

## COMMENTS

# THE RESPONSIBLE CORPORATE OFFICER, CRIMINAL LIABILITY, AND MENS REA: LIMITATIONS ON THE RCO DOCTRINE

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*In the case of true crimes . . . courts can never abandon insistence upon the evil intent as a prerequisite to criminality, partly because individual interests can never be lost sight of and partly because the real menace to social interests is the intentional, not the innocent, doer of harm.*<sup>1</sup>

## INTRODUCTION

Under the "responsible corporate officer" ("RCO") doctrine, a corporate official can be held criminally liable for violating a so-called "public welfare" or "regulatory" statute<sup>2</sup> if the officer was in a position to prevent or correct the violation and yet failed to do so.<sup>3</sup> The defendant's actual knowledge is not required,<sup>4</sup> and thus the RCO doctrine results in the imposition of a species of strict criminal liability.<sup>5</sup> Proponents who view the RCO doctrine as a serviceable tenet of criminal jurisprudence—one that merits expanded application—rely principally on two Supreme Court decisions, *United States v. Dotterweich*<sup>6</sup> and *United States v. Park*.<sup>7</sup> Both cases involved prosecutions under the Food, Drug and Cosmetic Act ("FDCA"),<sup>8</sup> which contains no express mens rea requirement and imposes only misdemeanor liability.<sup>9</sup> In each case, the Court used "responsible corporate officer" language, suggesting that the officer-defendant's guilt could legitimately be inferred solely on the basis of the individual's position within the company.<sup>10</sup> Because the defendants in *Dotterweich* and *Park* purportedly were convicted "without any

1. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933).

2. See, e.g., Ronald M. Broudy, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 KY. L.J. 1055, 1056-57 (1991/92) (stating that crimes containing no mens rea requirement often are termed "regulatory" or "public welfare" offenses); Jeremy D. Heep, Comment, *Adapting the Responsible Corporate Officer Doctrine in Light of United States v. MacDonald & Watson Waste Oil Co.*, 78 MINN. L. REV. 699, 702 (1994) (asserting that Supreme Court developed RCO doctrine to "apply to strict liability statutes protecting public welfare").

3. See *United States v. Park*, 421 U.S. 658, 673-74 (1975).

4. See *id.* at 670-71.

5. See Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 476 (1981) (noting that whenever limited evidence of culpability suffices for finding of guilt, "convictions that would have occurred were a strict liability approach applied will usually still occur").

6. 320 U.S. 277 (1943).

7. 421 U.S. 658 (1975).

8. 21 U.S.C. §§ 301-392 (1994).

9. The FDCA prohibits, inter alia, "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded." 21 U.S.C. § 331(a). Any person who violates § 331 is subject to imprisonment of not more than one year, a fine of not more than \$1000, or both. See *id.* § 333(a)(1).

10. See *United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (noting that defendant must have had "responsible share in the furtherance" of unlawful activity); see also *Park*, 421 U.S. at 665 n.9 (stating that defendant must have had "responsible relationship" to unlawful activity).

conscious wrongdoing,"<sup>11</sup> both opinions suggest that the Supreme Court relied on the "public welfare" theory in holding the corporate officers liable for the FDCA violations.<sup>12</sup> Courts have used this theory to except certain criminal statutes from the mens rea requirement on the basis that: (1) the social benefit of a conviction for such an offense far outweighs the significance of punishing the defendant; and (2) public welfare provisions typically have carried small penalties.<sup>13</sup>

In recent years, several commentators have urged expansion of the RCO doctrine to justify dispensing with or substantially diluting the mens rea requirement under various statutes.<sup>14</sup> This proposition has been urged frequently with regard to environmental protection laws.<sup>15</sup> The rationale for expanding the doctrine's application is that, like the FDCA, environmental protection laws also are "public welfare" statutes designed to protect public "health and welfare."<sup>16</sup>

This Comment suggests that those commentators who urge expanded application of the RCO doctrine offer reasons that have

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11. *Park*, 421 U.S. at 665 n.9. As noted above, with respect to *Park*, this statement is not quite accurate; in fact, the Court in *Park* expressly stated that "[t]he concept of a 'responsible relationship' to, or a 'responsible share' in, a violation of the [FDCA] imports some measure of blameworthiness." *Id.* at 673; see also *Dotterweich*, 320 U.S. at 284 (stating that "[h]ardship there doubtless may be under a statute [such as the FDCA] which . . . penalizes the transaction though consciousness of wrongdoing be totally wanting").

12. See Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337, 1356-62 (1982) (discussing "public welfare" nature of offenses in *Dotterweich* and *Park* and stating that "public welfare" legislation uses criminal sanctions to regulate conduct that puts public at unacceptably high risk of danger).

13. See *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 496 (E.D.N.Y. 1993) (explaining that "public welfare" offense constitutes most common exception to mens rea requirements).

14. See generally Marjorie P. Gabbett, *Eroding the Resource Conservation and Recovery Act's Scientist Requirement Regarding Responsible Corporate Officers*, 14 HAMLINE J. PUB. L. & POL'Y 49 (1993) (reasoning that protection of public welfare and environment is stronger interest than protection of corporate officers from criminal liability for acts of corporation); Robert A. Milne, Comment, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFF. L. REV. 307 (1989) (approving of strict criminal liability for corporate officers operating on behalf of corporation).

15. See Brickey, *supra* note 12, at 1338-42 (exploring situations in which defendants have and have not been found liable in RCO cases); *infra* Part III (examining post-*Park* environmental cases in which RCO doctrine was treated).

16. See, e.g., Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You Don't Know?*, 22 ENVTL. L. 1347, 1349-50 (1992) ("It is now well established that environmental laws fall within the realm of health and welfare statutes, whose purpose is to protect the general public.") (footnote omitted); Heep, *supra* note 2, at 725 (proposing that "[b]ecause [an environmental statute] is undeniably a public welfare statute that regulates inherently dangerous items . . . courts [may] construe [it] in a way that furthers its public welfare goals"); Colleen C. Murnane, *Criminal Sanctions for Deterrence Are a Needed Weapon, But Self-Initiated Auditing Is Even Better: Keeping the Environment Clean and Responsible Corporate Officers Out of Jail*, 55 OHIO ST. L.J. 1181, 1189 (1994) (asserting that "[t]he fact that the statutes aim at protecting the environment and remedying any problems which occur is evidence of an intent to protect the public").

nothing to do with the doctrine itself or, more specifically, have nothing to do with the doctrinal implications of true "public welfare" offenses. In effect, certain commentators reason that *some* doctrine must be found to ease the government's burden of proof in these cases merely because prosecuting high level corporate officials is often an arduous task.<sup>17</sup> On a related tack, others argue that deterrence justifies imposing strict criminal liability on corporate officers.<sup>18</sup>

None of the arguments offered, however, acknowledges the inherent limitations on the RCO doctrine that flow from the narrow circumstances in which the Supreme Court initially treated the doctrine.<sup>19</sup> Nor do they pay heed to the Court's recent expression of disfavor for strict criminal liability.<sup>20</sup>

Expansion of the RCO doctrine to the environmental arena, as these commentators urge (and as has been approved by some courts<sup>21</sup>), cannot be justified in view of: (1) the narrow holdings of *Dotterweich* and *Park*; (2) the absence of any persuasive rationale for analogizing the type of "public welfare" statute addressed in *Dotterweich* and *Park* to modern environmental protection statutes; and (3) the Supreme Court's recent strengthening of the statutory mens rea requirement, in cases such as *Staples v. United States*<sup>22</sup> and *United States v. X-Citement Video, Inc.*<sup>23</sup>

Part I of this Comment outlines the history of the mens rea principle and the "public welfare" exception. Part II argues that expansion of the RCO doctrine cannot be justified. Part II also offers a synopsis of recent Supreme Court cases that are relevant to the RCO doctrine analysis. Part III discusses a sampling of post-*Park* cases that have addressed the RCO doctrine. Part IV briefly summarizes the thoughts of certain commentators on the application of the RCO doctrine to environmental statutes. Part V recommends that use of the RCO doctrine should be limited scrupulously in view of various policy considerations surrounding its application. This Comment concludes that the RCO doctrine cannot justifiably be extended to

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17. See, e.g., Block & Voisin, *supra* note 16, at 1373 ("[P]rosecutors should focus their efforts beyond the principal actors and seek the person in the corporation . . . who is responsible for detecting problems . . . and has the authority for correcting them."); Heep, *supra* note 2, at 722 (rationalizing that it is unfair to hold low level employees responsible for acts directed by superiors).

18. But see *infra* note 230 (contending that changed behavior may be result of factors other than threat of strict liability).

19. See *infra* Part II.A.

20. See *infra* text accompanying notes 225-26.

21. See *infra* text accompanying notes 191-206.

22. 114 S. Ct. 1793 (1994).

23. 115 S. Ct. 464 (1994).

statutes expressly containing mens rea requirements. In addition, it forecasts that, in light of the current trend toward maintaining and even strengthening the mens rea requirement, the Supreme Court would not employ the RCO doctrine to justify dispensing with or diluting the mens rea element, even when a statute does *not* expressly require criminal intent.

This Comment urges that because expansion of the RCO doctrine to eviscerate or limit the mens rea principle will lead to an improvident and radical revision of settled principles of criminal liability, any proposal to expand application of the doctrine must be scrutinized carefully.<sup>24</sup> Moreover, this Comment maintains that the primary purpose of the criminal law is to punish wrongdoers retrospectively, and not to stimulate behavior prospectively. Finally, given the Supreme Court's recent reaffirmation of the primacy of the mens rea principle, this Comment projects that the Court likely would reject any proposed expansion of the RCO doctrine to environmental statutes.

## I. THE MENS REA REQUIREMENT AND THE "PUBLIC WELFARE" OR "REGULATORY" EXCEPTION

### A. *The Historical Underpinnings of the Mens Rea Requirement*

For hundreds of years, Western nations have adhered to the fundamental principle that an individual must possess mens rea—a "guilty mind"—before being charged with a crime.<sup>25</sup> This precept dates at least to the time of Plato.<sup>26</sup> Plato posited that an ideal criminal code should be based on an individual's level of intent; that is, on whether the alleged perpetrator of a crime acted "with a

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24. See Alan Zarky, *The Responsible Corporate Officer Doctrine*, 5 TOXICS L. REP. (BNA) No. 31, 983, 983-84 (Jan. 9, 1991) ("[I]f current criminal doctrines are ill-suited to resolving these societal problems, it does not follow that changes in those doctrines are the solution.")

