's being adulterated within the meaning of 21 U. S. C. §§ 342 (a) (3) and (4), in violation of 21 U. S. C. § 331 (k).

Acme pleaded guilty to each count of the information. Respondent pleaded not guilty. The evidence at trial demonstrated that in April 1970 the Food and Drug Administration (FDA) advised respondent by letter of insanitary conditions in Acme's Philadelphia warehouse. In 1971 the FDA found that similar conditions existed in the firm's Baltimore warehouse. An FDA consumer safety officer testified concerning evidence of rodent infestation and other insanitary conditions discovered during a 12-day inspection of the Baltimore warehouse in November and December 1971. He also related that a second inspection of the warehouse had been conducted in March 1972. On that occasion the inspectors found that there had been improvement in the sanitary conditions, but that "there was still evidence of rodent activity in the building and in the warehouses and we found some rodent-contaminated lots of food items."

The Government also presented testimony by the Chief of Compliance of the FDA's Baltimore office, who informed respondent by letter of the conditions at the Baltimore warehouse after the first inspection. There was testimony by Acme's Baltimore division vice president, who had responded to the letter on behalf of Acme and respondent and who described the steps taken to remedy the insanitary conditions discovered by both inspections. The Government's final witness, Acme's vice president for legal affairs and assistant secretary, identified respondent as the president and chief executive officer of the company and read a bylaw prescribing the duties of the chief executive officer. He testified that respondent functioned by delegating "normal operating duties," including sanitation, but that he retained "certain things, which are the big, broad, principles of the operation of the company," and had "the responsibility of seeing that they all work together."

Respondent was the only defense witness. He testified that, although all of Acme's employees were in a sense under his general direction, the company had an "organizational structure for responsibilities for certain function" according to which different phases of its operation were "assigned to individuals who, in turn, have staff and departments under them." He identified those individuals responsible for sanitation, and related that upon receipt of the January 1972 FDA letter, he had conferred with the vice president for legal affairs, who informed him that the Baltimore division vice president "was investigating the situation immediately and would be taking corrective action and would be preparing a summary of the corrective action to reply to the letter."

Respondent stated that he did not "believe there was anything [he] could have done more constructively than what [he] found was being done."

On cross-examination, respondent conceded that providing sanitary conditions for food offered for sale to the public was something that he was "responsible for in the entire operation of the company," and he stated that it was one of many phases of the company that he assigned to "dependable subordinates." Respondent was asked about and, over the objections of his counsel, admitted receiving, the April 1970 letter addressed to him from the FDA regarding insanitary conditions at Acme's Philadelphia warehouse. He acknowledged that, with the exception of the division vice president, the same individuals had responsibility for sanitation in both Baltimore and Philadelphia. Finally, in response to questions concerning the Philadelphia and Baltimore incidents, respondent admitted that the Baltimore problem indicated the system for handling sanitation "wasn't working perfectly" and that as Acme's chief executive officer he was responsible for "any result which occurs in our company."

The jury found respondent guilty on all counts of the information, and he was subsequently sentenced to pay a fine of $50 on each count. . . .

The question presented by the Government's petition for certiorari in *United States v. Dotterweich*, *supra,* and the focus of this Court's opinion, was whether "the manager of a corporation, as well as the corporation itself, may be prosecuted under the Federal Food, Drug, and Cosmetic Act of 1938 for the introduction of mis-branded and adulterated articles into interstate commerce."

Central to the Court's conclusion that individuals other than proprietors are subject to the criminal provisions of the Act was the reality that "the only way in which a corporation can act is through the individuals who act on its behalf." The Court also noted that corporate officers had been subject to criminal liability under the Federal Food and Drugs Act of 1906, and it observed that a contrary result under the 1938 legislation would be incompatible with the expressed intent of Congress to "enlarge and stiffen the penal net" and to discourage a view of the Act's criminal penalties as a "'license fee for the conduct of an illegitimate business.'"

At the same time, however, the Court was aware of the concern which was the motivating factor in the Court of Appeals' decision, that literal enforcement "might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment." A limiting principle, in the form of "settled doctrines of criminal law" defining those who "are responsible for the commission of a misdemeanor," was available. In this context, the Court concluded, those doctrines dictated that the offense was committed "by all who . . . have . . . a responsible share in the furtherance of the transaction which the statute outlaws."

The Court recognized that, because the Act dispenses with the need to prove "consciousness of wrongdoing," it may result in hardship even as applied to those who share "responsibility in the business process resulting in" a violation. It regarded as "too treacherous" an attempt "to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation." The question of responsibility, the Court said, depends "on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance." The Court added: "In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted."

The rule that corporate employees who have "a responsible share in the furtherance of the transaction which the statute outlaws" are subject to the criminal provisions of the Act was not formulated in a vacuum. *Cf. Morissette* v. *United States*. Cases under the Federal Food and Drugs Act of 1906 reflected the view both that knowledge or intent were not required to be proved in prosecutions under its criminal provisions, and that responsible corporate agents could be subjected to the liability thereby imposed. Moreover, the principle had been recognized that a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime. The principle had been applied whether or not the crime required "consciousness of wrongdoing," and it had been applied not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission.

In the latter class of cases, the liability of managerial officers did not depend on their knowledge of, or personal participation in, the act made criminal by the statute. Rather, where the statute under which they were prosecuted dispensed with "consciousness of wrongdoing," an omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability. It was enough in such cases that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of.

The rationale of the interpretation given the Act in *Dotterweich*, as holding criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of, has been confirmed in our subsequent cases. Thus, the Court has reaffirmed the proposition that "the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors." *Smith* v. *California*. In order to make "distributors of food the strictest censors of their merchandise," the Act punishes "neglect where the law requires care, or inaction where it imposes a duty." *Morissette v. United States*. "The 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." Similarly, in cases decided after *Dotterweich*, the Courts of Appeals have recognized that those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a "responsible relationship" to, or have a "responsible share" in, violations.

Thus *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission—and this is by no means necessarily confined to a single corporate agent or employee—the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

The Act does not, as we observed in *Dotterweich*, make criminal liability turn on "awareness of some wrong-doing" or "conscious fraud." The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but the Act, in its criminal aspect, does not require that which is objectively impossible. The theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "powerless" to prevent or correct the violation to "be raised defensively at a trial on the merits." *United States* v. *Wiesenfeld Warehouse Co*. If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition. Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution.

We cannot agree with the Court of Appeals that it was incumbent upon the District Court to instruct the jury that the Government had the burden of establishing "wrongful action" in the sense in which the Court of Appeals used that phrase. The concept of a "responsible relationship" to, or a "responsible share" in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.

Turning to the jury charge in this case, it is of course arguable that isolated parts can be read as intimating that a finding of guilt could be predicated solely on respondent's corporate position. But this is not the way we review jury instructions, because "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten.*

Reading the entire charge satisfies us that the jury's attention was adequately focused on the issue of respondent's authority with respect to the conditions that formed the basis of the alleged violations. Viewed as a whole, the charge did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent "had a responsible relation to the situation," and "by virtue of his position . . . had . . . authority and responsibility" to deal with the situation. The situation referred to could only be "food . . . held in unsanitary conditions in a warehouse with the result that it consisted, in part, of filth or . . . may have been contaminated with filth."

Moreover, in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial. "Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the *trial.*" *United States* v. *Birnbaum.* The record in this case reveals that the jury could not have failed to be aware that the main issue for determination was not respondent's position in the corporate hierarchy, but rather his accountability, because of the responsibility and authority of his position, for the conditions which gave rise to the charges against him.

