Comments and Notes

THE *DOTTERWEICH* DOCTRINE RE-EXAMINED

United States v. Park

I. INTRODUCTION

In the October 1974 Term the Supreme Court in *United States v. Park*,[1] in an opinion by Mr. Chief Justice Burger expressing the views of six members of the Court, reinstated the conviction of John R. Park, president of Acme Markets, Inc., and undertook an attempt at clarification of the guidelines established in *United States v. Dotterweich*[2] for prosecutions of corporate officials for violations of the Federal Food, Drug, and Cosmetic Act.[3] The Fourth Circuit Court of Appeals reversed Park's conviction[4] holding that Park could not be found criminally liable absent wrongful conduct on his part, and that admission into evidence of prior violations of the Act at Acme's Philadelphia warehouse was error.[5] The object of this comment is to ascertain whether the Court has achieved the clarification needed with respect to the standard of liability of corporate officers under the Act as construed in *Dotterweich* or added additional confusion to what has been an ambiguous and imprecise guide in individual corporate prosecutions.

The major difficulty for those prosecuted under a statutory violation is that liability may attach without knowledge of the acts involved.[6] The problem for a corporate officer, such as Park, is compounded when the corporate officer is prosecuted under a statute for acts committed by the corporation. The Supreme Court reiterated the standard outlined in *Dotterweich* by determining who in the corporation stands in a "responsible relation" to the business process resulting in a violation. In stating that it is a question that must be trusted to ". . . the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries . . ."[7]

1. 95 S. Ct. 1903 (1975).

2. 320 U.S. 277 (1943).

3. 21 U.S.C. § 301 et seq. [hereinafter referred to as the Act].

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

5. *Id.*

6. Our scope is limited to an analysis of prosecutions under the Act. For an analysis of the concept of mens rea, *see* Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

7. 95 S. Ct. at 1910, *quoting Dotterweich*, 320 U.S. at 284-85.

the Court has neither provided the guidance needed nor objectively established any standard to guide future actions.[8]

II. FACTS

John R. Park is the president of Acme Markets, Inc., a national retail food chain with approximately 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses. Both Acme and John R. Park were charged in a five count information with violation of the Act alleging that the defendants had received food shipped in interstate commerce, and while the food was being held for sale in Acme's Baltimore warehouse following the interstate shipment caused it to become adulterated within the meaning of 21 U.S.C. 342(a)(3) and (4).[9] The adulteration was caused by leaving the food in a building accessible to rodents and contamination from rodent excrement in violation of 21 U.S.C. 331(k).[10]

Acme pleaded guilty and Park not guilty. The evidence demonstrated that in April 1970, the FDA advised Park by letter of unsanitary conditions in Acme's Philadelphia warehouse. In 1971, the FDA found similar conditions in Acme's Baltimore warehouse. During a 12 day inspection of

---

8. Sayre refers to violations under the Act as "Public Welfare Offenses" in his article *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933). He classifies offenses under various statutes into the following groups:

1. Illegal sales of intoxicating liquor;
   (a) Sales of prohibited beverage;
   (b) Sales to minors;
   (c) Sales to habitual drunkards;
   (d) Sales to Indians or other prohibited persons;
   (e) Sales by methods prohibited by law.
2. Sales of impure or adulterated food or drugs;
   (a) Sales of adulterated or impure milk;
   (b) Sales of adulterated butter or oleomargerine;
3. Sales of misbranded articles;
4. Violations of anti-narcotic acts;
5. Criminal nuisances;
   (a) Annoyances or injuries to the public health, safety, repose or comfort;
   (b) Obstructions of highways;
6. Violations of traffic regulations;
7. Violations of motor-vehicle laws;
8. Violations of general police regulations, passed for the safety, health or well-being of the community.

9. Section 402 of the Act, 52 Stat. 1046, 21 U.S.C. § 342, provides in pertinent part:

> A food shall be deemed to be adulterated — (a) . . . (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have been rendered injurious to health . . ."

10. Section 301(k) of the Act, 52 Stat. 1042, 21 U.S.C. § 331(k), 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.

the Baltimore warehouse in 1971, evidence of rodent infestation and other insanitary conditions was discovered. In a second inspection in 1972, some improvement was noted, but evidence of rodent contamination still existed.