25. In a recent decision from the Eastern District of New York, Judge Weinstein discussed extensively the history of the mens rea requirement in Anglo-American law, including the "public welfare" exception. See *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 489-96 (E.D.N.Y. 1993); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 114 (1968) (observing that "[a]ll civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state of frame of mind or will"); see also Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 81 (1908) ("It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind."); Sayre, *supra* note 1, at 56 ("Acts alone are frequently colorless; it is the state of mind which makes all the difference between innocence and criminality.")

26. See *Cordoba-Hincapie*, 825 F. Supp. at 490.

rightful spirit and in a rightful manner."<sup>27</sup> The philosopher's model criminal code imposed no responsibility on those who acted unintentionally.<sup>28</sup>

English common law has long honored the mens rea requirement.<sup>29</sup> Although the concept of mens rea did not crystallize until the twelfth century, the level of a criminal's mental culpability was considered in the determination of his punishment for most established offenses before that time.<sup>30</sup> Toward the close of the Middle Ages, the focus on the putative criminal's state of mind evolved more fully,<sup>31</sup> and by the seventeenth century, English law had firmly established that a guilty state of mind was an essential element of most criminal charges and certainly of all serious charges.<sup>32</sup> In the mid-1800s, Blackstone touted the mens rea requirement as follows:

[A]s a vicious will without a vicious act is no . . . crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will, and secondly, an unlawful act consequent upon such vicious will.<sup>33</sup>

American criminal jurisprudence continues to pay strict heed to the mens rea requirement. As Judge Weinstein has noted, "*mens rea* in some form remains a defining and irreducible characteristic of the criminal law."<sup>34</sup> Another commentator has referred to the mens rea requirement as an "orthodox fundamental principle of criminality,"<sup>35</sup> and the Supreme Court has stated:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in

27. *Id.*

28. *See id.*

29. *See id.* at 489-92 (outlining history of mens rea requirement in criminal law).

30. *See* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 981 (1932).

31. *See Cordoba-Hincapie*, 825 F. Supp. at 491.

32. *See id.*; *see also* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30 (2d ed. 1961) (noting "[t]he requirement of a guilty state of mind (at least for serious crimes) had been developed by the [seventeenth century]").

33. 2 WILLIAM BLACKSTONE, COMMENTARIES \*20-21.

34. *Cordoba-Hincapie*, 825 F. Supp. at 492; *see also* 1 JOEL PRENTISS BISHOP, CRIMINAL LAW § 287 (9th ed. 1930) (asserting that "[t]here can be no crime large or small without an evil mind").

35. Sayre, *supra* note 1, at 79; *see also* State v. Brown, 28 S.C.L. (1 Speers) 129, 131-32 (S.C. 1843) (stating that when one is charged with an unlawful act, "an averment of knowledge is necessary").

freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.<sup>36</sup>

As the recent Supreme Court opinion in *Staples v. United States*<sup>37</sup> confirms, the status of the mens rea requirement in our modern jurisprudence compels the conclusion that exceptions to the doctrine should be limited severely.<sup>38</sup> The Court in *Staples* held that in order for a defendant to be held criminally liable, the government must prove that he had actual knowledge that he violated the law, even when the relevant statute contains no express scienter requirement.<sup>39</sup>

### B. *The Evolution of the "Public Welfare" or "Regulatory" Exception*

The term "public welfare offense" was coined in the middle of the nineteenth century and refers to an exception to the fundamental rule of American jurisprudence that a criminal conviction requires a guilty mind.<sup>40</sup> Implementation of this exception creates a form of strict liability within the criminal law system<sup>41</sup>—an idea that, on its face, runs counter to the very meaning of the word "crime."<sup>42</sup>

Early "public welfare" cases applied this strict liability standard to minor regulatory violations involving the sale of liquor<sup>43</sup> and adulter-

36. *Morissette v. United States*, 342 U.S. 246, 250 (1952); see also *Staples v. United States*, 114 S. Ct. 1793, 1797 (1994) (stating that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence" (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978))).

37. 114 S. Ct. 1793 (1994).

38. See *infra* notes 225-26 and accompanying text.

39. See *Staples*, 114 S. Ct. at 1804 (stating that "[s]ilence does not suggest that Congress dispensed with mens rea for the element of [the statute] at issue").

40. See Sayre, *supra* note 1, at 56, 62-63 (noting that concurrently, but independently of one another, both England and United States embarked on movements toward disregarding mens rea requirement in case of violations of certain regulatory statutes). One of the first "public welfare" cases is an often-cited English decision, *Hobbs v. Winchester Corp.*, 2 K.B. 471 (1910). In *Hobbs*, the court held that the defendant-butcher could be convicted under the Public Health Act of 1875 for selling injurious meat "even though he and his assistants were unaware of the unsoundness of the meat and could not have discovered it by any examination which they could reasonably have been expected to make and even though the offense involved a maximum penalty of three months imprisonment." *Id.* at 483-85. In its analysis, the court reasoned: "A man takes upon himself to offer goods to the public for their consumption with a view to making a profit by the sale of them. Those goods may be so impregnated with disease as to carry death or at any rate serious injury to the health to any one consuming them." *Id.*

41. See *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984) (stating that those statutes deemed to be of "public welfare" genre, may be read without any mens rea requirement).

42. See BLACK'S LAW DICTIONARY 55 (4th ed. 1968) (defining *Actus non facit reum, nisi mens sit rea* as "[a]n act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intent be criminal").

43. See, e.g., *Barnes v. State*, 19 Conn. 398 (1849) (holding that one could be convicted for selling liquor to common drunkard, punishable by ten dollar fine, even if seller had no knowledge that buyer was common drunkard).

ated food.<sup>44</sup> Since that time, courts have held on occasion that the "public welfare" principle justifies convicting otherwise innocent individuals, those without intent to commit wrongdoing, in the context of a select group of offenses.<sup>45</sup> This practice has been condoned largely because it has been applied only to petty crimes and misdemeanors carrying light penalties.<sup>46</sup>

The significance of penalty severity with regard to the "public welfare" designation is traceable to early English law<sup>47</sup> and still is weighed heavily by courts today.<sup>48</sup> Indeed, the Supreme Court in *Staples* indicated that in a society such as ours that generally requires a "vicious will" to establish a crime, imposing harsh penalties for offenses that require no mens rea would not make sense.<sup>49</sup> The Court in *Staples* further proclaimed that without express congressional legislation indicating that mens rea is *not* required for a given offense, the Court should not apply the "public welfare" rationale to construe any felony statute as dispensing with the element.<sup>50</sup>

## II. THE RCO DOCTRINE AND THE LACK OF JUSTIFICATION FOR ITS EXPANSION

### A. *The Narrow Holdings of Dotterweich and Park*

As noted above, the "public welfare" exception arguably was applied in both *United States v. Dotterweich*<sup>51</sup> and *United States v. Park*.<sup>52</sup> It is from this concept and these cases that the RCO doctrine evolved.

Specifically, the RCO doctrine derives principally from dicta in the Supreme Court's decision in *Dotterweich*.<sup>53</sup> In *Dotterweich*, the presi-

44. See Sayre, *supra* note 1, at 64-65. In the 1860s Massachusetts was the first state to adopt the "public welfare exception." See *id.* By 1868, the exception was accepted by several other states as well. See *id.* at 66.

45. See *infra* Part III (discussing on RCO cases).

46. See *Staples v. United States*, 114 S. Ct. 1793, 1802 (1994) ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea."); see also Sayre, *supra* note 1, at 70 (explaining that because public welfare offenses historically carried only small monetary penalties and not imprisonment, "the courts [could] afford to disregard the individual in protecting the social interest").

47. See *Regina v. Tolson*, 23 Q.B.D. 168, 177 (1889) (holding that when determining whether to dispense with mens rea in criminal statute, "the nature and extent of the penalty attached to the offense may reasonably be considered").

48. See *infra* Part II.C.

49. See *Staples*, 114 S. Ct. at 1803 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*21).

50. See *id.* at 1804. It should be remembered that the statute at issue in *Staples* was silent as to a mens rea requirement; in that case, the Supreme Court read one into 26 U.S.C. § 5861(d).

51. 320 U.S. 277 (1943).

52. 421 U.S. 658 (1975).

53. *United States v. Dotterweich*, 320 U.S. 277 (1943).



dent of a pharmaceutical distribution company was prosecuted under the FDCA for introducing adulterated and misbranded drugs into interstate commerce.<sup>54</sup> The corporation purchased drugs from manufacturers and then packaged, labeled, and shipped the products for resale.<sup>55</sup> The violations alleged in the indictment involved: (1) the use of an old label that inaccurately stated one drug's ingredients; and (2) the use of a second label that overstated the amount of an ingredient in a second drug.<sup>56</sup> The only issue before the Court, however, was whether Congress intended the term "person," as used in the FDCA to define the class of potential defendants, to include individuals as well as corporations.<sup>57</sup> The Court held that the statutory term "person" included individuals.<sup>58</sup> It then concluded that Dotterweich was liable for the violations alleged.<sup>59</sup>

Despite the narrowness of its holding, *Dotterweich* has received significant attention for its dicta. In particular, both courts and commentators have noted that the Court in *Dotterweich* appears to have endorsed the imposition of strict criminal liability on the individual defendant.<sup>60</sup> It found that under the FDCA, an "offense is committed . . . by all those who [have] a responsible share in the furtherance of the transaction which the [FDCA] outlaws . . . though consciousness of wrongdoing may be totally wanting."<sup>61</sup> In explaining this view, the Court reasoned that a violation of the FDCA was characterized as a "public welfare" offense<sup>62</sup> and that by leaving a mens rea requirement out of the statute, Congress opted to impose the hardship of criminal prosecution on corporate officers "rather than to throw the hazard on the innocent public who are wholly helpless."<sup>63</sup>

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54. See *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd sub nom.* *United States v. Dotterweich*, 320 U.S. 277 (1943).