We conclude that, viewed as a whole and in the context of the trial, the charge was not misleading and contained an adequate statement of the law to guide the jury's determination. . . .

UNITED STATES v. BRITTAIN, 931 F.2d 1413 (10th Cir. 1991)

BALDOCK, Circuit Judge:

A jury convicted defendant-appellant, Raymond T. Brittain, of eighteen felony counts of falsely reporting a material fact to a government agency, 18 U.S.C. § 1001, and two misdemeanor counts of discharging pollutants into the waters of the United States in violation of §§ 301(a) & 309(c)(1) of the Federal Water Pollution Control Act of 1972 (Clean Water Act), codified at 33 U.S.C. §§ 1311(a) & 1319(c)(1). Defendant appeals, contending: (1) the government did not establish materiality as required by 18 U.S.C. § 1001; (2) he is not a "person" who discharged pollutants as contemplated by the Clean Water Act; and (3) the evidence is insufficient to prove that he discharged pollutants in violation of the Clean Water Act. We affirm. . . .

In 1984, the city of Enid obtained a renewed NPDES permit from the EPA to discharge pollutants from the city's wastewater treatment plant into nearby Boggy Creek. The original NPDES permit provided for two discharge point sources, outfalls 001 and 002; whereas the new permit allowed for only one discharge point source, outfall 001. Discharges from outfall 002, although expressly prohibited by the renewed NPDES permit, continued during times of heavy rain. The discharges resulted from a thirty-six-inch bypass pipe which would divert raw sewage through outfall 002 when heavy rain caused excess water to flow through the sewage system. The evidence reveals that the plant supervisor informed defendant, in defendant's capacity as public utilities director, that the plant was discharging raw sewage from outfall 002, and that defendant physically observed two such discharges in January and August 1986. Moreover, the evidence reveals that defendant instructed the plant supervisor not to report the discharges to the EPA as required by the permit. The jury convicted defendant on two counts pursuant to 33 U.S.C. §§ 1311(a) & 1319(c) for the January and August 1986 permit violations.

As stated above, § 1311(a) of the Clean Water Act prohibits "any person" from discharging "any pollutant" into the waters of the United States except as authorized by the EPA or an EPA authorized state agency. The EPA authorizes certain discharges pursuant to the NPDES permitting system. *See* § 1342. At the time of the indictment period, § 1319(c) provided for criminal sanctions for "any person" who "willfully or negligently" violated § 1311(a) or any NPDES permit. This case involves a "willful or negligent" violation of an NPDES permit.

Defendant claims . . . he is not a "person" as contemplated by §§ 1319(c) & 1362(5) of the Clean Water Act. . . .

As with any question of statutory interpretation, we must begin with the language of the statutes. If the statutory language "'is unambiguous and free of irrational result, that language controls.'" *United States v. Morgan* (quoting *Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist.*, *cert. denied*). The plain language of the relevant statute includes "individuals" in the definition of "persons" subject to the Clean Water Act. *See* § 1362(5). Defendant certainly is an "individual." Section 1311(a) prohibits "any person"—any "individual" according to § 1362(5)—from discharging pollutants except as in accordance with an NPDES permit or other specified provisions in the Act. Section 1319(c), at the time of the indictment, provided for criminal sanctions for "any person"—"any individual"—who "willfully or negligently" caused such a violation. Thus, it appears that defendant, as an "individual," is subject to criminal liability under the Act.

Defendant, however, contends that an "individual" is subject to § 1319(c)'s criminal sanctions for NPDES permit violations only if he is the permittee. As support for this interpretation, he points to § 1319(c)(3)'s addition of "responsible corporate officers" to the Act's general definition of "persons" as contained in § 1362(5). He argues that § 1319(c)(3)'s addition of "responsible corporate officers" is meaningless if § 1362(5) already makes "persons" of "individuals" who merely are related to discharging permittees. Accordingly, he argues, he is not a "person" subject to criminal liability because the government did not prove that he was the permittee or a "responsible corporate officer" of the discharging permittee.

Section 1319(c)(3) does not define a "responsible corporate officer" and the legislative history is silent regarding Congress's intention in adding the term. The Supreme Court, however, first recognized the concept of "responsible corporate officer" in 1943. *See United States v. Dotterweich*. The *Dotterweich* Court held that a corporation's misdemeanor offense under the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA) was committed by all corporate officers "who do have . . . a responsible share in the furtherance of the transaction which the statute outlaws . . . though consciousness of wrongdoing be totally wanting." *See also United States v. Park*; *United States v. Cattle King Packing Co.*, *cert. denied*; 21 U.S.C. § 333(a) (misdemeanor criminal responsibility under FDCA does not require "consciousness of wrongdoing"). The rationale for this harsh rule lay in the type of legislative action that the *Dotterweich* Court was interpreting. Congress passed the FDCA in order to protect the public health, and, according to the Court, Congress perceived the public health interest to outweigh the hardship suffered by criminally liable responsible corporate officers who had no consciousness of wrongdoing. *Dotterweich*. The same rationale applies to the Clean Water Act. Congress intended, with the Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters . . . [and that] the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a). We think that Congress perceived this objective to outweigh hardships suffered by "responsible corporate officers" who are held criminally liable in spite of their lack of "consciousness of wrongdoing." We interpret the addition of "responsible corporate officers" as an expansion of liability under the Act rather than, as defendant would have it, an implicit limitation. The plain language of the statute, after all, states that "responsible corporate officers" are liable "*in addition to* the definition [of persons] contained in section 1362(5). . . ." § 1319(c)(3). Under this interpretation, a "responsible corporate officer," to be held criminally liable, would not have to "willfully or negligently" cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility. This in no way limits other "persons," as defined by § 1362(5), to permittees. The statute plainly states that any "person," permittee or nonpermittee, who causes a permit violation through willful or negligent conduct, is subject to criminal sanctions. We hold that defendant, as an "individual," is a "person" subject to criminal liability under the Act. . . .

UNITED STATES v. DECOSTER, 828 F.3d 626 (8th Cir. 2016)

MURPHY, Circuit Judge:

Austin "Jack" DeCoster and Peter DeCoster both pled guilty, as "responsible corporate officers" of Quality Egg, LLC, to misdemeanor violations of 21 U.S.C. § 331(a) for introducing eggs that had been adulterated with salmonella enteritidis into interstate commerce. The district court sentenced Jack and Peter to three months imprisonment. The DeCosters appeal, arguing that their prison sentences and 21 U.S.C. § 333(a)(1) are unconstitutional. . . . We affirm.

Jack DeCoster owned Quality Egg, LLC, an Iowa egg production company. Jack's son Peter DeCoster served as the company's chief operating officer. Quality Egg operated six farm sites with 73 barns which were filled with five million egg laying hens. It also had 24 barns which were filled with young chickens that had not yet begun to lay eggs. Additionally, the company owned several processing plants where eggs were cleaned, packed, and shipped.

Jack also owned and operated several egg production companies in Maine, and Peter worked at those facilities. In 2008, salmonella enteritidis ("salmonella") tests conducted at the Maine facilities came back positive. The DeCosters succeeded in eliminating salmonella from their Maine facilities by following the recommendations of hired consultants, including poultry disease specialist Dr. Charles Hofacre and rodent control expert Dr. Maxcy Nolan.

