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A FRESH LOOK AT THE RESPONSIBLE RELATION DOCTRINE

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This Article suggests a rethinking of the responsible relation doctrine, which holds business officials, managers, and supervisors criminally liable for failing to prevent or correct violations that occur within their areas of responsibility and control. The conventional public welfare justification for the doctrine is that it provides added and important deterrence of legal violations that threaten human health and safety. This Article suggests instead that the doctrine is better understood and defended as properly following from traditional criminal law prohibitions on acts of omission, and specifically from the principle that individuals may be criminally liable when their failure to fulfill their employment responsibilities results in a harm that is punishable as a crime. Examined through this lens, the responsible relation doctrine justifiably can be applied much more broadly than it has been to date, in a variety of contexts in which a defendant's employer gives him the responsibility to prevent violations of the law. This Article concludes by discussing some insights into the operation of the responsible relation doctrine that are highlighted by identifying the doctrine as a species of criminal omission, such as that the responsible relation doctrine is not, as it is often described, a form of imputed liability.

I. INTRODUCTION

Recent corporate scandals—Enron, WorldCom, HealthSouth, Tyco, Adelphia, Cendant, and more—have refocused attention on efforts to reign

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in corporate wrongdoing. Criminal enforcement, and in particular prosecuting individuals, can be one of the government's most powerful tools for combating corporate misconduct, but such prosecutions can be tricky. Our intuition may be to hold responsible those upper-level corporate officers and managers who allow illegal conduct to occur on their watch. But criminal liability in our society has historically, and appropriately, been quite circumscribed. Courts interpreting criminal enforcement provisions of statutes tend to assume that Congress legislated consistently with traditional principles of criminal law, which balance the objective of enforcing the rule of law with competing concerns, such as due process. The predominance of collective action and shared responsibility in business organizations can make it difficult to pin criminal liability on particular individuals acting within such organizations without overstretching traditional criminal law principles. The challenge, therefore, is to hold individuals accountable for wrongdoing to which they contributed, but in a manner that comports with general principles of criminal law.

The responsible relation doctrine is one way in which such liability may be imposed, and it therefore warrants reexamination. The responsible relation doctrine holds individuals criminally liable for failing to prevent or correct violations that occur within their area of responsibility and control in a business organization. The origins of the doctrine in American jurisprudence are commonly traced back to two seminal Supreme Court cases, *United States v. Dotterweich*[1] and *United States v. Park*,[2] both of which upheld convictions of corporate executives for misdemeanor offenses based on their failure to prevent violations of the Federal Food, Drug, and Cosmetic Act (FFDCA),[3] without requiring proof that the defendants knew of the violations. *Dotterweich* and *Park* relied heavily on the idea that, although a duty to prevent violations was potentially onerous, such an obligation was necessary to effectuate the statute's purpose of protecting human health and safety.[4]

Examinations of the responsible relation doctrine have uncritically accepted this public welfare rationale. Scholars and commentators analyzing *Dotterweich*, *Park*, and their progeny have tended to treat this line of cases as unique and self-contained, accepting as given that the public welfare rationale set forth in *Dotterweich* and *Park* determines, as one scholar put it, "the content, limits, and fairness"[5] of the responsible relation

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[1] 320 U.S. 277 (1943).

[2] 421 U.S. 658 (1975).

[3] 21 U.S.C. §§ 301-392 (2000).

[4] *Park*, 421 U.S. at 671-74; *Dotterweich*, 320 U.S. at 284-85.

[5] Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability*

doctrine.[6] Moreover, existing analyses of the responsible relation doctrine focus almost exclusively on the link between the doctrine and the mental state elements of a criminal offense, and frequently mischaracterize that link.[7] In fact, although it is now relatively well-settled in the case law that the responsible relation doctrine does not affect statutory mental state elements, much of the commentary on the doctrine mistakenly continues to describe it as principally affecting mental state.[8] The responsible relation doctrine's relationship to the act elements of the offense, by contrast, has rarely been explored.

The legitimacy of the responsible relation doctrine as a basis for imposing criminal liability in any circumstance should depend, like any other judicially created doctrine of criminal law, on whether the doctrine can be explained by reference to widely accepted principles of criminal law. But the upshot of the two aforementioned analytical shortcomings—an uncritical acceptance of the public welfare rationale and misguided focus on mental state—is that the doctrine has really not been rigorously tested; we do not know whether responsible relation liability follows from generally accepted criminal law principles. Moreover, without a clear explanation of how and why the doctrine is a legitimate basis for criminal liability, it is impossible to determine where the doctrine should and should not apply. In short, before it is ready to be considered for more widespread application and acceptance, and indeed before we can be sure that the doctrine is acceptable in any application, the responsible relation doctrine needs a robust defense.