55. See *Dotterweich*, 320 U.S. at 278.

56. See *Buffalo Pharmacal*, 131 F.2d at 500.

57. See *Dotterweich*, 320 U.S. at 279.

58. See *id.* at 281-82.

59. See *id.* at 285.

60. See, e.g., Broudy, *supra* note 2, at 1057 (alleging that Court in *Dotterweich* established that legislation written to promote public welfare could dispense with conventional mens rea requirement).

61. *Dotterweich*, 320 U.S. at 284. The Court declined to specify or even to offer an example of those employees who may stand in such a "responsible relation." See *id.* at 285. Instead, it left that decision to "the good sense of prosecutors, the wise guidance of trial judges [and] . . . the ultimate judgment of juries." *Id.*

62. See *id.* at 284.

63. *Id.* at 285.

The principal point that certain commentators and a handful of courts have either missed or ignored<sup>64</sup> is that the discussion of “responsible share” liability—that is, the RCO doctrine—was unnecessary to resolve the only question before the Court.<sup>65</sup> Thus, the discussion was pure dicta and not a binding proclamation of law.<sup>66</sup>

Three decades after *Dotterweich*, however, in *United States v. Park*,<sup>67</sup> the Supreme Court again appeared to uphold the imposition of strict criminal liability on a corporate officer-defendant who stood in a position to prevent or remedy infractions of the FDCA.<sup>68</sup> The defendant, as president and chief executive officer of a national food chain, was convicted of violating the statute as a result of alleged rodent infestation at some of the company’s warehouses.<sup>69</sup> The facts in *Park* were largely undisputed, demonstrating unequivocally that Park had actual knowledge of the violations alleged.<sup>70</sup> In light of these facts and noting the “public welfare” rationale of *Dotterweich*, the Court in *Park* held that the jury charge, which allowed a finding of the officer’s guilt if “it [was] clear . . . that [he] had a responsible relation to the [violation],”<sup>71</sup> was not erroneous.<sup>72</sup> The Court found:

[T]he Government establishes a prima facie case [of liability under the FDCA] when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason

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64. See, e.g., *In re Dougherty*, 482 N.W.2d 485, 489 (Minn. Ct. App. 1992) (“The responsible corporate officer doctrine is appropriate in the context of environmental laws.”); *infra* Part IV.

65. It is significant to note that the Court in *Dotterweich* did not treat seriously the question of what was necessary to find a corporate officer liable. The Court also failed to define a “corporate officer” for purposes of the RCO doctrine. Addressing the former, the Court merely set forth the “responsible share/responsible relation” language. See *Dotterweich*, 320 U.S. at 284-85. Regarding the latter, the Court stated that to attempt to delineate which officers may stand in such a “responsible” position would be “mischievous futility,” leaving the question to trial judges, juries, and prosecutors. See *id.* at 285.

66. See *Wainwright v. Witt*, 469 U.S. 412, 422 (1985) (stating that dicta are “not controlling” statements of law (citing *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981))); see also BLACK’S LAW DICTIONARY 454 (6th ed. 1990) (defining “dicta” as “[e]xpressions in a court’s opinion which go beyond the facts before the court and therefore are individual views of the author of opinion and not binding in subsequent cases as legal precedent”).

67. 421 U.S. 658 (1975).

68. See *United States v. Park*, 421 U.S. 658, 673 (1975) (discussing Congress’ intent “to enforce the accountability of responsible corporate agents . . . and the obligation of the courts . . . to give . . . effect [to relevant laws]”).

69. See *id.* at 660.

70. Evidence showed that a Food and Drug Administration (“FDA”) inspector’s express instruction to the defendant to eradicate the infestation problem in order to ensure the company’s “compliance with the law” substantially was ignored. See *id.* at 663-64. Evidence also showed that Park had conferred with the company’s vice president of legal affairs regarding the FDA warning. See *id.*

71. *Id.* at 665 n.9.

72. See *id.* at 674-75 (stating that instruction, viewed in full, did not allow jury to find guilt solely on basis of officer’s position).

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.<sup>73</sup>

In light of the Court's later comment that some blameworthiness was necessary for a conviction under the Act<sup>74</sup>—notwithstanding its “responsible share” or “responsible relation” language—and, in particular, taking into consideration the facts of the case, the above quotation cannot be viewed as a holding and certainly cannot be interpreted as an unequivocal endorsement of the RCO doctrine.<sup>75</sup>

The crucial point in *Park*, in light of recent calls for expansion of the RCO doctrine, is that the defendant plainly had knowledge of the violations alleged.<sup>76</sup> Indeed, *Park* admitted receiving notice from the federal Food and Drug Administration of unsanitary conditions at one of the company's warehouses after agents had inspected the building,<sup>77</sup> and evidence showed that two subsequent inspections revealed that the problems had not been substantially cured.<sup>78</sup>

It should be reiterated that the FDCA, under which both *Dotterweich* and *Park* were decided, contains no express mens rea requirement.<sup>79</sup> As per *Staples*, such an omission does not, in and of itself, dispense with the element. However, considering the inconsequential nature of the penalties attached to the FDCA, punishment of an unintentional violation seems justifiable, subject to due process requirements. Nevertheless, *Dotterweich* and *Park* provide no basis for the punishment of an unintentional act under a statute requiring scienter as a

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73. *Id.* at 673-74.

74. *See id.* at 674.

75. The trial judge in *Park* perceived the weakness of the jury instruction, noting that it failed to specify a minimum standard of liability under the “responsible relation” test; but he felt obligated to let it stand under *Dotterweich*. *See id.* at 679-80 (Stewart, J., dissenting). In response to a request for clarification of the term “responsible relationship,” the district court judge said: “Let me say this, simply as to the definition of the ‘responsible relationship.’ *Dotterweich* and subsequent cases have indicated this really is a jury question. It says it is not even subject to being defined by the Court. As I have indicated to counsel, I am quite candid in stating that I do not agree with the decision; therefore I am going to stick by it.”

*Id.* at 680 n.1 (Stewart, J., dissenting).

76. *See id.* at 661-65 & n.9.

77. *See id.* at 664.

78. *See id.* at 661-62.

79. *See supra* note 9 (quoting relevant portion of FDCA, in which there exists no scienter requirement); *see also* Barry M. Hartman & Charles A. De Monaco, *The Present Use of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10,145, 10,147 (Mar. 1993) (observing that in *Dotterweich*, Justice Frankfurter recognized that “the statute itself eliminated the knowledge requirement”).

predicate to the imposition of criminal liability.<sup>80</sup> Such a requirement is present in the vast majority of environmental protection statutes, including those to which it has been suggested that the RCO doctrine apply.<sup>81</sup>

### B. *The "Public Welfare" Rationale of Dotterweich and Park*

Neither *Dotterweich* nor *Park* suggests or even alludes to expanding the applicability of the RCO doctrine. Nonetheless, certain commentators suggest that the doctrine be extended to statutes other than the strict liability FDCA—the only statute for which the Supreme Court even *arguably* has condoned its use—and a handful of courts ostensibly have acquiesced.<sup>82</sup> Both groups rationalize such an application on the theory that these offenses are “public welfare” offenses in the same sense that the term has applied to the sale of adulterated or misbranded food and drugs.<sup>83</sup> As noted earlier in this Comment, this suggestion has been made mostly within the context of environmental laws.

There is no question that environmental protection statutes aim to safeguard the “public welfare.” The characterization of a statute as a “public welfare” enactment, however, is so broad as to be analytically meaningless. One similarly could label most, if not all, statutes.<sup>84</sup> Because there is no sound method by which a court could determine which unlawful activities pose the “greatest” danger to the public or which wrongs cause the “most” harm, the “worst” harm or the “most” human misery, no court should arbitrarily broaden the “public welfare” rubric to negate the requisite *mens rea* of a particular statute.<sup>85</sup> Thus, applying a test that asks only if the statute aims to protect some aspect of the public’s well-being does not meaningfully

80. See *United States v. White*, 766 F. Supp. 873, 894-95 (E.D. Wash. 1991) (addressing significance of “knowing” requirement under RCRA). The court in *White* contrasted the environmental statute at issue from the FDCA, noting: “[We] must recognize that the statutes involved in *Park* and *Dotterweich* require no mental state or action.” *Id.* at 895. The court refused to hold the defendant in *White* liable under the RCO doctrine. See *id.*

81. See *infra* Part III and accompanying text (discussing cases in which courts have applied RCO doctrine).

82. See *id.*

83. See, e.g., *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 667 (3d Cir. 1984) (concluding that “in RCRA, no less than in the Food and Drugs Act, Congress endeavored to control hazards that, ‘in the circumstances of modern industrialism, are largely beyond self-protection’” (quoting *United States v. Dotterweich*, 320 U.S. 277, 280 (1943))).

84. See JAMES B. HADDAD ET AL., *CASES AND COMMENTS ON CRIMINAL PROCEDURE* 488 (4th ed. 1992) (“Can it not be said that enforcement of *all* criminal laws have some public welfare purpose?”).

85. Also, as was noted by the Court in *Staples*, contrary to the suggestion of the dissent in that case, the *mens rea* requirement is a question of law to be decided by the court—it is not an issue for the jury. See *Staples v. United States*, 114 S. Ct. 1793, 1800-01 n.6 (1994).

differentiate between regulatory "public welfare" laws and other types of statutes.<sup>86</sup> Consequently, if a statute's broad "public welfare" purpose was the sole criterion by which to determine whether mens rea should be ignored, the exception would swallow the rule, thereby eviscerating the tenet that crimes should be the product of a truly culpable mind.

Furthermore, extending the application of the RCO doctrine to felonies—environmental or otherwise—cannot be justified based on the magnitude of punishments imposed for such crimes. The importance of the penalty attached to a given statute must be recognized before interpreting its violation as a "public welfare" offense. Historically, this factor has been significant in determining whether and to what extent a showing of mens rea should be required for a conviction.<sup>87</sup> As noted above, one of the distinguishing features of traditional "public welfare" offenses is that they typically have been limited to statutes calling for "only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary."<sup>88</sup> The defendants in *Dotterweich* and *Park*, for instance, were charged with misdemeanors, both of which involved insignificant pecuniary fines and neither of which called for imprisonment.<sup>89</sup>

The stigma attached to a person with criminal status in today's society, where both personal and professional success are largely dependent upon reputation, is yet another reason that the RCO doctrine should be applied sparingly.<sup>90</sup> From this perspective, it is difficult to justify utilizing the RCO doctrine to dilute mens rea requirements for environmental crimes, as most constitute felonies calling for lengthy imprisonment, substantial monetary fines, or both.<sup>91</sup>

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86. See HADDAD, *supra* note 84, at 3.