Periodically the DeCosters also tested the Iowa hens and facilities for salmonella. Some of these tests came back positive in 2006, and the positive test results increased in frequency through the fall of 2010. Until the USDA adopted its new egg safety rule in July 2010, Quality Egg was not legally obligated to conduct salmonella tests of its eggs after receiving positive environmental test results. Nevertheless, Quality Egg tested its eggs in April 2009 after being notified that a Minnesota restaurant purchaser had had a salmonella outbreak. The sample of its eggs tested negative for salmonella.

Other than conducting the single egg test in April 2009, Quality Egg did not test or divert eggs from the market before July 2010 despite receiving multiple positive environmental and hen test results. In 2009 the DeCosters hired Dr. Hofacre and Dr. Nolan to consult on the company's Iowa operations. The consultants recommended implementing the same measures in Iowa as had been used in Maine. Although the DeCosters claim they adopted all of the recommendations, the precautions implemented by Quality Egg failed to eradicate salmonella. The Centers for Disease Control and Prevention estimated that about 56,000 Americans fell ill with salmonellosis in 2010 after consuming contaminated eggs. In August 2010, federal and state officials determined that the salmonella outbreak had originated at Quality Egg's facilities. In response Quality Egg recalled eggs that had been shipped from five of its six Iowa farm sites between May and August 2010.

The FDA inspected the Quality Egg operations in Iowa from August 12–30, 2010. Investigators discovered live and dead rodents and frogs in the laying areas, feed areas, conveyer belts, and outside the buildings. They also found holes in the walls and baseboards of the feed and laying buildings. The investigators discovered that some rodent traps were broken, and others had dead rodents in them. In one building near the laying hens, manure was found piled to the rafters; it had pushed a screen out of the door which allowed rodents into the building. Investigators also observed employees not wearing or changing protective clothing and not cleaning or sanitizing equipment.

The FDA concluded that Quality Egg had failed to comply with its written plans for biosecurity and salmonella prevention. One government expert reported that "there were minimal to no records from the poultry [] barns to indicate that company personnel [had] implemented the written plans [to eliminate salmonella]." The agency also discovered that the company's eggs tested positive for salmonella at a rate of contamination approximately 39 times higher than the current national rate, and that the contamination had spread throughout all of the Quality Egg facilities. In October 2010 the FDA instructed Quality Egg to euthanize every hen, remove the manure, repair its facilities, and disinfect its barns to prevent the risk of another outbreak.

The government then began a criminal investigation of the company's food safety practices and ultimately filed a criminal information against Quality Egg and both of the DeCosters. The investigation revealed that Quality Egg previously had falsified records about food safety measures and had lied to auditors for several years about pest control measures and sanitation practices. Although its food safety plan stated that Quality Egg performed flock testing to identify and control salmonella, no flock testing was ever done. Quality Egg employees had also bribed a USDA inspector in 2010 to release eggs for sale which had been retained or "red tagged" for failing to meet minimum quality grade standards. Quality Egg also misled state regulators and retail customers by changing the packing dates of its eggs and selling the misbranded eggs into interstate commerce. The parties additionally stipulated that one Quality Egg employee was prepared to testify at trial that Jack DeCoster had once reprimanded him because he had not moved a pallet of eggs in time to avoid inspection by the USDA. The investigation also revealed that in 2008 Peter DeCoster had made inaccurate statements to Walmart about Quality Egg's food safety and sanitation practices. . . .

Before sentencing, the DeCosters argued that sentences of incarceration would be unconstitutional because they had not known that the eggs were contaminated at the time they were shipped. The district court denied the motions, imposed $100,000 fines on both Jack and Peter DeCoster and sentenced them to three months imprisonment. *See* 21 U.S.C. § 333(a)(1) (explaining that anyone who violates section 331 "shall be imprisoned for not more than one year or fined not more than $1,000, or both"); 18 U.S.C. § 3571(b)(5) (setting maximum fine of $100,000 for class A misdemeanor not resulting in death). The court determined that although nothing in the record indicated that Peter and Jack had actual knowledge that the eggs they sold were infected with salmonella, the record demonstrated that their safety and sanitation procedures were "egregious," that they ignored the positive salmonella environmental test results before July 2010 by not testing their eggs, and that they knew that their employees had deceived and bribed USDA inspectors. The district court explained that the record supported the inference that the DeCosters had "created a work environment where employees not only felt comfortable disregarding regulations and bribing USDA officials, but may have even felt pressure to do so." The district court accordingly concluded that this was not a case involving "a mere unaware corporate executive." . . .

The DeCosters . . . argue that the penalty of incarceration of any length for this misdemeanor offense would violate substantive due process. *See Zadvydas v. Davis*; *see also United States v. Greenbaum* (concluding that three month prison sentence for corporate officer's FDCA misdemeanor violation did not violate due process); *United States v. Higgins* (same for nine month prison sentence).

We review de novo a substantive due process claim. *United States v. Clemmons*. The DeCosters argue that their prison sentences are unconstitutional because they did not personally commit wrongful acts. They analogize this case to others where courts have determined that due process is violated when prison terms are imposed for vicarious liability crimes. *See Lady J. Lingerie*; *State v. Guminga*; *Davis v. City of Peachtree City*; *Commonwealth v. Koczwara*. The Eleventh Circuit explained in *Lady J.* that "due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation.'"

Officer liability under the FDCA, however, is not equivalent to vicarious liability. *See Park*. Under vicarious liability, a supervisory party is held liable "for the actionable conduct of a subordinate . . . based on the relationship between the two parties." *Liability*, Black's Law Dictionary (10th ed. 2014). Under the FDCA, in contrast, a corporate officer is held accountable not for the acts or omissions of others, but rather for his own failure to prevent or remedy "the conditions which gave rise to the charges against him." *See Park*. Thus, "some measure of blameworthiness" is "import[ed]" directly to the corporate officer.

Here, as owner of Quality Egg, Jack decided which barns were subject to salmonella environmental testing, and as chief operating officer, Peter coordinated many of the company's salmonella prevention and rodent control efforts. Neither of the DeCosters claim to have been "powerless" to prevent Quality Egg from violating the FDCA. *See id.* Despite their familiarity with the conditions in the Iowa facilities, they failed to take sufficient measures to improve them. On this record, the district court reasonably found that "the defendants 'knew or should have known,' of the risks posed by the insanitary conditions at Quality Egg in Iowa, 'knew or should have known' that additional testing needed to be performed before the suspected shell eggs were distributed to consumers, and 'knew or should have known' of [] proper remedial and preventative measures to reduce the presence of [salmonella]." The FDCA "punishes neglect where the law requires care." (internal quotation marks omitted). We conclude that the record here shows that the DeCosters are liable for negligently failing to prevent the salmonella outbreak. *See id.* (reading majority opinion in *Park* as establishing a negligence standard).

The DeCosters argue that their prison sentences also violate the Due Process Clause because they did not know that the eggs the company distributed had salmonella. We have explained that "the imposition of severe penalties, especially a felony conviction, for the commission of a morally innocent act may violate" due process. *See United States v. Enochs*. The elimination of a mens rea requirement does not violate the Due Process Clause for a public welfare offense where the penalty is "relatively small," the conviction does not gravely damage the defendant's reputation, and congressional intent supports the imposition of the penalty. *See Staples v. United States* (citing *Morissette v. United States*; *Holdridge v. United States*).

