

# The *Park* Doctrine—Application of Strict Criminal Liability to Corporate Individuals for Violation of Environmental Crimes\*

## I.

### INTRODUCTION

Individuals who stand in a responsible relationship with unlawful corporate acts may be held criminally liable for these acts. Culpability typically arises in public welfare statutes which impose strict criminal liability or require some form of guilty knowledge. When a statute imposes strict liability, courts punish corporate conduct absent scienter. Statutes impose vicarious liability because the risk of injury to the public has superior importance to and is unrelated to the violator's intent.<sup>1</sup> Even where statutes include elements of guilty knowledge or intent, courts often dilute these requirements by implying their existence.<sup>2</sup> Since hazardous and toxic materials pose serious threats to the public welfare, their discharge into the environment must be carefully controlled. Imposing criminal sanctions upon corporate officers in response to a corporation's unlawful disposal of hazardous waste presents one method of curtailing this undesirable behavior.

## II.

### EARLY HISTORY

The English case, *Regina v. Stephens*,<sup>3</sup> was one of the first decisions to hold a defendant criminally liable without requiring the prosecution to establish the defendant's guilty mind, or *mens rea*. In *Stephens*, the prosecution charged a quarry owner with illegally obstructing the navigation of a public river when the quarry dis-

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1. Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337, 1342-43 (1982).

2. See *United States v. Starr*, 535 F.2d 512, 515 (9th Cir. 1976).

3. 1 L.R.- Q.B. 702 (1866).

posed of rubbish and slate in the river and along its banks.<sup>4</sup> In holding the quarry owner criminally liable, the court adapted the civil doctrine of strict liability to a criminal nuisance case.<sup>5</sup> That court held the quarry owner individually liable, even though he did not oversee the daily operation of the company.

The *Stephens* Court relied on an earlier case, *Rex v. Medley*,<sup>6</sup> in which several employees and directors of the Equitable Gas Company faced criminal charges for discharging waste from their plant into the river Thames.<sup>7</sup> The *Medley* opinion described this effluent as "nasty stuff fit to poison a horse."<sup>8</sup> Levels of contaminants appeared so deleterious that according to one description, it "smelt ready to knock anybody down."<sup>9</sup> A reporter commented that the sample produced at trial "fully justified the witness's statement."<sup>10</sup>

Workmen decided to dump the sludge into the river only after the machinery designed to dispose of the refuse had failed.<sup>11</sup> The directors claimed ignorance of the condition as their defense, since they rarely visited the plant and never actively managed it. None of the directors ever approved of the illegal dumping, and subsequent plant improvements abated the nuisance before the case went to trial.

Lord Denman's instructions to the jury included his opinion that the directors' unawareness of the condition was of no consequence, so long as they had conferred authority upon those who operated

4. This method of waste disposal produced great mounds of material that projected out of and extended along the stream and river. Although the slate's presence in the river did not create a chemical hazard, it created a physical hazard. This case represents a very early hazardous waste disposal problem.

5. See *Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Comm'n*, 153 Cal. App. 3d 605, 620 n.18, 200 Cal. Rptr. 575, 585 n.18 (1984) (citing Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 59 (1933)).

6. 172 Eng. Rep. 1246 (K.B. 1834).

7. See *People v. Chevron Chemical Co.*, 143 Cal. App. 3d 50, 53, 191 Cal. Rptr. 537, 538 (1983).

8. *Medley*, 172 Eng. Rep. 1246, 1248.

9. *Id.*

10. *Id.* at 1248 n.(a)1.

11. The prosecution introduced evidence that the effluent had killed a substantial number of fish and made the water unfit to drink. Counsel for the defense argued that if the engineer had not devised this ingenious method of disposing of the plant's waste, the plant would have had to shut down and cease lighting the district for a time. *Id.* at 1249.

The defense counsel countered:

In considering what is or is not a nuisance, a jury must take into consideration the whole of the circumstances and consequences. If it can be shewn [sic] that the comfort and security of society are much promoted by particular works, it would be absurd to say that the poisoning of a few fish was a thing not to be tolerated. *Id.*

This line of reasoning has a remarkably contemporary ring.

the plant. He stated that "if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants."<sup>12</sup> The jury apparently agreed. It convicted four individual defendants: the engineer, superintendent, deputy-chairman, and chairman.<sup>13</sup> Judge Littledale made the following observation before sentencing the convicted defendants:

[W]e think, under all the circumstances, that this is not a matter to be passed over merely by the infliction of a nominal fine. At the same time, as no complaint has been made since this indictment was preferred [sic], we do not think it necessary to visit the offence [sic] of these defendants with severe punishment.<sup>14</sup>

Clearly, the court did not impose a severe punishment on the defendants because they abated the nuisance before trial.

In general, the common law requires that scienter be proved as a necessary element in every crime.<sup>15</sup> Many older opinions include the Latin phrase *actus non facit reum, nisi mens sit rea*. This phrase means "an act does not make one guilty unless his mind is guilty."<sup>16</sup> Over time, the common law *mens rea* requirement evolved from a showing of intent, to knowledge, then to constructive knowledge, and finally to strict liability for *mala prohibita* crimes such as regulatory offenses.<sup>17</sup>

For many years, courts in the United States have imposed strict criminal liability for violations of federal law. In 1910, an Alabama district court instructed a jury that a corporation's officers must be convicted for violating the Food and Drug Act of June 30, 1906<sup>18</sup> if the jury found that three conditions were met: (1) there was cocaine in a jug of material that had arrived in New Orleans, (2) there was nothing on the jug noting that it contained cocaine, and (3) the defendants had introduced the jug into interstate commerce.<sup>19</sup> These conditions included no scienter elements. Two years later,

12. *Id.* at 1250. Although this statement appears to be consistent with the general doctrine of *respondeat superior*, the court implies a criminal rather than a tortious character to the nuisance charge.

13. Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and An Observation*, 60 WASH. U. L.Q. 393, 419 (1982).

14. *Rex v. Medley*, 172 Eng. Rep. 1246, 1250 (K.B. 1834).

15. *United States v. Balint*, 258 U.S. 250, 251 (1922).

16. *United States v. Winston*, 558 F.2d 105, 107 (2nd Cir. 1977).

17. Linda S. Weiss-Malik, *Imposing Penal Sanctions on the Unwary Corporate Executive: The Unveiled Corporate Criminal*, 17 U. TOL. L. REV. 383, 388-89 (Winter 1986). "*Mala prohibita*" refers to "acts or omissions which are made criminal by statute, but which, of themselves are not criminal." *Black's Law Dictionary*, 861-862 (5th ed. 1979).

18. Ch. 3915, § 2, 34 Stat. 768 (1906).

19. *United States v. Mayfield*, 177 F. 765, 770 (D.C. Ala. 1910).

another district court, interpreting the same Food and Drug Act, determined that a defendant's intent was immaterial to a finding of criminal liability.<sup>20</sup>

In *New York Central & Hudson River R.R. v. United States*,<sup>21</sup> the United States Supreme Court discussed imposing individual criminal penalties for wrongful corporate acts. The Court stated, "We go only a step farther" by applying criminal sanctions to the civil law principle of respondeat superior.<sup>22</sup> The *New York Central* Court clearly indicated its belief that imposing strict criminal liability on individuals acts as both a punishment and a deterrent.<sup>23</sup>

Another author, David J. Reilly, said the following about criminally punishing corporate officers:

Wrongful acts performed on behalf of a corporation that result in death cannot be condoned. A theory, however, of criminal liability which stigmatizes all members of the organization, penalizing an innocent body of shareholders and having little deterrent effect on future misconduct, is not the answer. Rather, prosecutorial efforts must be directed at punishing responsible *individuals*, notwithstanding the argument that it is often difficult, if not impossible, to identify these persons. The fact remains that human beings control corporations. Punishing a creation of law is meaningless; punishing those who control the entity, on the other hand, may deter future misconduct on behalf of a corporate entity which results in death.<sup>24</sup>

In *Golden Grain Macaroni Co. v. United States*,<sup>25</sup> a corporation shipped adulterated food while the individual defendant, the company's president and general manager, was away from the plant for a month. The court in that case broadly interpreted the concept of corporate officer responsibility, finding that the food was manufactured before the individual defendant departed and that another shipment was made after he returned. This interpretation eliminated any potential requirement that an individual defendant had to be present while the illegal act took place.

A 1947 case noted that an individual could not diminish his or her criminal liability by delegating a duty.<sup>26</sup> The court in *United*

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20. *Von Bremen v. United States*, 192 F. 904, 906 (2d Cir. 1912).

21. 212 U.S. 481 (1909).

22. *Id.* at 494.

23. 212 U.S. 481 (1909).

24. David J. Reilly, Comment, *Murder, Inc.: The Criminal Liability of Corporations for Homicide*, 18 SETON HALL L. REV. 378, 403-404 (1988).

25. 209 F.2d 166 (9th Cir. 1953).

26. *United States v. Parfait Powder Puff Co.*, 163 F.2d 1008, 1010 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

*States v. Parfait Powder Puff Co.* held that a corporate officer may not sidestep criminal penalties by delegating his responsibility to a subordinate.<sup>27</sup>

W. Page Keeton, one of the most authoritative legal scholars in torts, wrote the following about the evolution of strict criminal liability: “[T]he last hundred years have witnessed . . . a general acceptance of the principle that in some cases the defendant may be held liable, although he is not only not charged with moral wrongdoing, but has not even departed in any way from a reasonable standard of intent or care.”<sup>28</sup>

### III.

#### THE PARK DOCTRINE: EVOLUTION OF *DOTTERWEICH*

In the United States, two Supreme Court cases created a body of law that holds corporate officers strictly liable for crimes committed by their corporations.<sup>29</sup> Both of these cases involved corporate violations of the Federal Food, Drug, and Cosmetic Act.<sup>30</sup>

In the first of these cases, *United States v. Dotterweich*,<sup>31</sup> the government brought actions against Buffalo Pharmacal Company and its president/general manager, Mr. Dotterweich. Buffalo Pharmacal Company employed twenty-six people.<sup>32</sup> It purchased drugs from manufacturers, then repackaged and labeled them for sale in interstate commerce.<sup>33</sup> The criminal charges in *Dotterweich* stemmed from the company’s “introduction or delivery for introduction into interstate commerce of [a] . . . drug . . . that [was] adulterated or misbranded.”<sup>34</sup>

In *Dotterweich*, a closely divided Supreme Court looked to the purposes of the Food, Drug, and Cosmetic Act and noted that it “touched phases of the lives of the people which, in the circumstances of modern industrialism, are largely beyond self-protection.”<sup>35</sup> The Court then discussed the strict liability nature of the

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27. *Id.*

28. W. PAGE KEETON, PROSSER AND KEETON ON TORTS, § 75 (5th ed. 1984).

29. *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277, *reh’g denied*, 320 U.S. 815 (1943).

30. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1984 & Supp. 1991).

31. 320 U.S. 277, *reh’g denied*, 320 U.S. 815 (1943).

32. Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 U.C.L.A. L. REV. 463, 464 (1981).

33. *Dotterweich*, 320 U.S. at 278.

34. *Id.*; based on § 301 of the Act; 21 U.S.C. § 331 (1984 & Supp. 1991).

35. *Dotterweich*, 320 U.S. at 280.

Food, Drug, and Cosmetic Act. "The Act is of 'a now familiar type' which 'dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but *standing in responsible relation to a public danger.*'"<sup>36</sup> The court reasoned that "[the] only way in which a corporation can act is through the individuals who act on its behalf."<sup>37</sup> Moreover, Congress expressly intended to "enlarge and stiffen the penal net"<sup>38</sup> as well as discourage the view that criminal penalties under the Act were merely "a 'license fee for the conduct of an illegitimate business.'"<sup>39</sup> The Court affirmed the jury verdict which had convicted Mr. Dotterweich, but acquitted the corporation.<sup>40</sup>

*Dotterweich* has been cited as the first American case to impose strict, vicarious criminal liability on corporate executives.<sup>41</sup> Under the *Dotterweich* rationale, a corporate officer could be punished without any proof of conscious fraud or wrongdoing. Therefore, some observers believe that *Dotterweich* did not require proof of *mens rea* to obtain a criminal conviction.<sup>42</sup> Others, however, believe that the Court required a showing of *mens rea*, but did not require conscious fraud or an awareness of some wrongdoing.<sup>43</sup> According to a third view, the corporate officers may have been found liable as accomplices of the corporation.<sup>44</sup> The *Dotterweich* Court explained that accomplice liability attaches because "under § 301 [of the Food, Drug, and Cosmetic Act] a corporation may commit an offense and all persons who aid and abet its commission are equally guilty . . . . The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws . . . ."<sup>45</sup>

The Food, Drug, and Cosmetic Act places a burden on all sellers who distribute their goods through interstate commerce to know the condition of their goods. The Act makes an otherwise innocent

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36. *Id.* at 280-81 (quoting *United States v. Balint*, 258 U.S. 250 (1922)) (emphasis added).

37. *Id.* at 281.

38. *Id.* at 282.

