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## ***United States v. Johnson & Towers, Inc.:* Corporate Employee Criminal Liability Under RCRA**

The Resource Conservation and Recovery Act<sup>1</sup> (RCRA) was enacted to “promote the protection of health and the environment and to conserve valuable mineral and energy resources.”<sup>2</sup> One way of accomplishing these objectives is through regulation of the “treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment.”<sup>3</sup> To assure compliance with RCRA, Congress included certain criminal provisions in the regulatory scheme.<sup>4</sup>

In *United States v. Johnson & Towers, Inc.*<sup>5</sup> (*Johnson &*

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1. 42 U.S.C. §§ 6901-6987 (1982).

2. 42 U.S.C. § 6902 (1982) (Objectives).

3. 42 U.S.C. § 6902(4) (1982). *See also* H.R. Rep. No. 94-1491 Part I, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6241.

4. Criminal penalties under RCRA are contained in 42 U.S.C. § 6928(d) (1982) which provides in pertinent part:

(d) Any person who . . .

(2) Knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either-

(A) Without having obtained a permit under Section 6925 of this title . . . ; or

(B) in knowing violation of any material condition or requirement of such permits; . . . shall, upon conviction, be subject to a fine of not more than \$25,000 (\$50,000 in the case of a violation of paragraph (1) or (2)) for each day of violation, or to imprisonment not to exceed one year (two years in the case of a violation of paragraph (1) or (2)), or both.

*See also* H.R. Rep. No. 94-1491 Part I, 94th Cong., 2d Sess. 31, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6269 where it is noted that:

This section also provides for criminal penalties for the person who . . . disposes of any hazardous waste without a permit under this title . . . . The use of criminal penalties are sufficiently narrow in that they only apply to those who knowingly transport hazardous wastes to a facility which does not have a permit, the actual disposal of hazardous wastes without a permit, or the falsification of documents, all of which are more serious offenses than the other provisions of the hazardous waste title.

5. 741 F.2d 662 (3rd Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985).

*Towers*), the United States Court of Appeals for the Third Circuit considered, in a question of first impression, whether RCRA's broad statutory definition of "person"<sup>6</sup> should extend the statute's criminal provisions to include individual employees of a company regulated by the Act. The court held that the class of potential defendants covered under the Act's criminal provisions include, in addition to "owners and operators" of a facility, employees who "knowingly treat, store, or dispose of any hazardous waste [without having obtained a permit]."<sup>7</sup> The standard announced by the court exempts employees from criminal prosecution unless they knew or should have known that their employer failed to comply with the Act's permit requirement.<sup>8</sup> The court did, however, allow for the trier of fact to infer the requisite knowledge on the basis of the employee's job responsibilities.<sup>9</sup>

Part I of this note discusses *Johnson & Towers* with respect to the court's interpretation of the terms "any person" and "knowingly" as they appear in the Act's criminal provisions. Part II follows with an analysis of the case and a discussion of the potential deterrent effect criminal enforcement of RCRA might have on responsible corporate employees engaged in the illegal disposal of hazardous wastes. Finally, Part III concludes that if environmental statutes, of which RCRA is but one, are to achieve their objectives, it is the duty of the judiciary to interpret and apply them in a manner consistent with their purpose.

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6. See 42 U.S.C. § 6903(15) (1982) ("The term *person* means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.").

7. 741 F.2d at 664-65. RCRA permit requirements are contained in 42 U.S.C. § 6925 which provides in relevant part:

(a) [E]ach person owning or operating a facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter [is required] to have a permit issued pursuant to this section . . . [T]he treatment, storage or disposal of any such hazardous waste is prohibited except in accordance with such a permit.

8. 741 F.2d at 665.

9. *Id.* at 669.