Testimony presented in the District Court related to notice to Park of the conditions in the Baltimore warehouse after the first inspection, and a recitation of Acme's bylaws defining Park's duties.[11]

Park, testifying in defense, spoke to the actions he undertook in response to the letter from the FDA, and on cross examination conceded that "providing sanitary conditions for food offered for sale to the public was something that he was responsible for in the entire operation of the company. . . ."[12] The Trial Judge charged the jury in pertinent part as follows:

> In order to find the defendant guilty on any count of the Information, you must find beyond a reasonable doubt on each count. . . .
>
> Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, Incorporated.
>
> However, you need not concern yourselves with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets.
>
> The statute makes individuals, as well as corporations, liable for violations. An individual is liable if it is clear, beyond a reasonable doubt, that the elements of the adulteration of the food as to travel in interstate commerce are present. As I have instructed you in this case, they are, and that the individual had a responsible relation to the situation, even though he may not have participated personally.
>
> The individual is or could be liable under the statute, even if he did not consciously do wrong. However, the fact that the Defendant is president and is a chief executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue. The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.[13]

The jury found Park guilty on all counts.

---

11. The bylaw provided in pertinent part:
The Chairman of the board of directors or the president shall be the chief executive officer of the company as the board of directors may from time to time determine. He shall, subject to the board of directors, have general and active supervision of the affairs, business, offices and employees of the company . . . .
He shall, from time to time, in his discretion or at the order of the board, report the operations and affairs of the company. He shall also perform such other duties and have such other powers as may be assigned to him from time to time by the board of directors.

12. 95 S. Ct. at 1907.

13. *Id.* at 1908 n.9.

III. HOLDING ON APPEAL TO THE FOURTH CIRCUIT

Park had appealed the conviction alleging (1) that the court erred in its instructions to the jury and (2) prejudicial evidence of warnings of alleged prior violations of the act were improperly admitted.[14] In a 3–2 decision,[15] the Fourth Circuit reversed and remanded the case for a new trial. Reversal was granted on both grounds.

The Fourth Circuit held that the Trial Court in its instructions to the jury had erroneously dispensed with the requirement of proof of "wrongful action" by the corporate officer. The court charged the jury that the sole question was

> . . . whether the Defendant held a position of authority and responsibility in the business of Acme Markets; that Park could be found guilty even if he did not consciously do wrong and even though he had not personally participated in the situation if it were proved beyond a reasonable doubt that Park had a responsible relation to the situation.[16]

These instructions, according to the Fourth Circuit, supported a conviction predicated solely upon a showing that defendant Park was president of the offending corporation. This was an incorrect statement of the law of the case as interpreted by the Fourth Circuit.[17]

United States v. Dotterweich,[18] as interpreted by the Fourth Circuit, eliminated the need of establishing "awareness of wrongdoing," but required proof of "wrongful action" — proof of acts that *cause* adulteration.[19] In *Dotterweich,* personal responsibility was established — Dotterweich personally made every executive decision and had direct supervisory responsibility. The Fourth Circuit ruled that there was no allegation or proof that Park was responsible for the executive decisions that resulted in the contamination.

> The criminal acts which were the subject of Acme's conviction cannot be charged to Park without proof that he participated, directly or constructively therein or that the acts were done to further some criminal conspiracy in which he took part.[20]

The decision required that the defendant *cause* the adulteration. Conviction according to the Fourth Circuit under § 301 of the act, does not rest upon the defendant's position in the corporation, but upon his relation to the specific criminal acts. To support this, the Court relying on *Dotterweich* stated: "a corporation may commit an offense and *all persons who aid and abet its commission are equally guilty.*"[21]

14. United States v. Park, 499 F.2d 839 (4th Cir. 1974).
15. *Id.* at 840.
16. *Id.*
17. *Id.*
18. 320 U.S. 277 (1943).
19. 499 F.2d at 841.
20. *Id.*
21. *Id.*

The "wrongful action" requirement could be satisfied on retrial, and concomitantly, Park's guilt established by showing:

> . . . gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which would "cause" the contamination of the food.[22]

While recognizing that enforcement will be more difficult under this standard, the Court stated that due process requires fairness and justice over ease of enforcement.[23]

The second ground for reversal was predicated upon admission of evidence of an FDA warning to Park regarding conditions in Acme's Philadelphia warehouse in 1970. No prosecution ensued from the violation and its admission constituted prejudicial error under the theory in which the case was tried.[24] The jury was instructed that the main issue for their determination was "whether the Defendant held a position of authority and responsibility in the business of Acme Markets."[25] The need for evidence of "prior crimes" is not apparent under this charge. On retrial, "prior crimes" evidence may be admissible where it can be shown that the need and relevance of the evidence will outweigh its prejudicial effect in light of the issues.[26]

Judge Craven dissented finding the District Court's charge in compliance with *Dotterweich*. Mr. Justice Frankfurter, writing for the majority in *Dotterweich* recognized that the legislation under which Dotterweich was prosecuted

> . . . dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. . . . The offense is committed . . . by all who . . . have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs [or food].[27]

Judge Craven took issue with the contention of the majority that the trial judge's charge equated the presidency of the corporation with the requisite responsibility.[28] The question of responsibility was determined by the jury in accordance with *Dotterweich*.[29] The evidence was sufficient to establish that Park retained both the power and the responsibility to see that the system of rodent control was effective, and if it didn't work, to change it.[30] Like Dotterweich, Park, as president of the corporation, was responsible for the operation of the entire company, including sanitation.