39. *Id.* at 282-283 (quoting H. Rep. No. 2139, 75th Cong., 3d Sess., p.4).

40. *Id.* at 285.

41. *Abrams*, *supra* note 32.

42. *Id.*

43. *Id.*

44. *Id.* at 465.

45. *United States v. Dotterweich*, 320 U.S. 277, 284, *reh'g denied* 320 U.S. 815 (1943).

party, who stands in a responsible relationship with a public danger, ultimately responsible for that danger.<sup>46</sup> "Public welfare legislation utilizes criminal sanctions to regulate conduct that poses an unacceptably high risk of danger to the public at large."<sup>47</sup>

The *Dotterweich* decision created strict liability for corporate officers:

where the statute under which they were prosecuted dispensed with 'consciousness of wrongdoing,' and omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability. It was enough in [this case] that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of.<sup>48</sup>

*Dotterweich* emphasized the officer's responsibility as the test for determining an individual's guilt. The *Dotterweich* opinion stated that any person who "shares responsibility in the business process" that introduces adulterated drugs into the stream of commerce violates the Act.<sup>49</sup>

The Court placed a burden on the individuals capable of protecting consumers to do so, since the consumers are "wholly helpless" to protect themselves.<sup>50</sup> However, the Court did not specify whether a corporate officer bears responsibility because of culpable acts of his or her subordinates (a vicarious liability theory), or because that officer failed to perform a statutory duty of his or her own, such as a duty to prevent the violation.<sup>51</sup>

In *United States v. Park*, the Supreme Court reinforced its concept of strict criminal liability for corporate officers.<sup>52</sup> *Park*,<sup>53</sup> like *Dotterweich*,<sup>54</sup> involved a corporation's violation of the Food, Drug, and Cosmetic Act.<sup>55</sup> The Court affirmed the conviction of John Park, who acted as chief executive officer and president of ACME Markets, Inc., and exercised "general and active supervision of the affairs, business, offices and employees of the company. . . ."<sup>56</sup> The *Park* decision increased the responsibility of corporate officers even

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46. *Id.* at 281.

47. Brickey, *supra* note 1, at 1356.

48. *United States v. Park*, 421 U.S. 658, 671 (1975) (quoting *Dotterweich*, 320 U.S. at 284).

49. *United States v. Dotterweich*, 320 U.S. 277, 284 (1943).

50. Brickey, *supra* note 1, at 1345-46.

51. *Id.* at 1346.

52. 421 U.S. at 671.

53. *Id.*

54. 320 U.S. 277.

55. *Park*, 421 U.S. at 660.

56. *Id.* at 663, n.7 (quoting the corporation's bylaws); see also *id.* at 664-65.

further than had *Dotterweich*. Unlike the small company in *Dotterweich*, ACME Markets was a national company engaged in the storage, transportation, and sale of food items, with 36,000 employees, 874 retail outlets and sixteen warehouses.<sup>57</sup> Thus, the corporate officer in *Park* had far less daily supervisory control over the company as a whole than did the corporate officer in *Dotterweich*. The government charged both the corporation and Park personally with violating section 331(k) of the Food, Drug, and Cosmetic Act.<sup>58</sup> Each defendant was charged with five counts of storing food in a building accessible to rodents and exposing the food to rodent contamination which caused the food to become adulterated within the meaning of the statute.<sup>59</sup>

At trial, evidence showed the following interactions between ACME and the Food and Drug Administration (FDA) before the FDA filed charges:

*April 1970*—FDA advised respondent by letter of unsanitary conditions at the firm's warehouse facility in Philadelphia.<sup>60</sup>

*November-December 1971*—12 day inspection of Baltimore warehouse by FDA revealed evidence of rodent infestation and other unsanitary conditions. (Four of the five counts charged related to this inspection.)<sup>61</sup>

*January 27, 1972*—Letter sent by FDA Chief of Compliance (Baltimore office) informed Park of conditions at the Baltimore warehouse. "[S]uch reprehensible conditions obviously existed for a prolonged period of time without any detection, or were completely ignored . . . ."<sup>62</sup>

In response to the FDA letter, Park met with ACME's vice-president for legal affairs, who assured him that the vice-president of the Baltimore division was investigating, would take remedial action, and would summarize corrective actions taken in response to the letter.<sup>63</sup>

57. *Id.* at 660.

58. 21 U.S.C. § 331(k) (1984 & Supp. 1991). This section provides:

The following acts and the causing thereof are prohibited: . . . (k) The alteration, mutilation, destruction . . . of the whole or any part of the labeling of . . . a food, drug, device, or cosmetic, if such act is done while such article is held for sale . . . after shipment in interstate commerce and results in such article being adulterated or misbranded.

59. *Park*, 421 U.S. at 660. Section 402 of the Act, 21 U.S.C. section 342, provides in pertinent part "a food shall be deemed to be adulterated . . . (A) . . . (4) if it has been prepared, packed, or held under unsanitary conditions whereby it may have been rendered injurious to health."

60. *Id.* at 661.

61. *Id.*

62. *Id.* at 662, n.6.

63. *Id.* at 663-64.

March 1972—Second inspection of Baltimore warehouse revealed improvements in conditions, but rodent activity was evidenced within the building and some lots of rodent-contaminated food items were found in the warehouses. (One count related to this inspection.)<sup>64</sup>

ACME plead guilty, while Mr. Park plead not guilty.<sup>65</sup> The jury found Park guilty on all counts, and the district court sentenced him to pay a \$50.00 fine for each count. The Fourth Circuit reversed Park's conviction, finding that Park personally engaged in no wrongful conduct.<sup>66</sup>

In reversing the Fourth Circuit, Chief Justice Burger, writing for the Supreme Court, explained as follows:

The *duty* imposed by Congress on responsible corporate agents is, we emphasize, *one that requires the highest standard of foresight and vigilance*, but the Act, in its criminal aspect, does not require that which is objectively impossible. *The theory* upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act *permits a claim that a defendant was 'powerless' to prevent or correct the violation* to 'be raised defensively at a trial on the merits.' (citation omitted) . . . [T]he Government's ultimate burden . . . [is to prove] beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition . . . .

The concept of a '*responsible relationship*' to . . . *violation of the Act* indeed imports some measure of blameworthiness . . . .<sup>67</sup>

A corporate officer may not be held strictly liable merely because he or she holds a high corporate position.<sup>68</sup> In order to ascribe liability to a corporate officer, the finder of fact must make a specific finding that the individual officer had "authority with respect to the conditions that formed the basis of the alleged violations."<sup>69</sup> Only individuals who have a *responsible share* in furthering the transaction that the statute outlaws should incur liability.<sup>70</sup> Under the *Park* doctrine, the jury must find beyond a reasonable doubt that "the defendant held a position of authority and responsibility in the

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64. *Id.* at 661-62.

65. *Id.* at 661.

66. *United States v. Park*, 499 F.2d 839 (4th Cir. 1974), *rev'd*, 421 U.S. 658 (1975).

67. *United States v. Park*, 421 U.S. 658, 673-74 (1975) (citing *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964)) (emphasis added).

68. *Id.* at 674.

69. *Id.* See also *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 234-35 (D. Mass. 1980).

70. *Park*, 421 U.S. at 670. *But see Morissette v. United States*, 342 U.S. 246, 258 (1952) (emphasis added).

business . . . .”<sup>71</sup> *Park* established that the failure of a manager to act, when he or she had the authority and responsibility to act, will result in a violation.<sup>72</sup> This description of duty and breach invites a standard negligence analysis.

The *Park* opinion stated:

Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution.<sup>73</sup>

Two affirmative duties imposed by the *Park* Court included: (1) the duty to implement procedures which will assure that violations will not occur, and (2) the duty to find and remedy existing violations.<sup>74</sup> Failure of a corporate officer to perform either of these duties could satisfy the causation element in the negligence analysis. The *Park* Court capsulized its analysis of corporate officer liability in negligence terms by saying:

[T]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent’s authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.<sup>75</sup>

The *Park* opinion later explained, “[w]e are satisfied that the Act imposes the highest standard of care and permits conviction of re-

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71. The trial court instructed jurors:

The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets.

The statute makes individuals, as well as corporations, liable for violations. An individual is liable if it is clear, beyond a reasonable doubt, that the elements of the adulteration of the food as to travel in interstate commerce are present.

The individual is or could be liable under the statute, even if he did not consciously do wrong . . . . The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.

*Park*, 421 U.S. at 665, n.9.

72. *Id.* at 671.

73. *Id.* at 673.

74. *Id.* at 672.

75. *Id.* at 673-74.

sponsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions."<sup>76</sup> By discussing causation and standards of care, the Court appears to infer that its theory of imposing criminal liability is rooted in negligence.

The *Park* doctrine contains an inherent ambiguity as to whether a corporate officer is strictly liable merely because he or she possesses the power to correct a violation, or whether the prosecution must show the violation of a negligence standard. In his *Park* dissent, Justice Stewart addressed this ambiguity and argued that the Court should apply a negligence standard.<sup>77</sup> Justice Stewart explained:

As I understand the Court's opinion . . . the prosecution must at least show that by reason of an individual's corporate position and responsibilities, he had a duty to use care to maintain the integrity of the corporation's food products. A jury may then draw the inference that when the food is found to be in such condition as to violate the statute's prohibitions, that condition was 'caused' by a breach of the standard of care imposed upon the responsible official. This is the language of negligence, and I agree with it.<sup>78</sup>

One factor which may have led Justice Stewart to conclude that the majority was applying a negligence standard was the majority opinion's emphasis on the corporate officer's standard of care.<sup>79</sup> Justice Stewart explained: "[T]he Court has reaffirmed the proposition that 'the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors.'"<sup>80</sup>

In the past, the Court had interpreted federal statutes that omitted a *mens rea* element as requiring some *mens rea*.<sup>81</sup> In *Morrisette v. United States*, the Court stated: "The accused, if he does not will the violation, is in a position to prevent it with no more care than

76. *Id.* at 676.

77. *Id.* at 678-79. See *Abrams*, *supra* note 32, at 469-70. Justice Stewart dissented; he thought that the case should be remanded for a new trial because the jury instructions did not clearly set forth a negligence standard.

78. *United States v. Park*, 421 U.S. 658, 678-79 (1975).

79. *Id.* at 671, 674. Standards of care are consistent with the concept of negligence. See also, KEETON, *supra* note 28, § 32 (5th ed. 1984).

80. *Id.* at 671 (citing *Smith v. California*, 361 U.S. 147, 152 (1959)) and *id.* at 674.

81. See, *Morrisette v. United States*, 342 U.S. 246 (1951) (Plaintiff was convicted of stealing government property. The federal statute did not specify the *mens rea* required for the crime. The Court held that Congressional omission of the mental element of a crime that is well defined at common law would incorporate the common law's *mens rea* element unless Congress expressly specified otherwise.) See also, *United States v. Gypsum Co.*, 438 U.S. 422 (1978), in which the Court held that the Sherman Act should not be construed to impose strict liability.

society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."<sup>82</sup>

The *Park* court summarized the duties of corporate officers as follows:

Thus, *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission—and this is by no means necessarily confined to a single corporate agent or employee—the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.<sup>83</sup>

Whether a court applies strict liability or simple negligence, it is clear that corporate officers incur strict personal criminal liability under the *Park* doctrine for unlawful corporate conduct. Courts adopting the negligence standard frequently imply a duty by virtue of the officer's position, imply breach from the illegal corporate activity, or imply causation due to the relationship between the position and activity. Thus, any differences between the theories of negligence and strict liability are insignificant in practice.

#### IV.

##### DECISIONS AFTER *PARK*

Following *Park*, officers of other corporations were convicted as a result of corporate acts that violated federal public welfare laws. In *United States v. Torigian Laboratories, Inc.*, both the corporation and its president were convicted of eighteen criminal charges.<sup>84</sup> These convictions stemmed from the company's distribution of contaminated intraocular lenses in violation of the Food, Drug and Cosmetic Act.<sup>85</sup> The district court found the company's president criminally responsible for misbranding and adulteration under the Act.<sup>86</sup>

In a similar case, *United States v. Acri Wholesale Grocery Co.*,<sup>87</sup> both the corporation and its officers were convicted of violating the Food, Drug, and Cosmetic Act by permitting the adulteration of food.<sup>88</sup> The district court stated:

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82. *Morissette*, 342 U.S. at 256.

83. *United States v. Park*, 421 U.S. 658, 672 (1975).

84. 577 F. Supp. 1514 (E.D.N.Y.), *aff'd*, 751 F.2d 373 (2d Cir. 1984).

85. 21 U.S.C. §§ 331(a), (k) (1984 & Supp. 1991).

86. *Torigian Labs.*, 577 F. Supp. at 1531.

87. 409 F. Supp. 529 (S.D. Iowa C.D. 1976).

88. 21 U.S.C. §§ 301(k), 331(k), 342(a)(3),(4) (1984 & Supp. 1991).