## I. United States v. Johnson &amp; Towers, Inc.

A. *The Facts and the District Court Decision*

Located in Mount Laurel, New Jersey, Johnson & Towers, Inc. is in the business of repairing and rebuilding heavy machinery. The manner of disposing of caustic and chemical degreasers containing toxic materials<sup>10</sup> used in the company's operations was the gravamen of the criminal prosecutions. In June 1981, federal agents allegedly observed company employees empty a holding tank containing waste chemicals from the company's cleaning operation into a trench located near the plant building.<sup>11</sup> A search warrant was obtained and surveillance continued.<sup>12</sup> The warrant was executed the following day when disposal of liquid was again observed. Analysis of the liquid and soil samples seized indicated the presence of hazardous wastes.<sup>13</sup>

In March 1983, a federal grand jury returned a five count indictment against Johnson & Towers, Inc. and two company employees, Jack Hopkins, a foreman, and Peter Angel, the service manager of the trucking department.<sup>14</sup> The indictment charged the two employees with having "managed, supervised and directed a substantial portion of Johnson & Towers'

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10. Specifically, the degreasers contained two volatile organic toxic pollutants: methylene chloride and trichloroethylene. *United States v. Johnson & Towers, Inc.* 741 F.2d 662, 664 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985). *See also* 40 C.F.R. § 122. App. D (1984).

11. Brief for Appellant at 5, 6, *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984).

12. *See, e.g.*, U.S. Evtl. Protection Agency, RCRA Inspection Manual 7/24/81 (wherein inspectors are advised to obtain warrants).

13. Brief for Appellant, *supra* note 11, at 6.

14. Three counts of the indictment charged RCRA violations under 42 U.S.C. § 6928(d)(1982). The two other counts alleged conspiracy under 18 U.S.C. § 371 (1982), and a violation of the Federal Water Pollution Control Act criminal provision, 33 U.S.C. § 1319(c)(1982). In addition, the individual defendants were charged with each substantive count under 18 U.S.C. § 2 (1982) which provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principle.

operations . . . including those related to the treatment, storage, and disposal of the hazardous wastes and pollutants' and that the chemicals were discharged by 'the defendants and others at their direction.'"<sup>15</sup> The company pled guilty to the three RCRA counts and concurrent \$20,000 fines were imposed.<sup>16</sup> The two individual defendants, however, pled not guilty and moved to dismiss the RCRA counts of the indictments. In September 1983, the district court granted the defendants' motions to dismiss the substantive RCRA counts, but held that the individual defendants could be tried for aiding and abetting the corporate RCRA violations.<sup>17</sup>

At issue in the district court was whether liability under the RCRA criminal provisions could attach to corporate employees who were neither owners nor operators of the facility. The court ruled "that the RCRA criminal provision applies only to 'owners and operators,'"<sup>18</sup> i.e., those obligated to obtain a permit."<sup>19</sup> Thus the court interpreted "person," as used in Section 6928(d)(2)(A) of the Act, to exclude the individual defendants. Following the district court's denial for reconsideration the government filed notice of appeal to the Third Circuit.<sup>20</sup>

## B. *The Decision of the Third Circuit Court of Appeals*

### 1. The Parameters of "Any Person" Within RCRA

On review, the Third Circuit first considered whether an employee could be considered a "person" under the RCRA criminal provisions by turning to the text of Section

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15. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 664.

16. Brief for Appellant, *supra* note 11, at 3.

17. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 664. *See supra* note 14.

18. Regarding the definition of "operators," the district court relied on 40 C.F.R. § 260.10 (1982) where "operator" is defined as "the person responsible for the overall operation of a facility." Using a "primary control" standard, the district court found the individual defendants to fall outside the class. *United States v. Johnson & Towers, Inc.*, 741 F.2d n.2 at 664.

19. *Id.* at 664.

20. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 664. The court of appeals had jurisdiction under 18 U.S.C. § 3731 which allows for appeal from the dismissal of a portion of the indictment.

6928(d)(2)(A).<sup>21</sup> Observing that Congress might have more explicitly phrased the section,<sup>22</sup> the court found the relevant statutory language supportive of neither the expansive interpretation suggested by the prosecution nor the restrictive construction proffered by the defense.<sup>23</sup> Instead, the court adopted the definition of "person" set forth in Section 6903(15) of the Act.<sup>24</sup>

Noting the sole basis for exculpation under the plain language<sup>25</sup> of Section 6928(d)(2)(A) to be compliance with the Act's permit requirement, the court nevertheless elected to construe RCRA's criminal provisions by focusing on the statute's regulatory purpose as well as congressional intent.<sup>26</sup> Recognizing RCRA's public policy of protecting the health and welfare of the American public, the court turned for guidance to federal decisional law concerning other public health statutes. The court's review of case law led to *United States v. Dotterweich*,<sup>27</sup> where the United States Supreme Court reviewed the reversal of a corporate president's conviction

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21. See *supra* note 4.

22. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 665.

