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RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement

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INTRODUCTION

The Resource Conservation and Recovery Act (RCRA)\(^1\) was passed by Congress in 1976 as part of the growing national effort to control the dangers of environmental pollution.\(^2\) Section 6928(d) of RCRA provides that certain criminal acts committed knowingly shall be punished as felony offenses.\(^3\) Confusion over how to apply the knowledge requirement under this section of the Act\(^4\) has centered around the application of the responsible corporate officer (RCO) doctrine\(^5\) that has been developed by the Supreme Court in the context of strict liability crimes.\(^6\)

\(^{3}\) The section provides in part as follows:
   (d) Criminal penalties
   Any person who —
   (1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter . . .
   (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—
      (A) without a permit under this subchapter . . .
      (B) in knowing violation of any material condition or requirement of such permit;
      or
      (C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards; . . . shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years . . . , or both.
\(^{4}\) See, e.g., United States v. Laughlin, 768 F. Supp. 957, 960 (N.D.N.Y. 1991) (noting confusion over congressional intent of "knowingly").
\(^{5}\) See generally Alan Zarky, The Responsible Corporate Officer Doctrine, 5 Toxics L. Rep. (BNA) No. 31, at 983 (Jan. 9, 1991) (discussing the doctrine as a hybrid of corporate and criminal law).
\(^{6}\) See infra part I.A.
In the past decade, two federal courts of appeals have looked favorably upon the use of variants of the RCO doctrine to obtain criminal convictions under § 6928(d) of RCRA.7 By contrast, in the recent case United States v. MacDonald & Watson Waste Oil Co.,8 the First Circuit overturned a jury trial conviction that had relied on certain aspects of the RCO doctrine.9 The court rejected the use of the RCO doctrine because, in the court’s view, it effectively short-circuits the RCRA’s knowledge requirement.10

This Note addresses the resulting conflict among the circuits. Part I traces the development of the responsible corporate officer doctrine in Supreme Court decisions concerning public welfare statutes. Part II deals with the history of the knowledge requirement under § 6928(d) of RCRA, as interpreted by various federal courts of appeals. Finally, Part III discusses MacDonald & Watson in light of this background.

This Note concludes that application of the RCO doctrine is inappropriate in a case that requires proof of actual knowledge as part of the statutory definition of the crime. This is so even when Congress intended the statute being construed to aid in protecting the public welfare. Concerns over due process place strict criminal liability on shaky constitutional footing; as such, the scope of such liability should not be extended arbitrarily by the courts without a clear expression of congressional intent to do so. The use of the RCO doctrine allows the government to side-step a mens rea requirement by establishing a defendant’s knowledge as to any element of a crime, without proving actual knowledge. Because of this possibility, the doctrine should not be used as a means of obtaining a conviction under § 6928(d) of RCRA, which includes knowledge as an element of all the crimes it defines.11

I. THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

A. Supreme Court Decisions

The Supreme Court developed the RCO doctrine in the context of strict criminal liability, i.e., in relation to crimes that have no

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8 933 F.2d 35 (1st Cir. 1991).
10 See id. at 51-52.
11 See supra note 3 and accompanying text.
mens rea requirement. Such crimes are usually found in regulatory statutes and are often termed public welfare offenses. The RCO doctrine has its roots in *United States v. Balint*, in which the Court stated: "[T]he State may in the maintenance of a public policy provide 'that he who shall do [particular prohibited acts] shall do them at his peril and will not be heard to plead in defense good faith or ignorance.'" *Balint* was concerned chiefly with the constitutionality of imposing a felony conviction on the basis of strict liability. The Court held that this practice was not a violation of due process, in large part because the importance of protecting the public health and safety outweighed the "possible injustice of subjecting an innocent seller [of narcotics] to a penalty."

*United States v. Dotterweich* was the first Supreme Court case to deal directly with the question of strict liability for criminal defendants charged on the basis of their position within a corporate structure. The Court established important principles in *Dotterweich*. First, legislation that promoted public welfare could "dispense[ ] with the conventional requirement for criminal conduct—awareness of some wrongdoing." Second, congressional intent was to be a central consideration when a court balanced the goal of protecting the individual from unjust prosecution against that of protecting the public from undue risks to health and safety. Third, not only could the actor that created the public welfare risk be liable for resulting harm, but anyone "otherwise innocent but standing in a responsible relation to a public danger" could be held liable as well. In the current context, this "responsible relation" applies to those whose supervisory duties include control over activities that present a risk of hazard to the community at large. Such activities include the