The three month prison sentences the DeCosters received were relatively short. *See Staples*. We have previously determined that even a maximum statutory penalty of one year imprisonment for a misdemeanor offense is "relatively small" and does not violate due process. *See United States v. Flum*; *cf. United States v. Wulff* (concluding that a felony conviction which carried a penalty of a maximum of two years imprisonment was not relatively small).

The DeCosters' misdemeanor convictions also do not gravely damage their reputations. In *Flum*, we explained that a misdemeanor conviction under a federal law which provided for a maximum imprisonment of one year did not gravely "besmirch" the defendant's reputation because it did not brand him as a "felon or subject him to any burden beyond the sentence imposed." *cf. Wulff* (felony conviction would irreparably damage a defendant's reputation because a felon loses his civil rights). Similarly in this case, the DeCosters will not be branded as felons, and the record does not identify any additional civil sanctions they may be subject to beyond their sentences. Finally, the elimination of criminal intent under 21 U.S.C. § 333(a) did not violate due process because, as the Supreme Court has explained, "Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms." *Park*.

The dissent argues that we must treat the FDCA, 21 U.S.C. §§ 331(a), 333(a)(1), as requiring a defendant to know he violated the statute in order to be subject to its penalties because the statute has "no express congressional statement" to omit a mens rea requirement. We rely however "on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements." *Staples*. The FDCA regulates services and products which affect the health and well being of the public. For this reason, Congress has not required "awareness of some wrongdoing" in order to hold responsible corporate agents accountable for violating the statute. *Park* (internal quotation marks omitted). Although the "requirements of foresight and vigilance imposed on responsible corporate agents [in 21 U.S.C. § 331(a)] are beyond question demanding, and perhaps onerous, [] they are no more stringent" than required to protect the unknowing public from consuming hazardous food, such as salmonella infected eggs. The language in the FDCA and Supreme Court precedent interpreting the statute support the conclusion that defendants are not required to have known that they violated the FDCA to be subject to the statutory penalties. . . .

GRUENDER, Circuit Judge, concurring.

The DeCosters do not challenge either the constitutionality of § 331(a) or the sufficiency of the factual basis for their pleas. Rather, they claim that due process concerns prevent them from being sentenced to prison for a crime involving no mens rea on their part because it is based solely on their positions as responsible corporate officers—*i.e.*, vicarious liability. I agree with the dissent that imprisonment based on vicarious liability would raise serious due process concerns. However, because the district court found the DeCosters negligent, they were not held vicariously liable for violations committed by others, and this case thus does not implicate these concerns. I therefore concur in the judgment and join Judge Murphy's opinion to the extent that it recognizes that the DeCosters were negligent. I write separately in order to make clear my view that *Park* requires a finding of negligence in order to convict a responsible corporate officer under § 331. . . .

BEAM, Circuit Judge, dissenting.

Austin (Jack) and Peter DeCoster, entered pleas of guilty because their corporation sold eggs contaminated by a strain of salmonella enteritidis bacteria during a period of time extending "[b]etween about the beginning of 2010 and in or about August 2010." The government contends that these were federal misdemeanor offenses under 21 U.S.C. § 331(a) and § 333(a)(1). As noted by the district court, they were at the time of the alleged offenses the two ranking corporate officers of Quality Egg, LLC (Quality Egg)—Jack being the trustee of the trust that owned Quality Egg and Peter, his son, being the Chief Operating Officer of this multistate corporate enterprise.

At all relevant times, Quality Egg operated six Iowa farms with 73 barns filled with 5 million laying hens and 24 barns filled with young chicks that had not begun to lay eggs. Quality Egg also had several processing plants where eggs were cleaned, packed, and shipped. Jack also owned several other egg-production companies in the state of Maine where Peter apparently spent part of his working time. Collectively, these were large, diverse, and labor-intensive agricultural operations requiring several levels and areas of management, as well as a substantial number of "hands-on" production workers. . . .

The record discloses that salmonella contamination of eggs sold by Quality Egg was the sole basis for adulteration claims under § 331(a) concerning the DeCosters as individuals. Given such factual predicate, the government stipulated that "[t]o date" (April 18, 2014), "the government's investigation has not identified any personnel employed by or associated with Quality Egg, including the defendant[s], who had knowledge during the [charged] time frame from January 2010 through August 12, 2010, that eggs sold by Quality Egg were, in fact, contaminated with *Salmonella* [*Enteritidis*]. Further, the government conceded that the criminal complaint against the DeCosters as executives of Quality Egg was animated by salmonella-prevention regulations published by the FDA on July 9, 2009, but not placed in force until July 9, 2010, through adoption of an Egg Safety Rule. The government also stipulated that "until adoption of the Egg Safety Rule in July 2010, there was no legal or regulatory requirement" for Quality Egg to comply with these regulations. The record also establishes that, given the state of the art of poultry-sanitation management, egg-safety difficulties, especially involving salmonella contamination, are inherent in such operations.

In short, large numbers of employees and supervisors were needed and employed by Quality Egg in an attempt to avoid problems with this ubiquitous pathogen. Thus, the misdemeanor convictions found and imposed by the district court in response to the DeCosters' very limited guilty pleas amounted to crimes and sentences based upon almost wholly nonculpable conduct.

On the record and the stipulated facts, it is also clear that the DeCosters lacked the necessary mens rea or "guilty mind," that is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime," *Mens Rea*, Black's Law Dictionary (10th ed. 2014). This mens rea requirement is especially applicable when the crime, as here, is punished by imprisonment. Although § 333(a)(1) purports to authorize a criminal misdemeanor sentence of "imprison[ment] for not more than one year," the DeCosters' presentence motions to preclude any such sentence of imprisonment based upon the vicarious-liability standard the district court applied should have been granted.

The Fifth Amendment Due Process Clause forbids the government from depriving any person of liberty without due process of law. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*. Such a due process violation as attends the DeCosters' prison sentence is well illustrated in *Staples v. United States*. Under the National Firearms Act, 26 U.S.C. §§ 5801–5872, any fully automatic weapon is a "firearm" within the meaning of the statute. *Staples*. The Act, in turn, makes it a crime to possess a firearm that is not registered. Staples possessed an unregistered semi-automatic rifle that, unbeknownst to him, had been modified to permit automatic firing. Upon prosecution under the Act, the district court ruled that the government did not have to prove that Staples knew the weapon fired automatically because of the modification by someone else. He was convicted and sentenced to prison.

On appeal, the Supreme Court reversed, saying "we must construe [an imprisonment] statute in light of the background rules of the common law in which the requirement of some *mens rea* for a crime is firmly embedded." While the government argued, as it does in this case, that a presumption of the need for a finding of mens rea did not apply in Staples, the Supreme Court rejected the argument and reversed, holding that Staples's lack of knowledge of the weapon's capability of automatic fire prohibited his conviction and prison sentence. . . .

There is, of course, no express congressional statement to the contrary contained in § 331(a) or § 333(a)(1). While it might be possible to concoct an actionable interpretation of § 333(a)(1) that omits a mens rea requirement, Congress has no power to enact a federal statute that violates the Fifth Amendment Due Process Clause. . . .