87. See R. PERKINS, CRIMINAL LAW 793-98 (2d ed. 1969) (suggesting that when deciding whether to categorize act as "public welfare" offense, analysis should begin with consideration of its prescribed penalty).

88. *Staples*, 114 S. Ct. at 1802-03 (citing *Commonwealth v. Raymond*, 97 Mass. 567 (1867) (carrying fine of up to \$200 or six months imprisonment, or both); *Commonwealth v. Farren*, 91 Mass. 489 (1864) (carrying small fine); and *People v. Snowberger*, 71 N.W. 497 (Mich. 1897) (carrying fine of up to \$500 or brief imprisonment)).

89. See *United States v. Park*, 421 U.S. 658, 666 (1975) (resulting in fine of \$50 per count for five counts, or \$250, cumulatively); *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (assessing fine of \$500 for each of three counts charged and probation for 60 days on each count, to run concurrently); see also 21 U.S.C. § 333(a)(1) (1994) (providing that "[a]ny person who violates a provision of section 301 [21 U.S.C. § 331] shall be imprisoned for not more than one year or fined not more than \$1,000, or both").

90. Cf. *Zarky*, *supra* note 24, at 994 (noting that RCO doctrine could send individual to prison for several years because of events over which he had no practical control).

91. See *Staples*, 114 S. Ct. at 1802 (opining that "[i]t is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of

Finally, it is relevant to consider the historical context in which the Court decided *Dotterweich* and in which the RCO doctrine was spawned.<sup>92</sup> The ominous view of the “evils” of “big business” that prevailed in the late 1930s and 1940s almost certainly played some role in the case’s outcome. Such a view is not compelling today, as business enterprises are commonplace and no longer are a mystery to the average citizen. Moreover, the current Supreme Court appears to attribute more importance to an individual’s right to be free from wrongful criminal conviction than it does to the protection of the public welfare.<sup>93</sup>

### C. *The Supreme Court’s Recent Reaffirmation and Strengthening of the Mens Rea Requirement*

Post-*Park* Supreme Court decisions consistently have reaffirmed and strengthened the mens rea requirement, often reading culpability requirements into statutes that, by their literal terms, contain none.<sup>94</sup> Moreover, most of the relevant case law has emphasized the narrowness of the “public welfare” exception.<sup>95</sup>

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imprisonment if . . . what they genuinely and reasonably believed was [lawful activity] turns out to have [been unlawful]”).

92. See generally WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932-1968, at 3-27 (1970). Swindler observes:

The developments of the postwar era had “cleared the way for the claims of a group far wider than either the owners or the control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society.”

*Id.* at 24 (quoting ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 355-56 (1932)).

93. See *infra* notes 225-26 and accompanying text.

94. See, e.g., *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 468 (1994) (adopting presumption that scienter requirement should apply to each statutory element that criminalizes otherwise innocent conduct); *Posters ‘N’ Things, Ltd. v. United States*, 114 S. Ct. 1747, 1753-54 (1994) (requiring proof that defendant knowingly made use of interstate conveyance in scheme to sell drugs when word “knowingly” is absent from statute prohibiting such conduct); *Ratzlaf v. United States*, 114 S. Ct. 655, 657 (1994) (holding that, where defendant was convicted of structuring financial transactions to avoid currency reporting requirements, government must prove defendant “willfully violated” antistructuring law by knowingly violating law); *Liparota v. United States*, 471 U.S. 419, 425-26 (1985) (ruling that, where defendant was convicted of unlawfully acquiring and possessing food stamps, government must prove defendant knew his acquisition and/or possession was unlawful); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) (“Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”).

95. See, e.g., *X-Citement Video*, 115 S. Ct. at 468-69 (“Persons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent regulation.”); *Liparota*, 471 U.S. at 432-33 (finding that unauthorized food stamp possession did not constitute “public welfare” offense and distinguishing such violation from hand grenade possession and adulterated drug sale).

The Court's decision in *Staples v. United States*<sup>96</sup> is illustrative.<sup>97</sup> In *Staples*, the defendant-petitioner was charged with possessing an unregistered machine gun in violation of the National Firearms Act ("NFA"),<sup>98</sup> a statute that is silent with respect to mens rea.<sup>99</sup> Although the gun in question originally was a semi-automatic weapon that would not have required registration under the NFA, it had been modified to operate in a fully automatic fashion, bringing it within the scope of the statute.<sup>100</sup> At trial the defendant testified that the weapon never had fired automatically while in his possession and that he had no knowledge of its automatic firing capability.<sup>101</sup> The trial court, however, declined to instruct the jury that it must find that the defendant knew of the weapon's automatic firing capability<sup>102</sup> and Staples was convicted. He subsequently was sentenced to five years' imprisonment and fined \$5000.<sup>103</sup> The Court of Appeals for the Tenth Circuit affirmed the conviction.<sup>104</sup>

The Supreme Court held in *Staples* that the Government should have been required to prove that the defendant had actual knowledge of those characteristics which brought the weapon within the statutory proscription, even absent an express knowledge requirement in the NFA.<sup>105</sup> The Government offered two related arguments, both of which the Court rejected.<sup>106</sup>

The Government argued first that because Congress intended the NFA to "regulate and restrict the circulation of dangerous weapons,"<sup>107</sup> Staples' violation of the NFA should be characterized as a

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96. 114 S. Ct. 1793 (1994).

97. Although *Staples* does not address the issue of corporate officer liability, the mens rea and "public welfare" analyses presumably would be equivalent in that context.

98. 26 U.S.C. § 5861(d) (1994).

99. The relevant portion of the NFA states only that "[i]t shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." *Id.*

100. See *Staples*, 114 S. Ct. at 1796.

101. See *id.*

102. See *id.* The jury instruction given in *Staples* provided:

The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation.

*Id.*

103. See *id.*

104. See *id.*

105. See *id.* at 1804. In a concurring opinion, Justice Ginsberg noted that not only must the defendant have known he was dealing with a dangerous device, but he also must have known that such possession violated the law. See *id.* at 1806 (Ginsburg, J., concurring). "I conclude that conviction under [this section of the NFA] requires proof that the defendant knew he possessed not simply a gun, but a machine gun." *Id.* (Ginsburg, J., concurring).

106. See *id.* at 1804.

107. *Id.* at 1797.

“public welfare” or “regulatory” offense.<sup>108</sup> As discussed above, courts have construed statutes proscribing such offenses as imposing strict criminal liability on violators, thus justifying conviction absent a showing of mens rea.<sup>109</sup> The Government pointed out that the Supreme Court has so interpreted statutes governing the illegal sale of narcotics,<sup>110</sup> the illegal possession of unregistered grenades,<sup>111</sup> and the illegal shipment of adulterated or misbranded food or drugs,<sup>112</sup> all of which were silent as to requisite mens rea.<sup>113</sup>

In addressing the Government’s first contention, the Court noted that the relevant discussion in *Dotterweich*, which involved allegedly adulterated and misbranded drugs, was mere “dicta” and therefore did not address that case at any length.<sup>114</sup> Instead it focused on the cases that upheld criminal liability without evidence of mens rea, for the sale of narcotics and unregistered grenades.<sup>115</sup>

First, the Court looked to the public welfare designation of the narcotics offense.<sup>116</sup> In *United States v. Balint*,<sup>117</sup> a 1922 case in which the Court addressed a violation of the Anti-Narcotic Act of 1914.<sup>118</sup> The Supreme Court in *Balint* invoked the public welfare rationale and concluded that a conviction under the Act required proof only that the defendant knew that he was selling drugs; not that he knew the specific items he had sold were “narcotics.”<sup>119</sup> The Court in *Staples*, however, refused to subscribe to such reasoning. It explained that a corresponding instruction would permit a conviction solely on the basis that Staples knew he possessed a “firearm” in the ordinary sense of the word.<sup>120</sup> Given the widespread lawful use of

108. See *id.*

109. See generally Sayre, *supra* note 1.

110. See *United States v. Balint*, 258 U.S. 250, 254 (1922) (addressing violation of Anti-Narcotic Act of 1914).

111. See *United States v. Freed*, 401 U.S. 601, 602 (1971) (addressing hand grenade possession as violation of NFA).

112. See *supra* Part II.A (discussing *Park* and *Dotterweich*).

113. See *Balint*, 258 U.S. at 254 n.1 (citing pertinent portion of Anti-Narcotic Act of 1914); *Freed*, 401 U.S. at 604 n.3 (citing pertinent portion of NFA); see also *supra* Part II.A.

114. See *Staples v. United States*, 114 S. Ct. 1793, 1797-98 (1994).

115. See *id.* at 1793 (discussing *Balint* and *Freed*).

116. See *id.* at 1797-98.

117. 258 U.S. 250 (1922).

118. Act of Dec. 17, 1914, 38 Stat. 785, 786.

119. See *United States v. Balint*, 258 U.S. 250, 253-54 (1922) (characterizing Anti-Narcotic Act as taxing act, with incidental purpose of minimizing spread of addiction to the use of poisonous and demoralizing drugs).

120. *Staples*, 114 S. Ct. at 1798, 1799 (distinguishing guns from grenades in *Freed* and drugs in *Balint* on basis that guns have enjoyed “a long tradition of widespread lawful . . . ownership”).



guns,<sup>121</sup> the Court observed that this would lead to a result clearly at odds with the mens rea principle.<sup>122</sup>

Next, the Court in *Staples* analyzed *United States v. Freed*,<sup>123</sup> a 1971 case addressing a violation of the same section of the NFA that was at issue in *Staples*.<sup>124</sup> The Court determined in *Freed* that the unlawful possession of unregistered grenades could properly be termed a public welfare offense.<sup>125</sup> In that case, neither party disputed that the defendant knew that the objects he possessed were grenades.<sup>126</sup> The defendant claimed, however, that he did not know that the explosive devices were unregistered.<sup>127</sup> The Court held that mens rea as to the registration element of the offense was not required and upheld the defendant's conviction.<sup>128</sup> It reasoned that the NFA "is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act."<sup>129</sup>

Although the Government in *Staples* asserted that the gun at issue should be treated as the equivalent of the grenades in *Freed*,<sup>130</sup> the Court refused to assign the public welfare label to the NFA violation under the relevant facts.<sup>131</sup> The Court stated that the classification in *Freed* "rested entirely on the assumption that the defendant knew" his possession of the weapons in question "was not entirely 'innocent' in and of itself."<sup>132</sup> The Court in *Staples* concluded that although innocent gun ownership is commonplace, one in possession of grenades reasonably can be expected to know that such weapons are used only as implements of destruction.<sup>133</sup>

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121. See *id.* at 1800 (stating that gun ownership is generally innocent act).