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13 258 U.S. 250 (1922) (involving an indictment for a violation of the Narcotic Act of 1914, Pub. L. No. 63-223, 38 Stat. 785, in which the defendant argued that the government had the burden of proving that he knew that the substances sold were illegal drugs).
16 Balint, 258 U.S. at 254.
17 320 U.S. 277 (1943).
19 See "Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.").
20 Id. at 281 (emphasis added) (citation omitted).
distribution for sale of foods and drugs that might be adulterated, and the disposal of hazardous wastes.\textsuperscript{21}

\textit{Morissette v. United States}\textsuperscript{22} further elaborated on the doctrine of strict criminal liability. Although Justice Jackson’s opinion conveyed concern with the notion of strict liability in criminal prosecutions,\textsuperscript{23} Jackson explained that it is appropriate in the context of public welfare offenses:

[L]egislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.\textsuperscript{24}

Jackson also indicated that an important consideration for the Court, besides the public policy established by the legislature, was the size and stigma of the penalty,\textsuperscript{25} noting that strict criminal liability was appropriate only when \textquotedblleft penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.\textsuperscript{26}\textquotedblright

Finally, Jackson remarked that many public welfare offenses \textquotedblleft are in the nature of neglect where the law requires care, or inaction where it imposes a duty,\textsuperscript{27}\textquotedblright thus indicating that a failure to act can be just as culpable as a prohibited action.

In \textit{Morissette}, the Court concentrated on the fact that Congress had codified a common law crime.\textsuperscript{28} Later, in two cases heard during the October, 1970 Term, the Court addressed the question of how

\begin{itemize}
  \item \textsuperscript{22} 342 U.S. 246 (1952). The statute that Morissette allegedly violated provided that \textquoteleft[w]hoever embezzles, steals, purloins, or knowingly converts\textquoteright property of the United States shall be subject to fine and imprisonment. \textit{See id.} at 248 n.2 (quoting 18 U.S.C. § 641 (current version at 18 U.S.C. § 641 (1988))).
  \item \textsuperscript{23} \textit{See id.} at 250 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.").
  \item \textsuperscript{24} \textit{Id.} at 256.
  \item \textsuperscript{25} Morissette was convicted of a misdemeanor offense and sentenced to two months imprisonment or a $200 fine. \textit{See id.} at 248.
  \item \textsuperscript{26} \textit{Id.}
  \item \textsuperscript{27} \textit{Id.} at 255.
  \item \textsuperscript{28} \textit{See id.} at 262-63. Courts cannot do away with the traditional mens rea requirement for a codified common law crime unless Congress clearly so intends. When an "offense is new to general law," however, an apparent failure to include criminal intent as a requirement for conviction can be construed to intend the creation of a strict liability crime. \textit{Id.} at 262. The Court refused to allow a conviction without proof of Morissette's intention as to the acts alleged: "He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." \textit{Id.} at 271.
\end{itemize}
to apply a knowledge requirement to a public welfare offense. In *United States v. Freed*, the alleged crime involved possession of unregistered firearms, and the relevant statute contained no mens rea requirement. The opinion of the Court, delivered by Justice Douglas, stated that a "regulatory measure in the interest of the public safety ... 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."  

Justice Brennan, in his concurring opinion, divided the crime into its three elements: (1) possession of items that (2) are hand grenades and (3) are unregistered. He posited that the legislative history made clear Congress’s intention to require proof of defendant’s mens rea as to the first two elements of the crime.

As to the third element, Brennan made an important distinction between ignorance of the law, which is no excuse, and ignorance of a legal element of the crime, which may be a valid ignorance of fact defense. Given a mens rea requirement as to whether the grenades are registered, the defendant could not claim ignorance of the registration requirement, as such a claim would be an untenable ignorance of the law defense. A claim that he mistakenly believed that the weapons were registered, however, would be a claim of ignorance of "circumstances that the law has defined as material to the offense." These circumstances would be a set of facts that contain a legal element, and as such would be a basis for an ignorance of fact defense. This defense would not be disallowed *per se*.

