

H.R. 7040: CRIMINAL LIABILITY FOR CORPORATE NONDISCLOSURE

Favorable laws and public policy have produced a tremendous growth in the number and size of corporations in the last century.¹ Government regulation was originally limited to corporate behavior as it affected shareholders.² In the past decade, however, as corporate behavior has had a more direct effect on the public, the federal government refocused its attention by expanding corporate regulation through numerous agencies and statutes.³

Despite available civil penalties, the government has relied increasingly on adjunct criminal sanctions⁴ to enforce compliance with corporate regulations.⁵ Furthermore, independent criminal legislation recently has emerged in an effort to regulate corporate behavior.⁶ One proposed statute, H.R. 7040,⁷ would amend Title 18 of the Federal

1. Werner, *Management, Stock Market and Corporate Reform: Berle and Means Reconsidered*, 77 COLUM. L. REV. 388, 414 (1977).

2. *Id.*

3. Thirty regulatory statutes and seven new agencies were created between 1970 and 1975. Lilley & Miller, *The New "Social Regulation,"* 47 PUB. INTEREST 49, 49-50 (1977). See also *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1229 (1979) [hereinafter cited as *Regulating Corporate Behavior*].

4. For example, the number of civil antitrust actions has remained relatively constant, while criminal actions have increased dramatically. The ratio was 133:29 in 1968-1970 and 115:89 during 1974-1976. M. GOTTFREDSON, M. HINDELANG & N. PARISI, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 61 (1977).

5. *Regulating Corporate Behavior*, *supra* note 3, at 1229 n.5.

6. The most recent effort to codify the federal criminal code includes a reckless endangerment provision that would apply to corporate conduct. See S. 1722, 96th Cong., 1st Sess. (1979). For a discussion of the proposed legislation, see Spurgeon and Fagan, *Criminal Liability for Life-Endangering Corporate Conduct*, 72 J. CRIM. L. & CRIMINOLOGY 400 (1981).

7. H.R. 7040, 96th Cong., 2d Sess. (1980), reprinted in *Corporate Criminal Liability: Hearings on H.R. 4973 and H.R. 7040 Before the Subcomm. on Crime of the Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 582-86 (1979-1980) [hereinafter cited as *Hearings*]. H.R. 7040 provides:

A BILL

To amend title 18 of the United States Code to impose penalties with respect to certain nondisclosure by business entities as to serious concealed dangers in products and business practices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 89 of title 18 of the United States Code is amended by adding at the end the following new section:

"§ 1822. *Nondisclosure of serious concealed dangers by certain business entities and personnel*

“(a) Whoever—

“(1) is a manager with respect to a product or business practice;

“(2) discovers a serious concealed danger that is subject to the regulatory authority of an appropriate Federal agency and is associated with such product (or a component of that product) or business practice; and

“(3) knowingly fails during the period ending fifteen days after such discovery is made (or if there is imminent risk of serious bodily injury or death, immediately)—

“(A) to inform an appropriate Federal agency in writing, unless such manager has actual knowledge that such an agency has been so informed; or

“(B) to warn affected employees in writing, unless such manager has actual knowledge that such employees have been so warned;

shall be fined not more than \$250,000 or imprisoned not more than five years, or both, but if the convicted defendant is a corporation, such fine shall be not more than \$1,000,000.

“(b) Whoever knowingly discriminates against any person in the terms or conditions of employment or in retention in employment or in hiring because of such person's having informed a Federal agency or warned employees of a serious concealed danger associated with a product or business practice shall be fined not more than \$10,000, or imprisoned not more than one year, or both.

“(c) If a fine is imposed on an individual under this section, such fine shall not be paid, directly or indirectly, out of the assets of any business entity on behalf of that individual.

“(d) As used in this section—

“(1) the term ‘manager’ means a person having—

“(A) management authority in or as a business entity; and

“(B) significant responsibility for the safety of a product or business practice or for the conduct of research or testing in connection with a product or business practice;

“(2) the term ‘product’ includes services;

“(3) the term ‘discovers’, used with respect to a serious concealed danger, means obtains information that would convince a reasonable person in the circumstances in which the discoverer is situated that the serious concealed danger exists;

“(4) the term ‘serious concealed danger’, used with respect to a product or business practice, means that the normal or reasonably foreseeable use of, or the exposure of a human being to, such product or business practice is likely to cause death or serious bodily injury to a human being (including a human fetus) and the danger is not readily apparent to the average person;

“(5) the term ‘serious bodily injury’ means an impairment of physical condition, including physical pain, 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, or mental faculty;

“(6) the term ‘warn affected employees’ means give sufficient description of the serious concealed danger to all individuals working for or in the business entity who are likely to be subject to the serious concealed danger in the course of that work to make those individuals aware of that danger; and

“(7) the term ‘appropriate Federal agency’ means the Federal agency on the following list which has regulatory authority with respect to the product or business practice and serious concealed dangers of the sort discovered:

Criminal Code to impose criminal liability for the manager⁸ of a business entity knowingly⁹ to fail to report to an appropriate federal agency, or to warn affected employees, of a serious concealed danger associated with a business product or practice.¹⁰

This Note evaluates the proposed statute. Part I examines the problems that prompted the legislative proposal. Part II analyzes the statutory language in light of the statute's purpose. Part III discusses constitutional limitations on the proposal. Finally, Part IV suggests alternative means by which to effectuate the legislative purpose.

I. THE CAUSE FOR CONCERN

Several incidents provided the impetus for H.R. 7040.¹¹ These incidents can be divided into three categories: occupational harms, threats to consumer safety, and dangers to the environment.¹²

Millions of Americans are exposed to health hazards in the workplace. For example, exposure to asbestos dust¹³ causes at least four

"(A) The Food and Drug Administration.

"(B) The Environmental Protection Agency.

"(C) The National Highway Traffic Safety Administration.

"(D) The Occupational Safety and Health Administration.

"(E) The Nuclear Regulatory Commission.

"(F) The Consumer Product Safety Commission.

"(G) The Federal Aviation Administration.

"(H) The Federal Mine Safety and Health Review Commission."

SEC. 2 The table of sections for chapter 89 of title 18 of the United States Code is amended by adding at the end the following new item:

"1822. Nondisclosure of serious concealed dangers by certain business entities and personnel."

8. See notes 44-75 *infra* and accompanying text.

9. See notes 83-105 *infra* and accompanying text.

10. See note 77 *infra*.

11. The bill's drafters cited the following incidents: Buffalo Creek (collapse of mine waste dam); Firestone 500 (defective tires); Ford Pinto (defective gasoline tank); Kepone (hazardous pesticide discharged into river); Love Canal (leaching of chemical residue); Metropolitan Edison and Three Mile Island (nuclear reactor accident); Asbestos (occupational exposure to carcinogen); and Polybrominated Biphenyls (industrial compound in dairy feed). SUBCOMM. ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., CORPORATE CRIME 10 (Comm. Print 1980) [hereinafter cited as CORPORATE CRIME].

12. This trichotomy was first articulated in Schragger & Short, *Toward a Sociology of Organizational Crime*, 25 SOC. PROB. 407, 413 (1978). See also Spurgeon & Fagan, *supra* note 6, at 402.

13. Asbestos is a mineral that separates easily into long, flexible fibers that can be spun, woven, pressed to form paper, or used as structural reinforcement. It is a valuable commercial product because of its resistance to heat and chemicals. Nearly one million tons of asbestos are consumed annually by the United States. An estimated 50,000 workers are involved in the manufacture of products containing asbestos. This figure does not include the number of workers in-

debilitating diseases.¹⁴ Scientists first documented this hazard in 1924.¹⁵ Subsequently the asbestos industry conducted an investigation of the dangers¹⁶ that revealed a relationship between exposure to asbestos dust and disease.¹⁷ Nevertheless, the industry took few steps to control the levels of asbestos in its manufacturing plants.¹⁸ The government also failed to take any corrective measures until 1970, when Congress enacted the Occupational Health and Safety Act.¹⁹ Even today, at least 880,000 workers are continually exposed to carcinogens, including asbestos.²⁰

Publication of an article accusing Ford Motor Company of producing a car that Ford knew had a defective fuel tank²¹ helped to reveal a danger to consumers in 1977. Subsequent federal investigation re-

involved in the secondary manufacture of products containing asbestos. 40 Fed. Reg. 47,652-53 (1975).

14. The diseases are asbestosis, broncogenic carcinoma, mesothelioma, and cancers of the stomach, colon, and rectum. *Id.* Asbestosis is a diffuse, interstitial, nonmalignant scarring of the lungs. *Id.* at 47,653. See Sweeny, *The Asbestosis Time Bomb*, 14 TRIAL 16 (1978). For a discussion of asbestosis and its effect upon industrial insulation workers, see Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967). Broncogenic carcinoma is a malignancy of the lung interior. 40 Fed. Reg. 47,652-53 (1975). Mesothelioma is a diffuse malignancy of the chest lining or abdomen. *Id.* at 47,653; Sweeny, *supra*, at 16.

15. See Cooke, *Fibrosis of the Lungs Due to Inhalation of Asbestos Dust*, 1924 BRIT. MED. J. 147.

16. Sweeny, *supra* note 14, at 17. The study investigated the relationship between the percentage of workers diagnosed as having asbestosis and the number of years each worker was exposed to the substance.