[T]he court validates the district court's prison sentence based upon the DeCosters' supposed negligence in performing executive functions on behalf of Quality Egg. However, there is no precedent that supports imprisonment without establishing some measure of a guilty mind on the part of these two individuals, and none is established in this case. The government concedes in the DeCosters' plea agreements that they did not know that any eggs distributed by Quality Egg at any relevant times "were, in fact, contaminated with *Salmonella* [*Enteritidis*]." Indeed, the plea agreements explicated above further concede that no person associated with Quality Egg had knowledge of salmonella contamination at any relevant time. And when first alerted to the problem by the FDA in August of 2010, Quality Egg immediately, and at great expense, voluntarily recalled "hundreds of millions of shell eggs produced at Quality Egg's facilities." This is hardly the stuff of "guilty minds." . . .

There is no proof that the DeCosters, as individuals, were infected with a "guilty mind" or, perhaps, even with negligence. Clearly, the improvident prison sentences imposed in this case were due process violations. . . .

Many observers expected the *DeCoster* case to get Supreme Court review. Certiorari, however, was denied. With respect to the current status of the RCO doctrine, it is reasonable to ask (1) whether the Supreme Court's future approval of the doctrine, as reflected in *Dotterweich* and *Park*, would be contingent on the nature of the penalty imposed on any individual convicted on the RCO theory, and additionally (2) whether the present Court might wholly reject the doctrine as unconstitutional.

B. Theories of Supervisory Liability Beyond the RCO Doctrine?

Consider the following items—two pieces of legislation (the first an enacted UK statute; the second a proposed but not enacted US bill) and one case—(1) in terms of the problem of managerial criminal responsibility and (2) in light of general principles of criminal responsibility you learned in introductory criminal law.

UK Financial Services (Banking Reform) Act 2013

Section 36. Offence relating to a decision causing a financial institution to fail.

(1) A person ("S") commits an offence if—

(a) at a time when S is a senior manager in relation to a financial institution ("F"), S—

(i) takes, or agrees to the taking of, a decision by or on behalf of F as to the way in which the business of a group institution is to be carried on, or

(ii) fails to take steps that S could take to prevent such a decision being taken,

(b) at the time of the decision, S is aware of a risk that the implementation of the decision may cause the failure of the group institution,

(c) in all the circumstances, S's conduct in relation to the taking of the decision falls far below what could reasonably be expected of a person in S's position, and

(d) the implementation of the decision causes the failure of the group institution.

(2) A "group institution", in relation to a financial institution ("F"), means F or any other financial institution that is a member of F's group for the purpose of FSMA 2000 (see section 421 of that Act).

(3) Subsections (1) and (2) are to be read with the interpretative provisions in section 37.

(4) A person guilty of an offence under this section is liable—

(a) on summary conviction—

(i) in England and Wales, to imprisonment for a term not exceeding 12 months (or 6 months, if the offence was committed before the commencement of section 154(1) of the Criminal Justice Act 2003) or a fine, or both;

(ii) in Scotland, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum, or both;

(iii) in Northern Ireland, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum, or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or a fine, or both.

Section 37: interpretation

(1) This section has effect for the interpretation of section 36.

(2) "Financial institution" means a UK institution which—

(a) meets condition A or B, and

(b) is not an insurer or a credit union.

(3) Condition A is that it has permission under Part 4A of FSMA 2000 to carry on the regulated activity of accepting deposits.

(4) Condition B is that—

(a) it is for the purposes of FSMA 2000 an investment firm (see section 424A of that Act),

(b) it has permission under Part 4A of that Act to carry on the regulated activity of dealing in investments as principal, and

(c) when carried on by it, that activity is a PRA-regulated activity.

(5) In subsection (2)—

(a) "UK institution" means an institution which is incorporated in, or formed under the law of any part of, the United Kingdom;

(b) "insurer" means an institution which is authorised under FSMA 2000 to carry on the regulated activity of effecting or carrying out contracts of insurance as principal;

(c) "credit union" means a credit union as defined by section 31 of the Credit Unions Act 1979 or a credit union as defined by Article 2(2) of the Credit Unions (Northern Ireland) Order 1985.

(6) Subsections (3), (4) and (5)(b) are to be read in accordance with sections 22 and 22A of FSMA 2000, taken with Schedule 2 to that Act and any order under section 22.

(7) A person is a "senior manager" in relation to a financial institution if, under an arrangement entered into by the institution, or by a contractor of the institution, in relation to the carrying on by the institution of a regulated activity, the person performs a senior management function.

(8) A "senior management function" is a function designated as such—

(a) by the FCA under subsection (6A) of section 59 of FSMA 2000 (approval for particular arrangements), or

(b) by the PRA under subsection (6B) of that section.

(9) A financial institution ("F") is to be regarded as failing where—

(a) F enters insolvency,

(b) any of the stabilisation options in Part 1 of the Banking Act 2009 is achieved in relation to F, or

(c) F is taken for the purposes of the Financial Services Compensation Scheme to be unable, or likely to be unable, to satisfy claims against F.

(10) In subsection (9)(a) "insolvency" includes—

(a) bankruptcy,

(b) liquidation,

(c) bank insolvency,

(d) administration,

(e) bank administration,

(f) receivership,

(g) a composition between F and F's creditors, and

(h) a scheme of arrangement of F's affairs.

113th CONGRESS, 2d Session

A BILL

To establish criminal penalties for failing to inform and warn of serious dangers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CRIMINAL PENALTIES.

(a) IN GENERAL.—Part I of title 18, United States Code, is amended by inserting after chapter 101 the following:

"CHAPTER 101A—REPORTING STANDARDS

"Sec.

"2081. Definitions.

"2082. Failure to inform andwarn.

"§ 2081. Definitions

"In this chapter—

"(1) the term 'appropriate Federal agency' means an agency with jurisdiction over a covered product, covered service, or business practice;

"(2) the term 'business entity' means a corporation, company, association, firm, partnership, sole proprietor, or other business entity;

"(3) the term 'business practice' means a method or practice of—

"(A) manufacturing, assembling, designing, researching, importing, or distributing a covered product;

"(B) conducting, providing, or preparing to provide a covered service; or

"(C) otherwise carrying out business operations relating to covered products or covered services;

"(4) the term 'covered product' means a product manufactured, assembled, designed, researched, imported, or distributed by a business entity that enters interstate commerce;

"(5) the term 'covered service' means a service conducted or provided by a business entity that enters interstate commerce;

"(6) the term 'responsible corporate officer' means a person who—

"(A) is an employer, director, or officer of a business entity;

"(B) has the responsibility and authority, by reason of his or her position in the business entity and in accordance with the rules or practice of the business entity, to acquire knowledge of any serious danger associated with a covered product (or component of a covered product), covered service, or business practice of the business entity; and

"(C) has the responsibility, by reason of his or her position in the business entity, to communicate information about the serious danger to—

"(i) an appropriate Federal agency;

"(ii) employees of the business entity;

or

"(iii) individuals, other than employees of the business entity, who may be exposed to the serious danger;

"(7) the term 'serious bodily injury' means an impairment of the physical condition of an individual, including as a result of trauma, repetitive motion, or disease, that—

"(A) creates a substantial risk of death; or

"(B) causes—

"'(i) serious permanent disfigurement;

"(ii) unconsciousness;

"(iii) extreme pain; or

"(iv) permanent or protracted loss or impairment of the function of any bodily member, organ, bodily system, or mental faculty;

"(8) the term 'serious danger' means a danger, not readily apparent to a reasonable person, that the normal or reasonably foreseeable use of, or the exposure of an individual to, a covered product, covered service, or business practice has an imminent risk of causing death or serious bodily injury to an individual; and

"(9) the term 'warn affected employees' means take reasonable steps to give, to each individual who is exposed or may be exposed to a serious danger in the course of work for a business entity, a description of the serious danger that is sufficient to make the individual aware of the serious danger.