23. *Id.* The government contended that § 6928(d)(2)(A) reaches "anyone who handles hazardous waste without a permit." On the other hand, the defendants argued that the section is merely an "administrative enforcement mechanism applying only to those who come within section 6925 and fail to comply." See also *supra* note 7. In addition, the defendants contended that since the Clean Air Act, 42 U.S.C. § 7413(c)(3) (1982), and the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c)(3) (1982) include "any responsible corporate officer" in their statutory definition of "person," the absence of similar language in RCRA supported the district court findings. The court of appeals concluded, however, that such additions serve "to expand rather than limit the class of potential defendants." *Id.* n. 3 at 665.

24. See *supra* note 6.

25. A fundamental canon of statutory construction, deeply rooted in common law, is the "plain meaning doctrine." This primary rule asserts that the grammatical and ordinary sense of a word is to be adhered to "unless that would lead to some absurdity or some repugnance or inconsistency, but no further." *Grey v. Pearson*, 26 Law J. Rep. (N.S.) Chanc. 473, 6 H. L. Cas. 61 (1857). See also Llewellyn, *Canons of Construction*, 3 Vand. L. Rev. 395 (1950).

26. 741 F.2d at 666 ("[T]hough the result may appear harsh, it is well established that criminal penalties attached to regulatory statutes intended to protect public health, . . . are to be construed to effectuate the regulatory purpose.").

27. 320 U.S. 277, *reh'g denied*, 320 U.S. 815 (1943), *rev'g*. *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500 (2d Cir. 1942).

under the Federal Food, Drug, and Cosmetic Act.<sup>28</sup> The court of appeals' decision in that case was based on a narrow reading of the statutory term "any person" in the context of defining criminal liability.<sup>29</sup> In rejecting the lower court's limiting construction, the Supreme Court held that "the offense [criminalized by the act] is committed . . . by all who . . . have . . . a responsible share in the furtherance of the transaction which the statute outlaws."<sup>30</sup> The Court, while acknowledging possible hardships on persons oblivious to their criminal behavior, grounded its decision on a congressional intent to place the burden "upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers . . . rather than to throw the hazard on the innocent public who are wholly helpless."<sup>31</sup> *Dotterweich* thus upheld the concept of safeguarding public health through legislation specifically designed to "enlarge and stiffen the penal net"<sup>32</sup> for possible defendants.

In *Johnson & Towers* the Third Circuit found the statutory construction analysis of *Dotterweich* to be guiding.<sup>33</sup> Applying the *Dotterweich* approach, the court studied RCRA's legislative history and concluded that "[i]t would undercut the purposes of [RCRA] to limit the class of potential defendants to owners and operators when others also bear responsibility for handling regulated materials."<sup>34</sup> The court's analysis, like that in *Dotterweich*, accorded deference to the particular nature of the legislation under review. The *Dotterweich* Court imputed a broad definition to the term "any

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28. 21 U.S.C. §§ 301-392 (1938).

29. The Supreme Court granted certiorari because an important question regarding the interpretation of the Act was raised by the court of appeals' reversal of the conviction "[o]n the ground that only the corporation was the 'person' subject to prosecution unless, perchance, Buffalo Pharmacal was a counterfeit corporation serving as a screen for [the individual defendant] *Dotterweich*." *United States v. Dotterweich*, 320 U.S. at 279.

30. *Id.* at 284.

31. *Id.* at 284-85.

32. *Id.* at 282.

33. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 666.

34. *Id.* at 667.

person” as used in the Food, Drug and Cosmetic Act of 1938 so as not to frustrate the congressional purpose of safeguarding public health through the regulation of drug shipments.<sup>35</sup> Similarly, the *Johnson & Towers* court gave an expansive reading to the identical term, as used in RCRA, so as not to negate congressional efforts to “control hazards that, ‘in the circumstances of modern industrialization are largely beyond self-protection.’”<sup>36</sup> With respect to the question of the individual defendants’ employment responsibilities — a primary factor for the imputation of criminal liability — the court, again relying on *Dotterweich*, opined that the issue “can best be left to ‘the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries.’”<sup>37</sup>

## 2. The “Knowingly” Requirement

Having found the individual defendants to at least arguably fall within the ambit of the RCRA criminal provisions, the Third Circuit next addressed the section’s use of the word “knowingly” with respect to the government’s burden in proving elements of a Section 6928(d)(2)(A) violation. The court rejected as “overly literal”<sup>38</sup> the prosecution’s contention that “knowingly” refers only to “treats, stores or disposes,”<sup>39</sup> and that therefore it need not prove whether the defendants had knowledge concerning either the EPA classification of the waste material, or whether the facility had in fact applied for or received the necessary permit.<sup>40</sup> Turning to decisional law for guidance, the court found the analysis of *United States v. Marvin*<sup>41</sup> to be “appropriate.”<sup>42</sup> In *Marvin* the government ar-

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35. *United States v. Dotterweich*, 320 U.S. at 282.

36. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 667, quoting *United States v. Dotterweich*, 320 U.S. at 280.

37. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 670, quoting *United States v. Dotterweich*, 320 U.S. at 285.

38. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984), cert. denied, 105 S. Ct. 1171 (1985).

39. See *supra* note 4.

40. See *supra* note 7.

41. 687 F.2d 1221 (8th Cir. 1982), cert. denied, 460 U.S. 1081 (1983). Briefly, the court in *Marvin* was faced with the issue whether Congress, in enacting the Food Stamp Program, chose “to exercise its power to disregard the maxim *actus non facit*



gued that since the illegal purchase of food stamps was “a so-called ‘regulatory offense,’ ”<sup>43</sup> as opposed to a traditional common law crime, *mens rea* need not be proved. The court dismissed this contention by noting that whenever Congress wishes to dispense with the conventional *mens rea* requirement, “it must manifest its intention by ‘affirmative instruction.’ ”<sup>44</sup> In sum, the *Marvin* court looked first to the plain language of the statute and upon finding an ambiguity turned to the legislative history. The court stressed that before “displac[ing] a time honored principle of criminal jurisprudence such as *mens rea*, Congressional intent must be found to be unequivocal.”<sup>45</sup>

The statutory language before the *Johnson & Towers* court paralleled the statutory language considered in *Marvin*. In *Johnson & Towers* a central issue was whether “knowingly,” as used in Section 6928(d)(2), modifies section (2) exclusively — thereby rendering subsection (A), where the word does not appear, an absolute liability offense; or whether modification of “knowingly” to subsection (A) should be judicially inferred — thereby creating a uniform “knowingly” standard for the entire section.<sup>46</sup> While acknowledging a policy in decisional law against statutory modification through inference, the Third Circuit nonetheless found the first alternative to be “arbitrary and nonsensical when applied to this statute.”<sup>47</sup> Embracing the latter construction, the court held “knowingly” to modify both Section (2) and subsection (A).<sup>48</sup> Consequently, the prosecution was not altogether relieved of the

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*reum, nisi mens sit rea.*” *Id.* at 1226. (An act does not render one guilty, unless the mind is guilty.)

42. 741 F.2d at 669.

43. *United States v. Marvin*, 687 F.2d at 1226.

44. *Id.* at 1226, quoting *Morissette v. United States*, 342 U.S. 246, 273 (1952).

45. *Id.* The *Johnson & Towers* court, however, cited *United States v. Behrman*, 255 U.S. 280 (1922) and *United States v. Balint*, 258 U.S. 250 (1922) in support of the proposition that in “a ‘public welfare statute,’ there would be a reasonable basis for reading the statute without any *mens rea* requirement.” *United States v. Johnson & Towers, Inc.*, 741 F.2d at 668.

46. See *supra* note 4.

47. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 668.

48. *Id.* at 669.

burden of proving at trial the defendants' state of mind. However, the Third Circuit followed *United States v. International Minerals & Chemicals Corp.*<sup>49</sup> in its determination that in the prosecution of "certain regulatory statutes requiring 'knowing' conduct the government need only prove knowledge of the actions taken and not the statute forbidding them."<sup>50</sup> In discussing the lower court's eventual charge to the jury, the court directed the trial judge to

instruct the jury, *inter alia*, that in 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.<sup>51</sup>

## II. Analysis

*United States v. Johnson & Towers, Inc.*<sup>52</sup> clarifies the scope of the criminal provisions contained in RCRA. All employees holding "requisite responsible positions with the corporate defendant"<sup>53</sup> are potential individual defendants if the government can demonstrate at least an inference of individual knowledge related to the elements of a Section 6928(d)(2)(A) violation. Moreover, should the decision have a deterrent effect, the potential to achieve meaningful strides toward assuring "the protection of health and the environ-

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49. 402 U.S. 558 (1971).

50. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 669. The defendants argued that due to the complexity of RCRA, responsibility for statutory compliance should rest on the facility's "owners and operators." It is of interest to note that on November 11, 1980, Johnson & Towers' chief engineer allegedly notified EPA that the company "was a 'small quantity generator' and was not subject to present regulations." Brief for Appellee Angel at 7, *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984). See generally Russell, *Managing Your Environmental Audit*, *Chemical Engineering*, June 24, 1985, at 37 (wherein the author describes environmental audits in general, and offers suggestions and checklists for both internal and outside audits).

51. *Id.* at 669.

52. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985).

53. *Id.* at 670.

ment”<sup>54</sup> is enhanced.

At the core of *Johnson & Towers* is the issue whether Section 6928(d)(2)(A) includes employees as well as owners and operators of a regulated facility even though the employees in question may not have been in a position to secure the necessary EPA permit.<sup>55</sup> After finding that Congress had not explicitly defined “person” within the disputed section, the court “view[ed] the statutory language in its totality”<sup>56</sup> and adopted the broad definition set forth in Section 6903(15).<sup>57</sup> One basis for this expansive interpretation is anchored in the public health aspects of RCRA.<sup>58</sup> The Third Circuit’s reliance on *United States v. Dotterweich*<sup>59</sup> and *United States v. Park*<sup>60</sup> is of interest in that while those cases also involved the enforcement of federal public health statutes, the issue in both concerned the criminal liability of corporate officers as opposed to non-officer employees.<sup>61</sup>

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54. See *supra* note 2 and accompanying text. See also Coffee, “No Soul to Damn; No Body to Kick:” *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1981).

55. See *supra* note 7. The thrust of the defendants’ argument, simply stated, was that because § 6925 applies only to “owners and operators” of a facility, the criminal penalties under § 6928 (d)(2)(A) should similarly apply only to “owners and operators.” *United States v. Johnson & Towers, Inc.*, 741 F.2d at 665.

56. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 665.

57. See *supra* note 6. The *Johnson & Towers* court further observed that “[h]ad Congress meant section 6928(d)(2)(A) to take aim more narrowly, it could have used more narrow language.” *Id.* at 665. See also Watson, Hare, Davidson & Case, *Hazardous Wastes Handbook*, Chap. 9-11, (1982 Partial Revision 1984) (noting that action under Section 6973 (a), (b), Imminent Hazard, “is authorized against any ‘person’ which is broadly defined [in section 6903(15), Definitions]”).

58. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 666. In support of the proposition that “criminal penalties attached to regulatory statutes intended to protect public health . . . are to be construed to effectuate the regulatory purpose,” the court relied on *United States v. Park*, 421 U.S. 658 (1975); *Smith v. California*, 361 U.S. 147 (1959); *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922); and *United States v. Freezo Brothers, Inc.*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). See generally Comment, *Criminal Enforcement of Federal Water Pollution Laws in an Era of Deregulation*, 73 J. Crim. L. & Criminology 642 (1982).

59. 320 U.S. 277 (1943).

60. 421 U.S. 658 (1975).

61. See *supra* note 58. See also Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 Ky. L. J. 73 (1976).

*Dotterweich*, as noted,<sup>62</sup> affirmed the proposition that criminal liability may be imputed to a corporate officer having a "responsible share in the furtherance of the [criminalized] transaction."<sup>63</sup> This view was based on the Supreme Court's unwillingness "to defeat the very object"<sup>64</sup> of legislation enacted to safeguard the health of the American public.

*Park* reaffirmed the vitality of *Dotterweich*. In *Park* the criminal liability of a corporate officer was held to rest upon whether "by virtue of the relationship he bore to the corporation . . . [the individual] . . . had the power to prevent the act complained of."<sup>65</sup> Therefore, in applying a *Dotterweich-Park* approach a two-pronged inquiry seems warranted: First, a determination as to the employee's position within the corporate structure; and second, an analysis of the employee's job responsibilities with respect to actual, apparent or implied authority to correct or rectify statutory violations of the corporate employer. Employing such an analysis could aid a court in determining whether an arguable nexus between the individual's placement within the particular corporate chain of command and his power to prevent criminal activity by the corporation existed at the time of the offense. Application of the first prong appears basic in that a trier of fact could elect to look no further than the individual's job title.<sup>66</sup> On the other hand, the second prong — which presents a more complex question of fact — permits inquiry into, among other fac-

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62. See also *Abrams, Criminal Liability of Corporate Officers for Strict Liability Offenses — A Comment on Dotterweich and Park*, 28 U.C.L.A. L. Rev. 463 (1981); *Notes, Rule 10b-5— The Equivalent Scope of Liability Under Respondeat Superior and Section 20(a) — Imposing a Benefit Requirement on Apparent Authority*, 35 Vand. L. Rev. 1383 (1982).