17. The results revealed a positive correlation between the disease and the number of years the employees had worked. The study recommended that the industry take steps to cure the problem and further study the effects of asbestos. *Id.*

18. *Id.* at 18.

19. 29 U.S.C. §§ 651-678 (1976).

20. Spurgeon & Fagan, *supra* note 6, at 402.

21. Dowie, *Pinto Madness*, MOTHER JONES, Sept./Oct. 1977, at 18. The article alleged that Ford had rushed the Pinto into production despite evidence that rear-end collisions would rupture the car's fuel tank system. *Id.* Further, the article claimed that Ford had tested three protective alterations for the gas tank but had used none of them. Ford engineers considered using the same kind of gas tank used in another Ford model. The other tank had proven successful in over 50 crash tests. The idea was discarded for unknown reasons. *Id.* at 20-21. Second, the author claimed to possess a Ford memorandum entitled "Fatalities Associated with Crash-Induced Fuel Leakage and Fires" that argued that the company would not benefit financially from complying with proposed federal fuel tank safety standards in fuel tank design. *Id.* at 24. Finally, the article claimed that in the same memorandum, Ford calculated that the costs of making the fuel tank correction (\$11 per car) were not equal to the savings in lives resulting from fires caused by rear-end collisions. *Id.* Ford officials have said the allegations are distorted and contain half-truths. See N.Y. Times, Aug. 11, 1977, at A-15; Wheeler, *The Public's Costly Mistrust of Cost-Benefit Safety Analysis*, Nat'l L.J., Oct. 13, 1980, at 26.

vealed that even before Ford's introduction of the Pinto, the company had conducted tests and knew that the gas tank would rupture upon rear-end collision.²² The jury in *Grimshaw v. Ford Motor Co.*²³ reached a similar conclusion regarding the Pinto's design and held Ford liable for gross misconduct in the design and manufacture of the model's fuel tank system.²⁴ The extent to which Ford knew of the defect was at issue in *Indiana v. Ford Motor Co.*,²⁵ in which Ford was tried on three counts of reckless homicide²⁶ in connection with the deaths of three persons in a Pinto crash. The state charged that Ford recklessly designed, manufactured, and sold the Pinto. Ford's knowledge went undecided, however, when the jury acquitted Ford on other grounds.

The nuclear reactor accident at Three Mile Island, Pennsylvania (TMI) posed a danger to the environment in 1979. The accident occurred when a pressure valve in the reactor's primary cooling system failed to close.²⁷ Investigation of the accident showed that the reactor designers, Babcock & Wilcox, knew that pressure valves similar to the one used at TMI had malfunctioned previously at nine other nuclear plants.²⁸ The firm neither warned customers nor alerted operators that such a malfunction was possible.²⁹

H.R. 7040 is the legislative response to these incidents.³⁰ The bill's

22. CORPORATE CRIME, *supra* note 11, at 10.

23. No. 197761 (Cal. Super. Ct. Orange County Feb. 6, 1978), *aff'd*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

24. Schmitt & May, *Beyond Products Liability: The Legal, Social, and Ethical Problems Facing the Automobile Industry in Producing Safe Products*, 56 U. DET. J. URB. L. 1021, 1022 (1979).

25. State v. Ford Motor Co., No. 5324 (Ind. Super. Ct. March 13, 1980).

26. Ford was indicted under IND. CODE ANN. § 35-42-1-5 (Burns Supp. 1980). The statute states that "a person who recklessly kills another human being commits reckless homicide, a class C felony." *Id.* For a discussion of the Pinto case, see Note, *Corporate Homicide: A New Assault on Corporate Decision-Making*, 54 NOTRE DAME LAW. 911 (1979).

27. A total of 32,000 gallons of water escaped through an open valve and out the let-down system. The investigatory commission found that if the valve had closed, or had control operators closed a backup valve or left the plant's high pressure injection pumps on, the accident never would have happened. REPORT OF THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, THE NEED FOR CHANGE: THE LEGACY OF TMI 111 (1979).

28. *Id.* at 43.

29. *Id.*

30. Other proposals include S. 1722, 96th Cong., 1st Sess. § 1617(a) (1979), which states: "A person is guilty of an offense if he engages in conduct by which he places another person in danger of imminent death or serious bodily injury." For earlier drafts of this proposal, see *Hearings on S. 1453 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); *Hearings on S. 1 Before the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

The American Law Institute also included a life-endangering provision in the Model Penal Code. Section 201.11 provides: "A person is guilty of reckless conduct if he: (a) recklessly en-

drafters found that although manufacturing corporations adhered to federal standards, serious dangers still appeared in products and workplaces. They concluded that these dangers persisted in part because corporate decisionmakers knowingly allowed worker and consumer exposure to product hazards.³¹ The proposed statute represents the drafters' attempt to go beyond the civil measures by regulating corporate behavior through criminal sanctions.

The proposed statute provides that any product or business manager³² who discovers³³ a concealed serious danger subject to federal regulatory authority and who knowingly³⁴ fails to inform an appropriate federal agency³⁵ or warn affected employees of the danger shall be fined not more than \$250,000 or imprisoned not more than five years, or both.³⁶ If the convicted defendant is a corporation, the fine shall be \$1,000,000.³⁷

The legislative purpose is deterrence.³⁸ The drafters believed that

gages in conduct which places or may place another person in danger of death or serious bodily injury" MODEL PENAL CODE § 201.11 (Tent. Draft No. 9, 1959). *See also* N.Y. PENAL LAW §§ 120.20, .25 (McKinney 1977) (reckless endangerment).

31. *Hearings, supra* note 7, at 20 (statement of Rep. George Miller).

32. *See* notes 44-75 *infra* and accompanying text.

33. *See* notes 77-83 *infra* and accompanying text.

34. *See* notes 84-105 *infra* and accompanying text.

35. Appropriate federal agencies include the Food and Drug Administration, the Environmental Protection Agency, the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, the Nuclear Regulatory Commission, the Consumer Product Safety Commission, and the Federal Mine Safety and Health Review Commission. H.R. 7040, § 1(d)(7) (1980), *reprinted in Hearings, supra* note 7 at 582, 585-86.

36. The proposal also imposes a fine and prison sentence on any individual who knowingly discriminates against an employee who reports a serious concealed danger to a federal agency or who warns affected employees.

37. H.R. 4973, 95th Cong., 2d Sess. (1979), *reprinted in Hearings, supra* note 7, at 2, was the precursor of H.R. 7040. It paralleled H.R. 7040, except that a manager had 30 days in which to report the danger. *Id.* § 1(a)(3). Further, the penalties were "not less than \$50,000 or imprisonment not less than two years, or both," for an individual, and "if the convicted defendant is a corporation, such fine shall be not less than \$100,000." *Id.* § 1(a).

38. *Hearings, supra* note 7, at 31. The purposes of criminal sanctions are rehabilitation, incapacitation, retribution, and deterrence. *See* H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-41 (1968); MODEL PENAL CODE § 1.02 (Proposed Official Draft, 1962); *Regulating Corporate Behavior, supra* note 3, at 1231-41. Retribution and deterrence are the two rationales for regulating corporate behavior. Deterrence, however, is the primary rationale because activities proscribed by a statute may not be ethically wrong in the business world. *See* Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835, 839 (1973); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 425-26, 436 (1963); *Regulating Corporate Behavior, supra* note 3, at 1235.

the criminal penalties would discourage corporate executives from concealing hazards from workers and consumers.³⁹ The drafters designed the bill to shift the burden of social responsibility from the government to private industry.⁴⁰ They viewed the legislation as redirecting the business manager's concern for the corporate good to concern for the public good⁴¹ and as addressing general questions of corporate ethics, individual responsibility, and business morality.⁴² The drafters also wanted, however, to limit the scope of the legislation. The bill is not intended to affect everyone in business but only those subject to the regulatory authority of eight federal agencies.⁴³

II. THE STATUTORY LANGUAGE

H.R. 7040 represents an attempt to address the common characteristics of the incidents that prompted the proposal while still encompassing a wide variety of circumstances. The proposed statute premises liability on three elements. To violate the statute, a person must (1) be a manager, (2) discover a serious concealed danger, and (3) knowingly fail to report to an appropriate federal agency or warn affected employees of the danger.

A. "Manager"

The first requirement for liability under H.R. 7040 is that a person be a manager. The proposed statute defines manager as a person having "management authority in or as a business entity and significant responsibility for the safety of a product or business practice or for the

39. *Hearings, supra* note 7, at 31. Representative Miller added: "I think that a person who aspires to be a leader in corporate America would not want to have a résumé with a criminal conviction on it." *Id.* The drafters treat corporate concealment almost as an offense *malum in se*. One of the drafters went so far as to declare: "[The decision to conceal hazards] has many of the components that we learn in law school about forethought, premeditation, calculation, knowingly. All of those things that we ascribe to criminals who lie in wait in the alleys can be ascribed to some of these decisions. . . ." *Id.* at 27.

40. *Id.* at 19, 21.

41. *Id.* at 21.

42. *Id.* at 20. According to Representative Miller, one of the drafters: [This legislation] raises the fundamentally disturbing question of whether our economic, political, or ethical systems have somehow become so skewed that the workshop of profit is more important than people.

Covering up known hazards from workers and the general public illustrates a moral and ethical problem which appears with alarming frequency, not just in one industry, but throughout industry and in our society as a whole. *Id.* at 20-21.