This Article suggests a rethinking of the responsible relation doctrine. It starts from the premise that, because the responsible relation doctrine is judicially created, its validity as a basis for criminal liability depends on whether it is rooted in, and consistent with, generally accepted and generally applicable principles of criminal law.[9] In other words, if the responsible relation doctrine follows from general principles of criminal liability, then it is a fair inference that the legislature intended the doctrine to apply to offenses that meet the doctrine's requirements, absent a contrary indication in the language, structure, or purpose of the statute that defines the offense.

Offenses—Another View, 35 VAND. L. REV. 1337, 1378 (1982).

[6] *See, e.g.*, sources cited *infra* notes 105-107.

[7] *See, e.g.*, sources cited *infra* notes 105-108.

[8] *See, e.g.*, sources cited *infra* note 108.

[9] *Cf., e.g.*, Liparota v. United States, 471 U.S. 419, 426 (1985) (assuming that, in the absence of an indication to the contrary, Congress intended criminal statutes to be interpreted consistently with traditional principles of criminal law).

The Article begins in Section II by reviewing *Dotterweich* and *Park*, the two seminal Supreme Court cases that established the doctrine. Section III then uses *Dotterweich*, *Park*, and the substantial body of case law that has addressed the doctrine's application to felony violations of federal environmental laws[10] to demonstrate that, although much of the scholarly attention on the doctrine has focused on its relationship to mental state, in fact the doctrine addresses the act elements of a criminal offense and not mental state. Section IV shows that the conventional public welfare explanation for the doctrine, which argues that the doctrine provides added and important deterrence of legal violations that threaten human health and safety, does not provide a principled justification for the doctrine. Section V explains that the doctrine also cannot be justified as a form of aiding and abetting liability. Section VI argues that the responsible relation doctrine is best understood and defended as properly following from traditional criminal law prohibitions on acts of omission, and specifically from the principle that individuals may be criminally liable when their failure to fulfill their employment responsibilities results in a harm that is punishable as a crime. Section VII explains that, examined through this lens, the responsible relation doctrine can justifiably be applied in a variety of contexts in which a defendant's employer gives him the responsibility to prevent violations of the law. Finally, Section VIII discusses some insights into the operation of the responsible relation doctrine that are highlighted by identifying the doctrine as a species of criminal omission.

II. THE ORIGINS OF THE RESPONSIBLE RELATION DOCTRINE

Any analysis of the responsible relation doctrine in American jurisprudence must begin with a detailed examination of *Dotterweich*[11] and *Park*.[12] Dotterweich was president and general manager of the Buffalo Pharmacal Company, a pharmaceutical corporation.[13] Buffalo Pharmacal shipped some misbranded and adulterated drugs, and the government prosecuted both Dotterweich and Buffalo Pharmacal for criminal violations of FFDCA.[14] The jury hung as to Buffalo Pharmacal and convicted

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[10] In this context, the responsible relation doctrine is referred to, for undetermined reasons, as the *responsible corporate officer doctrine*. This name is unfortunate in at least two respects. First, it unnecessarily obscures that the responsible corporate officer doctrine is just an application of the responsible relation doctrine. It also erroneously suggests that the doctrine applies only to corporate officers.

[11] United States v. Dotterweich, 320 U.S. 277 (1943).

[12] United States v. Park, 421 U.S. 658 (1975).

[13] *Dotterweich*, 320 U.S. at 278.

[14] *Id.*

Dotterweich.[15] The court of appeals reversed, holding that the FFDCA should be construed narrowly and that individuals were subject to prosecution for violations of the FFDCA only by piercing the corporate veil—by showing that "an individual operated a corporation as his 'alter ego' or agent."[16]

The Supreme Court reversed the court of appeals and upheld the convictions, holding that the FFDCA should be construed broadly, rather than narrowly, in order to effectuate its purpose of protecting "the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."[17] The FFDCA was a

> now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[18]

The Court acknowledged that penalizing individuals with a responsible relationship to the violation, even where there was a lack of intent, could impose a hardship when it reached those without "consciousness of wrongdoing," but concluded that this potential hardship reflected Congress' determination that the balance of hardships favored giving the responsibility to avoid violations of the FFDCA on "those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."[19] Finally, the Court declined to define which employees stand in responsible relation to a violation, deferring to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."[20]