The substantial weight of evidence in this cause [sic] clearly establishes the requisite "responsibility and authority" of the individual defendants. Both Joseph Acri and Anthony Acri were officers of the corporation; both Joseph Acri and Anthony Acri were key employees and daily operatives of the firm's activities; both gave orders to the work crews and generally supervised the warehouse work during the day and evening shifts. Anthony Acri, whose title was vice-president and warehouse superintendent, stated to an FDA inspector that he was responsible for building maintenance. Joseph Acri, a part-owner and president of the corporation, stated at trial that he was "in a responsible position for running that whole business, not only the warehouse, but the office, the buying, the selling, the bank statements. I am in charge of running the whole business."<sup>89</sup>

Under the *Park* rationale, these defendants clearly bore a responsible share in furthering the corporation's violations.

Justice Sneed, of the Ninth Circuit Court of Appeals, addressed the dangers associated with strict liability statutes by writing:

The propriety of eliminating *scienter* or *mens rea* in statutes designed to serve a regulatory purpose has again been recognized by the Supreme Court . . . . An expansive statute under which the prosecution encounters such reduced obstacles imposes a heavy responsibility upon the prosecutor. Many are his potential targets and few are the standards by which the exercise of his discretion can be measured. . . . *Whatever his decision, it is likely to be one in keeping with the political realities within which he functions.* This is a part of the price that this type of statute compels us to pay.<sup>90</sup>

In practice, the *Park* doctrine applies strict liability to individual corporate officers for violation of public welfare crimes. Courts have successfully applied the *Park* rationale to public welfare offenses other than the Food, Drug, and Cosmetic Act.<sup>91</sup> The *Park* doctrine protects the public from potentially serious danger by allowing courts to vigorously apply criminal sanctions against indi-

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89. *Acri Wholesale Grocery Co.*, 409 F. Supp. at 535.

90. *United States v. Charnay*, 537 F.2d 341, 357 (9th Cir.) (Sneed, J., concurring) (emphasis added), *cert. denied*, *Davis v. United States*, 429 U.S. 1000 (1976).

91. *See United States v. Charnay*, 537 F.2d 341, 357 (9th Cir. 1976) (concurring opinion) (violation of Securities & Exchange Act of 1934); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300-01 n.19 (5th Cir. 1976) (dictum) (violation of Rivers & Harbors Act); *Iowa City v. Nolan*, 239 N.W.2d 102, 105 (1976) (violation of parking laws). Other courts have limited application of the *Park* doctrine to violations of the Food, Drug, and Cosmetic Act, *cf. United States v. Ayo-Gonzales*, 536 F.2d 652, 662 (5th Cir. 1976), *cert. denied*, *Ayo-Gonzalez v. United States*, 429 U.S. 1072 (1977). One court referred to the *Park* case as the exception, rather than the rule which requires a *mens rea* component before our system allows a criminal conviction. *United States v. Winston*, 558 F.2d 105, 107 (2nd Cir. 1977).

viduals who could have protected the public safety, but failed to do so. The *Park* doctrine does not apply to crimes which specifically require knowledge.<sup>92</sup>

## V.

### DEFENSES TO LIABILITY UNDER *PARK*

*Park* alluded to the possibility of a defense to criminal sanctions.<sup>93</sup> The Court stated: "The theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim that a defendant was 'powerless' to prevent or correct the violation to 'be raised defensively at a trial on the merits.'" <sup>94</sup> Several cases have interpreted this "powerless" defense as requiring the corporate officer to prove either: (1) that he or she exercised extraordinary care through "vigilance" and "foresight," or (2) that preventing the offense would have been "objectively impossible."<sup>95</sup>

One Ninth Circuit decision that followed the *Park* rationale, *United States v. Starr*,<sup>96</sup> imposed liability on a corporation and its officer for failing to correct deficiencies discovered in an FDA inspection.<sup>97</sup> As in *Park*, even though the corporate officer delegated the cleanup function to an employee, that officer failed to verify that the deficiencies were corrected. The court of appeals determined that the appropriate standard of care requires corporate officers to monitor the performance of their subordinates; merely delegating responsibilities to them is not sufficient. Under this approach, a corporate officer has a duty to exercise extraordinary care when dealing with potential violations of the Food, Drug and Cosmetic Act. The duties of "foresight and vigilance" that *Park* imposed require a corporate officer to foresee occurrences that may lead to violations of the law.<sup>98</sup> The court fined Dean Starr, the corporation's secretary-treasurer, \$200 per count.<sup>99</sup>

In a companion case to *Starr*, *United States v. Y. Hata & Co.*,

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92. See *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44-45 (1st Cir. 1991).

93. *United States v. Park*, 421 U.S. 658, 673 (1975).

94. *Id.* (quoting *United States v. Weisenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964)).

95. See, e.g., *United States v. Y. Hata & Co., Ltd.*, 535 F.2d 508, 511 (9th Cir.), cert. denied, 429 U.S. 828 (1976); *United States v. Starr*, 535 F.2d 512, 515-16 (9th Cir. 1976).

96. 535 F.2d 512 (9th Cir. 1976).

97. *Id.* at 514.

98. *Id.* at 515.

99. *Id.* at 514.

*Ltd.*,<sup>100</sup> the Ninth Circuit upheld the convictions of a corporation and its president that operated a food storage warehouse in Hawaii.<sup>101</sup> *Hata* interpreted *Park* narrowly, stating that a defense of "objective impossibility" could not prevail unless the defendant used the "highest standard of foresight and vigilance" in his efforts to correct or prevent the violation.<sup>102</sup> In *Starr* and *Hata*, the Ninth Circuit refused to instruct the jury regarding the defense of objective impossibility because the defendants failed to introduce sufficient evidence to raise that defense.<sup>103</sup> Both *Starr* and *Hata* rejected the notion of strict liability.<sup>104</sup> Instead, these courts interpreted *Park* as imposing a negligence standard of "extraordinary care" upon corporate officers.<sup>105</sup>

In *United States v. Gel Spice Co., Inc.*,<sup>106</sup> a food importing company was charged with violating the Food, Drug and Cosmetic Act by allowing rodent excrement to contaminate the company's food warehouse.<sup>107</sup> The government charged Barry Engel, the company's president with ten counts and charged his brother Andre Engel, the company's vice president, with seven counts. The court convicted Barry Engel and acquitted Andre Engel. "The government's proof at trial demonstrated beyond a reasonable doubt that Barry Engel was in a position of authority in the corporation to prevent or correct violations of the Act and that he did not do so. Thus, he was not 'powerless to prevent or correct the violation[s].'"<sup>108</sup> The court did not convict Andre Engel because there was a reasonable doubt as to whether he had authority over the company's sanitary conditions.<sup>109</sup>

Regarding the impossibility defense, the court stated:

To establish the impossibility defense, the corporate officer must introduce evidence that he exercised extraordinary care, but was nevertheless unable to prevent violations of the Act. The defense is raised

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100. *United States v. Y. Hata & Co., Ltd.*, 535 F.2d 508 (9th Cir.), *cert. denied*, 429 U.S. 828 (1976).

101. *Id.*

102. 535 F.2d at 511, 515-16.

103. 535 F.2d at 510-11; 535 F.2d at 516.

104. *Abrams*, *supra* note 32, at 476.

105. *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 236 (D. Mass. 1980).

106. 601 F. Supp. 1205 (E.D.N.Y. 1984), *aff'd*, 773 F.2d 427 (2d Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986).

107. 21 U.S.C. §§ 301-350a (1984 & Supp. 1991).

108. *Gel Spice Co.*, 601 F. Supp. at 1212 (quoting *United States v. Park*, 421 U.S. 658, 673 (1975)).

109. *Id.* at 1212.

when defendant introduces sufficient evidence of the existence of extraordinary care to justify placing an additional burden on the government—that of proving beyond a reasonable doubt that had defendant indeed exercised such extraordinary care, he could have prevented or corrected those violations.<sup>110</sup>

The court found that the company's rodent control program did not establish sufficient proof of extraordinary care to allow the impossibility defense.<sup>111</sup>

Subsequently, Chief Judge Caffrey addressed the impossibility defense in *United States v. New England Grocers Supply Co.*:<sup>112</sup>

In sum, the impossibility defense allows the corporate officer to introduce evidence to establish an affirmative defense that he exercised extraordinary care and still could not prevent violations of the Act. The defense is raised when the defendant introduces a sufficient quantum of evidence as to his exercise of "extraordinary care" so as to justify placing an additional burden on the government. At this point, the government must prove beyond a reasonable doubt that the defendant, by the use of extraordinary care, was not without the power or capacity to correct or prevent the violations of the Act.<sup>113</sup>

Corporate officers may introduce evidence that they did not have the power to correct violations of the Act because of their corporate positions. These officers could use this claim to rebut the government's proof of a 'responsible relationship' to the violations.<sup>114</sup> One commentator suggests that three possible defenses exist to avoid individual liability under the Food, Drug and Cosmetic Act: (1) objective impossibility, (2) no responsible relationship, and (3) delegation of responsibility.<sup>115</sup> It is possible that the third defensive tactic is appropriate for large corporations in which top-level executives could claim that they only have general authority and delegate specific authority to subordinates.<sup>116</sup>

Corporate defendants may argue that imposing criminal penalties without an individual having knowledge of or participating in the wrongful act raises a due process problem. In *Park*, the Court solved this problem by alluding to Mr. Park being "on notice that

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110. *Id.* at 1213.

111. *Id.*

112. 488 F. Supp. 230, 236 (D. Mass. 1980).

113. *Id.*

114. *Id.* at 236 n.5.

115. Stephen C. Jones, *Individual Liability under the Federal Food, Drug, and Cosmetic Act: The Defenses Find a Defendant*, 39 FOOD DRUG COSM. L.J. 385, 396-400 (1984).

116. *Id.* at 397.

he could not rely on his system of delegation to subordinates."<sup>117</sup> It could be argued that a corporate officer who was totally unaware of deficiencies in the delegation system could not be held criminally liable, since he would not be on notice of the violation.

Defendants brought another type of constitutional challenge in *United States v. Marcen Laboratories, Inc.*<sup>118</sup> There, the defendants attacked the Food, Drug and Cosmetic Act as being too vague to be enforced as a criminal statute. This constitutional challenge to the Act failed.

Corporate defendants might also try to invoke the Business Judgment Rule, which provides that corporate directors' decisions are immune from prosecution if the directors: (1) acted within their authority and the corporation's power, (2) acted with a reasonable basis for their decision, (3) acted in good faith, and (4) honestly believed that their actions were in the corporation's best interest.<sup>119</sup> The Business Judgment Rule generally protects corporate directors from liability except in cases of gross negligence.<sup>120</sup> However, this rule "concerns only the director's fiduciary duty to the corporation, and not to outsiders . . . ."<sup>121</sup> Therefore, the Business Judgment Rule does not protect corporate directors for liability resulting from unlawful corporate acts against the public at large.

Corporate officials may try to insulate themselves from liability for violations of hazardous waste statutes by creating subsidiary corporations.<sup>122</sup> Strict application of the *Park* doctrine would preclude this defensive mechanism, however, since corporate officials in the parent corporation would still bear a responsible relationship to the illegal acts of the subsidiary corporations. Under *Park*, this relationship would still be sufficient to impose criminal liability upon the officers of the parent corporation.<sup>123</sup>

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117. *United States v. Park*, 421 U.S. 658, 662, n.6, 664-65, 678 (1975).

118. 416 F. Supp. 453 (S.D.N.Y.), *aff'd without opinion*, 556 F.2d 562 (2nd Cir. 1976).

119. Brett L. Warning, Note, *In Search of Effective Hazardous Waste Legislation: Corporate Officer Criminal Liability*, 22 VAL. U.L. REV. 385, 419, n.213 (1988).

120. *Id.* at 419.

121. *Frances T. v. Village Green Owners Ass'n.*, 42 Cal. 3d 490, 509, 229 Cal. Rptr. 456, 467, 723 P.2d 573, 584 (1986).

122. Warning, *supra* note 119 at 420.

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

VI.  
CORPORATE OFFICERS: STRICT LIABILITY IN  
CALIFORNIA

The California Supreme Court has long recognized the need for strict liability for certain criminal acts:

There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant. In these cases it is the duty of the defendant to know what the facts are . . . .<sup>124</sup>

In California, the doctrine of strict criminal liability has been applied to many business areas.<sup>125</sup> The regulations in each of these areas are aimed at protecting the public welfare.

The rationale of the doctrine of strict criminal liability is that, although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction, and that the interest of enforcement for the public health and safety requires the risk that an occasional non-offender may be punished in order to prevent the escape of a greater number of culpable offenders.<sup>126</sup>

This philosophy of occasionally punishing the innocent so that no guilty parties shall escape punishment is contrary to the typical American legal philosophy. As Sir William Blackstone said over two hundred years ago, “[i]t is better that ten guilty persons escape

124. *In re Marley*, 29 Cal. 2d 525, 529, 175 P.2d 832, 835 (1946) (quoting *State v. Weisberg*, 74 Ohio App. 91, 95, 55 N.E.2d 870, 872 (1943)).