43. *Id.* at 594. For a list of the eight agencies, see n.7 *supra*.

conduct of research or testing in connection with a product or business practice."⁴⁴ This definition thus has two elements:⁴⁵ "management authority" and "significant responsibility" for the safety of a product or business practice at any one manufacturing stage.⁴⁶

The first element presents only slight ambiguity. "Management authority" ordinarily connotes control of corporate policy.⁴⁷ Stockhold-

44. H.R. 7040, 96th Cong., 2d Sess. § 1(d), *reprinted in Hearings, supra* note 7, at 582, 584-86.

By defining "manager" to include a business entity, the drafters created corporate criminal responsibility for an individual employee's failure to report the discovery of a serious concealed danger. The drafters achieve this responsibility by imputing the acts and intent of individuals within the corporation to the corporate entity.

The theory adopts the agency doctrine of tort law, *respondeat superior*. See *Regulating Corporate Behavior, supra* note 3, at 1247. Under this doctrine, a corporation will be criminally liable if its agent commits an illegal act proscribed by the statute within the scope of his employment. See, e.g., *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979); *Boise Dodge, Inc. v. United States*, 406 F.2d 771, 772 (9th Cir. 1969); *United States v. Hougland Barge Line, Inc.*, 387 F. Supp. 1110, 1114 (W.D. Pa. 1974). The acts of officers, who are viewed as an extension of the corporate entity, are most often imputed to the corporation. See, e.g., *United States v. Carter*, 311 F.2d 934, 941-42 (6th Cir. 1963); *United States v. Empire Packing Co.*, 174 F.2d 16, 20 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949); *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945). The scope of liability, however, extends to include middle-level management. See e.g., *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975) (general foreman); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970) (sales manager), *cert. denied*, 401 U.S. 948 (1971); *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960) (depot manager); *United States v. Milton Marks Corp.*, 240 F.2d 838 (3d Cir. 1957) (general foreman); *United States v. Steiner Plastics Mfg. Co.*, 231 F.2d 149 (2d Cir. 1956) (production manager); *United States v. Armour & Co.*, 168 F.2d 342 (3d Cir. 1948) (managers, assistant managers, and salesmen). In certain instances, it includes subordinate employees. See, e.g., *United States v. Illinois Cent. R.R.*, 303 U.S. 239 (1938) (employee who unloaded cattle from carriers); *United States v. Harry L. Young & Sons, Inc.*, 464 F.2d 1295 (10th Cir. 1972) (truck driver); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963) (truck driver); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958) (terminal log clerk); *St. Johnsbury Trucking Co. v. United States*, 220 F.2d 393 (1st Cir. 1955) (rate clerk); *United States v. George F. Fish, Inc.*, 154 F.2d 798 (2d Cir.) (salesclerk), *cert. denied*, 328 U.S. 869 (1946); *Dollar S.S. Co. v. United States (The President Coolidge)*, 101 F.2d 638 (9th Cir. 1939) (crew member).

45. *Hearings, supra* note 7, at 613.

46. Under H.R. 4973, "manager" was defined to mean:

[A] person having management authority in or as a business entity with respect to a particular product or business practice, if such authority extends to informing Federal agencies and such business entity's personnel about serious dangers associated with such product (or any component of such product) or such business practice

H.R. 4973, 96th Cong., 1st Sess. § 1(b)(1) (1979), *reprinted in Hearings, supra* note 7, at 2-3. The definition under H.R. 7040, which adds the requirement of significant responsibility, eliminates much of the detail of the language in H.R. 4973 and makes the scope of the term "manager" broader. H.R. 7040, 96th Cong., 2d Sess. § 1(d)(1) (1980), *reprinted in Hearings, supra* note 7, at 582, 584.

47. See *Gottesman v. General Motors Corp.*, 279 F. Supp. 361, 367 (S.D.N.Y. 1967), *aff'd*,

ers⁴⁸ and corporate agents⁴⁹ can exercise management authority. Generally, however, only the board of directors and officers possess the authority to exercise corporate judgment and discretion.⁵⁰

The drafters adopted the element of "significant responsibility" from two Supreme Court decisions⁵¹ that defined the term as used in the Food, Drug, and Cosmetic Act.⁵² In *United States v. Dotterweich*⁵³ the government charged a corporation and its president with violating the Act.⁵⁴ The individual defendant argued that he should be acquitted because he had not possessed the requisite intent nor personally participated in the violation. The Court held that the jury was entitled to determine Dotterweich's guilt because the Food, Drug, and Cosmetic Act lacked the traditional requirement that the defendant be aware of having engaged in wrongdoing.⁵⁵ Instead, the Act provided that "a person otherwise innocent but standing in responsible relation to a public danger"⁵⁶ could also be liable.⁵⁷

436 F.2d 1205 (2d Cir.), *cert. denied*, 403 U.S. 911 (1971); W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2096, at 398 (rev. perm. ed. 1976).

48. *Union Pac. Ry. v. Chicago, R.I. & P.R. Co.*, 163 U.S. 564, 596 (1896) (powers vested in stockholders when charter fails to designate another); *Unemployment Compensation Comm'n v. City Ice & Coal Co.*, 216 N.C. 6, 9, 3 S.E.2d 290, 292 (1939) (ultimate control in stockholders).

49. Authority to agents is generally delegated by the board of directors. W. FLETCHER, *supra* note 47, § 665, at 831-32. The Model Business Corporation Act provides that "[a]ll officers and agents of the corporation . . . shall have such authority and perform such duties in the management of the corporation . . ." MODEL BUSINESS CORP. ACT § 50 (1979).

50. *Schein v. Caesar's World, Inc.*, 491 F.2d 17, 18 (5th Cir.) (corporate management vested in board of directors by statute), *cert. denied*, 419 U.S. 838 (1974); *Herald Co. v. Seawell*, 472 F.2d 1081, 1094 (10th Cir. 1972) (officers and directors manage corporate affairs); *Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 427 F.2d 862, 866 (4th Cir. 1970) (corporate management vested in board of directors by corporate charter).

Some state corporation laws explicitly designate the board of directors as managers of corporate affairs. *See, e.g.*, FLA. STAT. ANN. § 608.09 (West 1977); N.Y. BUS. CORP. LAW § 701 (McKinney Supp. 1981). Some courts have interpreted such statutes as giving directors undelegated and absolute power. *See, e.g.*, *In re Lone Star Shipbuilding Co.*, 6 F.2d 192, 195 (2d Cir. 1925); *Hillcrest Inv. Co. v. United States*, 55 F. Supp. 147, 149 (W.D. Mo. 1944), *aff'd*, 147 F.2d 194 (8th Cir. 1945). One author argues that the word "power" in the decisions means only that the board of directors has authority to formulate policy according to stockholder wishes and not that actual corporate control is vested in the board. *See Note, Shareholder Participation in Management*, 40 VA. L. REV. 901, 903-04 (1954).

51. *Hearings, supra* note 7, at 613.

52. 21 U.S.C. § 331(k) (1976).

53. 320 U.S. 277 (1943).

54. *Id.* at 278.

55. *Id.* at 279-81.

56. *Id.* at 281.

57. *Id.*

Although the *Dotterweich* Court indicated that the Food, Drug, and Cosmetic Act altered the normal principles of criminal responsibility,⁵⁸ the Court left two questions unanswered.⁵⁹ First, the Court failed to decide whether the Act created vicarious or strict liability for the individual defendant.⁶⁰ Second, the Court failed to define whom the Act included in the class of persons having a sufficiently responsible relation to the transaction to incur liability.⁶¹

In *United States v. Park*⁶² the Court attempted to resolve these issues. In *Park* the government charged a retail food store chain⁶³ and its chief executive officer, Park, with violating the Food, Drug, and Cosmetic Act. Although Park had delegated responsibility for sanitation to lower level employees, the Court affirmed the jury's verdict of guilty against him.⁶⁴

The Court reexamined *Dotterweich*, resolving the first unanswered issue in that case by adopting a standard of strict liability.⁶⁵ Chief Justice Burger, writing for the majority, interpreted the Food, Drug, and

58. The Food, Drug, and Cosmetic Act is a public welfare statute. Public welfare statutes are regulatory statutes, and violation of them is punishable without a showing of criminal intent. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55-56 (1933). Public welfare statutes differ from true criminal statutes because they are essentially regulatory and carry light penalties. Designed to make regulations more effective, penal sanctions are merely adjunctive to civil enforcement. See Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 717-19 (1930).

59. See 13 AM. CRIM. L. REV. 299, 302-03 (1975); 37 OHIO ST. L.J. 431, 436-37 (1976).

60. The dissent argued that the majority had created a vicarious liability standard. 320 U.S. at 286-87. Accord, O'Keefe & Shapiro, *Personal Criminal Liability Under the Food, Drug and Cosmetic Act—The Dotterweich Doctrine*, 30 FOOD, DRUG & COSM. L.J. 5, 5-8 (1975); Dauphinaï, *Vicarious Criminal Liability Under the Federal Food, Drug and Cosmetic Act*, 11 FOOD, DRUG & COSM. L.J. 398, 408-11 (1956). But see 12 GEO. WASH. L. REV. 366 (1944).