Brennan concluded by stating that Congress did not in fact require proof of mens rea as to whether the grenades were unregistered: "Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be

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31 Id. at 609.
32 See id. at 612, 614 (Brennan, J., concurring). Brennan pointed to the mens rea requirement under the case law interpreting the provisions replaced by the amendments that were construed in the case. Because Congress was aware of this case law at the time the amendments were passed, "we may therefore properly infer that Congress meant that the Government must prove knowledge with regard to the first two elements of the offense under the amended statute." Id. at 614 (Brennan, J., concurring).
33 Id. at 615 (Brennan, J., concurring).
34 See id. (Brennan, J., concurring).
presumed to be aware of it."\(^{35}\) Brennan agreed with the Court that the statute was meant to impose strict criminal liability on violators, at least as to the third element of the offense.\(^{36}\)

Apparently, when strict liability is intended by Congress, a court will allow a presumption that a defendant knew what the average person would be expected to know. This presumption, that the average person realizes that the possession and use of dangerous materials is likely to be regulated by law, enables a court to avoid the due process problem first raised in \textit{Balint}.\(^{37}\)

In \textit{United States v. International Minerals \& Chemical Corp.},\(^{38}\) the Court construed a statute providing that whoever "knowingly violates any . . . regulation" regarding the shipment of dangerous acids, as formulated by the Interstate Commerce Commission (ICC) pursuant to the statute, "shall be fined or imprisoned."\(^{39}\) The Court likened this case to \textit{Freed} in that neither of the statutes involved in the cases imposed strict liability; both required knowledge by a defendant of the shipment of dangerous materials.\(^{40}\) Here, the Court misconstrued its own prior analysis, for \textit{Freed} had in fact imposed strict liability as to at least the third element of the alleged offense.\(^{41}\)

In analyzing the statute, the Court relied on legislative history to determine that Congress had not intended to create strict criminal liability.\(^{42}\) As a result, the knowledge requirement applied to each element of the offense, although the government did not have to prove that the defendant had knowledge of the regulation.\(^{43}\) Only ignorance as to the legal aspects of a material fact or circumstance would be a valid defense. Therefore, "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered"\(^{44}\) by the statute. Justice Douglas concluded the Court's opinion by stating:

\(^{35}\) \textit{Id.} at 616 (Brennan, J., concurring).
\(^{36}\) \textit{See id.} at 616 (Brennan, J., concurring); \textit{id.} at 609 (explaining the court's rationale for imposing strict liability as to the third element of the offense) (citing \textit{Balint}, 258 U.S. at 254).
\(^{37}\) \textit{See supra} notes 13-16 and accompanying text.
\(^{38}\) 402 U.S. 558 (1971).
\(^{40}\) \textit{See id.} at 560.
\(^{41}\) \textit{See supra} notes 29-37 and accompanying text.
\(^{42}\) \textit{See International Minerals}, 402 U.S. at 563. "There is leeway for the exercise of congressional discretion in applying the reach of 'mens rea.'" \textit{Id.} at 564 (citations omitted).
\(^{43}\) \textit{See id.} at 563.
\(^{44}\) \textit{Id.} at 563-64.
Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require... “mens rea” as to each ingredient of the offense. But where, as here and as in Balint and Freed, 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.\textsuperscript{45}

In \textit{United States v. Park},\textsuperscript{46} the Court returned to the Food, Drug, and Cosmetic Act (FDCA), a strict liability statute under which it had first begun to develop the responsible corporate officer doctrine.\textsuperscript{47} The court of appeals had properly followed the Dotterweich opinion in ruling that the FDCA did not require proof of “awareness of wrongdoing.”\textsuperscript{48} It had held also that Park could be found guilty only if the government proved a “wrongful action” on his part.\textsuperscript{49}

The Supreme Court began its opinion by discussing the familiar agency theory of vicarious liability. Under this theory, the criminal act of a subordinate could create liability for his or her superiors “who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for [the act’s] commission. ... [W]here the statute ... dispense[s] with ‘consciousness of wrongdoing,’ an omission or failure to act [is] a sufficient basis for a responsible corporate agent’s liability,” even without knowledge on the part of the agent.\textsuperscript{50} In the context of this type of strict liability statute, responsible corporate agents are held to the “requirements of foresight and vigilance” in areas in which they are vested with responsibility and power.\textsuperscript{51}

The Court in \textit{Park} retreated slightly from the severity of the strict liability standard applied in \textit{Dotterweich}. First, Chief Justice

\textsuperscript{45} Id. at 564-65 (emphasis added).


\textsuperscript{47} See supra notes 17-20 and accompanying text.

\textsuperscript{48} See supra notes 17-20 and accompanying text.

\textsuperscript{49} See id. at 660-63.

\textsuperscript{50} Id. at 670-71.