125. The following examples may be found in *People v. Travers*, 52 Cal. App. 3d 111, 114, 124 Cal. Rptr. 728, 729-730 (1975):

*Misbranding drugs* (*People v. Stuart*, 47 Cal. 2d 167, 172-73, 302 P.2d 5, 8-9 (1956)).

*Misbranding onions as to weight* (*People v. Beggs*, 69 Cal. App. 2d Supp. 819, 822, 160 P.2d 600, 601 (1945)).

*Compounding and selling prescriptions by nonregistered pharmacist* (*Brodsky v. Cal. State Bd. of Pharmacy*, 173 Cal. App. 2d 680, 688, 344 P.2d 68, 76 (1959)).

*Mislabeling eggs* (*In re Casperson*, 69 Cal. App. 2d 441, 443-445, 159 P.2d 88, 90-91 (1945)).

*Shortweighting meat* (*In re Marley*, 29 Cal. 2d 525, 528-530, 175 P.2d 732 (1946)).

*Selling adulterated food* (*People v. Schwartz*, 28 Cal. App. 2d Supp. 775, 778, 70 P.2d 1017, 1020 (1938)).

*Maintaining unsanitary conditions in a nursing home* (*People v. Balmer*, 196 Cal. App. 2d Supp. 874, 877-878, 17 Cal. Rptr. 612, 615 (1961)).

126. *People v. Travers*, 52 Cal. App. 3d at 115, 124 Cal. Rptr. at 730 (citing *People v. Stuart*, 47 Cal. 2d 167, 172, 302 P.2d 5, 8-9 (1956)).

than one innocent suffer."<sup>127</sup>

However, many health and safety statutes which were enacted for the protection of the public, such as traffic or food and drug regulations, impose criminal sanctions even though the violator has no wrongful intent.

These offenses usually involve light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest in enforcement.<sup>128</sup>

In 1975, the owner of a California service station was charged with misbranding and mislabeling motor oil in violation of Business and Professions Code sections 20,840, 20,843, 20,911(b) and (c).<sup>129</sup> During the course of a sale, the defendant's employee made misrepresentations concerning the quality of the petroleum products he sold. The defendant did not know of the misrepresentations, did not condone them, did not order the employee to make them, and was not present when the employee made them.

The defendant claimed he could not be held responsible for criminal conduct under California Penal Code section 20<sup>130</sup> unless he either knew of the criminal act, intentionally encouraged it, or advised his employee about the act.<sup>131</sup> Applying agency theory, the court stated:

It is a settled rule of law that a principal is not criminally liable for the criminal act of his agent unless he authorized, consented to, advised, aided or encouraged the specific act. . . . An exception to this rule is the doctrine of criminal liability without fault which has been applied to criminal statutes enacted for the public morals, health, peace and safety. . . . In general, such statutes deal with offenses of a regulatory nature and are enforceable irrespective of criminal intent or criminal negligence.<sup>132</sup>

The court found it significant that the legislature had modified the

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127. THE OXFORD DICTIONARY OF QUOTATIONS 73 (2d ed. 1972).

128. *People v. Vogel*, 46 Cal. 2d 798, 801 n.2, 299 P.2d 850, 853 n.2 (1956).

129. *Travers*, 52 Cal. App. 3d at 113, 124 Cal. Rptr. at 729.

130. "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." CAL. PENAL CODE § 20 (West 1988, as enacted in 1872).

131. *Travers*, 52 Cal. App. 3d at 114, 124 Cal. Rptr. at 729.

132. *Id.* at 114, 124 Cal. Rptr. at 729 (citations omitted). "Although strict liability offenses falling in the mislabeling and misbranding category generally deal with the sales of food, beverages and drugs, they are not necessarily restricted to these items and they may include the sale, possession or use of any article that is misbranded or misla-

statute before this violation occurred, and omitted the word "knowingly" from the law.<sup>133</sup> Basing its decision upon the intent of the legislature,<sup>134</sup> the court upheld the defendant's criminal conviction under a strict liability interpretation.<sup>135</sup>

*People v. Bachrach*<sup>136</sup> focused on a landlord who was charged with violating numerous provisions of the Los Angeles Municipal Code related to fire prevention and public safety. The court upheld the strict liability statute, reasoning that statutes designed to protect the public health, safety and welfare do not require proof of intent or criminal negligence.<sup>137</sup> Instead, strict liability applied because statutes of this nature are primarily concerned with protecting the public, and not with punishing and rehabilitating offenders.

The California Court of Appeals also imposed strict criminal liability on a corporate officer in *People v. Rouse*.<sup>138</sup> There, county taxicab regulations established strict criminal liability for operating a taxi without a permit.<sup>139</sup> The regulations did not require the prosecution to show the defendant's knowledge or control of the taxi.<sup>140</sup>

At trial, the owner of the cab, L.A. Taxi, stipulated that the vehicle had no permit to operate in the county. The defendant, Michael Rouse, was the president of Wilmington Cab Company, which did business as L.A. Taxi. The county filed criminal charges against Rouse for violating Los Angeles County Code section 7.80.040, which provides:

Every taxicab into which passengers are accepted for transportation within the unincorporated area of the county of Los Angeles shall be required to display a vehicle permit affixed to the rear portion of such taxicab. Such vehicle permit shall be issued upon payment of an an-

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beled in violation of general police regulations passed for the safety, health or well-being of the community." *Id.* at 116, 124 Cal. Rptr. at 730.

133. *Id.* at 115-16, 124 Cal. Rptr. at 730. "[W]here qualifying words such as knowingly, intentionally, or fraudulently are omitted from provisions creating the offense it is held that guilty knowledge and intent are not elements of the offense . . ." *In re Marley*, 29 Cal. 2d 525, 529, 175 P.2d 832, 835 (1946).

134. "Although criminal statutes are not often construed to impose sanctions in the absence of *mens rea* or guilty intent, an exception occurs where the statute is an expression of a legislative policy to be served by strict liability." *People v. Steely*, 266 Cal. App. 2d 591, 594-95, 72 Cal. Rptr. 368, 370 (1968); *See also*, *People v. Wells*, 261 Cal. App. 2d 468, 478, 68 Cal. Rptr. 400, 406 (1968).

135. *Travers*, 52 Cal. App. 3d at 117, 124 Cal. Rptr. at 731.

136. 114 Cal. App. 3d Supp. 8, 170 Cal. Rptr. 773 (1980).

137. *Id.* at Supp. 12, 170 Cal. Rptr. at 775.

138. 202 Cal. App. 3d Supp. 6, 249 Cal. Rptr. 281 (1988).

139. *Id.* at Supp. 9, n.3, 4, Supp. 11, 249 Cal. Rptr. at 282, 283; LOS ANGELES COUNTY, CAL., CODE §§ 7.80.010 -7.80.420 (1991).

140. *Rouse*, 202 Cal. App. 3d at Supp. 11-12, 249 Cal. Rptr. at 283-84.

nual permit fee in amounts set forth in Section 7.14.010 of this title, under the appropriate heading, and upon authorization under a taxicab operator's license.<sup>141</sup>

The trial court found the defendant guilty.

On appeal, Rouse claimed the evidence was insufficient to prove he intentionally violated the statute. The appellate court noted that the county statute called for strict criminal liability<sup>142</sup> and held that the defendant could be convicted without proof of criminal intent.<sup>143</sup> The court also based its decision on the defendant's status within the corporation; he was the owner (license permittee in other jurisdictions) and a corporate officer.<sup>144</sup> As in *Park*, only those individuals who have a *responsible share* in furthering the corporation's unlawful transaction incur liability.<sup>145</sup> In comparing the statute that Rouse violated to other strict liability statutes, the court said: "[t]he taxicab regulations in this case are . . . akin to those regulations prohibiting the sale of mislabeled or short-weighted foods, the compounding of prescriptions without a license, *the sale of adulterated food*, or unsanitary conditions in a nursing home, which have been upheld as strict liability offenses."<sup>146</sup>

## VII.

### THE *PARK* DOCTRINE AS APPLIED TO THE CALIFORNIA HAZARDOUS WASTE ACT

The State of California currently enforces its Hazardous Waste Control Act<sup>147</sup> against individual corporate officers as well as corporations.<sup>148</sup> Several recent decisions have held corporate officers criminally liable under Health and Safety Code section 25,189.5, which penalizes the disposal, treatment, and storage of hazardous waste at facilities without permits, as well as the transportation of

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141. LOS ANGELES COUNTY, CAL., CODE § 7.80.040 (1991) (no mental element specified).

142. *Rouse*, 202 Cal. App. 3d at Supp. 10, 249 Cal. Rptr. at 283.

143. *Id.* at Supp. 11, 249 Cal. Rptr. at 283. (defendant could be convicted without proof of criminal intent because: 1) the statute was enacted for public morals, health, peace and safety; and 2) the defendant held a position of responsibility as a corporate officer).

144. *Id.* at Supp. 12, 249 Cal. Rptr. at 284.

145. *United States v. Park*, 421 U.S. 658, 670 (1975).

146. *Rouse*, 202 Cal. App. 3d at Supp. 11, 249 Cal. Rptr. at 283 (emphasis added).

147. CAL. HEALTH & SAFETY CODE § 25,100-25,249 (Deering 1988 & Supp. 1991); CAL. CODE REGS., tit. 22, §§ 66,260.10-67,786 (1990).

148. *Triple A Machine Shop, Inc. v. State of Cal.*, 213 Cal. App. 3d 131, 261 Cal. Rptr. 493 (1989).

hazardous waste to such facilities.<sup>149</sup> Liability of corporate officers for violating section 25,189.5 is based upon a negligence standard.<sup>150</sup> That section criminalizes activities of an individual who knew or "reasonably should have known" that he performed a criminal act.<sup>151</sup>

*Triple A Machine Shop, Inc. v. State of California*<sup>152</sup> concerned an ongoing court battle with an alleged polluter. In 1986, Navy personnel reported that they believed Triple A Machine Shop employees were illegally storing and dumping hazardous waste. In response to the Navy report, a hazardous materials specialist employed by the California Department of Health Services inspected the Triple A facility. Samples taken at the scene revealed asbestos and PCB<sup>153</sup> contamination. Observations made during the inspection also confirmed numerous violations of the California Hazardous Waste Control Act.

The State of California obtained a civil preliminary injunction in June 1987, to prevent Triple A from dissipating its assets. The purpose of the injunction was to assure that subsequent judgments for cleanup costs and related penalties could be paid by the defendant company.

In March 1988, after the state contacted upper-level corporate management without the permission of defense counsel, Triple-A filed an action seeking injunctive relief. The defense alleged violation of the attorney-client privilege, work product privilege, and other ethics violations.<sup>154</sup> The trial court issued a preliminary injunction in May 1988, that the state argued would severely limit the state's ability to contact corporate employees and inhibit the district attorney's ability to investigate corporate illegalities. In February 1989, California filed criminal charges against Triple A Machine Shop, Inc. and an individual corporate officer. These charges included sixteen counts for violations of Health and Safety Code section 25,189.5. The court of appeals reversed the trial court's preliminary injunction in August 1989. This decision allowed the district attorney to contact former employees not represented by the corporation's counsel, but not current officers.

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149. CAL. HEALTH & SAFETY CODE § 25,189.5 (Deering Supp. 1991).

150. *People v. Martin*, 211 Cal. App. 3d 699, 712, 716, 259 Cal. Rptr. 770 (1989).

151. CAL. HEALTH & SAFETY CODE § 25,189.5(b)-(d) (Deering Supp. 1991).

152. *Triple A*, 213 Cal. App. 3d 131, 261 Cal. Rptr. 493 (1989).

153. Polychlorinated biphenyls.

154. CAL. EVID. CODE §§ 950-962 (West 1966); CAL. CIV. CODE § 2018 (West 1985); CALIFORNIA RULES OF PROFESSIONAL CONDUCT, former Rule 7-103, present Rule 2-100 (West 1990).

A California court of appeals has held that federal law does not preempt the California Hazardous Waste Control Act. In *People v. Todd Shipyards Corp.*,<sup>155</sup> the state accused a corporation, its officers, and individual employees of multiple violations of the Hazardous Waste Control Act.<sup>156</sup> The charges included 341 alleged violations for transportation and storage of hazardous wastes without a permit.<sup>157</sup> Thirty-one counts specifically pertained to alleged violations of Health and Safety Code section 25,189.5.<sup>158</sup> (The same section involved in *Triple A.*) The defendants successfully demurred to these claims.

Defendant Todd had *knowingly stored and shipped* expired electrical transformers that contained oil contaminated with PCBs, in violation of section 25,189.5(c) and (d). Todd also *transported* these hazardous wastes via *unlicensed and unpermitted carriers*. In addition, Todd did not obtain permits allowing storage of these materials. Further, the waste disposal companies that defendant Todd hired to remove the transformers did not hold licenses to dispose, treat, or store PCBs or other hazardous wastes.<sup>159</sup> Some of the transformers leaked oil on the ground and onto the truck that transported them.