61. Subsequent cases also failed to relieve the confusion. Cases applying the *Dotterweich* doctrine required a finding that the individual defendant directed or personally participated in the violation. See, e.g., *United States v. Wise*, 370 U.S. 405, 409 (1962) (officers who actively promoted illegal scheme liable under Sherman Act); *Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949) (president of company charged with knowingly filing false invoices participated in scheme); *United States v. H.B. Gregory Co.*, 502 F.2d 700, 706 (7th Cir. 1974) (corporate president also personally responsible for federal Food, Drug, and Cosmetic Act violation), cert. denied, 422 U.S. 1007 (1975); *United States v. Hohensee*, 243 F.2d 367, 370 (3d Cir.) (defendant distributed pamphlets constituting misbranding of drugs), cert. denied, 353 U.S. 976 (1957). See also Note, *Individual Liability of Agents for Corporate Crimes Under the Proposed Federal Criminal Code*, 31 VAND. L. REV. 965, 983-84 (1978); 13 AM. CRIM. L. REV. 299, 303-04 (1975).

62. 421 U.S. 658 (1975).

63. Acme Markets, Inc. was the named chain in question.

64. Defendants were charged with allowing food in an Acme Markets, Inc. warehouse to become adulterated in violation of 21 U.S.C. § 331(k) (1976).

65. 421 U.S. at 673.

Cosmetic Act as requiring a corporate officer not only to prevent violations but to seek out and correct them.⁶⁶

The Court also looked to *Dotterweich's* second unresolved issue. *Dotterweich* indicated that all responsible officials could be held liable for a violation of the Act.⁶⁷ Chief Justice Burger's opinion in *Park* attempted to delineate with more precision the class of responsible officers. The Chief Justice indicated that all individuals carrying out the corporate purpose with the responsibility and authority to guarantee compliance with the Act are persons in a responsible relationship to the transaction.⁶⁸ The *Park* majority did recognize, however, that the responsible agent could claim that he was powerless to prevent or correct the violation.⁶⁹ Subsequent cases have construed this recognition as creating an affirmative defense,⁷⁰ requiring a defendant to show that he exercised extraordinary care and still could not prevent the violation.⁷¹

66. *Id.* at 672.

67. The *Dotterweich* Court stated that the question of responsibility was to be decided "on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance." 320 U.S. at 284-85.

68. The majority noted that liability was not restricted to a single corporate agent or employee. 421 U.S. at 672.

Subsequent cases have followed *Park's* responsible relation test. *See, e.g.,* United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1130 n.11 (3d Cir. 1979) (individuals convicted for violation of Water Pollution Control Act), *cert. denied*, 444 U.S. 1074 (1980); United States v. Acri Wholesale Grocery Co., 409 F. Supp. 529, 535 (S.D. Iowa 1976) (individual defendants had requisite responsibility and authority under Food, Drug, and Cosmetic Act); United States v. Gulf Oil Corp., 408 F. Supp. 450, 471 (W.D. Pa. 1975) (president liable under Mandatory Petroleum Allocation Regulations although he did not "own, operate or control the operation of one or more refineries").

For further discussion of the *Park* case, see Note, *supra* note 61, at 985-88; 13 AM. CRIM. L. REV. 299, 304-16 (1975); 37 OHIO ST. L.J. 431, 439-50 (1976).

69. 421 U.S. at 673.

70. *See, e.g.,* United States v. New England Grocers Supply, 488 F. Supp. 230, 234-35 (D. Mass. 1980). *Accord,* United States v. Starr, 535 F.2d 512, 515-16 (9th Cir. 1976); United States v. Y. Hata & Co., 535 F.2d 508, 510-12 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976).

The first case to recognize the impossibility defense was United States v. Wiesenfeld Warehouse Co., 376 U.S. 86 (1964), in which the government charged a public storage warehouseman with violating the Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(k) (1976). The Court implied that an officer who demonstrated that he exercised extraordinary care and still could not prevent the violation might not be culpable under the Act. 376 U.S. at 91. The elements of the possible defense have yet to be satisfied. The *Y. Hata* and *Starr* cases suggest that a corporate officer would have to show he identified conditions leading to a violation, took steps to correct them, and attempted to implement alternatives. *See Regulating Corporate Behavior, supra* note 3, at 1263-64.

United States v. Corbin Farm Service, 444 F. Supp. 510, 536 (E.D. Cal. 1976), *aff'd*, 578 F.2d 259 (9th Cir. 1978), extended the impossibility defense to the Migratory Bird Treaty Act of 1918, § 6, 16 U.S.C. § 707 (1976).

71. The evidentiary requirements under the impossibility defense are unclear.

The drafters of H.R. 7040 went beyond the first issue in *Dotterweich* and *Park* by requiring that a manager have actual knowledge of a defect or danger before liability attaches.⁷² They fully adopted, however, the responsible relationship test developed in *Dotterweich* and *Park*.⁷³

The drafters' reliance on the two decisions as a definitional basis for those subject to liability under H.R. 7040 was misplaced. First, the proposed statute's description of those individuals standing in a responsible relationship to the violative activity is imprecise. The *Park* Court had stated that corporate title in itself is insufficient to create liability; instead, liability should be predicated on the defendant's active authority and responsibility to prevent or correct the activity.⁷⁴ Ordinarily, however, that authority and responsibility is a feature of one's corporate position. Thus, courts still may tend to find liability by merely looking at a defendant's corporate title.⁷⁵ H.R. 7040 makes this possibility more likely by defining a manager as one with "management authority,"⁷⁶ a term that denotes the authority vested in the board of directors and officers.

Should a court look beyond a defendant's title, the availability in H.R. 7040 prosecutions of the powerless defense articulated in the *Park* case is questionable. Although a defendant could maintain that he identified a danger but was powerless to correct it, the bill adds a knowledge requirement not found in the Food, Drug, and Cosmetic Act. Thus, a prosecutor could still obtain a conviction by demonstrat-

72. *Hearings, supra* note 7, at 654 (remarks of Rep. Conyers).

73. *Id.* at 613.

74. 421 U.S. at 675.

75. See 37 OHIO ST. L.J. 431, 445-46 (1976). The dissent in *Park* claimed that the term "responsibility" had been given no content by the majority. The dissent stated:

Requiring . . . a verdict of guilty upon a finding of "responsibility," [the jury] instruction standing alone could have been construed as a direction to convict if the jury found Park "responsible" for the condition in the sense that his position as chief executive officer gave him formal responsibility within the structure of the corporation. But the trial judge went on specifically to caution the jury not to attach such a meaning to his instruction "Responsibility" as used by the trial judge therefore had whatever meaning the jury in its unguided discretion chose to give it.

The instructions, therefore, expressed nothing more than a tautology. They told the jury: "You must find the defendant guilty if you find that he is to be held accountable for this adulterated food." In other words, "You must find the defendant guilty if you conclude that he is guilty."

421 U.S. at 679 (Stewart, J., dissenting).

76. H.R. 7040, 96th Cong., 2d Sess. § 1(d)(1)(A), reprinted in *Hearings, supra* note 7, at 582, 584.

ing that the defendant, despite his efforts, knowingly failed to report the danger to the appropriate federal agency.

B. "Discovers"

H.R. 7040's second element requires that a manager discover a serious concealed danger.⁷⁷ The bill defines "discover" as obtaining information that, under the circumstances, would convince a reasonable person that the serious concealed danger exists.⁷⁸ The definition requires that a manager actually know of the existence of a serious concealed danger before a duty to report arises.⁷⁹ Neither suspicion⁸⁰ nor hearsay⁸¹ is sufficient to give rise to the duty.

This limited scope of the term "discover" is inconsistent, however, with the legislative purpose of deterrence underlying the bill. The proposed statute may insulate corporate executives who should know of a danger by virtue of their position but who do not have actual knowledge of it. Furthermore, the actual knowledge requirement prevents the bill from reaching one with knowledge under the rule of wilful blindness, which states that one is deemed to have knowledge when he suspects a fact is probable but refrains from determining its actual truth because he wants to deny knowledge of it.⁸² This rule could apply under H.R. 7040 when, for example, a manager receives an internal corporate safety report but deliberately refuses to read it. This interpretation of "discovers" would be consistent with the legislative purpose of deterring deliberate concealment of known dangers. Nonetheless, the requirement of actual knowledge precludes the bill from reaching this type of knowledge.

C. "Knowingly"

The final element of H.R. 7040 requires that a manager "knowingly"

77. "Serious concealed danger" is defined to mean "that the normal or reasonably foreseeable use of, or the exposure of human beings to, such product or business practice is likely to cause death or serious bodily injury to a human being (including a human fetus) and the danger is not readily apparent to the average person." *Id.* § 1(d)(4), reprinted in *Hearings, supra* note 7, at 582, 584-85.

78. *Id.* § 1(d)(3), reprinted in *Hearings, supra* note 7, at 582, 584.

79. *Hearings, supra* note 7, at 654.

80. *Id.* at 596.

81. *Id.* at 654.

82. See R. PERKINS, *CRIMINAL LAW* 776 (2d ed. 1969); G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 57 (2d ed. 1961).

fail to report discovery of a danger to an appropriate federal agency or to warn affected employees.⁸³ The drafters were concerned that corporate executives made calculated decisions to expose workers or consumers to health hazards.⁸⁴ Under the proposed statute, such a decision would constitute a knowing failure to report to the appropriate federal agency. The proposed statute does not, however, provide a general definition of the word "knowingly."⁸⁵ The drafters employed the term "wilfully" in the legislative history, equating the term with a manager's conscious decision to sell a defective product or disregard a hazardous workplace.⁸⁶ The drafters may have intended to use "knowingly" and "wilfully" interchangeably.