122. See *id.* Even more cogent an argument can be made against criminalizing the disposal of waste products. Certainly, society wants to promote such lawful activity for the betterment of individual communities and the environment in general.

123. 401 U.S. 601 (1971).

124. See *Staples*, 114 S. Ct. at 1798-99 (discussing 26 U.S.C. § 5861(d)).

125. See *United States v. Freed*, 401 U.S. 601, 609 (1971) ("This is a regulatory measure in the interest of the public safety.").

126. See *id.*

127. See *id.* Contrary to the analysis in *Staples*, the Court in *Freed* held that because the Act did not have an express scienter requirement, specific intent was not necessary. See *id.* at 607.

128. See *id.* at 609-10.

129. *Id.* at 609 (stating that grenades at issue were no less dangerous than narcotics at issue in *Balint*).

130. See *Staples v. United States*, 114 S. Ct. 1793, 1800 n.5 (1994) (noting Government's contention that "one would hardly be surprised to learn" that there are laws that affect one's rights of gun ownership" (quoting *Freed* 401 U.S. at 609)).

131. See *id.* at 1799-800.

132. *Id.* at 1800 (reasoning that, in general, guns are not "deleterious devices or products or obnoxious waste materials," as were grenades in *Freed* and drugs in *Balint* (quoting *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971))).

133. See *id.* at 1799.

As for the Government's second argument, it urged that *Freed's* logic should apply in *Staples* because guns, no less than grenades, are "highly dangerous" instruments and those who deal in them should be aware of the probability of regulation.<sup>134</sup> The Court rejected this argument as well, stating that merely because something is "dangerous" in some general sense, does not necessarily suggest . . . that it is not also entirely innocent."<sup>135</sup> The Court emphasized the unusual care which it has taken to avoid construing statutes so as to dispense with a mens rea requirement when this would "criminalize a broad range of apparently innocent conduct."<sup>136</sup> It observed that precisely such an outcome would result in *Staples* from the implementation of the government's theory that whenever an item is potentially hazardous, the hazard alone warrants dispensing with a culpability requirement.<sup>137</sup>

Because the Court in *Staples* went to some length to avoid extending the public welfare rationale to the *same section* of the NFA that previously sufficed for such a designation in *Freed*, it is likely that the Court would be less than receptive to expanding it otherwise.<sup>138</sup> Indeed, this seems an *a fortiori* conclusion: the NFA, as construed in *Staples*, contains no explicit mens rea requirement while most environmental statutes do.<sup>139</sup>

The Supreme Court in *Staples*<sup>140</sup> emphatically reaffirmed that, absent a clear expression of legislative intent to omit any mens rea

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134. See *id.* (suggesting that Court analogize guns in *Staples* to adulterated food in *Dotterweich*).

135. *Id.* at 1800.

136. *Id.* (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985)). It is significant to note here that not only is the responsible treatment of hazardous waste a lawful activity, but it is an absolute necessity that society should seek to encourage.

137. See *id.* at 1801-02.

138. See *id.* at 1797. The Court in *Staples* emphasized repeatedly that the mens rea requirement is a fundamental concept within the criminal law system and that some showing of congressional intent is necessary to dispense with that element of a crime. See *id.* at 1797-98; see also *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 468 (1994) (noting presumption favoring mens rea in all criminal contexts).

139. Two environmentally-related statutes that do not contain mens rea requirements are: (1) The Refuse Act of 1899, 33 U.S.C. § 407 (1994); and (2) The Migratory Bird Treaty Act, 16 U.S.C. § 707 (1994). Prosecutors, however, have not litigated the RCO doctrine in federal courts in association with these statutes; they have sought to apply the theory only to those environmental statutes with "knowing" requirements. See *infra* Part III.

140. The holdings of *Staples* and *X-Citement*, and in particular, their strong reiteration of the mens rea requirement, were prefigured in recent years. In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the Court noted the generally disfavored status of criminal laws that seek to dispense with a mens rea requirement. In *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747 (1994), the Court reaffirmed that "[c]ertainly far more than the simple omission of the [word 'knowingly'] from the statutory definition [of an offense] is necessary to justify dispensing with an intent requirement." *Id.* at 1752-53 (quoting *United States Gypsum*, 438 U.S. at 438); see also *Morrisette v. United States*, 342 U.S. 246, 250-51 (1952) (holding that criminal intent of defendant was essential element of the statutory crime at issue).

element, a criminal statute must be presumed to impose such a requirement with respect to each element of a crime.<sup>141</sup> Other recent Supreme Court decisions are in harmony with *Staples* in finding that criminal statutes require a showing of criminal intent even when the statute is silent on the subject.<sup>142</sup>

In *United States v. X-Citement Video, Inc.*,<sup>143</sup> the Court confronted the issue of whether a child pornography statute, which explicitly required the "knowing" transportation or distribution of child pornography, also required that the defendant have knowledge that the material in question in fact depicted a minor child.<sup>144</sup> The statute was silent as to this element.<sup>145</sup> The Court conceded that, given the express statutory language, the most natural grammatical reading of the provision suggested that the statutory term "knowingly" modified only the verbs—transports, ships, receives, distributes, or reproduces—and did not address knowledge of whether the pornography in question involved a minor.<sup>146</sup> Relying in significant part on the analysis in *Staples*, however, the Court stated that, contrary to the government's position, the "plain language reading of [the statute was] not so plain."<sup>147</sup> The Court then applied the presumption in favor of a scienter requirement, rejecting the "public welfare" rationale proffered for eliminating the application of the modifier "knowingly" to every element of the statute.<sup>148</sup>

Like that of *Staples*, the import of *X-Citement* is clear: the Supreme Court is not ready to dispense with mens rea when a statute is silent

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141. See *Staples*, 114 S. Ct. at 1797.

142. See *X-Citement Video*, 115 S. Ct. at 468 (stating that Court has required showing of mens rea even when statutes have been silent as to that element). But see *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971). In *International Minerals*, the defendant was charged with unlawfully shipping sulfuric acid and hydrofluosilicic acid in interstate commerce for failing to make proper notation on the requisite shipping papers, in violation of an Interstate Commerce Commission regulation. See *id.* at 559. The provision applied to those who "knowingly violate[d]" the statute. See *id.* Notwithstanding this knowledge requirement, however, the Supreme Court found the defendant criminally liable without proving knowledge, stating that "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565. The view of the dissent in *International Minerals* is more consistent with the current Court's belief that the mens rea principle should be adhered to strictly. See *id.* at 569 (Stewart, J., dissenting) (describing majority's decision as "a perversion of the purpose of criminal law").

143. 115 S. Ct. 464, 464 (1994).

144. See *X-Citement Video*, 115 S. Ct. at 465 (1994).

145. See *id.* at 467; see also 18 U.S.C. § 2252(a) (1994) ("Any person who knowingly transports or ships in interstate or foreign commerce or mails any visual depiction, if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . .").

146. See *X-Citement Video*, 115 S. Ct. at 467.

147. *Id.* at 468.

148. See *id.* at 468-70.

as to that element; and it is certainly not ready to impose strict liability or to dilute mens rea when a statute explicitly requires proof of a defendant's criminal intent.<sup>149</sup>

### III. POST-PARK ENVIRONMENTAL CASES IN WHICH THE RCO DOCTRINE WAS TREATED

A clear majority of courts has declined to impose strict criminal liability in environmental cases examining the RCO doctrine—especially in cases in which the applicable statute has contained an explicit mens rea requirement.<sup>150</sup> Unfortunately, however, several of these cases reached correct conclusions with confusing and misleading language.<sup>151</sup> Such careless expressions might be misconstrued in future cases, leading to incorrect jury instructions, incorrect results, or both.<sup>152</sup>

For simplicity's sake, it is helpful to divide the RCO cases into three distinct categories: (1) those in which courts refused to hold the defendant-officer liable under the RCO doctrine; (2) those in which the defendant-officer supposedly was convicted under the doctrine, but in which the facts make clear that the officer possessed actual knowledge of the violations at issue; and (3) those in which a type of "status" offense was created and the defendant-officer was held liable based solely on his official corporate position.

The most notable case in the first category is *United States v. MacDonald & Watson Waste Oil Co.*<sup>153</sup> In *MacDonald & Watson* the

149. *But see* *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993). In *Weitzenhoff*, two corporate officials were convicted under the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(2). This section makes it a felony to "knowingly" discharge pollutants into navigable waters without a permit. *See id.* at 1283. The trial court construed the statute to require that the defendants knew that they were discharging pollutants, but not necessarily to require knowledge that the discharges were unlawful. *See id.* Rejecting the contention that *Staples* dictated a different result, the Ninth Circuit held that because the CWA was a "public welfare" statute and because a polluter must be deemed to be on notice that his acts may pose a public danger, the imposition of criminal liability even absent any showing of knowledge of wrongdoing was justified. *See id.* at 1285-86 (citing *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)). The Ninth Circuit in *Weitzenhoff* concluded that *Staples* did not preclude the "public welfare" label from being applied to felonies. *See id.* at 1281. Although this reading is technically correct, the *Weitzenhoff* decision is at odds with the essence of *Staples* and the fundamental mens rea principle.

150. *See infra* notes 153-90 and accompanying text.

151. *See infra* text accompanying notes 143-90.