The trial court sustained demurrers to 277 counts, based upon an erroneous belief that the federal Toxic Substances Control Act (TSCA)<sup>160</sup> preempted the California hazardous waste storage regulations as applied to PCBs.<sup>161</sup> The trial court said, "if EPA exercises its rule-making power, state laws are preempted, *unless the state laws regulate the disposal of certain substances or the state laws are adopted under the authority of any other Federal Law.*"<sup>162</sup> The appeals court upheld the California Hazardous Waste Control Act and its regulation of PCB, since that Act complied with the exceptions enumerated in 15 U.S.C. 2617.<sup>163</sup>

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155. 192 Cal. App. 3d Supp. 20, 238 Cal. Rptr. 761 (1987).

156. *Id.* at Supp. 24.

157. *Id.* See also *id.* at Supp. 24-25 n.1.

158. *Id.* at Supp. 24-25 n.1.

159. An additional violation of section 25,189.5(c).

160. 15 U.S.C. §§ 2601-2671 (1982 & Supp. 1991).

161. *People v. Todd Shipyards, Corp.*, 192 Cal. App. 3d Supp. 20, 33-34, 238 Cal. Rptr. 761, 769 (1987). This section directly addresses preemption of state statutes by federal laws.

162. *Todd Shipyards*, 192 Cal. App. 3d at Supp. 34, 238 Cal. Rptr. at 769 (1987) (emphasis added) (citing 15 U.S.C. § 2617, which deals directly with federal preemption of state environmental laws).

163. *Id.*

The court in *People v. Martin*<sup>164</sup> recently applied the *Park* doctrine to violations of the Hazardous Waste Control Act.<sup>165</sup> *Martin* concerned the Chem-O-Lene Company which operated a chemical blending plant located in Ventura County. Ray Martin, Chief Executive Officer of Chem-O-Lene, also owned and operated another company, Unico Chemicals, located in Bakersfield. Chem-O-Lene blended chemicals in Ventura County, then sold and transported them to Unico's facility in Bakersfield.

Police arrested Martin on March 15, 1985 for violating section 25,189.5(b), which penalizes an individual for knowingly disposing of hazardous waste or causing others to dispose of it, without appropriate permits.<sup>166</sup> Within one week of his arrest, Martin instructed his employees to transport 182 metal drums of material from the Chem-O-Lene facility to Unico. Many of the drums shipped to Unico leaked, and their contents spilled onto the ground. The trial court convicted Martin of two violations of section 25,189.5(c), illegal transportation and disposal of hazardous waste at the Unico facility. That court fined Martin \$75,000, assessed a mandatory penalty of \$52,500, and placed Martin on felony probation for five years.

Martin appealed on the ground that section 25,189.5 violates due process by being unconstitutionally ambiguous and vague. In addition, Martin claimed that merely negligent conduct cannot be punished by criminal penalties. The court held that section 25,189.5 provided adequate notice to parties contemplating hazardous waste disposal. Moreover, the court determined that adequate standards existed for police to enforce the law. Therefore, the statute survived Martin's constitutional challenge. The court of appeals concluded:

In order to convict Martin, the jury must have found that he knew or should have known that he was causing the disposal and transportation of hazardous waste.<sup>167</sup> The scienter requirement itself guarantees adequate notice. (citations omitted) "Where as here dangerous substances are involved, and the probability of regulation is great, *the trier of fact may infer knowledge on the part of those engaged in the business of using such substances.*"<sup>168</sup>

This inference of knowledge is similar to the negligence view es-

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164. *People v. Martin*, 211 Cal. App. 3d 699, 712, 716, 259 Cal. Rptr. 770, (1989).

165. *Martin*, 211 Cal. App. 3d 699, 258 Cal. Rptr. 770 (1989).

166. The hazardous waste was improperly disposed of at the Chem-O-Lene facility in Ventura County (emphasis added).

167. CAL. HEALTH & SAFETY CODE § 25,189.5(b)-(c) (Deering Supp. 1991).

168. *Martin*, 211 Cal.App.3d at 706, 259 Cal. Rptr. at 773 (emphasis added) (quoting *State v. McAllister*, 399 N.W. 2d 685, 689 (Minn. App. 1987).

poused by Justice Stewart in his *Park* dissent.<sup>169</sup>

In *Martin*, the court established that a jury should apply a negligence standard when evaluating a defendant's conduct with respect to hazardous waste disposal.<sup>170</sup> "[T]he Legislature intended to impose criminal liability upon those who unlawfully transport and dispose of hazardous waste, even where their conduct falls short of gross negligence or recklessness."<sup>171</sup> In addressing strict criminal liability, the court continued:

Normally, persons who commit an act through misfortune or by accident with no evil design, intention, or culpable negligence are not criminally responsible for the act. "[T]o constitute a criminal act the defendant's conduct must go beyond that required for civil liability and must amount to a 'gross' or 'culpable' departure from the required standard of care. . . . The conduct must be aggravated or reckless; that is, it must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life. . . ."<sup>172</sup>

"The only exceptions to this general rule are so-called 'public welfare' or '*malum prohibitum*' crimes which are punishable despite the absence of any criminal intent or criminal negligence. . . ."<sup>173</sup> "These public welfare crimes are most often based upon the violation of statutes purely regulatory in nature and involving widespread injury to the public."<sup>174</sup> Those who violate these public welfare crimes may be held strictly liable for their conduct.<sup>175</sup>

Strict liability criminal statutes are easily identifiable. "Strict liability offenses are denoted where 'qualifying words such as knowingly, intentionally, or fraudulently are omitted from provisions creating the offense . . . .'"<sup>176</sup> Section 25,189.5 includes knowledge (or negligence) as an element of the offense; therefore, it is not a

169. *United States v. Park*, 421 U.S. 658, 679-80 (1975).

170. "[W]hether he 'reasonably should have known' that he caused the transportation or disposal of hazardous waste." *Martin*, 211 Cal. App. 3d at 712, 259 Cal. Rptr. at 777.

171. *Id.*

172. *Martin*, 211 Cal. App. 3d at 712-13, 259 Cal. Rptr. at 777 (quoting *People v. Peabody*, 46 Cal. App. 3d 43, 47, 119 Cal. Rptr. 780, 782 (1975)).

173. *Id.* at 713, 259 Cal. Rptr. at 777 (quoting *People v. Calban*, 65 Cal. App. 3d 578, 584, 135 Cal. Rptr. 441, 445 (1976)).

174. *Id.* at 713, 259 Cal. Rptr. at 777-78 (quoting *People v. Chevron Chemical Co.*, 143 Cal. App. 3d 50, 53-54, 191 Cal. Rptr. 537, 539 (1983)).

175. *Id.* at 713, 259 Cal. Rptr. at 778 (citing *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)).

176. *In re Marley*, 29 Cal. 2d 525, 529, 175 P.2d 832 (1946) (quoting 68 C.J.S. §§ 24, 25 (1934)).

strict liability offense.<sup>177</sup> However, once the legislature establishes a negligence standard, courts frequently assume the negligence standard was met, since any reasonable person would know that he was not disposing of the hazardous waste properly.

In practice, negligence statutes frequently become the functional equivalent of strict liability statutes. When the public welfare is at stake, courts often apply strict liability, but call it negligence. One possible explanation is that courts do not wish to openly support application of strict liability to criminal sanctions. Strict criminal liability may be perceived as consistent with the laws of totalitarian governments, but inconsistent with generally accepted democratic ideals. As a "free" society, we are generally unwilling to impose criminal sanctions without a showing of intent to do wrong. When dealing with legitimate interests of public safety, however, courts have routinely exhibited their belief that drastic measures are warranted.

In defending the California hazardous waste statute, the *Martin* court continued:

We have no doubt that in enacting section 25189.5, the Legislature intended to impose criminal liability upon those who reasonably should have known they were transporting or disposing of hazardous waste at an unpermitted facility, without requiring gross negligence or recklessness. The Legislature knows the difference between 'reasonably should have known' and acting with reckless disregard.<sup>178</sup>

....

... We conclude that section 25189.5, although not a strict liability offense, is part of a regulatory scheme where it is permissible to find criminal liability based on the violation of a standard of ordinary care.<sup>179</sup>

The defendant in *Martin* also asserted that federal hazardous waste statutes supersede state laws. The trial court agreed, holding that transportation of contaminated drums was subject to the federal Resource Conservation and Recovery Act (RCRA)<sup>180</sup> because the drums met the statutory definition of recyclable material. Additionally, since *Martin* admitted his attempt to sell the contaminated, but empty drums to a recycling entity, he knew that the empty drums were recyclable. California's law is more stringent than RCRA: any recyclable material (including empty drums) satisfies

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177. *Id.* at 713, 259 Cal. Rptr. at 778.

178. *Id.* at 715-16, 259 Cal. Rptr. at 779.

179. *Id.*

180. 42 U.S.C. §§ 6901-6992 (1982 & Supp. 1991).

the California statute's definition of hazardous waste, whereas RCRA exempts empty containers that once held hazardous waste.<sup>181</sup> Under California law, since the empty drums were recyclable, they qualified as hazardous waste and were regulated under section 25,100 et seq.<sup>182</sup>

The facts in *Martin* arose in 1985. In 1987, the State Legislature amended section 25,189.5(b) to provide that state statutes and regulations that are more stringent than their federal counterparts supersede the federal regulation.<sup>183</sup> This legislative modification will assist state courts in applying California's hazardous waste laws. If the state statute is more stringent than its federal counterpart, the court simply applies the state law, so long as compliance with the state law would not conflict with the federal law.

The California legislature delegated authority to the Department of Health Services to prepare a list of materials determined to be hazardous wastes. In *Martin*, the court found that this legislative grant of authority to an administrative agency was reasonable if the statute "provided adequate standards for administrative application of the statutory scheme."<sup>184</sup> The use of a hazardous waste list established by the Department of Health Services did not render the criminal statute unconstitutionally vague, because the California legislature fixed the criminal penalties and established the appropriate criminal sanctions.<sup>185</sup>

In its jury instructions, the *Martin* court specified some possible defenses available to future defendants charged with violating California's hazardous waste law:

When a person commits an act or makes an omission through *misfortune* or by *accident* under circumstances that show *he did not intend to do the acts* or omission which caused the disposal of hazardous waste or *reasonably could not have known* that his act or omission would result in the disposal of hazardous waste, then he does not thereby commit the crimes charged in this information.<sup>186</sup>

These exceptions are much narrower than the federal standard.

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181. *Martin*, 211 Cal. App. 3d at 708, 259 Cal. Rptr. at 774.

182. *Id.* at 709, 259 Cal. Rptr. at 775.

183. *Id.* at 708 n.3, 259 Cal. Rptr. at 774 n.3 (citing what is now CAL. HEALTH & SAFETY CODE § 25,159.5(b) (West Supp. 1991).

184. *Id.* at 710, 259 Cal. Rptr. at 776.

185. *Id.*

186. *Id.* at 711-12, 259 Cal. Rptr. at 777 (emphasis added).

### VIII. ENFORCEMENT

The public welfare demands that corporations become environmentally responsible. However, a corporation is a fictional entity incapable of forming the requisite *mens rea* necessary to find a defendant guilty of *malus animus* crimes.<sup>187</sup> Moreover, crimes that require scienter usually mandate corporal punishment; but a corporation cannot be imprisoned.<sup>188</sup> To achieve corporate compliance with environmental statutes, more drastic penalties must be created and applied.

An Environmental Law Symposium held at the University of Southern California in 1984 included a panel discussion of noted experts in the field of hazardous waste management. One of the speakers, Professor Barry Groveman, was one of the first prosecutors to obtain jail sentences for corporate officers who violated toxic waste statutes.<sup>189</sup> Professor Groveman, who previously served as a Deputy City Attorney and Deputy District Attorney in Los Angeles, stated:

Enforcement is the key to avoiding these problems. There is a way to enforce technology. We have also adopted the philosophy that there is a way to force the creation of new technological alternatives. If enough liability is created, including civil liability, criminal liability and jail sentences, this will start a turnaround in corporate decision-making. Even the good corporations, the majority of whom are trying to comply with the law, may stop considering space or landfill disposal and begin to discover creative disposal methods by reducing, recycling, and exchanging. Enforcement is the key to accomplishing these goals.<sup>190</sup>

As the leader of the Los Angeles task force on toxic waste, Professor Groveman prosecuted many corporate officers, including a South-Central Los Angeles battery manufacturer. The firm's owner faced criminal charges for regularly emptying acid from a 10,000-gallon tank into the city's sewer system. The law provided for criminal sanctions through which, if convicted, the owner faced up to

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187. Peter T. Edelman, Note, *Corporate Criminal Liability for Homicide: The Need to Punish Both the Corporate Entity and Its Officers*, 92 DICK. L. REV. 193, 197-98 (1987).

188. *Id.*

189. Panel Discussion, *Environmental Law Symposium: Toxic Waste; Is There A Final Resting Place*, 3 J. L. & ENV'T 87, 90 (Winter 1987).