Although some jurists use them interchangeably,⁸⁷ the terms can have different meanings. "Knowingly" suggests a person's awareness that his conduct is of a certain nature or will cause a certain result.⁸⁸ "Wilfully" connotes a wrongful purpose. In *United States v. Murdock*,⁸⁹ the Supreme Court defined a wilful act as one done with "bad purpose, without justifiable excuse, . . . a thing done without ground for believing it is lawful or conduct marked by careless disregard of whether or not one has the right so to act."⁹⁰ Thus, "wilfully" suggests a greater presence of evil motive.

H.R. 7040 requires only a "knowing" failure to report. The legislative history, however, indicates that the proposed statute was intended to deter active concealment of health hazards to promote corporate profits at the expense of health and safety.⁹¹ Furthermore, H.R. 7040

83. H.R. 7040, 96th Cong., 2d Sess. § 1(a)(3)(A), reprinted in *Hearings, supra* note 7, at 582, 583.

84. *Hearings, supra* note 7, at 20.

85. The drafters rejected using a broader reckless endangerment standard. *Id.* at 26.

86. *Id.* at 20.

87. See MODEL PENAL CODE § 2.02, Comment 10, at 130 (Tent. Draft No. 4, 1955).

88. The Model Penal Code defines "knowingly" in the following manner:

A person acts knowingly with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or the attendant circumstances, he knows that his conduct is of that nature or he knows of the existence of such circumstances; and

(2) if the element involves a result of his conduct, he knows that his conduct will necessarily cause such a result.

MODEL PENAL CODE § 2.02 (Tent. Draft No. 4, 1955).

89. 290 U.S. 389 (1933).

90. *Id.* at 394. See also *United States v. Heilman*, 614 F.2d 1133, 1137 (7th Cir. 1980); *Sherman v. United States*, 490 F. Supp. 747, 753-54 (E.D. Mich. 1980); *Kratz v. Kratz*, 477 F. Supp. 463, 478 (E.D. Pa. 1979).

91. *Hearings, supra* note 7, at 20-21.

was intended to reach only those enterprises subject to certain regulatory authority.⁹² The incidents that give rise to H.R. 7040⁹³ suggest that the bill was aimed at businesses affecting a large number of individuals. Thus, the statutory language would comport more fully with the legislative purpose if the term "wilfully" were construed in conjunction with the term "knowingly." A "knowing and wilful failure to report" would be one in which the actor was aware of his activities and yet consciously chose to violate the reporting requirement. Predicating liability on a manager's knowing and wilful failure to report a defect or danger would promote the bill's objective of deterring only those who actively conceal a discovered hazard that they recognize as a possible violation of health or safety regulations.

The drafters' use of the term "knowingly" as the third element of liability under H.R. 7040 raises a second question concerning the scope of the proposed statute. Although ignorance or mistake of law generally is no defense to a violation,⁹⁴ a line of decisions interpreting "knowingly" under the Bank Secrecy Act⁹⁵ suggests that an exception to this doctrine is available for reporting statutes.

In *United States v. San Juan*⁹⁶ the Second Circuit reversed the conviction of a woman who allegedly violated the Bank Secrecy Act. The statute provided that anyone who knowingly transported more than \$5000 across the United States border had to file a report with the Attorney General.⁹⁷ The court dismissed the indictment because the Government failed to establish that the defendant had knowledge of

92. *Id.* at 594.

93. *See* note 11 *supra*.

94. R. PERKINS, *supra* note 81, at 920. Ignorance or mistake of law is a defense if the defendant can show reliance on (1) a statute thereafter held unconstitutional, (2) a decision thereafter overruled, or (3) incorrect legal advice given by an officer authorized by law to advise the public on such matters. *Id.* at 926-28. *See also* W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 366-68 (1972).

95. 31 U.S.C. § 1101 (1976).

96. 545 F.2d 314 (2d Cir. 1976).

97. The Bank Secrecy Act of 1970, § 231, 31 U.S.C. § 1101 (1976), provides in part:

Whoever . . . knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, . . .

in an amount exceeding \$5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

Id.

the reporting statute.⁹⁸

The Fifth Circuit, interpreting the same statute in *United States v. Granda*,⁹⁹ similarly defined "knowingly" to require a showing that the defendant actually knew of the reporting requirement.¹⁰⁰ The court reasoned that no useful purpose would be served by prosecuting violators who have no knowledge of the reporting requirement.¹⁰¹ In a subsequent case,¹⁰² the court further explained that an acknowledged general awareness of currency laws did not satisfy the "knowingly" standard.¹⁰³ The court held that knowledge of the statute was necessary.¹⁰⁴

A similar interpretation of "knowingly" might be available for H.R. 7040. Liability under H.R. 7040, like that under the currency reporting statute, is predicated on a failure to report. Furthermore, unlike a crime such as theft, in which the legal questions are ancillary to the material element of the crime,¹⁰⁵ knowledge of the reporting requirement under H.R. 7040 is a material and legal element of the offense. Thus, in the case of theft, ignorance of the law should not be a defense because knowledge of the law is not an element of the crime. The "knowingly" requirement of H.R. 7040, however, makes awareness of

98. 545 F.2d at 318.

99. 565 F.2d 922 (5th Cir. 1978). Defendant had been convicted of knowingly transporting \$10,000 from Panama to the United States in violation of the Bank Secrecy Act. *Id.* at 923. The court overturned the conviction on the ground that it was impossible to prove beyond a reasonable doubt that defendant knowingly failed to report that she transported the money. *Id.* at 926-27.

100. *Id.* at 926. *Accord*, *United States v. Warren*, 612 F.2d 887, 890 (5th Cir.), *cert. denied*, 446 U.S. 956 (1980); *United States v. Rodriguez*, 592 F.2d 553, 557 (9th Cir. 1979); *United States v. Schnaiderman*, 568 F.2d 1208, 1211 (5th Cir. 1978). *But cf.* *United States v. Tolkow*, 532 F.2d 853, 858 (2d Cir. 1976) (court read congressional intent to construe the word "knowingly" in the Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1976), not to require actual knowledge of the reporting requirement). *See also* MODEL PENAL CODE § 2.02, Comment 11, at 131 (Tent. Draft No. 4, 1955) (requiring statute that makes knowledge of the law an element of the offense to provide so "plainly").

101. 565 F.2d at 926.

102. *United States v. Schnaiderman*, 568 F.2d 1208 (5th Cir. 1978). Defendant had been convicted of making a false statement to a government official in violation of 18 U.S.C. § 1001 (1976) and of knowingly failing to file a report that he transported over \$5000 into the United States in violation of the Bank Secrecy Act. *Id.* at 1208. The court overturned the conviction on the ground that defendant did not have the requisite intent under either statute. *Id.* at 1213.

103. *Id.*

104. *Id.* *See* *United States v. Warren*, 612 F.2d 887, 890 (5th Cir.) (persons must be specifically warned), *cert. denied*, 446 U.S. 956 (1980); *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978) (suggesting government could provide notice by adding sentence to customs declaration form).

105. *See* MODEL PENAL CODE § 2.02, Comment 12, at 131 (Tent. Draft No. 4, 1955).

the law an element of the H.R. 7040 offense, and ignorance of the law might therefore be an appropriate defense in an H.R. 7040 prosecution.

The statutory language thus is deficient in several ways. First, by defining a manager as a person with management authority and significant responsibility, H.R. 7040 may delimit the scope of liable persons more narrowly than the drafters intended. Second, the definition of "discovers" is also restrictive. Requiring actual knowledge may allow potential violators to insulate themselves from the proposed statute's effects. Finally, when the term "knowingly" is not used in conjunction with the term "wilfully," the last requirement for liability fails to serve the statutory purpose of deterrence.

III. CONSTITUTIONAL LIMITATIONS

By requiring a corporate officer or agent to report a serious concealed defect or danger, H.R. 7040 forces an individual to disclose information that might later be used against him in a criminal prosecution for violation of federal health and safety regulations. This requirement raises the question of whether H.R. 7040 is limited by the fifth amendment's privilege against self-incrimination.¹⁰⁶

The Supreme Court has addressed the effect of the privilege against self-incrimination on statutes with corporate reporting and disclosure provisions. The privilege is personal and cannot be asserted by a corporation.¹⁰⁷ Moreover, corporate officers obliged to allow inspection of corporate records cannot invoke it.¹⁰⁸ Under some statutory require-

106. "No person shall . . . be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

The constitutional privilege applies only in criminal prosecutions. See *Ullmann v. United States*, 350 U.S. 422 (1956); *Brown v. Walker*, 161 U.S. 591 (1896). Fear of coerced confessions is the usual reason given for allowing the privilege. Hoffman, *The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony*, 16 CRIM. L. BULL. 421, 427-28 (1980).

107. See, e.g., *Campbell Painting Corp. v. Reid*, 392 U.S. 286, 289 (1968); *Baltimore & O.R.R. v. I.C.C.*, 221 U.S. 612, 622 (1911); *Hale v. Henkel*, 201 U.S. 43, 75 (1906); *United States v. 3963 Bottles*, 265 F.2d 332, 335 (7th Cir.), cert. denied, 360 U.S. 931 (1959).

108. *Shapiro v. United States*, 335 U.S. 1, 8 (1948); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 196 (1946); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726 (1944); *Wheeler v. United States*, 226 U.S. 478, 490 (1913); *Wilson v. United States*, 221 U.S. 361, 376 (1911); *Hale v. Henkel*, 201 U.S. 43, 75 (1906).