63. *United States v. Dotterweich*, 320 U.S. at 284. See also *supra* notes 27-37 and accompanying text.

64. *Id.* at 282.

65. *United States v. Park*, 421 U.S. at 642. See also *United States v. Starr*, 535 F.2d 512, 516 (9th Cir. 1976) (where the court refers to a "standard of 'foresight and vigilance.'").

66. In *United States v. Johnson & Towers, Inc.*, 741 F.2d n.1 at 664, the court noted discrepancies in the descriptions of the individual defendants' job titles and responsibilities provided by the parties. The element of "responsibility" seems to reach the "should have known" aspect of the suggested charge to the jury. See also *supra* notes 55-58 and accompanying text.

tors, the employee's job description, the past practice of the employer and the corporate employment manual, if any.<sup>67</sup>

Job title and scope of employment responsibilities notwithstanding it appears that a threshold inquiry for courts interpreting public health and safety legislation should concern the precise act criminalized by the statute.<sup>68</sup> In *Johnson & Towers* the Third Circuit's interpretation of "knowingly" in terms of the "requisite proof" issue reflects an attempt to define the nature of the offense.<sup>69</sup> In its analysis the court followed the approach of *United States v. Marvin*<sup>70</sup> in determining the scope of "knowingly"<sup>71</sup> and the standard of *United States v. International Minerals & Chemicals Corp.*<sup>72</sup> in allowing the requisite knowledge to be inferred by the trier of facts. Regarding the scope of the "knowingly" requirement, the *Johnson & Towers* court applied *Marvin* in order to achieve a "natural" reading of the statute.<sup>73</sup> Concluding that

67. *But see* Abrams, *supra* note 62 at 477 (where the author cautions against setting a standard "so high . . . that in the corporate setting it is simply unfair to impose criminal liability on the individual.").

68. *Cf.* 42 U.S.C. § 6928(d)(2)(B), *supra* note 4, (providing criminal penalties for noncompliance with a permit requirement or condition). *See also* H.Conf. Rep. No. 96-1444, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 5028 at 5036, wherein the Joint Conference Committee observed that:

[E]xisting law is unclear whether a violation of a permit condition constitutes a criminal violation. The proposed section [6928(d)(2)] as amended would eliminate the ambiguity by providing explicit penalties for knowingly failing to comply with a material condition of the permit . . . [§ 6928 (d)(2)] is intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them.

69. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 667-70.

70. 687 F.2d 1221 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983).

71. *See supra* notes 38-51 and accompanying text.

72. 402 U.S. 558 (1971). *See also supra* notes 50-51 and accompanying text.

73. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 669. The *Marvin* court allowed for a narrow inference of knowledge by asserting "the government had to prove 'that the defendant knowingly did an act which the law forbids' . . . [t]his does not mean that the defendant must know, by chapter and verse, the precise law and regulation . . . [b]ut he must know that he was acting in violation of *some* law or regulation." *United States v. Marvin*, 668 F.2d at 1227. *But cf.* *United States v. Udofot*, 711 F.2d 831, 837 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 245 (1983) (holding 18 U.S.C. § 922(e) not to be a specific intent crime, the *Udofot* court distinguished *Marvin* because the firearms statute being considered "seek[s] to regulate dangerous or harmful objects."). Query whether the regulation of hazardous wastes under RCRA is at least as compelling as the regulation of firearms.

