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Criminal Law: Public Welfare Violations--Imposing Criminal Sanctions with a Strict Liability Standard?

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just two years prior to the instant decision,[74] yet it failed to pass muster here.[75] The instant case indicates that outside the home the captive audience test will be rigorously applied. Population growth, coupled with the trend toward urbanization, will make it more difficult to live in isolation from potentially unwanted communications. The fear of the dissenters concerning nudity in the streets is undoubtedly overstated. The distinction between the communications media and flesh is a convenient and logical place to daw the line. Although the state retains significant authority with regard to time and place restrictions,[76] it may be that the home will be a last refuge for those who wish to avoid exposure to offensive communication. If the alternative is broader state control over expression, brief exposure to unwanted communication seems to be the lesser of two evils.

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CRIMINAL LAW: PUBLIC WELFARE VIOLATIONS – IMPOSING CRIMINAL SANCTIONS WITH A STRICT LIABILITY STANDARD?

United States v. Park, 95 S. Ct. 1903 (1975)

Respondent Park, president of a large food chain corporation,[1] was convicted of violating a Federal Food, Drug, and Cosmetic Act (FDCA) provision[2] after rodent contaminated food was discovered in a company ware-

74. *See* notes 39-41 *supra.*

75. In addition, the Court effectively undermined most potential bases for improving the ordinance. An ordinance aimed at traffic regulation that singled out movies containing nudity would "nonetheless be invalid." 422 U.S. at 214. An ordinance drafted for the protection of children would still be subject to first amendment sanction. *Id.* at 214. The only bases left intact by the majority decision are zoning restrictions and protection of the privacy interests of persons in their homes. *Id.* at 212 n.9. *See* note 62 *supra.*

76. "[T]he police power has long been interpreted to authorize the regulation of nudity in areas to which all members of the public have access, regardless of any incidental effect upon communication." *Id.* at 223 (dissenting opinion).

1. ACME Markets, Inc. has over 36,000 employees, 874 retail outlets, 12 general warehouses, and 4 special warehouses. United States v. Park, 95 S. Ct. 1903, 1905 (1975).

2. Federal Food, Drug, and Cosmetic Act, §301(k), 21 U.S.C. §331(k) (1970), provides: "The following acts and the causing thereof are prohibited: (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded." Federal Food, Drug, and Cosmetic Act §402(a), 21 U.S.C. §342(a) (1970) provides in part: "A food shall be deemed to be adulterated – (a) Poisonous, insanitary, or deleterious ingredients . . . (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health. . . ."

house.[3] The trial judge instructed the jury that to find respondent guilty the government was required to prove beyond a reasonable doubt that Park had a "responsible relationship to the issue."[4] On appeal, the United States Court of Appeals for the Fourth Circuit reversed, holding that this instruction might have erroneously led the jury to believe that no "wrongful action" was required for conviction.[5] The United States Supreme Court reversed and HELD, criminal liability under the Federal Food, Drug, and Cosmetic Act requires neither wrongdoing nor conscious fraud for convictions of corporate officials who possess the power to prevent or correct FDCA violations.[6]

The concept of criminal liability "without fault" for public welfare offenses,[7] particularly violations of pure food and drug laws, is well settled.[8] Indeed, Congress indicated its intent to keep impure food and drugs out of interstate commerce as early as 1906 with passage of initial food and drug legislation.[9] Interpreting the congressional intent behind this initial legislation, an early court stated that "the purpose [of the Food and Drug Act] was to protect consumers against impure and adulterated food and drugs. . . ."[10] In 1938 the present statute was enacted;[11] its increased penalties for civil disobedience were an attempt to protect the unsophisticated consumer during an era of burgeoning industrialism.[12]

A landmark test of the strengthened statute resulted in *United States v. Dotterweich*.[13] The defendant,[14] a corporate president, was convicted under

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The criminal sanctions for violations of these sections are found in the Federal Food, Drug, and Cosmetic Act §§303(a), (b), 21 U.S.C. §§333(a), (b) (1970), which provide: "(a) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both. (b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such a person shall be imprisoned for not more than three years or fined not more than $10,000, or both."

3. ACME Markets, Inc., co-defendant, pleaded guilty to all counts of the charges. 95 S. Ct. at 1906. Defendant Park was sentenced to pay a $50 fine for each of the five counts. *Id.* at 1908.

4. United States v. Park, 499 F.2d 839, 841 (4th Cir. 1974).

5. 499 F.2d 839 (4th Cir. 1974).

6. 95 S. Ct. 1903 (1975) (Stewart, Marshall and Powell, JJ., dissenting).