The fifth amendment privilege does apply to oral testimony concerning the location of union records held by a custodian. See *Curcio v. United States*, 354 U.S. 118 (1957). See generally Fraser, *The Privilege Against Self-Incrimination as Applied to Custodians of Organizational Records*, 33 WASH. L. REV. & STATE B.J. 435 (1958).

ments, however, corporate officers and agents can assert the privilege when required to report certain information.

In *United States v. Sullivan*¹⁰⁹ the Supreme Court held that the fifth amendment privilege could not be used as a defense in a prosecution for failure to file an income tax return.¹¹⁰ Sullivan's return would have revealed that his income was derived in part from violations of the National Prohibition Act. The Court noted in dictum that defendant could have objected to the incriminating disclosure on the return but could not refuse completely to file the return.¹¹¹

Thirty-eight years later, in *Albertson v. Subversive Activities Control Board*¹¹² the Court held that the registration requirements of the Subversive Activities Control Act of 1950¹¹³ were inconsistent with the fifth amendment.¹¹⁴ The Act required members of "Communist-front" organizations to register, under certain circumstances, with the United States Attorney General.¹¹⁵ The Court found that the registration requirements created obvious risks of incrimination because the admission of membership could be used as evidence in a subsequent prosecution under the Smith Act.¹¹⁶

The *Albertson* Court distinguished *Sullivan* by noting that the questions on the income tax form were neutral and not directed to any particular segment of the population.¹¹⁷ The registration requirements in *Albertson*, by contrast, were directed at a group "inherently suspect of criminal activities."¹¹⁸ Moreover, the area of inquiry in *Sullivan* was regulatory, while the one in *Albertson* was "permeated with criminal statutes."¹¹⁹ The *Albertson* Court, in determining that the risk of incrimination was intolerable, stressed three factors: (1) the area of in-

109. 274 U.S. 259 (1927).

110. *Id.* at 263.

111. *Id.*

112. 382 U.S. 70 (1965). Members of the Communist Party were prosecuted for violating the Subversive Activities Control Act by failing to report to the Attorney General as required by the Act. *Id.* at 73. For a discussion of the *Albertson* decision, see Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103.

113. Pub. L. No. 81-831, 64 Stat. 987, 993-95 (1950) (repealed 1968).

114. 382 U.S. at 78.

115. 64 Stat. at 993.

116. 382 U.S. at 77.

117. *Id.* at 78.

118. *Id.*

119. *Id.*

quiry within which the reporting requirement was promulgated, (2) the nature of the information requested, and (3) the characteristics of the individuals from whom the information was requested.

In *Marchetti v. United States*¹²⁰ and *Grosso v. United States*¹²¹ the Court again emphasized these factors in upholding, on the basis of the privilege against self-incrimination, defendants' failures to comply with a taxation and registration requirement for persons engaged in accepting wagers.¹²² The Court declared that the issue was not whether the United States could tax unlawful activities but whether the methods that the tax employed created a real and appreciable danger of incrimination.¹²³ The Court found that such a danger existed in *Marchetti* and *Grosso* because wagering was an area "permeated with criminal statutes."¹²⁴ Furthermore, the group in question was "inherently suspect."¹²⁵ These cases suggest that reporting requirements directed at the public at large to further legitimate government purposes do not violate the fifth amendment privilege. By contrast, the fifth amendment may sanction a failure to report when the area of inquiry is per-

120. 390 U.S. 39 (1968). Petitioner had been convicted of conspiring to evade the payment of an occupational tax related to wagers in violation of 26 U.S.C. § 4411 (1976) and of failing to register as required under 26 U.S.C. § 4412 (1976). 390 U.S. at 40.

121. 390 U.S. 62 (1968). Petitioner had been convicted of the same offense as the petitioner in *Marchetti*.

122. *Grosso*, 390 U.S. at 71; *Marchetti*, 390 U.S. at 60. The Court overruled *United States v. Lewis*, 348 U.S. 419 (1955), and *United States v. Kahriger*, 345 U.S. 22 (1953), to the extent that those two cases disallowed the privilege in the context of registration and occupational tax requirements. *Grosso*, 390 U.S. at 67; *Marchetti*, 390 U.S. at 54. The Court rejected the argument that the privilege was waived merely because those "inherently suspect of criminal activities" had been told to choose between ceasing wagering or providing information. *Id.* at 52. Further, the Court rejected the argument that because the privilege offers protection for only past acts, it could not apply to the prospective requirements of the taxing statute. *Id.* at 53. The Court characterized the argument as "hinged on an excessively narrow view of the . . . privilege." *Id.* at 52.

123. *Marchetti*, 390 U.S. at 44-49.

Whether a "real and appreciable" danger of self-incrimination exists depends upon whether the possibility of such incrimination is "[within] the ordinary course of the law and such as [a] reasonable man would be affected by [it]." *Brown v. Walker*, 161 U.S. 591, 600 (1896). *Cf. Hoffman v. United States*, 341 U.S. 479, 486 (1951) (protection limited to situations in which witness has "reasonable cause" to apprehend a danger); *Rogers v. United States*, 340 U.S. 367, 375 (1951) (danger of incrimination more than a "mere imaginary possibility"); *Blau v. United States*, 340 U.S. 159, 161 (1950) (answers furnish a "link in the chain of evidence"); *Heike v. United States*, 227 U.S. 131, 144 (1913) (protection does not extend to a "remote possibility" of incrimination).

124. *Marchetti*, 390 U.S. at 47.

125. *Id.* For further discussion of *Marchetti*, see Note, *The Marchetti Approach to Self-Incrimination in Cases Involving Tax and Registration Statutes*, 56 MINN. L. REV. 229 (1971).

meated by criminal statutes, when the information disclosed may be used to facilitate a criminal prosecution, and when the questions are directed at a highly select group of individuals.

The Court had a further opportunity to develop the relationship between reporting statutes and the fifth amendment when it upheld section 2002(a)(1) of the California Motor Vehicle Code.¹²⁶ The statute required any motor vehicle driver involved in an accident resulting in property damage to stop and give the other party his name and address. In *California v. Byers*¹²⁷ the Court found that this requirement created no substantial risk of incrimination. The Court failed, however, to formulate a definitive rule governing reporting statutes.

Chief Justice Burger, writing for the plurality, enunciated a balancing test to be used in evaluating the constitutionality of the statute. The test, an objective standard, weighs the public need for information against the probability that the information will be used in a criminal prosecution.¹²⁸ Considering the factors in *Albertson*, *Marchetti*, and *Grosso*—the nature of the information requested, the characteristics of the group required to report, and the area of inquiry—in the balancing process, Chief Justice Burger concluded that most of the people driving automobiles in California were not inherently suspect of criminal activities.¹²⁹ Moreover, the Chief Justice found that very few of those who complied with the statute would face any substantial risk of incrimination.¹³⁰

Justice Harlan's concurring opinion suggested a different balancing test, one considering the individual's personal privilege against self-in-

126. CAL. VEH. CODE § 20002(a)(1) (Deering 1972).

127. 402 U.S. 424 (1971).

128. *Id.* at 427. The Chief Justice stated:

Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other

Id.

129. *Id.* at 430-31.

130. *Id.* Though the Chief Justice grounded his test on a permissible premise, he failed to consider the risk to the individual. He concluded that because the disclosures were less incriminating with regard to some statutes, the privilege was limited accordingly. His standard thus tests the privilege statistically and moves away from the notion that the privilege is a personal one. See 86 HARV. L. REV. 914, 919 (1973).

crimination.¹³¹ Justice Harlan's proposal would balance the risk of infringing the individual's interest against self-incrimination against the government's interest in the reporting requirement.¹³² If the dangers of incrimination outweighed the need for reporting, the test would consider the possible impact of a grant of immunity on the government's prosecutorial interest.¹³³

Stressing the nature of the event giving rise to the reporting requirement and the amount of detail required in the disclosures, Justice Harlan agreed that the statute was constitutional.¹³⁴ He concluded, first, that the defendant's personal interest was less substantial¹³⁵ than the state's interest in promoting financial responsibility with respect to automobile accidents.¹³⁶ Second, he concluded that the overall reporting scheme precluded imposition of a use immunity.¹³⁷

Because decisions subsequent to *Byers* have failed to clarify the issue further,¹³⁸ the application of *Byers* to H.R. 7040 produces unclear re-

131. 402 U.S. at 437 (Harlan, J., concurring).

132. *Id.* at 434-58 (Harlan, J., concurring). Justice Harlan found the balancing approach necessary, for although the individual's interest is important, the government has an interest in the reporting requirement based on its obligation to respond adequately to societal needs. *Id.* at 451-53.

133. The use restriction is not one of the primary factors. Instead, this factor comes into play only after the other interests have been balanced. This is consistent with the Court's practice of not deciding an immunity question until it decides the applicability of the privilege. See Meltzer, *Privileges Against Self-Incrimination and the Hit-and-Run Opinions*, 1971 SUP. CT. REV. 1, 17.

134. 402 U.S. at 458 (Harlan, J., concurring).

135. *Id.* at 454-58 (Harlan, J., concurring).

136. *Id.* at 450-51 (Harlan, J., concurring).

137. Justice Harlan was skeptical of use immunity because if it were provided, the state would have to prove that it "could have selected [the defendant] out from the general citizenry . . . even if he had not [complied]." In most cases this showing would be impossible. *Id.* at 444 n.4 (Harlan, J., concurring).