"§ 2082. Failure to inform and warn

"(a) REQUIREMENT.—After acquiring actual knowledge of a serious danger associated with a covered product (or component of a covered product), covered service, or business practice of a business entity, a business entity and any responsible corporate officer with respect to the covered product, covered service, or business practice, shall—

"(1) as soon as practicable and not later than 24 hours after acquiring such knowledge, verbally inform an appropriate Federal agency of the serious danger, unless the business entity or responsible corporate officer has actual knowledge that an appropriate Federal agency has been so informed;

"(2) not later than 15 days after acquiring such knowledge, inform an appropriate Federal agency in writing of the serious danger;

"(3) as soon as practicable, warn affected employees in writing, unless the business entity or responsible corporate officer has actual knowledge that affected employees have been so warned; and

" (4) as soon as practicable, inform individuals, other than affected employees, who may be exposed to the serious danger of the serious danger if such individuals can reasonably be identified.

" (b) PENALTY.—

" (1) IN GENERAL.—Whoever knowingly violates subsection (a) shall be fined under this title, imprisoned for not more than 5 years, or both.

" (2) PROHIBITION OF PAYMENT BY BUSINESS ENTITIES.—If a final judgment is rendered and a fine is imposed on an individual under this subsection, the fine may not be paid, directly or indirectly, out of the assets of any business entity on behalf of the individual. . . .

The problem with criminal liability for senior managers in connection with corporate scandals is one of both actus reus (distance from the conduct involved in the relevant harm or risk) and mens rea (lack of detailed knowledge or clear intent with regard to the conduct involved in the relevant harm or risk). An additional problem is the normative question of whether recklessness or negligence should be a sufficient basis for criminal punishment in the business context.

Consider the following case in terms of the defendant's mental state and his level of mens rea: intent, knowledge, recklessness, or something else. Also consider the court's discussion of the meaning of the mens rea term "willfulness" in light of that term's treatment in other contexts, such as the *Bank of New England* case in Chapter 1, as well as the efforts of some courts in the context of fraud to describe an elevated level of mens rea such as "specific intent to defraud" or "consciousness of wrongdoing," as discussed in Chapter 2.

UNITED STATES v. BLANKENSHIP, 846 F.3d 663 (4th Cir. 2017)

WYNN, Circuit Judge:

Defendant Donald Blankenship ("Defendant"), former chairman and chief executive officer of Massey Energy Company ("Massey"), makes four arguments related to his conviction for conspiring to violate federal mine safety laws and regulations. After careful review, we conclude the district court committed no reversible error. Accordingly, we affirm.

This case arises from a tragic accident on April 5, 2010 at the Upper Big Branch coal mine in Montcoal, West Virginia, which caused the death of 29 miners. Massey owned and operated the Upper Big Branch mine.

In the years leading up to the accident, the federal Mine Safety & Health Administration (the "Mine Safety Administration") repeatedly cited Massey for violations at the Upper Big Branch mine of the Mine Safety & Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Safety Act"), and its implementing regulations. In 2009 alone, the Mine Safety Administration identified 549 violations at the Upper Big Branch mine. Indeed, in the 15 months preceding the April 2010 accident, the Upper Big Branch mine received the third-most serious safety citations of any mine in the United States. Many of these violations related to improper ventilation and accumulation of combustible materials—problems that were key contributing factors to the accident. Defendant was aware of the violations at the Upper Big Branch mine in the years leading up to the accident, receiving daily reports showing the numerous citations for safety violations at the mine.

Not only did Defendant receive daily reports of the safety violations, beginning in mid-2009, but Defendant also received warnings from a senior Massey safety official about the serious risks posed by the violations at Upper Big Branch. And the safety official informed Defendant that "[t]he attitude at many Massey operations is 'if you can get the footage, we can pay the fines.'" Evidence suggested that Defendant had fostered this attitude by directing mine supervisors to focus on "run[ning] coal" rather than safety compliance and to forego construction of safety systems. Defendant also told the Massey employee in charge of the Upper Big Branch mine that "safety violations were the cost of doing business" and that it was "cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws."

Notwithstanding the numerous citations and warnings, Defendant had a "policy to invariably press for more production even at mines that he knew were struggling to keep up with the safety laws." For example, Defendant directed the supervisor of Upper Big Branch to reopen a mine section to production even though it lacked a legal return airway. Additionally, Massey employees advised Defendant that the lack of adequate staff was a key factor in the high number of safety violations at Upper Big Branch. Contrary to this advice, Massey reduced staff at the Upper Big Branch mine less than two months before the accident, a decision that Defendant would have had to approve given his close supervision of mine operations and staffing.

On November 13, 2014, a federal grand jury indicted Defendant for: (1) conspiring to willfully violate federal mine safety laws and regulations; (2) conspiring to defraud federal mine safety regulators; (3) making false statements to the Securities & Exchange Commission regarding Massey's safety compliance; and (4) engaging in securities fraud. The grand jury issued a superseding three-count indictment (the "Superseding Indictment") on March 10, 2015, which combined the conspiracy counts into a single, multi-object conspiracy charge and included additional factual allegations. Following a six-week trial, a jury convicted Defendant of conspiring to violate federal mine safety laws and acquitted him of the remaining indicted offenses. The district court sentenced Defendant to one year imprisonment and assessed a $250,000 fine, both of which were the maximum permitted by law. Defendant timely appealed. . . .

The jury convicted Defendant of conspiring to violate 30 U.S.C. § 820(d), which, in pertinent part, makes it unlawful for "[a]ny operator [to] willfully violate[ ] a mandatory [mine] health or safety standard." The Superseding Indictment alleged that Defendant was "an operator[ ] of [Upper Big Branch]," and in that capacity, conspired to "routinely violate federal mandatory mine safety and health standards.". . .

Defendant takes issue with the following instructions regarding the meaning of "willfully" in Section 820(d):

> 1. A person with supervisory authority at or over a mine willfully fails to perform an act required by a mandatory safety or health standard if he knows that the act is not being performed and knowingly, purposefully, and voluntarily allows that omission to continue.
>
> 2. A person with supervisory authority at or over a mine also willfully violates a mandatory mine safety or health standard if he knowingly,

> purposefully, and voluntarily takes actions that he knows will cause a standard to be violated[;]
>
> 3. [O]r knowingly, purposefully, and voluntarily fails to take actions that are necessary to comply with the mandatory mine safety or health standard[;]
>
> 4. [O]r if he knowingly, purposefully, and voluntarily takes action or fails to do so with reckless disregard for whether that action or failure to act will cause a mandatory safety or health standard to be violated.

Defendant first argues that the fourth instruction improperly allowed the jury to convict Defendant for "reckless" conduct, rather than requiring the government to prove Defendant "knew his conduct would cause a violation of safety regulations . . . and was unlawful." In particular, Defendant contends that the Supreme Court's decisions in *Bryan v. United States*, and *Safeco Insurance Co. of America v. Burr*, bar courts from defining "willfully" in criminal statutes in terms of "reckless disregard."