190. *Id.* at 92.

nineteen years imprisonment.<sup>191</sup>

In the Los Angeles area alone, by 1987, the district attorney's office had successfully prosecuted approximately a dozen cases in which chief executive officers received jail sentences for violations of California hazardous waste laws.<sup>192</sup> Companies and corporate officers in Los Angeles have suffered severe penalties for the environmental hazards they created. The following are examples from the Los Angeles area:

(1) The Los Angeles Toxic Waste Strike Force convicted the president of Culligan Water Company's Hollywood facility for the company's discharge of large amounts of hexavalent chromium into city sewers. He was sentenced to three months in custody, and the company was fined \$100,000 and ordered to perform community service.

(2) The Chairman of the Board of Magnum Resources Corporation was convicted of dumping cyanide in the Los Padres National Forest. He spent ninety days in jail. The Court ordered another corporate official to perform 1,200 hours of community service, and the company was fined \$10,000.

(3) The vice-president of Precision Specialty Metals Corporation was sentenced to four months in custody because his company installed illegal sewer hookups and dumped approximately 4,000 gallons of metal and corrosive wastes into the sewer system each day. A plant engineer also received a sentence of 1,000 hours community service, which included giving public speeches about his crime and the punishment he received. The company was required to place an advertisement in *The Wall Street Journal*. In this publication, the company was required to confess for its environmental crimes and urge other businesses not to repeat its mistakes.

(4) The president and vice-president of American Caster Corporation each received six month jail sentences for their part of the company's environmental crimes. The company buried 254 barrels filled with "extremely flammable" chemical wastes in deep trenches on adjacent property. In addition, the court ordered two sales representatives to give public speeches for a total of twenty-five hours each. The corporation was fined \$20,000 and the court mandated that the company take out a full page advertisement in *The Los Angeles Times*.<sup>193</sup>

Regardless of increases in statutory maximum penalties, the ac-

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191. Bill Girdner, *Profile, Barry Groveman: Los Angeles Deputy City Attorney*, 95 L. A. DAILY JOURNAL, Aug. 23, 1982, at 1, 12.

192. W. Alfred Mukatis & Paul G. Brinkman, *Managerial Liability for Health, Safety, and Environmental Crime: A Review and Suggested Approach to the Problem*, 25 AM. BUS. L.J. 323, 332-333 (1987).

193. Barry C. Groveman & John L. Segal, *Pollution Police Pursue Chemical Criminals*, 55 BUS. SOC'Y REV. 39, 42 (1985) (no citations provided).

tual penalties imposed by courts remain relatively insignificant. While John Park could have been fined \$1,000 and incarcerated for a year, he was only fined \$250.<sup>194</sup> *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*<sup>195</sup> is another case in which the court imposed minimal penalties. There the court fined the defendant company only \$600 for serious OSHA violations that resulted in a worker's death although the maximum possible fine was \$10,000.<sup>196</sup> In another environmental case, the City of Hopewell, Virginia, two corporations, and six individuals were charged with a total of 1,097 counts for causing the acute poisoning of 75 people by releasing kepone, a highly carcinogenic and toxic pesticide. The defendants all pled *nolo contendere* to the charges. In spite of the serious nature of the offenses, the court fined the two individual defendants only \$25,000 each. None of the parties were sentenced to prison. The corporation paid fines in excess of \$13.3 million, a paltry sum when compared to the company's \$3 billion in annual sales. The city was fined \$10,000 for its role in the crimes.<sup>197</sup>

Courts are reluctant to impose criminal penalties on corporate executives who violate the law. Infrequent prison sentences may result because white-collar criminals do not appear to be a vicious threat to society. Because of this lack of punishment, upper-level corporate officers who are ultimately responsible for a given business activity may not appreciate the responsibility associated with their positions. The corporate hierarchy and physical distance often remove these officers from the problems that cause statutory violations. An officer's perception may become distorted, thereby diminishing his belief in the seriousness of the violation. His sense of control or responsibility over the conditions responsible for causing the violation may also be diminished.<sup>198</sup> Criminal punishment of corporate officials is especially rare when a statute requires a "knowing" or "willful" violation, because evidence of these elements is difficult to produce.

~ Imprisonment is a valuable tool that the legislature may use to protect the public from the dangerous acts of individuals or the corporations they operate. "Criminal punishment satisfies six goals of society: prevention, restraint, rehabilitation, education, retribution

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194. Mukatis & Brinkman, *supra* note 192, at 332.

195. 430 U.S. 442 (1977), *superseded* by statute as stated in *In re United Missouri Bank of Kansas City*, 901 F.2d 1449 (8th Cir. 1990).

196. Mukatis & Brinkman, *supra* note 192, at 332.

197. William Goldfarb, *Kepone: A Case Study*, 8 ENVTL. L. 645, 661 (1978).

198. Lynn Bledsoe, Note, *Criminal Liability for Public Welfare Offenses: Gambler's Choice*, 10 MEM. ST. U. L. REV. 612, 613 (1980).

and deterrence. Criminal penalties also carry a community stigma and a criminal record."<sup>199</sup> Heavier criminal sentences for corporate officers would encourage compliance with the law.

Unfortunately, when courts do sentence corporate officers to jail time, the usual sentence is less than one month.<sup>200</sup> Since so few serious penalties are meted out, corporate executives continue to allow their corporations to violate the law. These corporate executives see the potential benefit to their corporations from illegal activities as greater than the benefit to be achieved by following existing laws. Many corporations even insure their high-level executives against criminal-financial penalties.<sup>201</sup> Therefore, existing laws have not acted as successful deterrents to these individuals. The judiciary has responded by interpreting these laws on a strict liability theory.<sup>202</sup>

One authority has commented, "[j]ail terms have a self-evident deterrent impact upon corporate officials who belong to a social group that is exquisitely sensitive to status deprivation and censure. The white collar offender and his business colleagues . . . are apt to learn well the lesson intended by a prison term."<sup>203</sup> An experienced judge has expressed similar views:

Jail sentences often are a much more effective deterrent for corporate officials than monetary penalties. Fines, even very large fines, are sometimes merely accepted as a cost of doing business, and are easily recovered by the company. As one Federal Judge stated, 'My experience at the bar was that one jail sentence was worth 100 consent decrees and that fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by his company down the line.'<sup>204</sup>

Corporations that expose human beings, animals, and water supplies to the risks of toxic waste by intentionally and clandestinely dumping dangerous chemicals into sewers, storm drains, or vacant lots inflict serious injuries on valuable natural resources. Such intentional acts, inspired by a short term profit motive, are potentially destructive to the social order and must be treated as violent crimes

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199. Warning, *supra* note 119, at 393 (footnotes omitted).

200. Linda S. Weiss-Malik, *Imposing Penal Sanctions on the Unwary Corporate Executive: The Unveiled Corporate Criminal*, 17 U. TOL. L. REV. 383, 385 (Winter 1986).

201. RALPH NADER, MARK GREEN, & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* 107 (1976).

202. *Id.* at 108.

203. CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY 286, n.6. (M. David Ermann & Richard J. Lundman eds., 2d ed. 1982) (citation omitted).

204. Groveman & Segal, *supra* note 193, at 42.

against the community. Only tough jail sentences, combined with stiff fines, will serve as an effective deterrent for corporate crime and will counteract the economic incentives to dispose of waste illegally.<sup>205</sup>

In addition to jail sentences and heavy fines, corporations are sometimes ordered to pay for full-page advertisements in local or national newspapers. In these ads, convicted corporations confess their guilt, acknowledge that they have committed crimes against the community, and urge other companies to obey hazardous waste laws. The ads, which have appeared in *The Wall Street Journal* and *The Los Angeles Times*, have generated strong public support.<sup>206</sup>

Company executives have also been required to give public speeches about their illicit hazardous waste activities. In one such speech, an unnamed former company official stated the following about his responsibility: "We are wrong in what we did and we paid the penalty. So if I can offer any advice . . . please make every effort to comply and save our environment and don't . . . and I emphasize *don't* do as we did."<sup>207</sup>

Weiss-Malik has suggested that corporate executives may try to protect themselves by precisely defining their corporate duties.<sup>208</sup> "Of course, *any deterrence depends on vigorous prosecution and sentencing of polluters*. If violations go unpunished, polluters will discount the amount of the sanction by the actual probability of punishment, and find compliance the more expensive alternative."<sup>209</sup>

The ultimate goal of the legislature and the courts in imposing strict liability to public welfare offenses is to eliminate undesirable corporate conduct.

The deterrence value of criminal sanctions in statutes like RCRA is augmented by the capability of the statute to reach individual defendants. Even if a straight economic analysis would lead a corporation to violate the statute and risk punishment, an executive's knowledge that he would be personally subject to criminal prosecution, all the attendant obloquy, and possibly a prison sentence, might induce him to think at other than the corporate level and in other than economic

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205. *Id.* at 41-42.

206. *Id.* at 42.

207. Groveman & Segal, *supra* note 193, at 42.

208. Weiss-Malik, *supra* note 200, at 396.

209. Brian E. Concannon, Jr., Comment, *Criminal Sanctions for Environmental Crimes and the Knowledge Requirement: United States v. Hayes International*, 786 F.2d 1499 (11th Cir. 1986), 25 AM. CRIM. L. REV. 535, 539 (1987) (emphasis added).

terms.<sup>210</sup>

Since corporations do not make decisions and cannot be imprisoned, the burden falls on responsible corporate officers who do make decisions and can go to prison. "As the Supreme Court said in *Dotterweich*, the question of responsibility can be left to 'the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries. . . .'"<sup>211</sup>

## IX.

### OTHER STATE PROSECUTIONS

Aggressive prosecutors in other states have also successfully imprisoned corporate violators of environmental laws. For example, early in the 1980's, three violators of the Pennsylvania Clean Stream Act were convicted, and one went to prison for unlawfully dumping toxic wastes.<sup>212</sup>

When a work-related exposure to highly toxic materials resulted in the death of an employee named Stefan Golab,<sup>213</sup> three corporate officers of Film Recovery Systems, Inc. and the company itself were found guilty of murder under an Illinois criminal statute.<sup>214</sup> This case represents the first time a corporation and its individual directors were found guilty of criminal homicide.<sup>215</sup> Individual criminal liability was incurred because the "defendants were totally knowledgeable in the dangers which are associated with the use of cyanide."<sup>216</sup> Moreover, the individual defendants' conduct created a lethal environment at their plant.<sup>217</sup> Once again, the court seems to have implied the knowledge element from the nature of the business. Even though the opinion is couched in terms of negligence, it appears to be an application of strict criminal liability to corporate officers because of their responsible relationship with the hazard.<sup>218</sup>

In assessing corporate criminal liability, the judge stated:

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210. *Id.* (citations omitted).

211. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) (quoting *United States v. Dotterweich*, 320 U.S. 277, 285 (1943)).

212. *TIME MAGAZINE*, Oct. 14, 1985, at 78.

213. Edelman, *supra* note 187, at 213 (Golab inhaled cyanide gas which permeated the company's facility).

214. *ILL. REV. STAT.* ch. 38, ¶¶ 5-4-5-5 (1983); *Film Recovery Systems, Inc.*, No. 83-11091 (Cook County Cir. Ct. of Ill. June 14, 1985) consolidated with *People v. O'Neil*, No. 84-5064 (Cook County Cir. Ct. of Ill. June 14, 1985).

215. Edelman, *supra* note 187, at 193.

216. *Id.* at 213-14.

217. *Id.* at 214.

218. *Id.*

The mind and mental state of a corporation is the mind and mental state of the directors, officers and high managerial personnel because they act on behalf of the corporation for both the benefit of the corporation and for themselves; and if the corporation's officers, directors and high managerial personnel act within the scope of their corporate responsibilities and employment for their benefit and for the benefit of the profits of the corporation, the corporation must be held liable for what occurred in the workplace.<sup>219</sup>

Each individual defendant held either a managerial or policy-making role in corporate operations. The court imposed sentences of twenty-five years for each of the three individual defendants found guilty of murder.<sup>220</sup> The court did not allow a defense under the Business Judgment Rule, because evidence presented at trial indicated that the officials knew or should have known about the hazardous conditions responsible for their employee's death.<sup>221</sup>

In 1986, the New York legislature passed a statute, chapter 671,<sup>222</sup> that allows courts to impose criminal sanctions for unlawful disposal of hazardous waste. The statute penalizes "any 'person' who unlawfully stores or releases any regulated substances."<sup>223</sup> In addition, violators are subject to a fine equal to double the amount of money gained from the illegal activity.<sup>224</sup>

The New York statute is similar to the California hazardous waste statute; both provide for imprisonment of violators. "By enacting chapter 671 the New York legislature intended to facilitate criminal prosecution of those corporations, corporate officers, and other individuals who discharge hazardous waste in an unlawful manner. The amendment provides a specific definition of hazardous waste and specific criminal sanctions."<sup>225</sup>

Several other states have also enacted environmental safety statutes with criminal penalties including incarceration. Maryland recently passed a hazardous waste act<sup>226</sup> that provides for prison

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219. *Id.*

220. Mukatis & Brinkman, *supra* note 192, at 333-34.

221. *Id.* at 333-35.

222. Substances Hazardous or Acutely Hazardous to Public Health, Safety, or the Environment, Chapter 671, approved July 26, 1986.