\textsuperscript{51} Id. at 672 ("[T]he Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.").
Burger spoke of "some measure of blameworthiness" arising from the "responsible relationship" between the corporate officer and the violation. Indeed, Burger made clear that the responsible corporate officer was not to be found guilty "solely on the basis of [his] position in the corporation." Second, the defendant officer could present a defense to the charge based on a claim that he was "powerless" to prevent or correct the relevant violation. Thus, even in a case of strict criminal liability, the defendant is afforded possible relief from liability based solely on his "responsible" corporate position.

The final Supreme Court case to address the general issue of the mens rea requirement for public welfare offenses is Liparota v. United States. In Liparota, the defendant was alleged to have committed food stamp fraud by violating a statute that punished "whoever knowingly uses, transfers, acquires, alters, or possesses coupons . . . in any manner not authorized by [the statute] or the regulations." The issue was whether the government had to prove that the defendant knew his actions were illegal. The Court held that the unauthorized nature of the defendant's conduct was a material fact, and a legal element of the crime, so that defendant's claim of ignorance of the regulations was an acceptable ignorance of fact defense. The government was left with the task of proving that the defendant knew his acts were unauthorized, "as in any other criminal prosecution requiring mens rea, . . . by reference to facts and circumstances surrounding the case."

Justice Brennan, delivering the opinion of the Court, classified public welfare offenses into two categories: (1) where the offenses "depend on no mental element but consist only of forbidden acts or omissions," and (2) where "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." He concluded that the presence of the

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52 See id. at 673.
53 Id. at 674.
54 See id. at 673.
57 See id. at 425 n.9.
58 Id. at 434.
59 Id. at 432 (quoting Morissette, 342 U.S. at 252-53).
60 Id. at 433.
knowledge requirement in the statute, coupled with the innocuous nature of food stamp coupons, prevented this case from fitting into either category.61

B. Analysis

Important conclusions can be drawn from the preceding account. First, congressional intent is a central consideration in determining the scope of the RCO doctrine. Any attempt to extend that doctrine to include types of public welfare offenses that do not involve strict liability should be based on the clearly expressed intent of Congress. Second, application of the RCO doctrine does not mean that a corporate officer charged with a crime is defenseless, despite having been charged without having had a "consciousness of wrongdoing." Third, those engaged in the handling of "obnoxious waste materials" can be presumed to be aware of the existence of regulations concerning those materials. The Supreme Court has generally refrained, however, from extending this presumption of knowledge to cover actual violations of these regulations. It is only with respect to strict liability crimes that the Court has been willing to dispense with the "consciousness of wrongdoing" for corporate officers. With respect to mens rea requirements, the Court has allowed a presumption as to knowledge of regulation, but this does not mean that a court can presume that a responsible corporate officer had knowledge of an actual violation.

Finally, because the responsible corporate officer doctrine has been developed in the context of strict criminal liability, it is inappropriate to apply it to criminal statutes that have a mens rea requirement. More traditional doctrines of liability, such as the vicarious liability aspects of agency theory or the doctrine of willful blindness,62 can serve the function of convicting corporate officers and should be preferred to the RCO doctrine in the context of statutory provisions with mens rea requirements. The use of the RCO doctrine in such contexts makes it too easy for juries and courts to overlook the need to prove that the defendant had actual knowledge as to every element of the alleged crime.

61 See id.
62 See infra notes 66-71 and accompanying text.
II. THE KNOWLEDGE REQUIREMENT

A. Overview

The first task that a court faces when dealing with a criminal statute that contains a knowledge requirement is to determine the parameters to use in applying that requirement to each element of the offense. Section 6928(d) of the RCRA uses the term "knowingly," which is defined by the Model Penal Code in the following terms:

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

In order to "know" certain facts one must be "actually aware of them."

Certain qualifying doctrines regarding the knowledge requirement have developed, the most important for the purposes of this Note being "willful blindness." The basic tenet of this doctrine is that a crime's knowledge requirement is satisfied if the defendant was aware at the time of the alleged crime that there was a "high probability" that his actions were illegal and then failed to investigate the situation, as a means of shielding himself from knowledge of the truth. Some courts may require additionally that the defendant's motive for remaining ignorant was to avoid future liability.