7. The phrase "public welfare offense" was promulgated by Professor Francis Bowes Sayre in Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933). The term was used to denote the group of police offenses and criminal nuisances that were punishable irrespective of the actor's state of mind. *Id.* at 56 n.5.

8. Professor Sayre provides an excellent discussion of the development of criminal public welfare offenses in England and the United States. *Id.* at 56-66.

9. Act of June 30, 1906, ch. 3915, 34 Stat. 768.

10. United States v. Mayfield, 177 F. 765, 766 (N.D. Ala. 1910). The corporate officers were found guilty because they conferred on the manager the authority to ship the adulterated goods and were determined responsible for the shipment. This was the first case to use the term "responsible."

11. Act of June 25, 1938, ch. 675, 52 Stat. 1040.

12. *See* 94 CONG. REC. 6760-71 (1948) (remarks of Congressman Morse).

13. 320 U.S. 277 (1943) (5-4 decision).

14. The corporation, Buffalo Pharmacal Co., was a co-defendant. The jury, however,

section 333(a) [15] of the FDCA for shipping adulterated and misbranded drugs. Although Dotterweich had no personal involvement with the concerned shipments, he was in charge of the corporation's day-to-day business and had given general instructions to the employees who packaged and labeled the drugs.[16] The Supreme Court, reasoning that this type of situation had been the impetus for the statute's enactment,[17] imposed a high standard of care. The Court placed the burden of taking affirmative action on individuals who were "otherwise innocent but standing in responsible relation to a public danger"[18] and found such a responsible relation in "all who do have such a responsible share in the furtherance of the transaction which the statute outlaws . . . ."[19] The Court, however, neither enunciated a further definition as to what constituted a "responsible relationship" nor indicated by example which class of employees might stand in such a responsible relationship, because to do so "would be too treacherous" and a "mischievous futility."[20] Thus, *Dotterweich* placed the consequences of unintentional error on those individuals having the opportunity of informing themselves of the conditions that would violate the FDCA rather than on a wholly innocent and helpless public.[21] Two principles were established in *Dotterweich*. First, an FDCA conviction requires neither proof of conscious fraud nor proof of the awareness of wrongdoing – the violation itself is sufficient.[22] Second, this apparent strict liability is vicarious in nature.[23]

Cases decided since *Dotterweich* have demonstrated judicial acceptance of these principles.[24] In *United States v. H. Wool & Sons, Inc.*,[25] a small family-

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failed to reach a verdict with regard to it. United States v. Buffalo Pharmacal Co., 131 F.2d 500 (2d Cir. 1942).

15. 21 U.S.C. §393(a) (1970). See note 2 *supra*.

16. 131 F.2d 500, 501 (2d Cir. 1942). Buffalo Pharmacal Co. was a small corporation of 26 employees with the total operation housed on one floor of a building. *Id.* at 501. The Second Circuit reversed Dotterweich's conviction on the narrow ground that he was not a "person" within the meaning of the Act. *Id.* at 500.

17. 320 U.S. 277, 284-85 (1943).

18. *Id.* at 281.

19. *Id.* at 284.

20. *Id.* at 285.

21. See Sayre, note 7 *supra*.

22. 320 U.S. 277, 284 (1943).

23. Though the Court did not use the term "vicarious," it implied that a person may be guilty of a violation conceived and wrought through the wrongdoing of others in the organization. *Id.*

24. United States v. Wiesenfeld Warehouse Co., 376 U.S. 86 (1964) (defendant convicted of storing food under unsanitary conditions); United States v. Roma Macaroni Factory, 75 F. Supp. 663 (N.D. Cal. 1947) (intent of defendants irrelevant to conviction of introducing adulterated food into interstate commerce). *See also* Barnes v. United States, 142 F.2d 648 (9th Cir. 1944) (defendants convicted of false guarantee and false labelling; emphasis on protection of the consuming public).

25. 215 F.2d 95 (2d Cir. 1954). As to the size of the corporation and the defendant's relationship to it, the court said: "The dividing line between Herbert Wool and the Corporation was at best a shadowy one. The Company was a family owned enterprise, Wool and his younger brother each owning 24½% of the stock, and their father, who was inactive, owning 51%. Wool's testimony makes it quite clear that he was the dominating factor in the enterprise and that he was intimately concerned in its affairs." *Id.* at 99.

owned corporation and its secretary were convicted under the FDCA for misbranding the weight of butter shipped in interstate commerce, despite the defendants' contention that they did not know the butter was underweight. In *United States v. Diamond State Poultry Co.*,[26] a corporation and two of its officers were convicted under the FDCA for introduction of decomposed chicken into interstate commerce. The court noted that the officers gave packing instructions to their employees and occasionally opened the crates to insure that these instructions were followed.[27] Citing *Dotterweich*, the Court stated:

> Under the Food, Drug, and Cosmetic Act, proof of personal participation of an individual defendant is not required to establish guilt if the individual is the responsible person for the operation of the business out of which the violation grows.[28]

In all cases prior to the case at bar, convicted individuals were personally connected with the entire operation of the corporation; either the size of the corporation was very small, as in *Dotterweich* and *H. Wool & Sons, Inc.*, or the defendants were in immediate control of the situation as in *Diamond State Poultry Co.*

The instant case is the first prosecution under the FDCA of an officer of a large corporation. The Supreme Court, applying the *Dotterweich* doctrine, rejected the lower court's concept that some element of "wrongful action" on the part of the defendant should be required for conviction[29] and found that neither conscious fault, awareness of wrongdoing, nor wrongful action was an element of proof in an FDCA conviction.[30] The majority, recognizing "responsible relationship" as too amorphous a standard of liability to provide cogent guidance to a jury, attempted to provide a more definitive guide.

> [T]he government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of 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

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26. 125 F. Supp. 617 (D. Del. 1954).

27. *Id.* at 619.

28. *Id.* at 620.

29. The Court of Appeals stated: "To hold Park *criminally* liable for the wrongful actions of each and every one of his employees merely showing his position with the corporation is manifestly unjust, unfair, and beyond the realm of reasonableness." 499 F.2d 841 n.5 (emphasis original). Many commentators, studying the evolution of criminal law in this country, note with alarm the increase in strict liability statutes imposing criminal penalties. For a discussion of the complexities of the mental element in criminal offenses, see Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932). For a corollary exposition of vicarious liability, see Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

30. 95 S. Ct. at 1912. For a defense of strict liability in the criminal law that emphasizes the deterrent technique used by the instant Court, see Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

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.[31]

The dissenting justices concurred in the majority's rationale,[32] acknowledging a duty created by the statute, a breach of which creates a violation, and finding a causal link between one's ability to prevent the violation and the violation itself. They felt that the majority was following a negligence standard using the language of strict liability[33] and disagreed with the holding because Park did not benefit from the Court's guidelines. He was convicted without "the wise guidance"[34] of the trial judge, since that judge felt restricted by *Dotterweich* to the undefined use of "responsible relationship" in his instructions.[35]

The instant case shows the need to establish a meaningful standard of liability that will give full force and effect to the FDCA and be in concert with the judicial interpretations already given (notably *Dotterweich*) while concomittantly providing definitive guidance to juries charged with determination of criminal guilt. The Court failed to adopt two viable options to reach such goals. First, it could have relied on a "reasonable man" theory, *i.e.*, the defendant knew, or should reasonably have known, of conditions in the plan or business operation that could result in FDCA violations.[36] Such a jury instruction would have resolved the lower court's concern over holding the president of such a large corporation strictly liable for the acts of his employees. This option, however, would have measurably increased the prosecution's burden.[37]

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31. 95 S. Ct. at 1912 (emphasis added).

32. *Id.* at 1914 (Stewart, J., dissenting).

33. The line between strict liability and negligence is hard to draw. For a comparison and contrast of the fault element of strict liability and negligence, see Wasserstrom, *supra* note 30, at 742-44.

34. 95 S. Ct. at 1915 (Stewart, J., dissenting), *quoting* United States v. Dotterweich, 320 U.S. 277, 285 (1943). Inherent in the *Dotterweich* doctrine was the trial judge's function of relating the law to the specific facts in such a way that the jury would be able to grasp the meaning of the law. 320 U.S. at 285. In a clear misinterpretation of this function under *Dotterweich*, the trial judge in the instant case failed to provide the jury with any guidance as to the meaning of "responsible relationship" as applied to the instant facts. On motion by the defendant to define the term "responsible relationship" he said: "Let me say this, simply as to the definition of the 'responsible relationship.' Dotterweich and subsequent cases have indicated this really is a jury question. It says it is not even subject to being defined by the Court. As I have indicated to counsel, I am quite candid in stating that I do not agree with the decision: therefore, I am going to stick by it." 95 S. Ct. at 1915 n.1 (Stewart, J., dissenting).

35. The Court attempted to answer this criticism by saying that even though the trial judge should have made a better effort to relate the legal issue to the facts of the case, the jury instructions, taken as a whole, properly conveyed the meaning of the law to the jury. 95 S. Ct. at 1912-13.