223. Warning, *supra* note 119, at 402.

224. *Id.* This law prohibits the knowing or reckless endangering of public health, safety, or the environment and classifies violations as a class-d felony. Purposeful violation is a class-c felony.

225. *Id.* at 405.

226. Hazardous Materials and Hazardous Substances Act, MD. ENVTL. CODE ANN. § 7-201(m) (1989 Supp.).

sentences up to five years, in addition to fines up to \$100,000.<sup>227</sup> Significantly, Maryland's statute eliminated the statute of limitations.<sup>228</sup> New Jersey modified its hazardous waste statute in 1987<sup>229</sup> to authorize up to ten years imprisonment and a \$100,000 fine for individuals, and up to a \$300,000 fine for corporations.<sup>230</sup> Pennsylvania also enacted hazardous waste legislation in 1987<sup>231</sup> which includes both civil and criminal penalties.<sup>232</sup> Additionally, Illinois modified its Environmental Protection Act in 1987,<sup>233</sup> adding criminal as well as civil penalties.<sup>234</sup>

A recent study of hazardous waste offense and offender characteristics in Maine, Maryland, New Jersey, and Pennsylvania describes many of the criminal penalties imposed against corporations and corporate agents in these states between January 1, 1977, and December 31, 1984.<sup>235</sup> Most of these penalties amounted to small fines and suspended prison terms for individuals; most corporations received small fines.<sup>236</sup> Clearly, the courts in these states have hesitated to impose criminal sanctions.

## X.

### FEDERAL REGULATIONS

In addition to regulations promulgated by the states, the federal government actively regulates hazardous waste disposal under a myriad of regulatory schemes. Congress passed the first federal regulations designed to protect the environment in 1899. This legislation, known as the Rivers and Harbors Act,<sup>237</sup> was designed to prevent obstruction of navigable waters.<sup>238</sup> The Rivers and Harbors

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227. Warning, *supra* note 119, at 408.

228. *Id.* at 424.

229. N.J. STAT. ANN. §§ 2C:17-2, 2C:43-3, 2C:43-4, 13:1E-9 (West 1982 & Supp. 1990).

230. Warning, *supra* note 119, at 409.

231. 35 PA. STAT. ANN. §§ 6018.101-1003 (Purdon Supp. 1990) (hazardous waste definition at § 6018.103).

232. Warning, *supra* note 119, at 410.

233. ILL. ANN. STAT. ch. 111 1/2, ¶¶ 1003-1052 (Smith-Hurd 1984 & Supp. 1990).

234. Warning, *supra* note 119, at 410-11.

235. Donald J. Rebovich, UNDERSTANDING HAZARDOUS WASTE CRIME: A MULTISTATE EXAMINATION OF OFFENSE AND OFFENDER CHARACTERISTICS IN THE NORTHEAST 5 (1986).

236. *Id.* at 59-63.

237. Ch. 425, 30 Stat. 1151 (1899) (codified as amended in 33 U.S.C. §§ 401-411 (1976)).

238. Richard M. Carter, Note, *Federal Enforcement of Individual and Corporate Criminal Liability for Water Pollution*, 10 MEM. ST. U. L. REV. 576, 578 (1980).

Act was also referred to as the Refuse Act.<sup>239</sup>

Since 1970, in addition to the Food, Drug and Cosmetic Act, Congress has passed many environmental statutes under the guise of public health and safety. These congressional Acts include, but are not limited to, the following:

1970

- National Environmental Policy Act<sup>240</sup>
- Clean Air Act<sup>241</sup>
- Occupational Safety and Health Act<sup>242</sup>

1972

- Federal Water Pollution Control Act (renamed Clean Water Act in 1977)<sup>243</sup>
- Federal Insecticide, Fungicide and Rodenticide Act<sup>244</sup>
- Coastal Zone Management Act<sup>245</sup>
- Marine Mammal Protection Act<sup>246</sup>

1973

- Endangered Species Act<sup>247</sup>

1974

- Safe Drinking Water Act<sup>248</sup>
- Forest and Rangeland Renewable Resources Planning Act<sup>249</sup>

1976

- Resource Conservation and Recovery Act<sup>250</sup>
- Toxic Substance Control Act<sup>251</sup>
- National Forest Management Act<sup>252</sup>
- Federal Land Policy Management Act<sup>253</sup>

1977

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239. "It shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States . . . ." Rivers and Harbor Appropriations Act of 1899, ch. 425 § 13, 30 Stat. 1152 (1899).

240. 42 U.S.C. §§ 4321-4370(c) (1989 & Supp. 1991).

241. 42 U.S.C. §§ 7401-7671a (1989 & Supp. 1991).

242. 29 U.S.C. §§ 651-678 (1990 & Supp. 1991).

243. 33 U.S.C. §§ 1251-1387 (1987 & Supp. 1991).

244. 7 U.S.C. §§ 135-136y (1978 & Supp. 1991).

245. 16 U.S.C. §§ 1451-1464 (1984 & Supp. 1991).

246. *Id.* §§ 1361-1407 (1984 & Supp. 1991).

247. *Id.* §§ 1531-1544 (1984 & Supp. 1991).

248. 42 U.S.C. §§ 300f-300j-26 (1978 & Supp. 1991).

249. 16 U.S.C. §§ 1600-1687 (1984 & Supp. 1991).

250. 42 U.S.C. §§ 6901-6987 (1982 & Supp. 1991).

251. 15 U.S.C. §§ 2601-2671 (1982 & Supp. 1991).

252. 16 U.S.C. §§ 471-544(p) (1978 & Supp. 1991).

253. 43 U.S.C. §§ 1701-1784 (1980 & Supp. 1991).

Surface Mining Control, and Reclamation Act<sup>254</sup>

1980

Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)<sup>255</sup>

Each of the Acts listed above generally requires that an individual have some scienter, ranging from knowledge to criminal intent, before criminal sanctions may be imposed.<sup>256</sup> Congress could have made *all* of these environmental crimes strict liability offenses, but has elected not to do so. The net result is that no federal environmental statute imposes criminal liability absent proof of a particular state of mind.<sup>257</sup> Moreover, contrary to state courts, federal courts are reluctant to impose strict criminal liability when a statute omits any scienter element.<sup>258</sup> The Food, Drug and Cosmetic Act is a rare exception, which requires no "consciousness of wrongdoing."<sup>259</sup> Federal hazardous waste statutes provide minimum standards and penalties, but explicitly authorize the states to create stricter regulatory standards.<sup>260</sup>

## The Resource Conservation and Recovery Act of 1976 (RCRA)

254. 30 U.S.C. §§ 1201-1328 (1979 & Supp. 1991).

255. 42 U.S.C. §§ 9601-9675 (1989 & Supp. 1991).

256. Mukatis & Brinkman, *supra* note 192, at 327-28. Compare the Clean Air Act § 133(c)(4), 42 U.S.C. § 7413(c)(4) (1989 & Supp. 1991), and Clean Water Act § 309(c)(1), 33 U.S.C. § 1319(c)(1) (1987 & Supp. 1991), which provide misdemeanor penalties for negligent conduct.

257. Mukatis & Brinkman, *supra* note 192, at 331. Even if an act requires knowledge, courts may apply the knowledge requirement differently. The Third Circuit has applied the knowledge requirement in RCRA § 6928(d)(2) to each of the following elements: (1) that the defendant knew that he treated, stored or disposed of a waste; (2) that the waste disposed of was hazardous; (3) that a permit was required; and (4) that no permit was obtained. *United States v. Johnson Towers, Inc.*, 741 F.2d 662, 668-69 (3d Cir. 1984) *cert. denied*, 469 U.S. 1208 (1985). The Ninth Circuit applied a looser standard, holding that RCRA does not require the defendant to have known that a permit was required and had not been obtained. *United States v. Hoffin*, 880 F.2d 1033, 1036-39 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990). The Fifth Circuit has applied the loosest standard, holding that a defendant could violate RCRA even if he did not know that the substances were classified as RCRA hazardous waste, so long as he knew the materials were generally dangerous. *United States v. Baytank*, 934 F.2d 599, 610-13 (5th Cir. 1991). The *Baytank* court held that the defendant's knowledge that the materials were toxic satisfied RCRA's knowledge requirement. The 6th Circuit upheld the conviction of a demolition contractor under CERCLA and the Clean Air Act based on his knowledge that asbestos had been released into the air; the court convicted the defendant for not filing a report of the release even if the defendant had not known a report was required. *United States v. Buckley*, 934 F.2d 84, 88-89 (6th Cir. 1991).

258. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-438 (1978), *cert. denied*, 444 U.S. 884 (1979).

259. *United States v. Park*, 421 U.S. 658, 669 (1975).

260. Warning, *supra* note 119, at 392 (footnotes omitted).

imposed criminal sanctions for the *knowing* disposal or transportation of hazardous waste without a permit.<sup>261</sup> Congress revised RCRA in 1980<sup>262</sup> and again in 1984.<sup>263</sup> The 1980 revisions increased the maximum criminal penalties for a first-time conviction to \$50,000 and/or two years imprisonment.<sup>264</sup> In addition, Congress modified section 3008(d) of RCRA to impose felony criminal sanctions upon “[a]ny person who *knowingly* transports any hazardous waste . . . to a facility which does not have a permit . . . ,”<sup>265</sup> or anyone who “*knowingly* treats, stores or disposes of any hazardous waste . . . without having obtained a permit . . . or in knowing violation of any material condition or requirement of such permit.”<sup>266</sup>

RCRA is complex legislation with well-defined parameters. “RCRA regulations identify over 400 specific chemicals which meet the statutory criteria for hazardous wastes. In addition, under the regulations, chemicals which exhibit any one of four characteristics of ignitability, corrosivity, reactivity, and toxicity, evaluated through an extraction process which gauges the pollutant’s ability to leach through the ground, are considered hazardous wastes.”<sup>267</sup>

Under the 1984 revisions, violations of RCRA’s “knowing endangerment” provisions may subject an individual to severe penalties. These changes provide for maximum penalties of up to fifteen years in prison plus \$250,000 in fines.<sup>268</sup> The first successful prosecution of a *corporation* under RCRA’s “knowing endangerment” provisions occurred in *United States v. Protex Indus., Inc.*,<sup>269</sup> a case concerning company employees who had suffered prolonged exposure to solvents and pesticides. The Tenth Circuit Court of Appeal stated: “Since section 6927(a) [of RCRA] provides no defense to criminal charges under the RCRA, the district court was not in

261. 42 U.S.C. § 6928(d) (1982 & Supp. 1991).

262. The EPA, with authority granted by Congress, promulgated regulations applicable to RCRA on May 19, 1980. The modifications became effective November 19, 1980. Fed. Reg. 33,066 (May 19, 1980); Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 13, 94 Stat. 2334, 2340 (1980) (codified at 42 U.S.C. §§ 6901-6992 (1988)).

263. Pub. L. No. 98-616, § 232(a)(3), 98 Stat. 3221, 3256-57 (1984), 42 U.S.C. § 6928(d) (1982 and Supp. 1991).

264. Mukatis & Brinkman, *supra* note 192, at 330.

265. 42 U.S.C. § 6928(d)(1)-(2) (1982 & Supp. 1991) (emphasis added).

266. *Id.*

267. Irene C. Warshauer & Lynn Ann Stansel, *Analyzing the Relationship Between the Civil, Governmental, and Criminal Obligations and Liabilities For Hazardous Waste*, 22 TORT INS. L.J. 37, 39 (1986) (citations omitted).

268. *Id.* at 43.

269. No. 87-CR-115 (D.C. Colo. Mar. 4, 1987); *aff’d* 874 F.2d 740 (10th Cir. 1989).

error in refusing to instruct the jury in the language of that statute."<sup>270</sup>

In *United States v. Tumin*,<sup>271</sup> corporate officer Albert Tumin was convicted of disposing three fifty-five gallon drums containing ethyl ether in a vacant lot in Rockaway, New York. He was charged with violations of section 3008(d)(1) of RCRA and section 103(b)(3) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA).<sup>272</sup> This conviction was perhaps the first time the "knowing endangerment" provisions of these statutes were successfully applied to an *individual*.<sup>273</sup> Defendant Tumin faced a maximum sentence of twenty-one years in prison and fines of \$310,000.<sup>274</sup>

In *United States v. Johnson & Towers, Inc.*,<sup>275</sup> the district court dismissed three counts against individual defendants for unlawful disposal of hazardous wastes in violation of RCRA. The individual defendants were Jack Hopkins, a foreman for the defendant corporation, and Peter Angel, the trucking department service manager. The court of appeals reversed the district court, holding that ". . . section 6928(d)(2)(A) covers employees as well as owners and operators of the facility who knowingly treat, store, or dispose of any hazardous waste, but . . . the employees can be subject to criminal prosecution only if they knew or should have known that there had been no compliance with the permit requirement of section 6925."<sup>276</sup>

Instructing the lower court on remand, the court of appeals stated:

[I]n order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit. Depending on the evidence, the district court may also instruct the jury that *such knowledge may be inferred*.