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64 MODEL PENAL CODE § 2.02(2)(b) (1962).
65 Id.; see also Jane F. Barrett & Veronica M. Clarke, Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee, 59 Geo. Wash. L. Rev. 862, 873 (1991) ("An act is done ‘knowingly’ if it is ‘done voluntarily and intentionally and not because of ignorance, mistake, accident, or other innocent reason.’" (citations omitted)).
66 See Hansen, supra note 12, at 990.
67 See id. at 991-93. In United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985), the court held: "[T]he government must present evidence indicating that [the] defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of subsequent prosecution. Absent such evidence, the jury might impermissibly infer guilty knowledge on the basis of mere negligence without proof of deliberate avoidance." Id. at 1098.
In *United States v. Jewell*, the defendant was convicted on the basis of a willful blindness instruction. Justice (then Judge) Kennedy criticized the majority for allowing the instruction to be used to lower the mens rea requirement—from a requirement of knowledge to one of recklessness or negligence in failing to investigate a suspicion regarding the facts. As one commentator has put it, ""There is no conscious purpose to avoid learning the truth when the risk of unlawfulness has not been realized."" Further, Kennedy argued that ""[w]hen a statute specifically requires knowledge as an element of a crime . . . the substitution of some other state of mind cannot be justified even if the court deems that both are equally blameworthy."" 

B. The Knowledge Requirement in Previous Courts of Appeals Cases

A problem that is encountered frequently when dealing with statutes that contain a knowledge requirement is determining the elements to which the knowledge requirement applies. Section 6928(d) contains five elements that could contain a knowledge requirement: (1) knowledge of the act of disposing of materials, (2) knowledge of the fact that RCRA regulates the disposal of dangerous waste materials, (3) knowledge of the permit requirement for a waste disposal site, (4) knowledge of the permit status of the facility to which hazardous wastes are transported, and (5) knowledge that the disposed material is in fact hazardous within the terms of RCRA.* United States v. Johnson & Towers, Inc.* presented the first opportunity for the courts of appeals to consider this issue.

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6 See United States v. Jewell, 532 F.2d 697, 707 (9th Cir.), cert. denied, 426 U.S. 951 (1976) (Kennedy, J., dissenting). Here, defendant drove someone else's car across the border into the United States. Marijuana was enclosed in a secret compartment within the car. Defendant claimed no knowledge of what was in the compartment, although he admitted knowing of its existence. The jury found, pursuant to a willful blindness instruction, that defendant had the required mens rea because defendant failed to inquire into the contents of the compartment.
70 Hansen, supra note 12, at 992 (quoting Rollin M. Perkins, "Knowledge" as a Mens Rea Requirement, 29 Hastings L.J. 953, 964 (1978)).
71 Jewell, 532 F.2d at 706 (footnote omitted).
72 See Barrett & Clarke, supra note 65 (setting forth the elements for which knowledge may be required); see also Rebecca S. Webber, Elements Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?, 16 B.C. ENVTL. AFF. L. REV. 53, 84 (1988) (listing the elements to be considered).
individual defendants in the case, managers of a motor vehicle repair facility, were charged with criminal liability for violations under § 6928(d) of RCRA. The violations occurred when workers at the facility pumped waste chemicals from cleaning operations into a trench that eventually led into the Delaware River.\textsuperscript{74}

The Third Circuit discussed the problem created by the ambiguous use of the word "knowingly" in § 6928(d)(2).\textsuperscript{75} The problem is to determine "how far down the sentence the word 'knowingly' is intended to travel."\textsuperscript{76} First, the Third Circuit noted that because RCRA is a regulatory or "public welfare" statute, "there would be a reasonable basis for reading the statute without any mens rea requirement."\textsuperscript{77} The use of the word "knowing" in subsection (B) of 6928(d)(2),\textsuperscript{78} however, gave the court pause. This language implied that the government had a more difficult task in convicting one that had violated a material permit condition at a permitted site (under subsection (B)) than in convicting one that had used a site that had no permit at all (under subsection (A)). Finding this to be counterintuitive, the Third Circuit concluded that the knowledge requirement must apply to every element of the offense outlined in § 6928(d)(2).\textsuperscript{79}

The court then stated that the government's task of proving knowledge would not be particularly onerous, however, because the defendant would be presumed to know that his actions are subject to regulation when he is dealing with dangerous waste materials. The court cited \textit{United States v. International Minerals & Chemical Corp.}\textsuperscript{80} for the proposition that "under certain regulatory statutes requiring 'knowing' conduct the government need prove only knowledge of the actions taken and not of the statute forbidding them."\textsuperscript{81} Next, however, the court attempted to make the governmental task of proof even easier by referring to the "absolute liability"