152. *See* Zarky, *supra* note 24, at 994. Zarky notes that the axiom that "hard cases make bad law" is well-founded. *See id.* He explains that when faced with an officer under whose direction substantial environmental damage has occurred, a court likely will uphold a conviction. He warns, however, that the court may not adequately consider the implications of its holding for future sets of facts. *See id.* Moreover, Zarky emphasizes that "[t]he criminal law . . . is full of examples of an evolution in doctrine that never was intended by the judges of the individual cases." *Id.*

153. 933 F.2d 35 (1st Cir. 1991).

defendant, a corporate officer, was convicted of knowingly transporting hazardous waste to a facility without a permit, thereby violating § 6928(d)(1) of the Resource Conservation and Recovery Act ("RCRA").<sup>154</sup> Although the district court did not find that the defendant was cognizant of the unlawful act, it permitted the jury to infer the defendant's knowledge solely on the basis of his corporate status.<sup>155</sup>

The Court of Appeals for the First Circuit reversed the conviction.<sup>156</sup> That court held that although the officer had both control over the transportation of the waste and knowledge of similar prior violations, the RCO instruction could not serve as a substitute for the requisite mens rea with respect to the offense at issue.<sup>157</sup> The court explained that a factfinder validly may consider an officer's position and responsibilities *along with* other evidence in determining whether he possessed actual knowledge of an offense,<sup>158</sup> but that a defendant's organizational status and responsibility, without more, does not suffice as evidence of criminal intent.<sup>159</sup>

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154. See *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 39 (1st Cir. 1991); see also 42 U.S.C. § 6928(d)(1) (1994) (stating that "criminal penalties" apply to "[a]ny person who . . . knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a [proper permit]").

155. See *MacDonald & Watson*, 933 F.2d at 50-51 (applying RCO jury instruction).

156. See *id.* at 55.

157. See *id.*

158. See *id.*

159. See *id.*; Hartman & De Monaco, *supra* note 79, at 10,152 (stating clearly that individual's status, without more, is insufficient basis on which to instigate criminal prosecution against that individual for environmental violation containing "knowing" requirement); see also *United States v. Ramagosa*, No. 3:CR-91-079 (M.D. Pa. 1992) (issuing instruction that comports with settled mens rea doctrine). The jury in *Ramagosa* was instructed as follows:

The element of knowledge can seldom be shown by direct evidence. Usually it is established from all the facts and surrounding circumstances. In determining the issue of knowledge, therefore, you may consider the entire conduct of the defendant at or near the time of the alleged offense including any statements made or acts done by the defendant. You may consider whether relevant circumstantial evidence establishes whether the defendant knew of the violations charged in the indictment.

Among the circumstances you may consider in determining a defendant's knowledge is his position in the corporation, including his responsibilities under the regulations and under any applicable corporate policies and his activities as a corporate executive. Thus, you may infer that the defendant knew certain facts by virtue of his position in the corporation, his relationship to other employees or any applicable corporate policies and other facts and circumstances including information provided to the defendant on prior occasions. If the defendant was an officer of the corporation, you may consider whether the defendant was the corporate officer who had primary and direct responsibility over the activities which gave rise to the violations charged in determining whether he had knowledge of the charged violations.

Hartman & De Monaco, *supra* note 79, at 10,152-53.

The First Circuit in *MacDonald & Watson* found that the jury instruction issued by the district court<sup>160</sup> allowed the defendant to be found guilty based merely on negligence, that is, upon proof only that he was aware of previous illegal shipments but not of those on which the criminal charges were based.<sup>161</sup> Accordingly, it reversed and remanded the case.<sup>162</sup> In distinguishing *Dotterweich* and *Park*, the court noted that: (1) both Supreme Court cases involved a statute “lacking an express knowledge . . . or scienter requirement” (the FDCA), in contrast to RCRA’s explicit knowledge requirement;<sup>163</sup> and (2) the defendants in those cases were subject only to misdemeanor penalties, and not the felonious liability at stake in *MacDonald & Watson*.<sup>164</sup> The court stated, “We have found no case, and the Government cites none, where a jury was instructed that the defendant could be convicted of a federal crime *expressly requiring knowledge as an element*, solely by reason of a conclusive, or ‘mandatory’ presumption of knowledge of the facts constituting the offense.”<sup>165</sup>

Like the court in *MacDonald & Watson*, the court in *United States v. White*<sup>166</sup> rejected the proposition that a corporate officer could be convicted of unlawfully disposing of waste under RCRA absent proof of actual knowledge.<sup>167</sup> The court in *White* maintained that the Government could not sustain its burden of proof merely by showing that the defendant “should have known” of the alleged violations in that case.<sup>168</sup> The court also distinguished the application of the RCO doctrine to RCRA from its application to the FDCA in *Dotterweich* and *Park*, as did the First Circuit in *MacDonald & Watson*, noting that the FDCA contained no express knowledge requirement.<sup>169</sup>

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160. See *MacDonald & Watson*, 933 F.2d at 50-51. The trial court issued the following jury instruction:

First, it must be shown that the person is an officer of the corporation, not merely an employee. Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question. And the third requirement is that the officer must have known or believed that the illegal activity of the type alleged occurred.

*Id.*

161. See *id.* at 55.

162. See *id.* at 51-54 (stating that under district court’s instruction, as long as officer knew or even *erroneously believed* that unlawful activity of same type occurred on another occasion, he could be held liable).

163. See *id.* at 51-52 (outlining statute’s “knowing” requirement).

164. See *id.*

165. *Id.* at 53.

166. 766 F. Supp. 873 (E.D. Wash. 1991).

167. *United States v. White*, 766 F. Supp. 873, 895 (E.D. Wash. 1991).

168. See *id.*

169. See *id.* at 894-95.

The second category of cases consists of those in which the facts satisfactorily demonstrated the defendant's actual knowledge of wrongdoing, but the court seemingly relied, at least in part, on the RCO doctrine nevertheless. In this group, the Tenth Circuit often is credited with offering the most expansive view of the doctrine.<sup>170</sup> In *United States v. Brittain*,<sup>171</sup> that court upheld the conviction of a defendant-officer found guilty of discharging pollutants into certain waters<sup>172</sup> in violation of the Clean Water Act ("CWA").<sup>173</sup> Given that copious evidence pointed to the defendant's actual knowledge of the unlawful dumping,<sup>174</sup> his conviction is consistent with the fundamental mens rea requirement of American criminal law.<sup>175</sup> More specifically, it is consistent with the CWA's express knowledge requirement.<sup>176</sup> The court in *Brittain*, however, opened the door for confusion by stating:

We interpret the addition of "responsible corporate officers" [to the CWA] as an expansion of liability under the Act rather than . . . [a] limitation. . . . Under this interpretation, a "responsible corporate officer," to be held criminally liable, would not have to "willfully or negligently" cause a . . . violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.<sup>177</sup>

On close analysis, it is clear that the Tenth Circuit's expansive language in *Brittain* is unwarranted dicta. As the court itself noted, the jury in that case considered the defendant's specific conduct and

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170. See Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169, 178 (1994) (stating that *Brittain* opinion represents broadest application of RCO doctrine to environmental statute).

171. 931 F.2d 1413 (10th Cir. 1991).

172. See *United States v. Brittain*, 931 F.2d 1413, 1414 (10th Cir. 1991).

173. See 33 U.S.C. § 1311(a) (1994). A negligent violator of § 1311 "shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both." *Id.* § 1319(c)(1). A knowing violator "shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both." *Id.* § 1319(c)(2).

174. See *id.* at 1420 (noting evidence that: (1) defendant physically observed both violations complained of; (2) defendant was informed that illegal discharges (such as those complained of) were prone to occur in case of heavy rains; (3) defendant reviewed logs that recorded company's repeated illegal discharges; (4) defendant instructed plant supervisor on several occasions not to report violations to EPA as was required by applicable permit, and (5) when advised that company was required to alert EPA to relevant discharges, defendant replied to subordinate, "Don't worry about it.").

175. See *supra* text accompanying notes 34-39.

176. See 33 U.S.C. § 1311(a). In pertinent part, this section prohibits "any person" from discharging "any pollutant" into the waters of the United States without an EPA or EPA authorized agency permit. See *id.* § 1311(a). Section 1319(c) mandates that such a violation be "willful" or "negligent." See *id.* § 1319(c).

177. *Brittain*, 931 F.2d at 1419.

did not base its decision solely on the officer's corporate position.<sup>178</sup> Additionally, the court indicated that it was *not* applying a strict liability standard to the case.<sup>179</sup> Therefore, because *Brittain* suggests that the court would have found the defendant guilty based solely on the officer's job description (i.e., absent any proof of the defendant's actual knowledge of wrongdoing), the holding in the case is confusing and should have no precedential weight.

Another Tenth Circuit case, decided before *Brittain*, exhibits a similar flaw. In *United States v. Cattle King Packing Co., Inc.*,<sup>180</sup> the defendant, an officer and shareholder of a corporation, was charged with the intentional violation of the Federal Meat Inspection Act ("FMIA"),<sup>181</sup> a strict liability statute imposing misdemeanor penalties but allowing for felony penalties for intentional violations.<sup>182</sup> The court issued the RCO jury instruction and the defendant was found guilty despite his absence from the facility at the time of the alleged unlawful activity.<sup>183</sup>

Notwithstanding the instruction, however, the court in *Cattle King* did not completely dispense with the mens rea requirement.<sup>184</sup> Instead, it focused on convincing evidence presented by the Government (and its forty witnesses) of the officer's actual knowledge of the violations of which the prosecution complained.<sup>185</sup> Specifically, the prosecution established that while absent, the defendant monitored the facility's operation. This was accomplished through phone calls and occasional visits to the plant made to ensure that the policies and practices that he directed, were in fact being carried out.<sup>186</sup> Based on these facts, *Cattle King* does not support the application of the

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178. See *id.* at 1420. The Government in *Brittain* never suggested that it was relying on the RCO doctrine and the jury never was presented with the theory; the RCO language was introduced on the court's own volition. See *id.* at 1418-19.

179. See *id.* at 1420.

180. 793 F.2d 232 (10th Cir. 1986).

181. 21 U.S.C. §§ 601-95. (1994). See *United States v. Cattle King Packing Co.*, 793 F.2d 232, 239 (10th Cir. 1986) (declaring that packing company violated FIMA "at about every turn": adulterated meat was shipped, meat was misdated, and rejected meat products were "reworked" and resold to avoid economic loss).

182. See *Cattle King*, 793 F.2d at 240; see also 21 U.S.C. § 676 (providing that "if such violation involves intent to defraud . . . such person, firm, or corporation shall be subject [to fines or imprisonment]").

183. See *Cattle King*, 793 F.2d. at 240 (reasoning that "whoever aids, abets, counsels, commands, induces, or procures the commission of a criminal act by another is himself punishable as a principal").