---

22. *Id.* at 842.
23. *Id.*
24. *Id.*
25. *Id.* at 843.
26. *Id.*
27. *Id.* at 844.
28. *Id.*
29. *Id.*
30. *Id.*

IV. THE SUPREME COURT OPINION

In reinstating Park's conviction,[31] the Supreme Court first analyzed cases decided subsequent to *Dotterweich* under the Act, in an effort to find some basis for the "wrongful action" concept advanced by the Fourth Circuit.[32] The conclusion reached was ". . . Criminal liability (does not) turn on awareness of some wrongdoing or conscious fraud."[33] In thus rejecting the concept of "wrongful action," the Court went on to state:

> We cannot agree with the Court of Appeals that it was incumbent upon the District Court to instruct the jury that the Government had the burden of establishing "wrongful action" in the sense in which the Court of Appeals used that phrase. The concept of a "responsible relationship" to, or a "responsible share" in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.[34]

Having concluded that the Government need not prove any wrongful action by Park, the Supreme Court then considered whether a conviction could rest solely on the basis of Park's position in the corporation. Park contended that the instructions by the Trial Court to the jury could lead them to conclude that he could be guilty merely because of his position as president of Acme.[35] The Court stated:

> The record in this case reveals that the jury could not have failed to be aware that the main issue for determination was not respondent's position in the corporate hierarchy, but rather his accountability because of the responsibility and authority of his position, for the conditions which gave rise to the charges against him.[36]

The Government has the burden of proving that the corporate officer has a responsible relationship to the violations charged, but ". . . the Act permits a claim that a defendant was 'powerless' to prevent or correct the viola-

---

31. 95 S. Ct. 1903 (1975).

32. The legislative history of the Act is contained in DUNN, FEDERAL FOOD, DRUG, AND COSMETIC ACT: A STATEMENT OF ITS LEGISLATIVE RECORD (1938).

33. 95 S. Ct. at 1912.

34. *Id.*

35. *Id.*

36. *Id.* at 1913.

tion. . . ."[37] The defendant ". . . has the burden of coming forward with evidence. . . ."[38]

Park advanced the defense of reliance upon his subordinates, and he:

> . . . sought to persuade the jury that, as president of a large corporation, he had no choice but to delegate duties to those in whom he reposed confidence, that he had no reason to suspect his subordinates were failing to insure compliance with the Act, and that, once violations were unearthed, acting through those subordinates he did everything possible to correct them.[39]

The defense was deemed inadequate by the admission of evidence of the prior violations at the Philadelphia and Baltimore warehouses which was held to be relevant ". . . to demonstrate that respondent was on notice that he could not rely on his system of delegation to subordinates to prevent or correct unsanitary conditions at Acme's warehouses, and that he must have been aware of the deficiencies of this system before the Baltimore violations were discovered."[40]

In approving the charge to the jury by the Trial Court as containing ". . . an adequate statement of the law to guide the jury's determination,"[41] the Supreme Court was ". . . satisfied that the Act imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions. Implicit in the Court's admonition that the ultimate judgment of juries must be trusted[42] however is the realization that they may demand more than corporate bylaws to find culpability."[43] The Supreme Court was apparently convinced that Park had the power to prevent or correct the violations, and that the jury in applying the law as stated by the Trial Court reached a conclusion which was to be trusted.

Mr. Justice Stewart in a dissenting opinion joined by Justices Powell and Marshall felt the instructions given the jury were inconsistent with the law as expressed in the majority opinion.

> [I]n order to sustain a conviction under § 301(k) of the Food, Drug, and Cosmetic Act the prosecution must at least show that by reason of an individual's corporate position and responsibilities, he had a duty to use care and maintain the physical integrity of the corporation's food products. A jury may then draw the inference that when the food is found to be in such condition as to violate the statute's prohibitions, that condition was "caused" by a breach of the standard of care imposed upon the responsible official. This is the language of negligence, and I agree with it.[44]

---

37. *Id.* at 1912 *quoting* United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964).
38. *Id.*
39. *Id.* at 1914.
40. *Id.*
41. *Id.* at 1913.
42. *Id.* at 1913–1914, *citing Dotterweich*, 320 U.S. at 285.
43. *Id.* at 1914.
44. *Id.* at 1914–1915.

Mr. Justice Stewart found that the jury's instructions as they related to the standard of responsibility for the violations ". . . as used by the trial judge . . . had whatever meaning the jury in its unguided discretion chose to give it."[45] "[B]efore a person can be convicted of a criminal violation of this Act, a jury must find — and must be clearly instructed that it must find — evidence beyond a reasonable doubt that he engaged in wrongful conduct amounting at least to common law negligence. There were no such instructions, and clearly, therefore, no such finding in this case."[46]

Mr. Justice Stewart agreed with much of the majority opinion, but clearly felt the jury instructions were an inadequate expression of the law as stated by the majority.