\textsuperscript{75} See id. at 667-68.
\textsuperscript{76} \textit{Liparota v. United States}, 471 U.S. 419, 425 (1985) (citing \textit{Wayne LaFave & Austin W. Scott, Criminal Law} § 27 (1972)).
\textsuperscript{77} \textit{Johnson & Towers}, 741 F.2d at 668 (citing United States v. Behrman, 258 U.S. 280, 288 (1922); United States v. Balint, 258 U.S. 250, 252-54 (1922)). The Court stated: "[C]riminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose." Id. at 666.
\textsuperscript{78} For the relevant text of this subsection, see \textit{supra} note 3.
\textsuperscript{79} See \textit{Johnson & Towers}, 741 F.2d at 668-69.
\textsuperscript{80} 402 U.S. 558 (1971).
\textsuperscript{81} \textit{Johnson & Towers}, 741 F.2d at 669.
threatening officers, agents, and employees of a corporation when they deal with "obnoxious waste materials." The court's authority for this proposition derived from United States v. Dotterweich and United States v. Balint. Both of these latter cases, however, construed statutes that involved strict criminal liability.

Such liability dispenses with the conventional requirement for "consciousness of wrongdoing" on the part of the defendant. The Third Circuit held that the "knowledge" requirement under RCRA could be satisfied by inference from the individual defendants' "requisite responsible positions" within the corporation, apparently because as managers they should have known of the violations.

A later case, United States v. Dee, approved of a much more direct application of the RCO doctrine. In Dee, the three individual defendants were responsible for RCRA compliance at the United States Army's Aberdeen Proving Ground. Dee was informed of improper disposal of lab wastes in violation of RCRA regulations as early as 1984. Violations continued through 1986, despite warnings on more than one occasion that cleanup was needed. Dee testified that he did not feel that the chemicals were a serious problem. He argued that the government had failed to prove that he had the requisite "intent" to violate RCRA.

The Fourth Circuit ruled directly on two arguments made by the individual defendants: (1) that the government had not proven "that they knew that violation of RCRA was a crime," and (2) that they had been "unaware that the chemicals they managed were hazardous wastes" in terms of the RCRA regulations. The court correctly and easily dispensed with these arguments. First, in the light of International Minerals and other Supreme Court precedents, "ignorance of the law is no defense," especially when defendants were dealing with "obnoxious waste materials" for which the knowledge of regulation is to be presumed. Second, the knowledge requirement in § 6928(d)(2)—that defendants knowingly disposed of

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82 Id. (citing International Minerals, 402 U.S. at 569).
83 320 U.S. 277 (1943).
84 258 U.S. 250.
85 See supra part I.A.
86 See supra notes 13-21 and accompanying text.
87 Johnson & Towers, 741 F.2d at 670.
89 See Barrett & Clarke, supra note 65, at 866-70.
91 See id.
“any hazardous waste identified or listed under this subchapter”—is met as long as defendants were aware of the dangerous or “obnoxious” nature of the waste materials involved. Although the Fourth Circuit disapproved of the jury instruction used at the trial level, which had failed to indicate that defendants at least had to know that the waste materials involved were dangerous or “hazardous,” the court held this instruction to be harmless.

Having properly disposed of these issues, the court then erred by allowing the RCO doctrine to taint the jury instructions. In a footnote, the court stated that “[a]s a whole, the instructions ‘fairly and adequately state[d] the pertinent legal principles involved.’” Although the RCO doctrine was never mentioned explicitly in the Fourth Circuit’s opinion, the jury instructions that it approved reflected an express adaptation of that doctrine to the facts presented at trial. This Note disagrees with the use of the RCO doctrine in this context, for it allows a conviction based upon defendant’s “knowing” failure to detect a violation. This seems a contradiction in terms, for failure to detect is at best negligence—unless it results from willful blindness, in which case an instruction to the jury concerning the willful blindness doctrine would be appropriate. Innocently failing to detect a violation, or even doing so negligently

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92 See id.; supra note 45 and accompanying text.

93 See Dee, 912 F.2d at 745; see also Barrett & Clarke, supra note 65, at 880-81 (discussing the knowledge requirement as analyzed by the Fourth Circuit).

94 See Dee, 912 F.2d at 745.

95 Id. at 746 n.8 (quoting Hogg’s Oyster Co. v. United States, 676 F.2d 1015, 1019 (4th Cir. 1982)).

96 See Barrett & Clarke, supra note 65, at 885. The court instructed the jury as follows:

Among the circumstances you may consider in determining the defendant’s knowledge are their positions in the organization, including their responsibilities under the regulations and under any applicable policies. Thus you may, but need not, infer that a defendant knew facts which you find that they should have known given their positions in the organization, their relationship to other employees, or any applicable policies or regulation.