184. See *id.* at 241 (concluding that there was sufficient evidence that defendant had requisite intent to defraud).

185. See *id.* at 235.

186. See *id.*



RCO doctrine in the absence of proof of a defendant's culpability. *Ergo*, it certainly does not support any expansion of the doctrine.

The court in *Cattle King*, however, like the court in *Brittain*, set forth in dicta a broad and somewhat confusing analysis of the RCO doctrine. First, it stated correctly that without more, the RCO instruction cannot suffice in a felony context.<sup>187</sup> Unfortunately, though, the court then permitted the RCO (strict liability) instruction, despite record facts sufficient to establish the requisite mens rea independent of the instruction.<sup>188</sup> As a result, the possibility now exists that such an instruction will be approved in future cases in which the facts do not show truly culpable knowledge.<sup>189</sup> This could lead to results that are at odds with prevailing mens rea doctrine.<sup>190</sup>

The third category of cases consists of those in which courts have relied erroneously on some variant of the RCO doctrine to dispense with mens rea, upholding liability based solely on an individual's corporate position. Commentators cite the Third Circuit's decision in *United States v. Johnson & Towers*<sup>191</sup> most often for this proposition.<sup>192</sup> In that case, the court intimated, for the first time, that the RCO doctrine could be applied to negate an express mens rea requirement in an environmental statute.<sup>193</sup> In *Johnson & Towers*,

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187. See *id.* at 240-41.

188. See *id.* at 241.

189. See Sayre, *supra* note 1, at 79. Sayre writes:

The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offenses may now and again . . . relax the mens rea requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions.

*Id.*

190. See Zarky, *supra* note 24, at 991-92 (pointing out that rationale in *Cattle King* could be unfairly and inaccurately applied in future cases); see also *State v. Kailua Auto Wreckers, Inc.*, 615 P.2d 730 (Haw. 1980). *Kailua Auto Wreckers* involved a state environmental statute that was silent as to any scienter requirement. See *id.* at 733 n.2. The Supreme Court of Hawaii affirmed the conviction of defendant corporate officers who openly had burned automobiles in violation of pollution regulations. See *id.* at 739-40. The defendants claimed that they were unconstitutionally discriminated against by selective law enforcement. See *id.* at 734-35. Given the uncontradicted evidence that violations were "flagrant," "continuous," and committed knowingly, see *id.* at 733, the outcome of *Kailua Auto Wreckers* appears to be correct. Because the Supreme Court of Hawaii read the statute as one imposing "strict liability" with a *Dotterweich/Park* "public welfare" analysis, however, the court established erroneous precedent with respect to the fundamental mens rea requirement. See *id.* at 738-39.

191. 741 F.2d 662 (3d Cir. 1984).

192. See Kevin L. Colbert, *Considerations of the Scienter Requirement and the Responsible Corporate Officer Doctrine for Knowing Violations of Environmental Statutes*, 33 S. TEX. L. REV. 699, 713-14 (1992) (noting that *Johnson & Towers* represents first example of corporate officer held strictly liable under RCRA).

193. See *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984).

two officers of the defendant-corporation were convicted of the illegal disposal of chemicals classified under RCRA as hazardous waste.<sup>194</sup>

On appeal, the only issue before the Third Circuit was the definition of the word "person" within the meaning of the statute.<sup>195</sup> In addressing the question, the court held that employees, as well as owners and operators of a facility, could be liable under RCRA provided that the violator "knew or should have known" of the unlawful conduct.<sup>196</sup> The court reasoned that Congress' purpose in enacting RCRA would be controverted by limiting its applicability to owners and operators if other employees also "bear responsibility" for handling hazardous materials.<sup>197</sup>

*Johnson & Towers*, however, has far greater significance for its dicta than it does for its holding. In dicta, the Third Circuit in that case likened RCRA's "knowing" requirement to the strict liability provision of the FDCA addressed by the Supreme Court in *Dotterweich and Park*.<sup>198</sup> Classifying RCRA as a "public welfare statute," the court averred that it would be reasonable to read the relevant provision as *not* requiring *mens rea*.<sup>199</sup> It then admitted that ultimately such a reading would be "arbitrary and nonsensical when applied to [RCRA]" and hence did not adopt such a construction.<sup>200</sup> The court applied a theory, however, that can be characterized in essentially the same way. It pronounced that an employee's knowledge can be inferred solely on the basis of his corporate position, suggesting that the RCO doctrine validly may create status offenses in the context of RCRA violations.<sup>201</sup>

Like the Third Circuit in *Johnson & Towers*, the Fourth Circuit also has applied the RCO doctrine rigidly when the defendants were not even corporate officers. In *United States v. Dee*,<sup>202</sup> civilian engineers employed by the government were charged with having stored,

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194. *See id.*

195. *See id.*

196. *See id.* at 665.

197. *See id.* at 667 (stating that "the justification of the penalties section [of RCRA] is to permit a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes" (quoting H.R. REP. NO. 94-1491, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6269)).

198. *See id.* at 666-67.

199. *See id.* at 668.

200. *Id.*

201. *See id.* at 670; *see also* Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase In Criminal Prosecutions Of Environmental Offenders*, 45 Sw. L.J. 1199, 1204-05 (1991). These commentators note that the RCO doctrine was not so-labeled by the Fourth Circuit, but that the court issued to the jury the RCO instruction, and thus the case has been classified accordingly. They state further that courts have held that "ignorance of the law is no defense" when applying the RCO doctrine.

202. 912 F.2d 741 (4th Cir. 1990).

treated, and disposed of hazardous waste without a permit.<sup>203</sup> Applying the public welfare rationale, the court held that "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."<sup>204</sup>

In *Dee*, the court found evidence that the defendants were aware of at least the possibility of RCRA violations, yet they failed to ensure the proper handling of the hazardous waste.<sup>205</sup> Thus, in light of settled mens rea doctrine, the holding in *Dee* arguably seems justifiable. Such a dilution of the mens rea principle by resort to the RCO doctrine, however, cannot be rectified.<sup>206</sup>

#### IV. THE COMMENTATORS

Several commentators have proposed that application of the RCO doctrine be extended to environmental crimes.<sup>207</sup> Like the court in *Johnson & Towers*, these commentators begin with the premise that environmental protection statutes are public welfare provisions in the

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203. *United States v. Dee*, 912 F.2d 741, 743 (4th Cir. 1990).

204. *Id.* at 745 (quoting *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)).

205. *See id.* at 748.

206. *See In re Dougherty*, 482 N.W.2d 485, 488 (Minn. Ct. App. 1992) (stating that, in civil case involving \$10,000 penalty, defendant-corporate president could be held liable under RCO doctrine for hazardous waste violations, notwithstanding insufficient evidence that he directly participated in alleged infractions, directed other employees, or ignored environmental regulations). Other environmental cases not discussed within the text of this Comment suggest the validity of dispensing with the mens rea requirement and essentially applying the RCO doctrine without so-classifying their analyses. *See, e.g., United States v. Baytank Houston, Inc.*, 934 F.2d 599 (5th Cir. 1991) (holding that specific intent was not required to support conviction of corporate defendant for failure to report release of hazardous chemicals); *United States v. Hoflin*, 880 F.2d 1033, 1036 (9th Cir. 1989) (finding that knowledge regarding permit requirement was not required for statutory violation). Several other cases have ratified the conviction of defendant-corporate officers without proof of actual knowledge, but on a basis other than inferring knowledge via corporate position. *See, e.g., United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989) (upholding conviction of corporate officer under statutory scheme requiring defendant to protect, prevent, and abate release of hazardous illegal substances into environment); *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988) (reversing decision of lower court to set aside guilty verdict for unlawfully dumping hazardous waste when defendant knowingly effected disposal); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986) (reversing decision of lower court to set aside guilty verdict when evidence demonstrated that defendant knowingly transported hazardous waste for purpose of illegal dumping).

207. *See Block & Voisin, supra* note 16, at 1357 (suggesting that RCO "merely raises inference that corporate officer possessed knowledge of the offense"); Heep, *supra* note 2, at 722 (suggesting that "[c]ourts should still make use of some form of the RCO doctrine in order to implement congressional intent in RCRA criminal cases"); Milne, *supra* note 14, at 309 (proposing that best way to remedy ill effects of pollution is to "actively pursue" criminal convictions of corporate policy makers for environmental violations).

same sense as the term has been applied to food and drug laws.<sup>208</sup> Accordingly, they argue that requisite levels of mens rea in such statutes should be lowered<sup>209</sup> or dispensed with entirely.<sup>210</sup>

One commentator suggests that the application of the RCO doctrine to environmental laws is legitimate because, in his view, Congress intentionally has left the definition of “knowingly”—insofar as the term applies to such statutes—to be decided by the courts.<sup>211</sup> The courts, he argues, have the right to interpret these provisions by applying whatever vehicles they deem appropriate, including the RCO doctrine.<sup>212</sup> He proffers that “[b]y not defining ‘knowingly,’ Congress recognized that the definition is not static, but rather changes according to modern jurisprudence and congressional guidance.”<sup>213</sup>

This Comment suggests, quite to the contrary, that the meaning of the “knowing” requirement in American criminal law is one of the few constants by which the law separates those who act criminally from those who simply act carelessly.<sup>214</sup> The Supreme Court’s decision in *Staples* refutes this commentator’s theory as well.<sup>215</sup>

Another commentator’s view evidences the emotional and moral, *but not legal*, principles on which he and some others base their arguments for strict liability environmental crimes.<sup>216</sup> He cites a prevalence of “[e]motionalism” and “anger” over corporate America’s ambivalent and “callous attitude” toward the environment.<sup>217</sup> Emotionalism and anger are understandable and appropriate reactions to pollution and environmental destruction.<sup>218</sup> Such

208. See Block & Voisin, *supra* note 16, at 1349 (asserting that it is well established that environmental laws are public welfare statutes); Heep, *supra* note 2, at 722 (comparing ambiguous mens rea requirement of FDCA with that of RCRA).

209. See Heep, *supra* note 2, at 723.

210. See Milne, *supra* note 14, at 335-36 (arguing that greater effort should be made to hold corporate officers strictly liable for environmental violations).

211. See Heep, *supra* note 2, at 723.

212. See *id.*

213. *Id.*; cf. Gabbett, *supra* note 14, at 57 (“Fortunately, some court decisions have effectuated the statutory purpose of public protection when construing the regulations concerning waste handling by imposing liability on corporate officers without a specific showing of intent.”).