V. ANALYSIS

A. The Dotterweich *Doctrine*

United States v. Dotterweich[47] is the leading case on criminal liability of corporate officials under the Act. The Court, in a 5–4 decision, resolved the question of whether an individual employed by a corporation was a "person" within the meaning of the Act in the affirmative.[48] Dotterweich, president and general manager of Buffalo Pharmacal was held criminally liable for shipping adulterated and misbranded drugs in interstate commerce even though the corporation was acquitted on all counts.[49]

The case established the principle that where an individual shared in responsibility for introducing misbranded or adulterated drugs into interstate commerce it would be of no consequence whether it was done so negligently, intentionally or without awareness of wrongdoing.[50]

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct — awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. . . .
>
> And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded (or adulterated), and that the article may be misbranded (or adulterated) without any conscious fraud at all. . . ."[51]

---

45. *Id.* at 1915.

46. *Id.* at 1917.

47. 320 U.S. 277 (1943).

48. *Id.* at 281–82.

49. *See* United States v. Buffalo Pharmacal Co., Inc., 131 F.2d 500 (2d Cir. 1942).

50. 320 U.S. at 284.

51. *Id.* at 280–81 (citations omitted).

Mr. Justice Frankfurter, speaking for the majority, recognized that hardship may ensue under a statute which dispenses with the requirement of criminal intent or knowledge of wrongdoing. However:

> Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing an illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.[52]

Conviction is predicated on whether or not the accused ". . . shares responsibility in the business process" — a question of fact to be determined by the jury, ". . . under appropriate guidance."[53] The Court made no attempt to define the class of individuals who stand in a responsible relation, but leaves such determination to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."[54]

The facts upon which the Court rendered its decision are found in the dissenting opinion of Justice Murphy:

> There is no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.[55]

Guilt is imputed to a corporate officer irrespective of intent:

> (1) even though there was no element of conscious fraud or awareness of wrongdoing on the president's part, (2) even though the president did not commit the violative acts, and (3) even though the president neither knew of, nor authorized, the act which constituted a violation of law.[56]

The *Dotterweich* Doctrine represents an evolution in the law of criminal liability which began in the nineteenth century. While no attempt is being made to fully analyze the historical development of criminal liability without knowledge of wrongdoing, a brief survey of the representative cases is necessary in understanding the *Dotterweich* Doctrine.

B. Historical Background

Both English and American jurisprudence witnessed a departure from the well established common law principle that scienter, wrongful intent, was a requisite element in a criminal prosecution. This modification was

52. *Id.* at 285.
53. *Id.* at 284.
54. *Id.* at 285.
55. *Id.* at 285-86..
56. D. F. O'Keefe, Jr. and M. H. Shapiro, *Personal Criminal Liability Under the Federal Food, Drug, and Cosmetic Act — The* Dotterweich *Doctrine,* 30 FOOD DRUG COSM. L.J. 3 (Jan. 1975).

furthered with the enactment of regulatory statutes in the form of health and social welfare legislation which called for punishment regardless of the actor's state of mind.[57] One such piece of legislation was the Food and Drug Act of 1906 which intended to protect the consumer against misbranded and adulterated food and drugs. Corporate officials and stockholders could be held criminally liable under this Act regardless of personal knowledge upon a mere showing that the manager was acting pursuant to authority conferred. In *United States v. Mayfield*[58] the Court charged the jury as follows:

> A corporation acts only by agents. The law is that, if any agent does an illegal act on behalf of his principal, he makes not only the principal liable for his act, but himself as well. . . . The men who are informed against are stockholders and officers of the company. So far as the mere fact of their being officers and stockholders in the corporation is concerned, I charge you that it does not make them responsible in this prosecution; but their responsibility depends altogether upon whether or not they conferred on the manager the authority to ship Celery Cola from one state into another; and whether the shipment upon which this prosecution is based was made by the manager pursuant to the authority so conferred.
>
> The question for you to inquire into is whether or not the defendants are shown by the evidence, to your satisfaction, to have given the manager the authority to do what he did. . . . If, from the evidence, you are satisfied beyond a reasonable doubt that this authority was conferred upon him by the defendants, then they would be just as responsible as the manager.[59]

In construing the 1906 Act, other Courts held that guilty knowledge was not necessary to sustain a conviction.[60]

In *United States v. Balint*,[61] the Supreme Court in a unanimous decision recognized that mens rea was no longer an absolute in determining criminal liability.