Furthermore, when *Byers* was decided no court had defined the limits of use immunity. See Comment, *Reporting Illegal Gains as Taxable Income: A Compromise Solution to a Prosecutorial Windfall*, 69 NW. U.L. REV. 111, 124 (1974). In *Kastigar v. United States*, 406 U.S. 441 (1972), however, the Supreme Court held that full transactional immunity need not be granted a witness before he is compelled to disclose information. *Id.* at 463. Rather, a statute may confer use immunity that requires the prosecution to show only that the evidence it proffers is derived from a source independent of the compelled testimony. *Id.* at 459. The scope of the immunity thus is co-extensive with the fifth amendment privilege against self-incrimination. *Id.* at 458.

138. In *Garner v. United States*, 424 U.S. 648 (1976), the Supreme Court upheld the conviction of a defendant who disclosed gambling as his source of income on his tax return. The Court found that defendant had a right to claim the privilege only at the time of filing. *Id.* at 665.

In *United States v. Ward*, 448 U.S. 242 (1980), the Supreme Court completely sidestepped the issue. The defendant was charged with violating the Federal Water Pollution Control Act, 33 U.S.C. § 311 (1976), which prohibited the discharge of oil into navigable waters. Defendant,

sults. Under Chief Justice Burger's analysis, the privilege would not attach because the disclosures that H.R. 7040 requires are not unusually incriminating. The proposed statute has a legitimate deterrent purpose and is not aimed at an inherently suspect group of individuals.¹³⁹

Cases arising under H.R. 7040 would be distinguishable from *Byers*. Unlike the statute in *Byers*, H.R. 7040 applies to an area permeated with criminal statutes.¹⁴⁰ Moreover, the *Byers* statute required the motorist to report only his name and address. Under H.R. 7040, the manager must reveal not only his name and address but also that his corporation is manufacturing a defective product or maintaining a dangerous workplace. The likelihood of self-incrimination is substantial.¹⁴¹

The Harlan two-step analysis would find that the proposal violates the fifth amendment. A disclosing manager must take a substantial risk of self-incrimination. Unlike the California statute at issue in *Byers*, H.R. 7040 requires detailed disclosures. Such detail could help the government meet its burden in a case against the individual for violat-

lessee of an oil drilling facility, reported a discharge as required by § 311(b)(5) of the Act, and the Environmental Protection Agency (EPA) used the report to support a showing of a substantive violation. 448 U.S. at 246. It fined defendant pursuant to § 311(b)(6) of the Act. *Id.* at 247.

Defendant contended that the reporting requirement of § 311(b)(5) as used to support a civil penalty under § 311(b)(6) violated his right against self-incrimination. *Id.* The Court construed the penalty as civil and held that the fifth amendment did not apply. *Id.* at 254-55.

Justice Stevens, dissenting, argued that the statutory purpose should govern whether the fifth amendment privilege could be invoked. *Id.* at 258 (Stevens, J., dissenting). If a reporting statute required information from a limited group of people "engaged in criminal activity in order to facilitate their prosecution and conviction," Justice Stevens would allow the defendant to assert the privilege. If, however, the statute required disclosure to facilitate regulatory objectives, the fact that the information might incriminate a particular person would not be sufficient to allow the invocation of the privilege. *Id.* at 258. Justice Stevens found the penalties sufficiently criminal to raise the question whether the statute is a proper one for allowing the privilege to attach. *Id.* at 259.

139. A similar argument was made by Professor Louis Seidman. See *Hearings, supra* note 7, at 670-71. Professor Seidman argued further that the fifth amendment "is normally thought of as a restriction on the way that the Government proves a crime after the crime has occurred. But H.R. 7040 is designed to regulate ongoing conduct. It concerns not proof that social harm already occurred; but prevention of social harm which is about to occur." *Id.* at 670.

140. See, e.g., Toxic Substances Control Act of 1976, § 16(b), 15 U.S.C. § 2615(b) (1976); Occupational Health and Safety Act of 1970, § 17, 29 U.S.C. § 666 (1976); the Federal Food, Drug and Cosmetic Act of 1938, § 303, 21 U.S.C. § 333 (1976).

141. Compare the facts of the *Ward* case, which is discussed in note 138 *supra*. After *Ward* complied with the reporting requirement, the EPA used the information to support a showing of a substantive violation of the Federal Water Pollution Control Act.

ing a separate health or safety regulation.¹⁴² On the other hand, the self-reporting scheme is not crucial to the statutory purpose of H.R. 7040. Although the government has an interest in protecting the public against safety and health hazards, the likelihood that it would use the information in a subsequent prosecution and the attendant risks of self-incrimination outweigh the government's interest in obtaining the disclosures.

Both the fifth amendment and the government's prosecutorial interest under H.R. 7040 could be accommodated under Justice Harlan's suggestion to consider use immunity. If the bill incorporated a use immunity provision, it could continue to require a manager to disclose his discovery of a concealed serious danger. The manager could object to the introduction of the information in a subsequent criminal proceeding, however, should it be incriminating. The government would remain free to prove any violations by independent sources. Thus, both interests would be accommodated: the government's regulatory interest and the individual's interest against self-incrimination.¹⁴³

IV. AN ALTERNATIVE PROPOSAL

Drafting deficiencies¹⁴⁴ and constitutional objections¹⁴⁵ to H.R. 7040 suggest that it may be an inappropriate measure for deterring corporate crime¹⁴⁶ and for shifting the burden of social responsibility for health and safety to corporations.¹⁴⁷ Other proposals for achieving these same

142. For example, a Ford "manager's" disclosure of the defective Pinto fuel tank could be used as evidence that Ford violated NHTSA safety standard 301, 49 C.F.R. § 571.301, S 5.5 (1979). A disclosure of the danger would necessarily involve detail concerning the scope of the danger and its potential effect on human beings as within the definition of "serious concealed danger." The government then would be relieved of its burden of showing that the defective fuel tank did not meet the safety standards.

143. Several drafters believed a grant of immunity would be disadvantageous. "It could conceivably be used by one who has in fact been involved in some kind of coverup of a prohibited activity, and be a tool for one of a number of actors to disassociate himself with . . . a conspiracy fraud." *Hearings, supra* note 7, at 608.

144. *See* notes 44-105 *supra* and accompanying text.

145. *See* notes 106-43 *supra* and accompanying text.

146. *See* notes 38-39 *supra* and accompanying text.

147. *See* notes 40-43 *supra* and accompanying text.

The proposed statute is objectionable on the further ground that it employs fines and imprisonment to effectuate its purpose. The sanctions are a partial response to criticism that corporate criminal fines are but a cost of doing business. *See* Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835, 836 (1973); Levin, *Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act*,

goals include federal corporate chartering¹⁴⁸ and deconcentration and divestiture.¹⁴⁹ These proposals, however, contain features making them undesirable alternatives.¹⁵⁰ An existing statute, the Racketeer Influences and Corrupt Organizations Act (RICO),¹⁵¹ may be the most feasible alternative to H.R. 7040.

RICO is the product of efforts to eradicate organized crime's infiltration of legitimate business organizations.¹⁵² RICO prohibits investment in,¹⁵³ acquisition or maintenance of an interest in,¹⁵⁴ or participation in the affairs of¹⁵⁵ an enterprise¹⁵⁶ engaged in interstate or

14 AM. CRIM. L. REV. 717, 736-37 (1977); *Regulating Corporate Behavior*, *supra* note 3, at 1336; Comment, *Increasing Community Control Over Corporate Crimes—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 293 (1961). The statute sets a fine of up to \$250,000 for individuals and \$1,000,000 for corporations. H.R. 7040, 96th Cong., 2d Sess. § 1(a), *reprinted in Hearings*, *supra* note 7, at 582, 582-83.

The proposed statute also allows imprisonment of individuals for up to five years. *Id.* Yet the effectiveness of this criminal sanction as a deterrent to corporate crime is questionable. Despite the statute's goal of deterrence, many judges refuse to sentence corporate executives to prison terms, believing that the offender has been sufficiently punished through participation in the criminal process. See Mann, Wheeler & Scott, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 486 (1980). Furthermore, judges are reluctant to imprison corporate executives because they want to avoid eliminating the positive contribution that corporate executives make to the community. *Id.* at 488. See also *Regulating Corporate Behavior*, *supra* note 3, at 1367.

148. Federal corporate chartering would mean that the federal government, through articles of registration, would incorporate business organizations. Federal rules would govern the activities of corporations. State chartering is the method by which business entities presently are incorporated. Advocates of federal chartering criticize the present system as ineffective in the modern era of the multinational corporation. States are limited in their resources to control illegal corporate behavior. See generally R. NADER, M. GREEN, & J. SELIGMAN, *TAMING THE GIANT CORPORATION* (1976). See also M. CLINARD & P. YEAGER, *CORPORATE CRIME* 310-13 (1980).

Federal corporate chartering may make business conduct more difficult and might also lead eventually to public ownership of corporations. *Id.* at 313.

149. Under a deconcentration and divestiture policy the federal government would require large corporations to divest themselves of certain product lines and businesses. Though congressional leaders have proposed several bills to effectuate this end, the legislation has failed to pass. See M. CLINARD & P. YEAGER, *supra* note 148, at 315.

150. For other proposals, see *id.* at 299-325.

151. 18 U.S.C. §§ 1961-1968 (1976).