36. This approach was advocated in O'Keefe & Shapiro, *Personal Criminal Liability Under the Federal Food, Drug, and Cosmetic Act: The* Dotterweich *Doctrine*, 30 FOOD DRUG COSM. L. J. 5, 41 (1975) [hereinafter cited as *The* Dotterweich *Doctrine*]; and Borre, *Public Welfare Offenses: A New Approach*, 52 J. CRIM. L.Q. & P.S. 418, 419 (1961).

37. In order to obtain a conviction, the prosecution necessarily would have the burden

A second alternative would have considered the corporate position of the concerned individual and determined whether the individual was reasonably close to the operation causing the violation or whether he otherwise should reasonably have known of the conditions that could have resulted in FDCA violations.[38] This variation of the reasonable man standard could have easily explained prior cases involving defendants who were personally connected with the operation. This standard, which lessens the prosecution's burden,[39] is more consistent with the purposes of the Act[40] while offering limited protection to corporate individuals far removed from the violations.

The Supreme Court in the present case, determining that any increase in the government's burden of proof could be detrimental to effective implementation of the Act,[41] employed a "responsible relationship" standard, allowing conviction of those who possess the power to prevent or correct a violation. This standard involved neither pure strict liability[42] nor pure negligence.[43] Under the Court's language, once a violation has been proved, a conviction will necessarily follow; whereas under the criminal negligence standard preferred by the dissenters,[44] proof of negligence is a prerequisite to conviction in each case.[45] This standard is definitive in diminishing the vagaries of "responsible relationship" yet necessarily broad and all-encompassing. Now, any person from corporate president to warehouse foreman, who could have prevented the violation or immediately corrected it, may be convicted under the FDCA. The duty thus imposed may be breached by inaction as well as by action. The blameworthiness of each individual is measured by the degree of danger to which the public is subjected and the degree of power each individual possesses within the corporation to prevent any possible FDCA violations.[46]

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of proving what a reasonable person would have done in like circumstances. This would be a definite advantage to the defense.

38. This approach was highly recommended in *The* Dotterweich *Doctrine, supra* note 36, at 41-42. Mr. O'Keefe is the president of the Food and Drug Law Institute. This article presents an excellent pre-*Park* synthesis of the state of the law in this area.

39. See note 37 *supra.*

40. See text accompanying notes 9-12 *supra.*

41. The open-ended scope of the decision's coverage is apparent on analysis of the following statement: "[I]n providing sanctions which reach and touch the individuals who execute the corporation 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." 95 S. Ct. at 1911.

42. See Wasserstrom, *supra* note 30, at 742-45.

43. *See generally* Sayre, *Mens Rea,* 45 HARV. L. REV. 974 (1932).

44. 95 S. Ct. at 1915 (Stewart, J., dissenting).

45. See Wasserstrom, *supra* note 30, at 744.

46. The Court recognized the following "powerlessness" defense to a claim of criminal liability against the corporate officer: "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

Implicit in the instant Court's holding was a ratification of Food and Drug Administration (FDA) procedures.[47] These exhaustive procedures, requiring warnings and hearings prior to instituting prosecution, result in the prosecution of only flagrant and notorious FDCA violations.[48] Thus, an element of knowledge or fault may be reasonably imputed to an individual whose case has reached the stage of prosecution. Accordingly, the Supreme Court did not require proof of fault in the instant case. It is unclear, however, whether the Court will follow this line of reasoning in a factual situation that does not involve FDA procedures, even though the Court's language and reasoning are broad enough to cover defendants being prosecuted for public welfare offenses unrelated to the FDA.[49]

This quasi-strict liability standard may, therefore, be imposed on officials of any corporation whose operations are regulated by federal environmental and health laws.[50] A minimum of 27 broad regulatory statutes are within this category, *inter alia*, the areas of air and water pollution control, occupational safety, aviation, and traffic and motor vehicle safety.[51] Of these statutes, 23

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merits.' " 95 S. Ct. at 1912. Practically, this defense is useless is to the corporation director or officer acting with traditionally broad powers and responsibilities.

47. Routinely, the FDA conducts inspections, forwarding the results to all concerned personnel, and issues warning letters urging compliance with established standards. See Comment, *Liability Without Fault in the Food and Drug Statutes*, 1956 WIS. L. REV. 641, for a discussion of FDA practices in Wisconsin. A thorough analysis of national administration that echoes the results found in the Wisconsin article may be found in *The* Dotterweich *Doctrine*, *supra* note 36.