> While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it (Ree v. Sleep, 8 Cox 472), there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.[62]

---

57. *See* Sayre, *Public Welfare Offenses, supra* note 8.

58. 177 F. 765 (N.D. Ala. 1910).

59. *Id.* at 767.

60. *See, e.g.*, Strong, Cobb and Co. v. United States, 103 F.2d 671 (6th Cir. 1939), United States v. Sprague, 208 F. 419 (E.D.N.Y. 1913). *See generally*, cases collected in WHITE AND GATES, DECISIONS OF COURTS IN CASES UNDER THE FEDERAL FOOD AND DRUG ACT (1934). *See also* cases collected in Annot., 152 A.L.R. 755 (1944).

61. 258 U.S. 250 (1922).

62. *Id.* at 251–52.

Determining whether the statutory offense eliminated a showing of scienter is a question of legislative intent.[63] In *Balint*, the Narcotics Act was construed to "require every person dealing in drugs to ascertain *at his peril* whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character to penalize him."[64]

Balint addressed the issue whether due process of law was violated where no guilty intent need be proved, and an individual is ignorant of the facts.[65] That objection was considered and rejected in *Shevlin Carpenter Co. v. Minnesota*[66] which held "that in the prohibition or punishment of particular acts, the State may in the maintenance of public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' "[67]

The Third Circuit Court of Appeals in a decision rendered just prior to *Dotterweich*,[68] held that scienter was not a requirement for prosecution under the Act. Samuel S. Greenbaum, president of a corporation was fined and sentenced to three months imprisonment for introducing adulterated eggs into interstate commerce. No allegation or proof was offered of guilty knowledge on his part. The Court looked to the legislative intent, as proscribed by *Balint* to determine whether proof of the offender's knowledge and wilfullness are necessary under the Act. "We perceive an intent in § 333(a) to punish persons who introduce adulterated foods into interstate commerce regardless of their lack of knowledge or wilfullness."[69]

C. *Application of the* Dotterweich *Doctrine*

Prosecutions under the Act applying the guidelines of *Dotterweich* have all generally stated the standard to be applied in the following terminology:

> The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs [or food]. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing an illicit commerce, rather than to throw the hazard on the innocent public who are totally helpless.[70]

---

63. *Id.* at 253.
64. *Id.* at 254 (emphasis added).
65. *See* Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1940).
66. 218 U.S. 57.
67. *Balint*, 258 U.S. at 252, *quoting Shelvin Carpenter Co.*
68. United States v. Greenbaum, 138 F.2d 437 (3d Cir. 1943).
69. *Id.* at 439–40.
70. United States v. Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

The threshold question has been deciding who in the corporate structure occupies the responsible position in relation to the violations of the Act subjecting that party to prosecution and criminal liability. A close reading of the cases reveals that most prosecutions were of corporate officers who headed corporations much smaller than Acme Markets, and were more intimately involved in the violative acts.

In *Parfait Powder Puff*, the defendant corporation had entered into a contract with another corporation which agreed to manufacture, package, and distribute for Parfait hair lacquer pads according to Parfait's directions under Parfait's label. Without Parfait's knowledge, the manufacturer substituted an ingredient which proved deleterious in use. Parfait argued the relationship was that of an independent contractor and not principal and agent. The Seventh Circuit in rejecting the argument stated:

> The liability was not incurred because defendant consciously participated in the wrongful act, but because the instrumentality which it employed, acting within the powers which the parties had mutually agreed should be lodged in it, violated the law. The act of the instrumentality is controlled in the interest of public policy by imputing the act to its creator and imposing penalties upon the latter.[71]

The case speaks in terms of absolute and vicarious liability, but no individual defendant was charged.

In *Kordel v. United States*[72] an individual defendant was convicted of a drug mislabeling violation. The statements constituting the questioned labeling were shipped separately from the drugs, but were held to be labeling within the meaning of the Act.[73] In affirming the conviction, the Supreme Court did not reach the argument of wrongful intent or knowledge, but cited *Dotterweich* in support of the purpose of the Act as protecting unwary consumers.[74] The defendant, Kordel, marketed his own health food products and wrote the literature which subjected him to prosecution. His relationship to the violations was one of complete responsibility.