"knowingly" modifies both subsections (2) and (A),<sup>74</sup> the court held that before liability can be imputed to an actor, the statute demands at least inferrable knowledge that: (1) the individual was disposing of what he knew to be hazardous waste;<sup>75</sup> and (2) the corporate entity had not obtained the required EPA permit. With reference to RCRA's mens rea requirement,<sup>76</sup> the court rejected the strict liability view set forth in *United States v. Behrman*,<sup>77</sup> and instead followed *International Minerals & Chemicals* which held that "under certain regulatory statutes requiring 'knowing' conduct the government need only prove knowledge of the actions taken and not the statute forbidding them."<sup>78</sup> Explicit in *International Minerals & Chemicals* is the presumption that when one is working with dangerous substances the likelihood of government regulation is great enough to presume knowledge of at least the existence of regulations.<sup>79</sup> Accordingly, the court in *Johnson & Towers* provided for the possible inference of knowledge on the part of the individual defendants.<sup>80</sup> As a result, although the Third Circuit felt compelled to read the "knowingly" requirement into all portions of Section 6928(d), the statute's effectiveness was maintained by easing the degree of

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74. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 669.

75. See also *United States v. Udofot*, 711 F.2d at 835, 837 ("[A]n act is knowingly done if it is done voluntarily and intentionally and not because of mistake, accident or some other innocent reason . . . [w]e hold that the Government did not have to prove that appellant 'knowingly' violated the law, but only that appellant 'knowingly' delivered firearms or ammunition to the carrier.").

76. See H.R. Rep. No. 1444, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 5028, 5038 (where the Joint Explanatory Statement of the Conference Committee notes that "[t]he state of mind for all criminal violations under section [6928] is 'knowing.' The conferees have not sought to define 'knowing' for offenses under subsection (d); that process has been left to the courts under general principles."). See also Costle & Beck, *Attack on Hazardous Waste: Turning Back the Toxic Tide*, 9 Cap. U. L. Rev. 425, 430-31 ("[T]he judicial system will play a large role in interpreting the RCRA program and clearly defining the penalties for non-compliance required to do so safely and assume liability for their actions to assure high standards of performance.").

77. 258 U.S. 280, 288 (1922).

78. 402 U.S. 558, 565 (1971).

79. See generally Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Har. L. Rev. 625 (1984).

80. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 669.

proof required for conviction by permitting inference of the “knowingly” aspect.

Allowing responsible corporate employees to be held criminally liable for the misdeeds of their employer raises questions as to the practical impact of *Johnson & Towers*. One significant jurisprudential aspect, not addressed by the Third Circuit, is the decision’s potential for curbing future illegal treatment, storage or disposal of hazardous waste through the prosecution and punishment of convicted offenders. If *Johnson & Towers* indeed stands for the proposition that all employees holding “requisite responsible positions with the corporate defendant”<sup>81</sup> are potentially criminally liable, the next step in the analysis — assuming conviction — must address the issue of punishment.<sup>82</sup>

Throughout the years various justifications for imposing punishment have been advanced by commentators and scholars.<sup>83</sup> The balance of this note, however, confines itself to but one view — general deterrence. For purposes of our discussion, general deterrence is defined as an effort to discourage the commission of “similar wrongdoing by others through a

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81. *Id.* at 670.

82. See *supra* note 4.

83. The following are illustrative of the various jurisprudential theories dealing with justification for punishing criminal offenders: (1) *Retribution*, see, e.g., I. Kant, *The Metaphysical Elements of Justice* 100 (J. Ladd trans. 1965) (“Judicial punishment . . . must in all cases be imposed only on the ground that [the offender] has committed a crime.”); (2) *Retribution*, see, e.g., J.F. Stephen, *A History of the Criminal Law of England* 81 (1883) (“[T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense.”); E. Durkheim, *The Division of Labor in Society*, 108, (Simpson trans. 1933) (“[Punishment’s] true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience.”); (3) *Rehabilitation*, see, e.g., Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 Hofstra L. Rev. 243, 254 (1979) (“[N]o treatment program now used [to rehabilitate] is inherently either substantially helpful or harmful. The critical fact seems to be the conditions under which the program is delivered.” (emphasis in original)); and (4) *Deterrence*, see, e.g., J. Bentham, *Principles of Penal Law*, Pt. II, bk. 1, ch. 3, in J. Bentham’s Works 396, 402 (J. Bowring ed. 1843) (“[Crime] will be more successfully combatted [when] . . . the law turns the profit of balance against it.”). See also *United States v. Bergman*, 416 F. Supp. 496, 498-505 (S.D.N.Y. 1976) (wherein several of the above jurisprudential views are discussed in the context of determining the appropriate sentence for a convicted defendant).

reminder that the law's warnings are real and that the grim consequence [of punishment] is likely to follow."<sup>84</sup>