48. If it appears that the individuals are not cooperating with this essentially administrative system of enforcement, a hearing under §305 is initiated. This hearing affords individuals a nonjudicial method of exculpation. Federal Food, Drug, and Cosmetic Act, §305, 21 U.S.C. §335 (1970). For a complete discussion of §305 hearings, see Rissman, *Criminal Intent Under the Federal Food, Drug, and Cosmetic Act*, 7 FOOD DRUG COSM. L.J. 336 (1942). Alternatives to criminal prosecution are explored in Austern, *Sanctions in Silhouette: An Inquiry into the Enforcement of the Federal Food, Drug, and Cosmetic Act*, 51 CALIF. L. REV. 38 (1963); Cody, *Food Recalled*, 27 FOOD DRUG COSM. L.J. 336 (1972); *Developments in the Law — The Federal Food, Drug and Cosmetic Act*, 67 HARV. L. REV. 632, 673-720 (1954). The defendant in the instant case had received the benefit of all FDA administrative procedures: two warnings, an inspection, reinspection, and a §305 hearing. Defendant declined to attend the §305 hearing, sending instead one of his subordinates. *The* Dotterweich *Doctrine*, *supra* note 36, at 21.

49. "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.* 95 S. Ct. at 1911 (emphasis added). For a discussion of the merits and rationale behind this theory of strict liability, see Wasserstrom, *supra* note 30, at 741-45.

50. For a detailed discussion of the federal statutes that might be affected by the instant case, see *The* Dotterweich *Doctrine*, *supra* note 36, at 33-40, apps. I and II.

51. *See, e.g.*, National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §1381 (1970); Consumer Product Safety Act, 15 U.S.C. §2051 (Supp. II, 1972); Federal Water Pollution Control Act, 21 U.S.C. §1251 (Supp. II, 1972); Occupational Safety and Health Act, 29 U.S.C. §651 (1970); Federal Coal Mine Health and Safety Act, 30 U.S.C. §801 (1970); Clean Air Act, 42 U.S.C. §1857 (1970); Federal Aviation Act, 49 U.S.C. §1301 (1970). See *The* Dotterweich *Doctrine*, *supra* note 36, at 50-57, app. I.

authorize criminal sanctions,[52] 13 of which expressly require "knowledge" or some similar element; 10, including the FDCA, do not address this requirement.[53] Six of the 23 statutes providing criminal sanctions expressly provide for some form of vicarious liability;[54] 16 duplicate the FDCA in their failure to address this point.[55] The instant case will assuredly be reflected in future interpretations of these provisions.

Two laws in particular that affect most large corporations are the Federal Water Pollution Control Act[56] (FWPCA) and the Clean Air Act,[57] which are administered by the Environmental Protection Agency. The FWPCA, although specifically providing that corporate officers responsible for its violation may be criminally convicted, requires willfulness or negligence to be an element of proof.[58] The Clean Air Act, although silent on vicarious liability, requires knowledge for criminal conviction.[59] The instant case increases the opportunity under these statutes for conviction of corporate officers with general authority over operations. Knowledge, and perhaps negligence, may be imputed to such an officer using the instant Court's rationale that the officer was in a position to be aware of the company's policies and, having assumed a position of authority in a business enterprise affecting the public's health and well-being,[60] had a high duty of care. A violation of that duty is negligence.

The Court's recognition that proof of an FDCA breach, using FDA administrative procedures, is adequate to determine criminal liability absent a judicial determination of fault is noteworthy but not novel in food and drug law. More importantly, the potential for extending this principle to other federal regulatory agencies and the corporate establishments they control will expose corporate officers to personal criminal liabilities heretofore nonexistent and unanticipated. Such administratively dictated liability usurps

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52. *The* Dotterweich *Doctrine, supra* note 36, at 26.

53. *Id.* at 36-37.

54. *Id.*

55. *Id.*

56. 33 U.S.C. §1251 (Supp. II, 1972).

57. 42 U.S.C. §1857 (1970).

58. 33 U.S.C. §1319(c)(1) (Supp II, 1972) provides: "Any person who willfully or negligently violates section 1311, 1312, 1316, or 1318 of this title . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both."

59. 42 U.S.C. §1857c-8(c)(1) (1970) provides: "Any person who knowingly—(A) violates any requirement of an applicable implementation plan . . . or (B) violates or fails to comply with any order issued by the Administrator under subsection (a) of this section . . . shall be punished by a fine of not more than $25,000 per day of violation or by imprisonment for not more than one year or both. If the conviction is for a violation committed after the first conviction of such a person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years or both."

60. One can easily see the relationship between food adulteration and environmental pollution in the context of the public's inability to protect itself.