214. See *supra* notes 25-39 and accompanying text.

215. In *Staples*, the Government argued that Congress intended to do away with the relevant intent requirement in order to aid in obtaining convictions. See *Staples v. United States*, 114 S. Ct. 1793, 1802 n.11 (1994). The Supreme Court maintained that “if Congress thinks it necessary to reduce the Government’s burden [of proof], . . . it remains free to amend 28 U.S.C. § 5861(d) by explicitly eliminating a mens rea requirement.” *Id.*

216. See Colbert, *supra* note 192, at 700 (indicating that public is angry and emotional over environmental crime).

217. See *id.*

218. The author is an avid animal rights activist and is a strong proponent of maintaining a clean and safe environment for all living things. She too is angered and upset by damage inflicted upon the water, the air, and the earth’s surface.

responses, however, are an inadequate basis for reordering settled principles of jurisprudence, such as the mens rea requirement, and would be directed more appropriately to the legislature, rather than to the courts.

A third commentator argues that because environmental crimes result in harms of great magnitude, they are more reprehensible than most traditional crimes and warrant a complete negation of any scienter requirement.<sup>219</sup> He proposes that the best way to address environmental violations is to pursue actively the convictions of high-level corporate officers on a wide scale basis.<sup>220</sup> Despite the moral appeal of this conclusion, such an endeavor still must entail the finding of proof as to an officer's culpability, if only through circumstantial evidence, to harmonize with the mens rea principle.

In general, several commentators have observed that determining corporate-officer criminal responsibility, within the context of environmental crimes, is difficult.<sup>221</sup> It often is relatively easy to assign knowledge to lower-level employees who actually handle hazardous waste; but it is more onerous to prove the culpability of a superior who may have *directed* the unlawful activity.<sup>222</sup> This argument seems as compelling as any for upholding a corporate officer's conviction on the basis of company position. Notwithstanding this difficulty encountered by prosecutors, however, proof of guilt beyond a reasonable doubt, which includes some level of mental culpability on behalf of the officer, still is required by law.<sup>223</sup> The integrity of the American criminal justice system depends on the uncompromising adherence to its nucleus—the mens rea principle.

Certain commentators also observe that imposing strict criminal liability on corporate officers would serve as a deterrent insofar as officers presumably would be more likely to take investigative and precautionary measures than they would absent the risk of strict

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219. See Milne, *supra* note 14, at 319-20, 336 (stating that standards of proof that courts have imposed for proving environmental crimes are "tantamount to strict liability," and that more convictions would occur if government aggressively pursued these opportunities).

220. See *id.* at 309, 336.

221. See *id.* at 332 (characterizing knowledge standard of environmental violation as "the major stumbling block" to prosecution); see also Colbert, *supra* note 192, at 701-02 (stating that application of respondeat superior typically is not used for criminal violations requiring mens rea); Heep, *supra* note 2, at 700 (noting ambiguity in using RCO doctrine to facilitate showing of mens rea).

222. See Heep, *supra* note 2, at 722. *But see* Liparota v. United States, 471 U.S. 419, 434 (1985) (observing that government may prove knowledge of illegal activity indirectly by "reference to facts and circumstances surrounding the cases that [the defendant] knew that his conduct was unauthorized or illegal").

223. See *supra* Part I.A.

liability.<sup>224</sup> This argument, although powerful, is subject to the same criticism given above: it undercuts the mens rea principle. In addition, it bears consideration that when proof of a defendant's culpability in a given situation is negligible, that defendant may indeed be innocent.<sup>225</sup>

## V. RECOMMENDATIONS

As discussed above, recommendations to expand the RCO doctrine persist and courts undoubtedly will continue to be urged to apply the doctrine in other areas of law.<sup>226</sup> This Comment suggests that expanded application of the doctrine, that is, *any* application beyond narrow factual settings like those present in *Dotterweich* and *Park*, is not justifiable.<sup>227</sup> This conclusion follows from, and is supported by, a number of factors, including policy considerations.

First, there is reason to question whether the imposition of strict criminal liability on corporate officers will, in the long run, create socially desirable incentives. In the short run, admittedly, some corporate officers *will* be motivated to act assiduously to ensure compliance with putative public welfare enactments. Ultimately though, the possibility of strict criminal liability, involving the payment of substantial, uninsurable, and non-indemnifiable penalties,

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224. See Heep, *supra* note 2, at 731. But see SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 198-202 (4th ed. 1983) (pointing out difficulties in determining actual deterrent effects of criminal sanctions).

225. In contrast to the beliefs of these commentators, others analyze the RCO doctrine in a fashion that is harmonious with the mens rea principle. See Hartman & De Monaco, *supra* note 79, at 10,153 (stating that RCO doctrine should not eliminate statute's knowledge requirement and criminal enforcement may not always be appropriate course of action, particularly when it cannot be proved, by circumstantial evidence or otherwise, that relevant corporate officer had actual knowledge of unlawful activity at issue); Richard S. Porter, *Environmental Law: Does the Application of the Responsible Corporate Officer Doctrine Apply to the Resource Conservation and Recovery Act?*, 16 S. ILL. U. L.J. 687, 687-88 (1992) (arguing that if RCO doctrine may be applied to RCRA without express congressional intent, every "public welfare" statute could similarly be reduced to create strict liability offense—"a mammoth undertaking that is properly left to Congress and not to the courts"); Zarky, *supra* note 24, at 994 (suggesting that problem of deterring corporate officers from directing or permitting unlawful activity is more appropriately addressed through civil liability system than through criminal law).

226. At least one court has refused to apply the RCO doctrine in contexts other than environmental regulation. In *Beaulieu v. RSJ, Inc.*, 532 N.W.2d 610 (Minn. Ct. App. 1995), the court held that the RCO doctrine could not be invoked to impose strict criminal liability on corporate officers for the violation of a state employment discrimination statute when the statute required that the defendant "know or should know" of the discriminatory act. See *id.* at 613-14. The attempt to invoke the doctrine in such a case, however, indicates the potential for its expansion beyond the environmental context. See *supra* note 84 and accompanying text (describing expansion of "public welfare" terminology to wide range of statutes such as environmental and criminal).

227. See *supra* Part II.

as well as lengthy prison sentences, is likely to dissuade capable and responsible individuals from accepting jobs that carry such a prospect.<sup>228</sup> Accordingly, an expanded application of the RCO doctrine may in fact have the ironic and undesired effect of ensuring that critical organizational positions—for example, those responsible for implementing a company's environmental compliance measures—are staffed by less capable and perhaps, more importantly, by less "risk averse" individuals.

Second, the preeminence of the mens rea requirement in criminal law, as indicated by *Staples* and a host of earlier decisions, does not merely reflect a recent policy choice. Both the English and the American legal systems have recognized criminal intent as an essential element of criminal liability for hundreds of years. This fact exhibits, at least in part, the settled judgment that overall societal interests are best served when the severe burden of criminal liability and punishment are reserved for those with "guilty minds"<sup>229</sup> and are not imposed simply as an extra incentive to assist in achieving narrower goals such as environmental safety. Accordingly, displacement or dilution of the mens rea requirement to advance such goals, should not be taken lightly.

In this same vein, use of an expanded RCO doctrine as a tool to engineer environmental safety might have unfair and discriminatory effects.<sup>230</sup> For example, utilizing the doctrine to hold corporate officials, as a class of defendants, strictly criminally liable subjects them to risks and burdens that others in society do not face. Regardless of whether this creates concerns of constitutional dimension,<sup>231</sup> such an application would give rise to questions of fairness and of whether a system in which strict criminal liability is a risk for some but not others, will command public respect.<sup>232</sup>

Finally, as noted above, this Comment maintains that the primary purpose of the criminal law is to punish wrongdoers retrospectively, and not to stimulate behavior prospectively. For all of the above-

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228. See *Zarky*, *supra* note 24, at 994 (recognizing that to hold officers strictly liable may deter people who have expertise from taking corporate positions for fear of prosecution).

229. See *supra* notes 25-39 and accompanying text.

230. See *KADISH*, *supra* note 224, at 198-202 (pointing out that ability to determine deterrent effects of criminal sanctions is limited by inability to eliminate other factors that could account for changed behavior).

231. See *Zarky*, *supra* note 24, at 994 (suggesting that disparate treatment of employees may result in equal protection problem).

232. See Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 518-19 (1967) (stating that strict liability unnecessarily "establishes a standard [that] can only breed frustration and disrespect for the law . . . [by] impos[ing] criminal sanctions irrespective of care").

mentioned reasons then, this Comment thus recommends that the United States Department of Justice and the Environmental Protection Agency reflect the necessity of proving knowing conduct when writing their respective corporate investigative policies.

### CONCLUSION

The RCO doctrine, under which corporate officials can be subject to criminal liability for the violation of so-called "public welfare" statutes without any showing of actual criminal intent, should not be expanded to achieve modern regulatory goals, even those as worthy as environmental safety. The doctrine arose in the context of food and drug regulation; yet even in this narrow context, its vitality was and is uncertain. On close reading, the Supreme Court's decisions in *Dotterweich* and *Park* do not appear to provide unequivocal approval of the RCO doctrine. Although a few subsequent cases have invoked the doctrine to justify the imposition of strict criminal liability in the context of environmental regulations, an overwhelming majority of decisions, despite confusing or misleading dicta, has rejected efforts to extend its use.<sup>233</sup>

With the Supreme Court's recent reaffirmation of the significance of the mens rea requirement in cases such as *Staples* and *X-Citement*, it appears unlikely that the Court would sanction any expanded application of the RCO doctrine. Finally, there are significant policy considerations that weigh heavily against expanded use of the doctrine at the expense of the mens rea requirement, which is fundamental to American criminal jurisprudence.

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233. See Richard G. Singer, *The Myth of the Doctrine of the Responsible Corporate Officer*, 6 TOXICS L. REP. (BNA) No. 44, at 1373, 1381 (Apr. 8, 1992). Singer states:

At the very best, an impartial reader would have to say that [these] decisions are uncertain and conflicting, that they often contain language that suggests the [c]ourt is embracing strict liability, but that their holdings consistently refuse to go that far. Still these are the cases that created the RCO myth in the environmental field . . . .

*Id.*