While the deterrence theory of punishment could arguably serve an educational function in the context of imposing RCRA criminal liability on responsible employees,<sup>85</sup> the practical question is what type of punishment the sentencing court should mete out.<sup>86</sup> The *Johnson & Towers* court recognized that "criminal penalties attached to regulatory statutes intended to protect public health . . . are to be construed to effectuate the regulatory purpose."<sup>87</sup> It could be argued that to effectively halt the illegal disposal of hazardous materials, RCRA must be strictly construed to impose liability on all persons individually responsible for, or who arranged for, the illegal disposal of hazardous waste.<sup>88</sup> Thus, while not having the required permit is clearly a statutory violation not to be downplayed, clearly the offense with the greatest potential for harming health and the environment is the actual illegal disposal of the waste.<sup>89</sup> Consequently, courts must "continue to develop a federal common law of pollution within the frame-

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84. *United States v. Bergman*, 416 F. Supp. at 499. See also Blumstein et al. (Editors), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 3* (1978) (wherein deterrence is defined as "the inhibiting effect of sanctions on the criminal activity of people *other than* the sanctioned offender." (emphasis in original)).

85. See, e.g., Andenaes, *General Prevention — Illusion or Reality*, 43 J. Crim. L. C. & P. S. 176 (1952).

86. See Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949, 970 (1966) ("Experience seems to show that excessively severe penalties may actually reduce the risk of conviction, thereby leading to results contrary to their purpose."); Costle & Beck, *supra* note 76, at 431 (cautioning that undesirable effects may result "if liability exposure is too great"). See also Pelaez, *Of Crime — And Punishment: Sentencing the White Collar Criminal*, 18 Duq. L. Rev. 823 (1980). See generally National Research Council, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978).

87. *United States v. Johnson & Towers, Inc.*, 741 F.2d at 666.

88. With respect to Superfund liability of corporate employees, see, e.g., *United States v. Northeastern Pharmaceutical & Chemical Co.*, 20 E.R.C. 1401 (W.D.Mo. 1984); *United States v. Wade*, 20 E.R.C. 1277 (E.D. Pa. 1983).

89. Of course not all damage to health and the environment is the result of illegal activity. Often "sudden and unexpected occurrences such as operator error, equipment malfunction, power failure, failure of cooling water, fire [and] flooding" cause harmful emissions. Crocker, *Preventing Hazardous Pollution During Plant Catastrophes*, *Chemical Engineering*, May 4, 1970, at 97.



work of the applicable statutes.”<sup>90</sup>

### III. Conclusion

It must be remembered that in *United States v. Johnson & Towers, Inc.*<sup>91</sup> the Third Circuit merely reinstated indictments and allowed possibly responsible corporate employees to be brought to trial. In the final analysis, the responsibility for effectuating the legislative intent of RCRA’s criminal penalties falls squarely at the lower court level where penalties are actually imposed. With respect to RCRA, the “justification for the penalties section is to permit a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes”<sup>92</sup> and the express legislative intent is to close “the last remaining loophole in the environmental laws.”<sup>93</sup> In this context, the Third Circuit’s decision in *Johnson & Towers* is sound. Had the court permitted a “loophole” through the creation of a non-owner, non-operator employee exemption the effectiveness of Section 6928(d)(2)(A) would have been diminished thereby frustrating the congressional intent explicit in the enactment of the penalties section. As a result, rather than having a “working instrument of government”<sup>94</sup> to protect health and the environment, the American public would have been left with a “[mere] collection of English words”<sup>95</sup> which acknowledge the existence of a problem, but provide no viable solution.

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90. Riesel, *Environmental Litigation*, ALI-ABA Course of Study: *Environmental Law* 246 (1984) (discussing the avoidance of federal statutes with respect to “such critical issues as to whether or not joint and several liability is imposed upon responsible parties.”). See also Note, *Federal Enforcement of Individual and Corporate Criminal Liability for Water Pollution*, 10 Mem. St. U.L. Rev. 576 (1980).

91. 741 F.2d 662 (3d Cir. 1984), cert. denied, 105 S. Ct. 1171 (1985).

92. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Ad. News at 6269.

93. *Id.* at 4, U.S. Code Cong. & Ad. News at 6241. See also Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 Wis. L. Rev. 635 (1978).

94. *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).

95. *Id.*