In *Bryan*, the Supreme Court reviewed whether the government introduced sufficient evidence to convict the defendant of "willfully" violating the federal Gun Control Act, which, among other things, prohibits dealing in firearms without a license. 524 U.S. at 189, 118 S. Ct. 1939; *see also* 18 U.S.C. § 924(a)(1)(D). The defendant argued that in order to prove that he "willfully" violated federal gun laws, the government had to introduce evidence that "he was aware of the federal law that prohibits dealing in firearms without a federal license." The Supreme Court rejected the defendant's argument, holding that, as a result of the long-standing principle that ignorance of the law is no excuse, the government need not prove that the defendant knew of the statutory provision at issue to violate it.

In reaching this conclusion, the Court noted that "willfully" is "a word of many meanings whose construction is often dependent on the context in which it appears." The Court said that, "[a]s a general matter," in the criminal context, "willful" means an act "undertaken with a 'bad purpose,'" and a "'willful' violation of a statute" occurs when "'the defendant acted with knowledge that his conduct was unlawful.'" The Court provided several additional examples of criminally "willful" conduct, including: (1) acting "without justifiable excuse"; (2) acting "stubbornly, obstinately, perversely"; (3) acting "without ground for believing it is lawful"; and (4) acting with "careless disregard [as to] whether or not one has the right so to act."

Safeco involved a civil action under Section 1681n of the Fair Credit Reporting Act, which establishes a cause of action against entities that "willfully" fail to comply with the statute. 551 U.S. at 56–57, 127 S. Ct. 2201. The Supreme Court rejected the defendant's argument that willfully limited liability to "acts known to violate the Act, not to reckless disregard of statutory duty." In reaching this conclusion, the Court said that "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well." The

Court further noted that, as explained in *Bryan*, in the criminal context "willfully" often requires the government to prove a defendant to have a "'bad purpose'" or to have "'acted with knowledge that his conduct was unlawful.'"

Neither *Bryan* nor *Safeco* supports Defendant's position that reckless disregard cannot amount to criminal willfulness. In particular, *Bryan* and *Safeco* emphasized that "willful" has multiple meanings and that the "bad purpose" language upon which Defendant relies defines willful only as a "general matter"—i.e. not in all circumstances. Additionally, even if *Bryan* and *Safeco* had required a showing that a Defendant acted with a "bad purpose"—which they did not—the Supreme Court long ago recognized—in a decision relied on in *Bryan*—that "reckless disregard" can amount to acting with a "bad purpose" for purposes of criminal "willfulness." *Screws v. United States*. And *Bryan*—upon which *Safeco* entirely relied—expressly recognized that "conduct marked by careless disregard" constitutes "willfulness." Accordingly, *Bryan* and *Safeco* did not overturn longstanding Supreme Court precedent holding that reckless disregard can amount to criminal willfulness.

We further point out that this Court repeatedly has held, post-*Bryan* and *Safeco*, that "reckless disregard" and "plain indifference" can constitute criminal "willfulness." For example, in a decision addressing the meaning of "willfully" in the civil and criminal penalty provisions in federal gun control laws, we concluded that "[a]t its core [willful] describes conduct that results from an exercise of the will, distinguishing 'intentional, knowing, or voluntary' action from that which is 'accidental' or inadvertent." *RSM, Inc. v. Herbert*. Accordingly, "when determining the willfulness of conduct, we must determine whether the acts were committed in deliberate disregard of, or with plain indifference toward, either known legal obligations or the general unlawfulness of the actions."). We further held that this construction of "willfully" was "in accordance with Bryan's construction of the term in the criminal context of § 924(a)(1)(D)."

Applying this standard to the conduct at issue, we held that the defendant's repeated failure to comply with federal gun laws in the face of warnings by federal officials amounted to "willfulness":

> To be sure, a single, or even a few, inadvertent errors in failing to complete forms may not amount to "willful" failures, even when the legal requirement to complete the form was known. Yet at some point, when such errors continue or even increase in the face of repeated warnings given by enforcement officials, accompanied by explanations of the severity of the failures, one may infer as a matter of law that the licensee simply does not care about the legal requirements. At that point, the failures show the licensee's plain indifference and therefore become willful.

Thus, we have held that "not car[ing]" about adherence to legal requirements amounts to criminal "willfulness," which is what the fourth instruction stated here. Notably, *RSM*'s description of the defendant's willful conduct tracks the government's theory of the case here: Defendant was repeatedly informed of safety violations at Upper Big Branch, and notwithstanding that knowledge, Defendant chose to prioritize production and pay fines rather than to take steps necessary to prevent the safety violations from continuing.

Following *RSM*, which post-dated *Bryan* but pre-dated *Safeco*, we held that *Safeco* did not call into question *RSM*'s analysis of the meaning of "willfully." *Am. Arms Int'l v. Herbert*. Additionally, in *American Arms*, we expressly equated "plain indifference" with "reckless disregard" for purposes of finding willfulness. . . .

Having determined that "reckless disregard" can constitute criminal "willfulness," we now must determine whether the district court properly concluded that "reckless disregard" amounts to willfulness for purposes of Section 820(d). In deciding this question, we do not write on a clean slate. In *United States v. Jone*s, we affirmed a trial court's instruction that a criminal defendant "willfully" violated a federal mine safety standard if he acted "either in intentional disobedience of the [safety] standard or in reckless disregard of its requirements." "This language conforms to the interpretations of willfulness provided by several of the circuits," we held. In reaching this conclusion, we relied on the Sixth Circuit's decision in *United States v. Consolidation Coal Co.*—the only appellate decision interpreting the meaning of "willfully" in a criminal provision of a federal mine safety statute—which held that an act or omission is "willful if done knowingly and purposefully by a coal mine operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements." *Jones*.

Defendant contends that we should disregard Jones because, notwithstanding that the district court instructed the jury on the meaning of "willfully," *Jones* involved a prosecution under a provision in the Mine Safety Act with a "knowing," as opposed to "willful," mens rea requirement. But we see no reason to depart from Jones' statement that, for purposes of the Mine Safety Act's criminal provision, willfulness encompasses reckless disregard—nor does Defendant provide us with any.

Section 820(d) derives from a substantively identical provision in the federal Coal Mine Health and Safety Act of 1969 (the "Coal Act"), which the Mine Safety Act replaced. At the time Congress enacted the Mine Safety Act, the Sixth Circuit had already interpreted "willfully" in the Coal Act in terms of "reckless disregard." *Consol. Coal Co*. Because "[w]e assume that Congress is aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, we must presume that Congress intended "willfully" in Section 820(d) to have the same meaning as the judicial construction of the term in the Coal Act, *see United States v. Georgopoulous* (construing, post-*Bryan*, "willfulness" element in labor union bribery statute as requiring only general intent because such a construction accorded with the judicial construction of willfulness in the statute from which the bribery provision derived). That Congress enacted the Mine Safety Act because it believed the penalties available under the Coal Act had proven insufficient to deter safety violations further evidences that Congress did not intend for courts to construe "willfully" in the Mine Safety Act more strictly than they had interpreted the term in the parallel provision in the Coal Act, as Defendant invites us to do here. *See* S. Rep. 95-181, at 4, 9 (1977) ("[E]nforcement sanctions under the [Coal Act] are insufficient to deal with chronic violators.").

Other Congressional statements in the legislative history of the Mine Safety Act further indicate that Congress intended to bring conduct evidencing reckless disregard within the meaning of "willfully." In particular, Congress imposed enhanced penalties in the Mine Safety Act because it found "[m]ine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the government can bring habitual and chronic violators of the law into compliance." S. Rep. 95-181, at 4. Accordingly, Congress saw criminal penalties as a mechanism to punish "habitual" and "chronic" violators that choose to pay fines rather than remedy safety violations.