Individual defendants were held criminally liable for false and misleading labeling in *United States v. Kaadt*.[75] The defendants operated a diabetic clinic and shipped a drug in interstate commerce accompanied by printed matter which represented that the drug would be efficacious in the cure, mitigation, and treatment of diabetes whereas in fact and in truth the drug was not.[76] The defendants argued that there existed a difference of medical opinion as to the best method of treatment and that a difference of opinion does not prove either party wholly right or wholly wrong.[77] The Seventh Circuit rejected the argument and concluded that a fact

71. *Id.* at 1009 (citations omitted).
72. 335 U.S. 345 (1948).
73. *Id.* at 347–48.
74. *Id.* at 349.
75. 171 F.2d 600 (7th Cir. 1948).
76. *Id.* at 601.
77. *Id.* at 603.

question existed as to whether the defendant's labeling was false and misleading. According to the opinion of the Seventh Circuit, the jury was instructed that:

> If they concluded that any or all of the defendants shared responsibility in conducting the business and that the operation of that business resulted in unlawful distribution of misbranded drugs, the defendants who shared such responsibility might be found guilty. . . . [T]he burden of proof was upon the Government to prove every material allegation of the indictment and to establish the defendant's guilt beyond a reasonable doubt, and that in determining whether the defendants did have a responsible share in the conduct of the business, *it must take into consideration the work that each defendant did at the Kaadt Diabetic Clinic or Institute, the duties and responsibilities of each, and the extent to which each controlled or directed the conduct of the business.*[78]

The Government did not show that in each instance all of the defendants physically participated in the violations, "[b]ut physical participation is not necessary in order to have criminal responsibility attach for a violation of the Act."[79] The defendants could thus be found criminally liable if they had the responsibility for the actions which constituted the violation, regardless of whether the individual physically participated in that wrongful action.

Reaffirming the finding of criminal liability without physical presence during the time when the violation occurred is *Golden Grain Macaroni Co. v. United States*.[80] The individual defendant contended that he could not be responsible because he was absent from the plant when the violation occurred and that he did everything in his power to insure that the plant would be sanitary during his absence. The Ninth Circuit in rejecting his argument noted that some of the products were manufactured prior to his absence, the unsanitary conditions had prevailed for a considerable period of time, and he and the corporation had suffered a previous conviction for like violations of the Act.[81] Knowledge of the violations was imputed to the individual defendant. The Court went on to state: "the criminal responsibility of a corporate officer having broad authority such as that possessed by this defendant does not depend upon his physical presence."[82]

In *United States v. Diamond State Poultry Co.*,[83] a corporation and individual defendants were convicted for violations of the Act in shipping decomposed poultry in interstate commerce. The individual defendants were the major officers of the corporate defendant, and the evidence established that one defendant stated to his employees to be careful in grading poultry and on occasion opened crates to see if his instructions were

78. *Id.* at 604 (emphasis added).
79. *Id.*
80. 209 F.2d 166 (9th Cir. 1953).
81. *Id.* at 168.
82. *Id.*
83. 125 F. Supp. 617 (D. Del. 1954).

followed. The other defendant stated he periodically checked the condition of shipped poultry.[84] Citing *Dotterweich, Greenbaum,* and *Parfait Powder Puff,* 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.[85]

The defendants in this case were intimately involved in the day to day affairs of the corporation and undoubtedly were the responsible parties to be held accountable for the violations.

In *Lelles v. United States,*[86] a conviction of an individual corporate defendant was upheld despite acquittal of the corporate defendant for violations of the Act. Lelles contended that ". . . if the corporation of which this individual is President did not make the shipment, and the Court so found by dismissing the action, then its President is not guilty."[87] In citing *Dotterweich* the Ninth Circuit stated: "a person who has responsibility in the business activities of a corporation may be personally guilty."[88] Lelles's argument was rejected, the Court quoting *Dotterweich* with approval:

> To speak with technical accuracy, under § 301 [of the Act, 21 U.S.C.A. § 331] a corporation may commit an offense and all persons who aid and abet commission are equally guilty. Whether an accused shares responsibility in the business process resulting in an unlawful distribution depends on the evidence produced at the trial and its submission — assuming the evidence warrants it — to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs.[89]

The most recent Supreme Court opinion prior to *Park* which examined the guidelines of *Dotterweich* was *United States v. Wiesenfeld Warehouse Co.*[90] The defendant was a public storage warehouseman charged with violating Section 301(k) of the Act.[91] The District Court for the Middle District of Florida dismissed the information for failure to allege an offense under the Act.[92] The District Court construed the Act as not applying to the mere act of holding goods. Mr. Justice Stewart, writing for a unanimous Court, in reversing the judgment of the District

84. *Id.* at 619.
85. *Id* at 620.
86. 241 F.2d 21 (9th Cir. 1957), *cert. denied,* 353 U.S. 974 (1957).
87. *Id.* at 23.
88. *Id.*
89. *Id.* at 24 (emphasis in original).
90. 376 U.S. 86 (1964).
91. *Id.* at 91.
92. *Id.* at 88.