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270. *United States v. Protex Indus., Inc.*, 874 F.2d 740, 746 (10th Cir. 1989).

271. *United States v. Tumin*, No. 87-CR-488 (E.D.N.Y., April 13, 1988); U.S. Department of Justice News Release #202-633-1017 (Washington, D.C., April 15, 1988).

272. 42 U.S.C. § 9603(b)(3) (1989 & Supp. 1991).

273. Christopher Harris, Patricia O. Cavanaugh & Robert L. Zisk, *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203, 204 (1988).

274. U.S. Department of Justice News Release No. 202-633-1017 (Washington, D.C., April 15, 1988), regarding *United States v. Tumin*, No. 87-CR-488 (E.D.N.Y., April 13, 1988).

275. 741 F.2d 662 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

276. *Id.* at 664-65 (sections 6928 (d)(2)(A) and 6925 refer to RCRA, 42 U.S.C. §§ 6901-6987 (1982 & Supp. 1991)).

In summary, we conclude that the individual defendants are "persons" within section 6928(d)(2)(A), that all the elements of that offense must be shown to have been knowing, but that such knowledge, including that of the permit requirement, may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant.<sup>277</sup>

Another RCRA<sup>278</sup> prosecution for illegal transportation of hazardous waste, *United States v. Hayes Intern. Corp.*,<sup>279</sup> resulted in jury convictions of the company and its employee. The judge, however, granted a motion for judgment notwithstanding the verdict.<sup>280</sup> The court of appeals reversed, finding that there was sufficient evidence for the jury to find *the defendants knew* the recycler to whom they sold their waste did not have permits and did not intend to recycle the waste. Therefore, the court reasoned, the defendants knowingly transported hazardous waste in violation of the statute.<sup>281</sup>

The defendants first claimed a legitimate belief that their actions were exempt from the law because they sent their hazardous wastes to a recycler. This defense failed. Second, the defendants claimed that they did not know that the recycler did not have permits. The court determined that the jury could have found, beyond a reasonable doubt, that the defendants knew the recycler did not have a proper permit. Finally, the defendants asserted their good-faith belief that the recycler was actually recycling the waste. Initially, the court appeared to accept this mistake of fact theory, but ultimately reversed the lower court and reinstated the convictions; the court found sufficient evidence for the jury to have rejected this defense.<sup>282</sup>

The court stated:

The government does not face an unacceptable burden of proof in proving that the defendant acted with knowledge . . . . Knowledge does not require certainty; a defendant acts knowingly if he is aware 'that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'<sup>283</sup>

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277. *Id.* at 669-70 (emphasis added).

278. 42 U.S.C. §§ 6901-6987 (1982 & Supp. 1991).

279. 786 F.2d 1499 (11th Cir. 1986).

280. *Id.* at 1501.

281. *Id.*

282. *Id.* at 1506.

283. *Id.* at 1504 (quoting *United States v. Gypsum Co.*, 438 U.S. 422, 445 (1978), *cert. denied*, 444 U.S. 884 (1979); and quoting Wayne R. LaFave & Austin W. Scott, Jr., *CRIMINAL LAW* 196 (1st Ed. 1972)).

Federal courts seem much less willing than their state counterparts to imply knowledge, thereby creating the equivalent of strict criminal liability.

[T]here is no evidence that the *Park* doctrine of convicting a responsible corporate official who was not consciously aware of the violation is being extended to any other major federal area pertaining to individual health and safety or degradation of the environment.

. . . .  
. . . All of the major federal environmental laws have a culpable mental state associated with criminal offenses, such as negligence, willfulness, knowledge, or intent. Therefore, no corporate official should be unduly fearful of a criminal conviction under any one of them unless he or she is consciously aware of a wrongful situation or consciously avoids acquiring knowledge of the situation.<sup>284</sup>

A 1975 study conducted by Daniel O'Keefe and Marc Shapiro evaluated twenty-seven federal health and safety statutes.<sup>285</sup> This study concluded that many of these statutes varied considerably with regard to the mental state necessary for conviction. The authors noted that these variations are the result of legislation written by different legislators and different committees, at different points in time.<sup>286</sup>

O'Keefe and Shapiro evaluated thirteen federal statutes that require prosecutors to show specific proof of a defendant's knowledge or willfulness regarding the statutory violation. Twelve of these thirteen statutes imposed criminal penalties even if no actual harm to the public resulted from the violation. Only OSHA<sup>287</sup> requires actual harm to the public (specifically, the death of an employee) before it imposes criminal liability.<sup>288</sup>

The prosecution must show that a criminal defendant either *willfully* or *negligently* violated the Federal Water Pollution Control Act<sup>289</sup> before criminal sanctions may be imposed.<sup>290</sup> In contrast, the Air Pollution Prevention and Control Act (the Clean Air Act)<sup>291</sup> penalizes only knowing violations.<sup>292</sup>

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284. Mukatis & Brinkman, *supra* note 192, at 330-31.

285. Daniel F. O'Keefe, Jr., & Marc H. Shapiro, *Personal Criminal Liability Under the Federal Food, Drug, and Cosmetic Act: The Dotterweich Doctrine*, 30 FOOD DRUG COSM. L.J. 1 (1975).

286. *Id.* at 36.

287. 29 U.S.C. §§ 651-678 (1990 & Supp. 1991).

288. *Id.* § 666(e).

289. 33 U.S.C. §§ 1251-1387 (1987 & Supp. 1991).

290. *Id.* § 1319(c)(1)-(2).

291. 42 U.S.C. §§ 7401-7642 (1989 & Supp. 1991).

292. *Id.* § 7413(c).

A recent amendment to the Federal Water Pollution Control Act<sup>293</sup> imposes criminal sanctions of up to two years in prison. Fines range up to \$50,000 per day for parties "who negligently violate the Act or who negligently introduce into a sewer system or publicly owned water treatment plant a pollutant or hazardous substance which they reasonably should have known could cause injury to person or property."<sup>294</sup>

A court interpreting the Federal Water Pollution Control Act,<sup>295</sup> imposed criminal sanctions on a corporation and its officers for the first time in *United States v. Frezzo Bros., Inc.*<sup>296</sup> There, a jury convicted the defendants on six counts of negligently or willfully discharging pollutants into a navigable waterway.<sup>297</sup> The individual defendants, corporate officers James and Guido Frezzo, each received thirty-day jail sentences and an aggregate fine of \$50,000. In addition, the court fined the corporation \$50,000. Explaining why it did not require the EPA to exhaust all possible administrative remedies, the court stated:

[W]e see no reason why the Government should be hampered by prerequisites to seeking criminal sanctions under the Act. . . . The Government could logically argue, as it did in this case, that the circumstances surrounding the alleged discharges manifested willful violations of the Act and that it had the power to pursue criminal rather than civil sanctions. . . . We therefore hold; that the Administrator of the EPA is not required to pursue administrative or civil remedies, or give notice, before invoking criminal sanctions under the Act.

. . . .

. . . The jury was entitled to infer from the totality of the circumstances surrounding the discharges that a willful act precipitated them. The Government did not have to present evidence of someone turning on a valve or diverting wastes in order to establish a willful violation of the Act.<sup>298</sup>

In *United States v. Distler*, the court sentenced the owner of a liquid waste disposal company to two years in prison and a \$30,000 fine

293. 33 U.S.C. §§ 1251-1387 (1987 & Supp. 1991).

294. *People v. Martin*, 211 Cal. App. 3d 699, 715, 259 Cal. Rptr. 770, 779 (1989) (citing 33 U.S.C. § 1319(c)(1)).

295. 33 U.S.C. §§ 1251-1387 (1987 & Supp. 1991).

296. 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

297. *Id.* at 1124. This was a violation of 33 U.S.C. §§ 1311(a) and 1319(c). Section 1319(c) provides: "(1) Any person who willfully or negligently violates section 1311 . . . of this title . . . shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both . . ."

298. *Frezza Bros.*, 602 F.2d at 1126-30 (citations omitted).

for dumping pesticide waste into a sewer system in Louisville, Kentucky.<sup>299</sup>

In *People v. Chevron Chemical Co.*,<sup>300</sup> the court did not agree with the defendant's interpretation of section 5650 of the California Fish & Game Code.<sup>301</sup> Defendant Chevron proposed that the statute required proof of scienter or criminal negligence. The court replied:

Section 5650 on its face does not require such proof. What is more important, however, is that the subject matter of this statute—the prevention of adverse impacts upon California's fish, plant life or bird life through water pollution—is clearly within the regulatory *public welfare* exception to the criminal prosecution mens rea requirement.<sup>302</sup>

The Food and Drug Administration (FDA) enforces the Food, Drug and Cosmetic Act, from which the *Park* doctrine originated. Before imposing a criminal prosecution, the FDA considers several factors:

- 1) the gravity of the offense;
- 2) whether defendants had *actual knowledge or deliberate intent* to circumvent or violate the law;
- 3) the deterrent value within that company and within that trade;
- 4) health and/or economic risk to the public;
- 5) FDA resources;
- 6) recurrent transgressions by that company;
- 7) whether the violation could have been easily detected, prevented or promptly corrected; and
- 8) whether the potential defendant occupied a position in a responsible relation to the violation.<sup>303</sup>

Under some circumstances, the FDA will not attempt to impose criminal sanctions for violation of the Act. These areas include:

- 1) legitimate confusion about what the law says;
- 2) where there is a new or novel issue of law or fact;
- 3) if there is confusion resulting from prior prosecutions; and
- 4) if clear evidence shows that the defendant was unaware of the consequences of his or her actions.<sup>304</sup>

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299. *United States v. Distler*, 9 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,700 (W.D.Ky. 1979), *aff'd*, 671 F.2d 954 (6th Cir. 1981), *cert. denied*, 454 U.S. 837 (1981).

300. 143 Cal. App. 3d 50, 191 Cal. Rptr. 537 (1983).

301. *Id.*, CAL. FISH & GAME CODE § 5650(f) (West 1984) (forbids depositing substance deleterious to fish, plant life or bird life into state waters).

302. *Chevron*, 143 Cal. App. 3d at 54 (emphasis added).

303. Daniel F. O'Keefe, Jr., *Criminal Liability: Park Update*, 32 *FOOD DRUG COSM. L.J.* 392, 400-02 (1977).

304. *Id.* at 403.

Empirical data illustrate that courts rarely impose criminal sanctions under the Act except in cases of repeated violations.<sup>305</sup> Under the apparent strict liability approach, the penalty is typically subjected to a rational review before implementation.<sup>306</sup>

James W. Moorman, the Justice Department official responsible for enforcing federal environmental laws, testified before Congress:

We do not know where the millions of tons of stuff is going. We feel that the things that have turned up like the Love Canal and Kin-Buc situation are simply the tip of the iceberg. We do not have the capacity at this time really to find out what is actually happening. In my view, it is simply a wide open situation, like the Wild West in the 1870's, for toxic disposal.<sup>307</sup>

The Justice Department notes that during the period from 1983 to 1985, its environmental crimes unit recorded over 100 criminal indictments and collected over 1.5 million dollars in fines.<sup>308</sup> It also reports that three corporate officers were each sentenced to one year in jail and ordered to pay restitution equaling cleanup costs.<sup>309</sup> The Justice Department has become much better at achieving convictions for environmental crimes. In 1990 the Justice Department brought charges against 100 defendants which resulted in total sentencing of 745 months of jail time.<sup>310</sup>

## XI. CONCLUSION

It has been sixteen years since the *Park* doctrine first imposed strict liability on corporate officers. During those years, the number of corporations producing hazardous waste has increased, and the number of state and federal regulations has increased as well. California and several other states express their hazardous waste disposal statutes in terms of a negligence standard. As applied, however, prosecutions under these statutes amount to strict criminal liability similar to that in *Park*. This result occurs because courts impute

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305. Brickey, *supra* note 1, at 1376.

306. *Id.*

307. House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess., Report on Hazardous Waste Disposal 31 (Comm. Print 1979) (quoting James Moorman, Asst. Att'y Gen. for Land and Natural Resources).

308. U.S. DEPT. OF JUSTICE LEGAL ACTIVITIES 1986-1987, 36.

309. *Id.*

310. EPA, ENVIRONMENTAL ENFORCEMENT ACCOMPLISHMENTS REPORT FISCAL YEAR 1990 3-2 (1991).

knowledge to corporate officers when their company illegally disposes of hazardous waste.

The survival of our planet depends upon a long term resolution of the hazardous waste problem. As a society we depend on technological innovations. Many of these developments create byproducts that are toxic, infectious, or hazardous. Survival of our species should be our most sacred priority.

Corporate America is driven by profits. Financial gain is their sole objective. The conflict between this corporate priority and that of society at large is obvious. Since it costs more corporate money to comply with environmental laws than it costs to violate the laws, more than economic forces must be utilized to force corporations to be responsible and law-abiding. Imposition of criminal penalties on corporate officers is more than merely a cost of doing business. It requires individual decision-makers to reevaluate their actions. Hopefully, application of strict criminal liability will shift the balance, and make corporations err on the side of a clean and life-sustaining environment.

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