As noted previously, we explained in *RSM* that an inference of plain indifference—and therefore willfulness—arises from evidence of "continu[ing]" or "increas[ing]" violations "in the face of repeated warnings given by enforcement officials." Put differently, a "long history of repeated failures, warnings, and explanations of the significance of the failures, combined with knowledge of the legal obligations, readily amounts to willfulness." . . .

That (1) Congress imposed enhanced penalties on mine operators in order to punish operators who "chronic[ally]" and "habitual[ly]" violate mine safety laws, rather than to devote resources to safety compliance, and that (2) courts construe willfulness in terms of reckless disregard when a statute is intended to levy criminal penalties on defendants who persist in violating a federal law notwithstanding repeated warnings of the violations, further indicates Congress intended to define "willfully" in Section 820(d) in terms of reckless disregard. . . .

Defendant and amici coal industry trade associations nonetheless maintain that, as a matter of policy, Congress did not intend for reckless disregard to amount to willfulness, as that term is used in Section 820(d), for four reasons: (1) Congress could not have intended to hold mine operators criminally liable for making "budgeting" and "business" decisions about how to allocate resources between production and safety compliance; (2) "violations inexorably result from coal production" and therefore violations should not give rise to criminal liability absent evidence a defendant committed such violations with specific intent to violate a particular mine safety statute or regulation; (3) defining willfully in terms of reckless disregard would allow juries to find mine operators criminally liable even when the operators did not want safety violations to occur; and (4) if "reckless disregard" amounts to willfulness, then operators will be deterred from engaging "in detailed oversight over important aspects of safety and regulatory compliance." We disagree.

First, the legislative history of the Mine Safety Act contradicts Defendant's and amici's argument that Congress did not intend to punish mine operators for the type of budgeting and business decisions the government challenged here. In particular, Congress repeatedly stated that the Mine Safety Act's enforcement provisions were designed to deter mine operators from choosing to prioritize production over safety compliance on grounds that it was "cheaper to pay the penalties than to strive for a violation-free mine." S. Rep. No. 95-181, at 9; *see also id.* at 4 (expressing concern that "[m]ine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions"). To that end, Congress said that operators should not balance the financial returns to increasing output against the costs of safety compliance. *See id.* ("The Committee strongly believes that industry-wide compliance with strong health and safety standards must be a basic ground rule for increased production.").

Congress imposes penalties on corporate officers—like Defendant—alongside enterprise penalties because it is often impossible to impose monetary penalties on corporations large enough to deter corporate misconduct. John C. Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1980) ("[O]ur ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources."). And when the returns to violating a law exceed a potential corporate fine, discounted by the likelihood of the government imposing the fine, corporate officers who do not face personal liability will treat "criminal penalties as a 'license fee for the conduct of an illegitimate business'"—as the government's evidence showed Defendant did here. *See United States v. Park* (quoting *United States v. Dotterweich*).

By subjecting mine operators to personal liability, including incarceration, Congress forced mine operators to internalize the costs associated with noncompliance with mine safety laws, even when such noncompliance would be profit-maximizing from a business perspective. *See* Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329 (2004) (explaining that subjecting corporate officers to personal liability forces such officers to internalize risk associated with corporation's non-compliance with laws). Put differently, in subjecting mine operators—who have "primary responsibility for providing a safe and healthful working environment," S. Rep. No. 95-181, at 18—to personal liability, Congress wanted to deter operators from choosing to treat penalties for violating safety provisions as a "license fee" to be factored into profit-maximization analyses, *Park*. Accordingly, contrary to Defendant's and amici's position, a mine operator cannot immunize himself from criminal liability under Section 820(d) by characterizing his mine's repeated failure to comply with safety laws as a consequence of "tough decisions" he had to make weighing "production, safety, and regulatory compliance." Amicus Br. at 26.

Second, regarding amici's contention that the "unavoidability" and "inexorability" of mine safety violations precludes use of such violations to establish criminal intent, we rejected an identical argument in *RSM*. There, the defendant—a firearms dealer—argued that its repeated failure to correctly fill out forms establishing that a customer was qualified to purchase a firearm did not amount to willfulness because, given the complexity of the regulatory regime and the number firearms the defendant sold, "human errors were virtually inevitable." In rejecting defendant's argument, we explained that even though "inadvertent" violations may not amount to willfulness, continuing violations in "the face of repeated warnings" allows a jury to infer criminal intent. We see no reason to diverge from that principle here, particularly in light of the parallels between Section 820(d) and Section 924(d)(1).

Next, Defendant argues that defining willfully in terms of reckless disregard impermissibly allowed the jury to convict him even if it concluded that Defendant desired "to eliminate and reduce the [safety] hazards and violations" at the Upper Big Branch mine. But just as the law holds criminally liable an individual who drives a car with brakes he knows are inoperable, even if he does not intend to harm anyone, *e.g., State v. Conyers*, so too Section 820(d) holds criminally liable a mine operator who fails to take actions necessary to remedy safety violations in the face of repeated warnings of such violations, regardless of whether the operator subjectively wanted the violations to continue.

Finally, contrary to amici's assertion, defining willfully in terms of reckless disregard should not deter mine operators from engaging in detailed safety oversight. The Mine Safety Act declares that "operators"—like Defendant—"have the primary responsibility to prevent . . . unsafe and unhealthful conditions and practices" at mines. 30 U.S.C. § 801. And in *Jones*, we affirmed the trial court's instruction that "[r]eckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation." Here, the district court correctly defined "reckless disregard" using the language we endorsed in *Jones*. Because mine operators have "primary" responsibility for safety and regulatory compliance and because an operator acts with reckless disregard if he "clos[es] [his] eyes" to safety compliance or "should have known" that an action or omission would lead to a safety violation, a mine operator cannot avoid liability under Section 820(d) by failing to engage in close oversight over safety and regulatory compliance.

In sum, the district court properly instructed the jury that it could conclude that Defendant "willfully" violated federal mine safety laws if it found that Defendant acted or failed to act with reckless disregard as to whether the action or omission would lead to a violation of mine safety laws.

As the *Blankenship* prosecution shows, the government is less likely to rely on the responsible corporate officer doctrine, even when it is available, if it has good evidence of actual knowledge by senior managers of the relevant wrongdoing. For example, the government recently prosecuted Texas-based ice cream manufacturer Blue Bell Creamery and its CEO Paul Kruse in connection with a 2015 bacterial (listeria) outbreak that killed three people and sickened others. The corporation pled guilty and paid a fine. At trial in August 2022, a jury hung (reportedly divided 10-2 in favor of acquittal) on mail and wire fraud charges that include extensive allegations that Kruse was personally aware of the listeria contamination and directed employees to cover it up. In a subsequent plea agreement, Kruse agreed to plead guilty to a single misdemeanor count and pay a $100,000 fine. The indictment against Kruse is available here: https://www.justice.gov/opa/press-release/file/1329726/download.

Problem 7-1

(a) As a normative matter, is the responsible corporate officer doctrine beneficial and defensible? Should it be expanded to other areas? Would broader or different statutes imposing criminal liability for failure to act by corporate officers be a good idea? If so, in what form? How might such laws be retributively justified?

(b) Is there an acceptable way to define mens rea for managerial involvement in crime committed at lower level of a corporation that would accommodate the requirements of notice and fairness in criminal law with the desire to use criminal law to incentivize greater care and supervision by senior managers in preventing corporate crimes?

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