152. See SENATE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969).

153. 18 U.S.C. § 1962(a) (1976).

154. *Id.* § 1962(b).

155. *Id.* § 1962(c).

156. "Enterprise" is defined to include "any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). Courts have struggled with the precise meaning of the word despite the statutory definition. Until *United States v. Turkette*, 101 S. Ct. 2524 (1981), the lower federal courts were in conflict over the extension of "enterprise" to cover wholly illegitimate organiza-

foreign commerce through a pattern of racketeering activity.¹⁵⁷

Despite evidence that Congress intended RICO to address only the infiltration of organized crime into legitimate businesses,¹⁵⁸ extremely broad judicial constructions of the statute have transformed RICO into a measure that can be used against a broad range of criminal activity.¹⁵⁹ As such, RICO can extend to corporate concealment of health and safety dangers.

Liability under RICO is predicated upon proof of a pattern of racketeering activity.¹⁶⁰ Racketeering activity includes eight state law offenses and twenty-six federal law offenses.¹⁶¹ To find a pattern of racketeering activity the court must determine that the defendant has committed at least two of the predicate acts within ten years of each

ions. See, e.g., *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979) (enterprise liability not limited to legitimate enterprise), *vacated*, 642 F.2d 1001 (6th Cir. 1980); *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979) (enterprise includes robbery, counterfeiting, murder, and illegal use of explosives), *cert. denied*, 445 U.S. 946 (1980); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976) (enterprise not limited to legitimate businesses). *Contra*, *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975) (enterprise limited to legitimate organizations), *overruled*, *United States v. Altese*, 542 F.2d 104, 107 n.6 (2d Cir. 1976). For further discussion, see Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"*, 124 U. PENN. L. REV. 192 (1975); Note, *Racketeer Influenced and Corrupt Organizations: Distinguishing the "Enterprise" Issues*, 59 WASH. U.L.Q. 1343 (1981).

157. See notes 160-62 *infra* and accompanying text.

158. See note 152 *supra*.

159. See, e.g., *United States v. Aleman*, 609 F.2d 298, 303 (7th Cir. 1979) (Act not restricted to members of organized crime), *cert. denied*, 445 U.S. 946 (1980); *United States v. Campanale*, 518 F.2d 352, 363-64 (9th Cir. 1975) (RICO makes certain activities unlawful no matter who engages in them), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Mandel*, 415 F. Supp. 997, 1018-19 (D. Md. 1976) (although primary concern to curb organized crime, RICO not intended to apply exclusively to organized crime). *But see Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (RICO aimed at society of criminals operating outside control of American people).

160. 18 U.S.C. § 1962 (1976).

161. *Id.* § 1961(1). The eight state acts include murder, kidnapping, gambling, arson, robbery, bribery, extortion, and dealing in narcotics or other dangerous drugs. The 26 federal acts cover a broader range of activities and include bribery, sports bribery, counterfeiting, theft from interstate shipment, embezzlement from pension and welfare funds, extortionate credit transactions, transmission of gambling information, mail fraud, wire fraud, obstruction of justice, obstruction of a criminal investigation, obstruction of state and local law enforcement, interference with commerce, robbery, extortion, racketeering, interstate transportation of wagering paraphernalia, unlawful welfare fund payments, prohibition of illegal gambling businesses, interstate transportation of stolen property, trafficking in contraband cigarettes, white slave traffic, restrictions on loans and payments to labor organizations, embezzlement from union funds, bankruptcy fraud, fraud in the sale of securities, and felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs.

other.¹⁶²

Upon a finding of liability, a defendant is subject to the most striking feature of RICO, its penalties provision.¹⁶³ The criminal penalties include a maximum \$25,000 fine and/or a maximum sentence of twenty years imprisonment. Furthermore, the statute provides for criminal forfeiture to the United States of any interest in a business acquired or maintained in violation of the substantive provisions of the Act.¹⁶⁴ It is the criminal forfeiture provision that makes RICO a particularly viable alternative to H.R. 7040.

The forfeiture provision is divided into two sections. First, a defendant must forfeit any interest he acquired or maintained in violation of the Act.¹⁶⁵ Second, he must forfeit any interest or security in, claim against, or property or contractual right in the enterprise.¹⁶⁶ Few reported cases have stated formally what kinds of interests are forfeitable under these sections.¹⁶⁷ In *United States v. Meyers*,¹⁶⁸ however, the court interpreted "interest" to mean a continuing ownership interest rather than the dividends or profits from that interest.¹⁶⁹ The court in *United States v. Marubeni America Corp.*¹⁷⁰ defined more generally the

162. 18 U.S.C. § 1961(5) (1976). The recurring issue under this definition is whether the predicate acts must be related to each other. See e.g., *United States v. Field*, 432 F. Supp. 55, 60 (S.D.N.Y. 1977) (acts must be connected by a common scheme, plan, or motive), *aff'd*, 578 F.2d 1371, cert. dismissed, 439 U.S. 801 (1978); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (pattern requires more than accidental or unrelated instances of the proscribed behavior), *aff'd*, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976); *United States v. Moeller*, 402 F. Supp. 49, 57-58 (D. Conn. 1975) (different criminal episodes, separate in time but factually connected).

163. 18 U.S.C. § 1963 (1976).

164. Section 1963 provides that

Whoever violates any provision . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Id. § 1963(a)(1).

165. *Id.*

166. *Id.* § 1963(a)(2).

167. The statute does not define the term "interest." Those cases that do discuss the forfeiture clause usually discuss only its constitutionality. See, e.g., *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979); *United States v. Amato*, 367 F. Supp. 547, 549 (S.D.N.Y. 1973).

168. 432 F. Supp. 456 (W.D. Pa. 1977).

169. *Id.* at 461. See also *United States v. Long*, 654 F.2d 911, 915 n.6 (3d Cir. 1981); *United States v. L'Hoste*, 609 F.2d 796, 811-12 (5th Cir. 1980).

170. 611 F.2d 763 (9th Cir. 1980). Defendants were charged with violating RICO by conducting a bribery scheme.

interests under the forfeiture section. The first section requires forfeiture of illegally acquired interests.¹⁷¹ The second section reaches interests even when the enterprise was legally acquired and maintained.¹⁷²

RICO provides a feasible alternative to H.R. 7040. Although the type of corporate activity the drafters of H.R. 7040 cited as the impetus for the proposed statute¹⁷³ would not constitute a pattern of racketeering activity in every situation,¹⁷⁴ some theories of liability might be viable. If mail, wire, or other kinds of interstate fraudulent activity were shown, a corporate manager might be liable under RICO.¹⁷⁵ A violation would trigger RICO's forfeiture provision. The second section of that provision could require an individual to forfeit his interest or security in, claim against, or property or contractual right in the enterprise.¹⁷⁶ Thus, for example, the Act could require a corporate executive, liable for concealing defects or dangers through a pattern of racketeering activity, to forfeit any stock he holds in the corporation together with any claim or contractual rights giving him influence over the entity.

Application of RICO would facilitate the deterrence function the drafters of H.R. 7040 desired. A corporate executive might hesitate before concealing dangers or defects if he thought that such conduct would lead to the loss of his interests and rights in the enterprise. By acting as a deterrent, the forfeiture provision of RICO would shift the burden of responsibility for health and safety dangers to the corporate sector. A corporate officer might take extra precautions in manufacturing rather than risk the forfeiture penalties.

171. *Id.* at 769. The court interpreted "interest" in § 1963(a)(1) not to include income received through a pattern of racketeering activity. It reasoned that the one percent investment exception in § 1962(a), which limits the government's ability to seize income received through a pattern of racketeering activity, sanctioned forfeiture of income under § 1963(a)(1) only after that income was invested in an enterprise. *Id.* at 766-67.

172. *Id.* at 769. *See also* *United States v. Thevis*, 474 F. Supp. 134, 143 (N.D. Ga. 1979), in which the court stated that interests subject to forfeiture under § 1963(a)(2) include not only property that the enterprise is capable of owning but also property that a person may hold in his individual capacity and has put under the control of an entity that cannot legally hold the property.

173. *See* notes 11-31 *supra* and accompanying text.

174. *See* note 161 *supra*.

175. RICO was suggested as an alternative to H.R. 7040 at the legislative hearings. *See Hearings, supra* note 37, at 592 (statement of Mr. Leonard).

176. *See* note 164 *supra*.

V. CONCLUSION

Corporations have a favorable impact on public activity in a variety of ways. They also create unwarranted health and safety dangers. H.R. 7040 is an attempt to accommodate these competing considerations. The drafters acknowledged that corporations create benefits by limiting the statute's scope to activities whose effects are detrimental to the public.¹⁷⁷ They also attempted to decrease the number of health and safety dangers corporations create by requiring disclosure of discovered dangers.¹⁷⁸ Deficiencies in the statutory language¹⁷⁹ and constitutional limitations¹⁸⁰ demonstrate, however, that the proposed statute does not fully accommodate these considerations. The goals of deterrence and corporate acceptance of the responsibility for ensuring health and safety can better be achieved through existing statutes.¹⁸¹ Thus, additional legislation is unnecessary. Legislative goals can be accomplished through more artful interpretations of existing criminal measures.

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177. See notes 32-37 *supra* and accompanying text.

178. See *id.*

179. See notes 44-105 *supra* and accompanying text.

180. See notes 106-43 *supra* and accompanying text.

181. See notes 144-78 *supra* and accompanying text.