Court went to the legislative history of the Act and held "that Congress intended to proscribe the particular conduct charged . . . — the holding of food under unsanitary conditions whereby it may have become contaminated."[93]

Wiesenfeld argued that he was "by the very nature of his business powerless to protect against this kind of contamination however high the standard of care exercised."[94] The Court in considering this contention makes an allowance for a defensive claim in stating: "Whatever the truth of this claim, it involves factual proof to be raised defensively at a trial on the merits."[95]

O'Keefe and Shapiro[96] feel this statement significantly and forecast the evolution of a due care defense as a legal doctrine to be utilized in future prosecutions.[97]

> While a possible defense of due care has not evolved into a legal doctrine, it may become such and the argument may well have some practical effect also. For example, if at a preliminary Section 305 hearing, an individual can show (1) an appropriately high standard of care and (2) facts and circumstances that made the violation impossible or difficult to avoid, it is possible that an administrative decision not to prosecute would be made by the Food and Drug Administration in the Department of Justice.[98]

D. Recent Actions

Two additional cases merit some discussion at this juncture, *United States v. Abbott Laboratories*,[99] and *United States v. H. B. Gregory Co.*[100] In *Abbott* the Fourth Circuit reversed and remanded the dismissal of an indictment which charged the corporation and five of its current or former employees with causing the introduction into interstate commerce of adulterated and misbranded intravenous solution drugs. The District Court dismissed the indictment for prejudicial pretrial publicity and for misconduct by the prosecution before the Grand Jury.[101] The Fourth Circuit in construing the guidelines of Dotterweich as applied by that Court in *Park* stated:

> Responsibility in turn depends upon knowledge, and if knowledge is established it depends further on the action or nonaction of the officer or employee after he had obtained knowledge.[102]

---

93. *Id.* at 90.
94. *Id.* at 91.
95. *Id.*
96. O'Keefe and Shapiro, *supra* note 56.
97. Mr. Justice Burger in *Park* quotes the language relating to a defensive claim. 95 S. Ct. at 1912.
98. O'Keefe and Shapiro, *supra* note 56 at 16.
99. 505 F.2d 565 (4th Cir. 1974), *cert. denied*, 95 S. Ct. 1424 (1975).
100. 502 F.2d 700 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 2629 (1975).
101. 369 F. Supp. 1396 (E.D.N.C. 1973).
102. 505 F.2d at 573.

The Fourth Circuit's interpretation was explicitly rejected in *Park*. The trial in this case should provide an opportunity to utilize the *Park* standards. The due care defense should certainly be advanced by the individual defendants, and its application in this case could provide a better indication of the evidence necessary to sustain convictions in the future than was determined by *Park*.

In *Gregory*, the Supreme Court's action in denying certiorari is consistent with *Park* and *Dotterweich* in light of the facts of the case. Both the corporation and its president and treasurer James H. Gregory were charged with holding foods under unsanitary conditions. During the FDA inspection, Gregory was observed directly involved in the day to day activities of the corporation. He stated to the inspector that he was in charge of the sanitation program.[103] Gregory challenged the standard of *Dotterweich* imposing personal and strict liability for violations of the Act, and also contended that the standard fails to require a causal relation between the individual and the violation of the Act.[104] The Sixth Circuit looked to Gregory's contentions as an articulation of the *Wiesenfeld* due care defense and in rejecting the contentions stated:

> In light of Inspector Brett's testimony and Mr. Gregory's admissions of his area of responsibility and actions in the operation of the warehouse business, we find and hold that the district court did not err in convicting him of the violations of the Act.[105]

VI. CONCLUSION

The import of the Act as interpreted by various Courts involving varying factual patterns makes it clear that corporations as well as the responsible persons in the corporate structure have the burden of insuring that the products they place in interstate commerce are not misbranded or adulterated. The concepts of conscious fraud or awareness of wrongdoing are not relevant to criminal conviction where a prohibited act occurs.[106] Individual defendants have been convicted when the corporation is acquitted (*Dotterweich, Lelles*), when the individual defendant was not present when the violations occurred (*Kaadt, Golden Grain Macaroni, Diamond State Poultry*), when the offending corporation is a public storage warehouse (*Wiesenfeld*), when the individual sent literature in separate shipments rather than with drugs (*Kordel*), and generally when the evidence shows a close and immediate relation to the violative acts (*Gregory*).[107]

---

103. 502 F.2d at 704.

104. *Id.* at 705.

105. *Id.* at 706.

106. O'Keefe and Shapiro, *supra* note 56, at 18.

107. For other examples *see* United States v. Shapiro, 491 F.2d 335 (6th Cir. 1974); United States v. Cassaro, Inc., 443 F.2d 153 (1st Cir. 1971); United States v. Vitasafe Corp., 345 F.2d 864 (3d Cir. 1965); *But cf.* United States v. Omar, 91 F. Supp. 121 (D. Neb. 1950).