... [A]s managers within the munitions directorate, defendants may be found guilty of counts one, two, three, or four if you find that the government has proved each of the following beyond a reasonable doubt:

First, that each defendant has a responsible relation to the violation. That is, that it occurred under his area of authority and supervisory responsibility.

That each defendant had the power or the capacity to prevent the violation.

That each defendant acted knowingly in failing to prevent, detect, or correct the violation.

Id. (quoting Joint Appendix to Appellee’s Brief at 1154-55, United States v. Dee, 912 F.2d 741 (4th Cir. 1990) (No. 90-877), cert. denied, ___ U.S. ___, 111 S. Ct. 1307 (1991)).
or recklessly, is not a knowing violation for the purposes of the RCRA statute.97

III. United States v. MacDonald & Watson Waste Oil Co.

The most recent court of appeals case to address the RCO doctrine in light of an RCRA violation is United States v. MacDonald & Watson Waste Oil Co.98 MacDonald & Watson (MacDonald) operated a waste disposal facility under the Rhode Island RCRA permit of Narragansett Improvement Co. (NIC) at the Poe Street Lot leased from NIC. The permit authorized disposal of liquid hazardous wastes only. Neither MacDonald nor NIC had an RCRA permit for solid wastes. D’Allesandro, president of MacDonald, admitted that he was the manager of the waste operations at the Poe Street Lot. Master Chemical Company contracted with MacDonald to dispose of certain hazardous wastes, including toluene-contaminated soil. Shipments of the soil were made to the Poe Street lot under the supervision of two employees of MacDonald. The corporation, its president, and the two supervising employees were all charged99 with criminal violations of § 6928(d) of RCRA.100

The First Circuit overturned the conviction of President D’Allesandro because

the district court erred by instructing the jury that proof that a defendant was a responsible corporate officer, as described, would suffice to conclusively establish the element of knowledge expressly required under § 3008(d)(1). . . . In a crime having knowledge as an express element, a mere showing of official responsibility under Dotterweich and Park is not an adequate substitute for direct or circumstantial proof of knowledge.101

The faulty jury instruction made explicit the possibility that the jury could find the RCRA knowledge requirement to be satisfied either through the traditional showing of actual knowledge, based upon either direct or circumstantial evidence, or alternatively through the use of the RCO doctrine.102

97 See generally Zarky, supra note 5, at 983.
98 933 F.2d 35 (1st Cir. 1991).
99 See MacDonald & Watson, 933 F.2d at 39-40.
101 MacDonald & Watson, 933 F.2d at 55.
102 See id. at 50. The district court had instructed the jury as follows:

When an individual Defendant is also a corporate officer, the Government may
The First Circuit based its reasoning on the complete lack of "precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute." The court rejected *United States v. Dotterweich* and *United States v. Park* as inapplicable precedents because the RCO doctrine established in those cases was meant "for strict liability misdemeanors," not for felonies requiring proof of knowledge. The court approved of the jury instructions regarding the knowledge requirement generally and the willful blindness doctrine specifically. The First Circuit clearly did not mean to deny the government the ability to prove knowledge indirectly, based on circumstantial evidence.

Evidence was presented at trial to the effect that D'Allesandro, the corporate officer charged in the case, had been told of previous evidence to prove that individual's knowledge in either of two ways. The first way is to demonstrate that the Defendant had actual knowledge of the act in question. The second way is to establish that the defendant was what is called a responsible officer of the corporation committing the act. In order to prove that a person is a responsible corporate officer three things must be shown. 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.*

103 *Id.* at 52.

104 *Id.*

105 See *id.*

106 The acceptable jury instruction read as follows:

An act is said to be done knowingly if it is done voluntarily and intentionally and not because of ignorance, mistake, accident or some other reason. The requirement that an act be done knowingly is designed to insure that a Defendant will not be convicted for an act that he did not intend to commit or the nature of which he did not understand. Proof that a Defendant acted knowingly or with knowledge of a particular fact does not require direct evidence of what was in that Defendant's mind. Whether a Defendant acted knowingly or with knowledge of a particular fact may be inferred from that Defendant's conduct, from that Defendant's familiarity with the subject matter in question or from all of the other facts and circumstances connected with the case. In determining whether a Defendant acted knowingly, you also may consider whether the Defendant deliberately closed his eyes to what otherwise would have been obvious. If so, the element of knowledge may be satisfied because a Defendant cannot avoid responsibility by purposefully avoiding learning the truth. However, mere negligence or mistake in not learning the facts is not sufficient to satisfy the element of knowledge.

*Id.* at 52 n.15.

107 See *id.* at 52.
violations at the Poe Street Lot. Had the jury found that D'Allesandro ignored these reports in an attempt to remain ignorant of the truth and thus to avoid liability as to the alleged violations for which he was charged, D'Allesandro may have been ensnared on the basis of the properly given willful blindness instruction. The government's use of the RCO doctrine and the district court's inclusion of it in the jury instructions, however, opened up the possibility that D'Allesandro could be convicted even if he had taken every reasonable precaution to prevent a recurrence of the supposed prior violations and had been given no reasonable basis for suspicion that the violations alleged by the government were in fact occurring.

Perhaps a conviction based on circumstantial evidence or willful blindness could have been obtained without the use of the RCO instructions. The government was not satisfied with this approach, however, and received its requested instruction concerning the RCO doctrine as an alternative way of establishing actual knowledge on the part of the defendant. The First Circuit balked at this attempt to prove actual knowledge, not on the basis of circumstantial or indirect evidence, but rather merely on the basis of a presumption stemming from the defendant's corporate position.

The First Circuit characterized the suspect jury instructions as creating a "mandatory" presumption that defendant knew of the facts constituting the offense, based solely on his position as a responsible corporate officer. Although this characterization overstates the severity of the effect of the RCO jury instructions, the general thrust of the court's view is accurate. If actual knowledge of illegal shipments is required under RCRA, and if such knowledge can be established via indirect or circumstantial evidence based on the willful blindness doctrine, there seems little need to muddy the waters with attempts to apply the RCO doctrine.

The difficulty with instructions that incorporate the RCO doctrine is that they leave the jury with little guidance as to how to define the term "responsibility." As Justice Stewart stated in his Park dissent: "'Responsibility' as used by the trial judge therefore had whatever meaning the jury in its unguided discretion chose to give it." The real issue in MacDonald & Watson was whether

108 See id. at 51 (noting D'Allesandro had been advised that "illegal shipments of the type alleged had previously occurred").

109 See supra notes 103-05 and accompanying text.

110 See MacDonald & Watson, 933 F.2d at 53.

D’Allesandro had sufficient cause to investigate the possibility that illegal disposal activity was taking place. Had he been aware of a "high probability" of illegality and still failed to investigate, he could have been convicted of having had actual knowledge of the crime, based on a theory of willful blindness.

Proving knowledge via willful blindness rather than using the RCO doctrine may indeed place a greater burden on the government in order to obtain convictions under RCRA. One commentator argues that the important public welfare purposes of RCRA and of environmental statutes in general validate the use of the RCO doctrine.112 If Congress agreed with this viewpoint, it could simply remove the knowledge requirement from the criminal penalties under RCRA, thus bringing the Park analysis fully to bear on RCRA prosecutions. The fact that Congress has not done so is a powerful indication that it does not condone the easy migration of the RCO doctrine to statutes that require "knowing" violations.

CONCLUSION

The split in the circuits regarding the application of the RCO doctrine to RCRA, and to environmental statutes in general, is ripe for Supreme Court review. Reasoning that environmental statutes are doubtless public welfare statutes, some courts have attempted to side-step the requirement of proving actual knowledge in order to impose criminal penalties under RCRA. They have done so by applying the RCO doctrine to establish proof of "constructive" knowledge, based neither on direct, indirect, or circumstantial evidence. Such attempts are bound to tempt juries to convict defendants on the basis of strict liability, which is the type of criminal liability that the RCO doctrine was designed to enforce. Strict liability, however, is not the type of liability that Congress established under § 6928(d) of RCRA.

In construing public welfare statutes, courts are required to balance two conflicting goals: guarding individual rights and protecting the public welfare. In the case of criminal acts that are solely statutory creations, courts look to Congress for guidance in striking the proper balance between these two goals. When Congress has removed the mens rea requirement in certain limited situations, courts have been willing to hold "responsible" corporate officers

112 See Milne, supra note 2, at 333-34 (describing the dangers of pollution and the need for criminal convictions of corporate officers for environmental offenses).
liable for criminal violations without any "consciousness of wrongdoing" or any affirmative act at all. When Congress has explicitly inserted a knowledge requirement into a statute, however, courts must rely on the traditional doctrines relating to proof of knowledge, including the doctrine of willful blindness. Although RCRA convictions may be more difficult without the application of the RCO doctrine, such is the apparent intent of Congress. Without explicit instructions to the contrary, courts should not use the RCO doctrine as a means of ignoring this intent.

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