Looking at *Park* in relation to the facts of *Dotterweich* and the cases applying the "Dotterweich Doctrine", it appears at first that *Park* does not fit into the pattern of previous prosecutions. Acme Markets, Inc. is a giant corporation employing approximately 36,000 persons, operating 874 retail outlets, and several warehouses. No Court has spoken of the liability for an individual defendant as vicarious, but rather as personal and strict liability.[108] A corporate officer is made criminally responsible for unsanitary conditions because, "if he does not will the violation, [he] usually is in a position to prevent it with no more care than society might reasonably . . . exact from one who assumed his responsibilities."[109] Looking to the facts of *Park,* he was notified of prior violations at the Philadelphia warehouse and also of the results of the first Baltimore inspection. His response was to rely on a system of delegating responsibility to subordinates. But, the Philadelphia violations put ". . . respondent . . . on notice that he could not rely on his system of delegation to subordinates to prevent or correct unsanitary conditions at Acme's warehouses, and that he must have been aware of the deficiencies of this system before the Baltimore violations were discovered."[110] Park conceded that as Acme's president he was responsible for any result that occurred in the company.[111] The requisite responsibility for the violations is thus placed on Park.

The result of *Park* while probably extremely pleasing to most people has done little to clarify the inadequacy of the "Dotterweich Doctrine". The concept of responsible relation to the violations is still undefined. The Court leaves it as a fact question depending ". . . on the evidence produced at the trial and its submission — to the jury under appropriate guidance."[112]

As aptly pointed out in the dissent, "the instruction . . . expressed nothing more than a tautology. . . . '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.' "[113] "It is the function of jury instructions, in short, to establish in any trial the *objective standards* that a jury is to apply as it performs its own function of finding the facts."[114]

The Trial Court in response to a request for further illustration of what he meant by "responsible relationship" said:

> Let me say this, simply as to the definition of the responsible relationship. Dotterweich and subsequent cases have indicated this really

108. O'Keefe and Shapiro state the opinion that "Close and immediate supervisory control by the defendant over the operation in which the violative act occurred has always been present when individuals have been held vicariously liable," *supra* note 56, at 20. For criticism of *Dotterweich* and the concepts of strict and vicarious liability, *see* Packer, *Mens Rea and the Supreme Court,* 1962 SUP. CT. REV. 107, 116-19.

109 Morissette v. United States, 342 U.S. 246, 256 (1952).

110. United States v. Park, 95 S. Ct. at 1914.

111. *Id.* at 1908.

112. *Id.* at 1910.

113. *Id.* at 1915.

114. *Id.* at 1916 (emphasis added); *see* Sparf v. United States, 156 U.S. 51 (1895).

is a jury question. It says it is not even subject to being defined by the Court. . . .[115]

By not setting forth objective guidelines, the Court is leaving a jury without any guidance as to the standard of conduct required to determine guilt. In the words of Mr. Justice Stewart, the decision stands for a "standardless conviction."[116]

The only safe conclusion to be reached in an analysis of the *Park* decision is that in the area of food and drug regulation, the principle of strict liability is now more firmly imbedded into American jurisprudence. Any conclusion as to the standard of conduct to bring one within the sanction of the Act will have to be determined on a case by case analysis. The Court in only looking to the facts of *Park* has failed to reach the question of who in the corporate structure occupies the "responsible relationship."

Arnold H. Cantor,
Eileen Cooper.

PHILLIP G. LARSEN, 65 T.C. ____, NO. 10 (1975): LIMITED PARTNERSHIP OR ASSOCIATION FOR TAX PURPOSES?

On November 7, 1975, the Tax Court withdrew for further consideration its opinion treating two California limited partnerships as associations for tax purposes.* Mai-Kai Apartments (hereinafter "Mai-Kai") and Somis Orchards (hereinafter "Somis") were limited partnerships[1]

115. *Id.* at 1915 note 1.

116. *Id.* at 1917.

* The petitions of the following limited partners are included herein: American Precision Metals, docket No. 5266-73 and Phillip G. Larson, docket No. 5267-73. The Internal Revenue Service will consider issuing advance rulings on classification as a limited partnership where the corporation is a sole general partner. *See* REV. PROC. 74-17, 1974-1 CUM. BULL. 438; REV. RUL. 72-13, 1972-1 CUM. BULL. 735.

1. The term partnership includes "a syndicate, group, pool, joint venture, or other unincorporated association * * * which is not, within the meaning of this title a trust or estate or a corporation." INT. REV. CODE of 1954, § 7701(a)(2). The term corporation includes "associations, joint-stock companies, and insurance companies." INT. REV. CODE of 1954, § 7701(a)(3). To clarify and effectuate these rather broadly drawn definitions, the Treasury Department promulgated a series of regulations embodying standards for each of the three major business organizations — associations (taxable as corporations), partnerships and trusts. Treas. Reg. § 301.7701-3(b)(1960):

> (b) *Limited Partnership.* — (1) *In general.* — An organization which qualifies as a limited partnership under State law may be classified for pur-