Dotterweich was clearly being held liable for a failure to prevent a violation of the FFDCA; there was no suggestion that Dotterweich had participated in or affirmatively assisted with the shipments of misbranded and adulterated drugs. But the *Dotterweich* majority did not speak of the "responsible relation" standard in terms of omissions. Instead, the Court seemed to see the "responsible relation" as probative of determining who

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[15] *Id.*

[16] United States v. Buffalo Pharmacal Co., 131 F.2d 500, 503 (2d Cir. 1942), *rev'd. sub nom.* United States v. Dotterweich, 320 U.S. 277 (1943).

[17] *Dotterweich*, 320 U.S. at 280.

[18] *Id.* at 280-81; *see also id.* at 284 ("The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws.").

[19] *Id.* at 284-85.

[20] *Id.* at 285.

could be prosecuted for a regulatory violation despite a lack of conscious wrongdoing.[21] In a dissent, however, Justice Murphy criticized the majority's "responsible relation" standard for allowing a conviction without active participation and without knowledge.[22] Justice Murphy noted that it was "inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and in which he had no personal knowledge," and opined that such canons should not be overridden without a clear indication from Congress that it intended vicarious liability for corporate officers.[23]

Park followed *Dotterweich* by more than three decades, but in many ways reads as a companion case. Park was the chief executive officer of Acme Markets, Inc., a national retail food chain.[24] When it was found that Acme was storing food in a rodent-infested warehouse in Baltimore, the government charged both Acme and Park with five counts of violating the FFDCA, the same statute under which Buffalo Pharmocal and Dotterweich were prosecuted.[25] Acme pled guilty, but Park went to trial.[26] At trial, the government proved that the Food and Drug Administration had advised Park of unsanitary conditions in Acme's Philadelphia and Baltimore warehouses.[27] Acme took some corrective actions that improved, but by no means remedied, the conditions.[28] The jury found Park guilty on all counts.[29] The court of appeals reversed, holding that the jury instructions allowed the jury to convict Park without finding that he had acted wrongfully by either omission or commission and that this improper instruction violated due process.[30]

As in *Dotterweich*, the Supreme Court reversed the court of appeals and reinstated the convictions. The Court held that the government could establish a prima facie case for a violation of the FFDCA by showing "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

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[21] *Id.* at 280-81.

[22] *Id.* at 286-87 (Murphy, J., dissenting).

[23] *Id.*

[24] United States v. Park, 421 U.S. 658, 660 (1975).

[25] *Id.*

[26] *Id.* at 661.

[27] *Id.*

[28] *Id.* at 662.

[29] *Id.* at 666.

[30] United States v. Park, 499 F.2d 839, 841-42 (4th Cir. 1974), *rev'd*, 421 U.S. 658 (1975).

so."[31] The defendant's duty to prevent or correct violations arose "by the interaction of the corporate agent's authority and the statute," and this duty "furnishe[d] a sufficient causal link" to hold the defendant responsible for the violations.[32] The Court concluded that "the individuals who execute the corporate mission," by allowing violations to occur that threatened the public health and welfare, violated the public trust:

> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.[33]

Thus, *Dotterweich* and *Park* established the proposition that, for some criminal offenses, liability attaches not only to those who directly participated in the violation but also to their supervisors or managers who stand in "responsible relation" to the violation by virtue of their authority and responsibility. This concept is the responsible relation doctrine. But *Dotterweich* and *Park* do not clearly explain from what authority the doctrine is derived, how the doctrine relates to the elements of the offense, and to what offenses (other than the FFDCA) it applies.

III. THE IRRELEVANCE OF MENTAL STATE

A. *DOTTERWEICH* AND *PARK*

Dotterweich and *Park* are in many ways remarkably similar. They involved similar factual situations: chief executive officers prosecuted for violations in which they did not actively participate. They presented similar legal questions: what is required to establish a criminal violation of FFDCA. They reached similar holdings: defendants with a responsible relation to violations of FFDCA can be guilty of criminal violations even without intent or direct participation in the violations. But the Court's focus differed greatly between the two cases. *Dotterweich* thoroughly intermingled its discussion of the FFDCA's mental state elements and act elements and left quite unclear whether the "responsible relation" standard it announced was intended to address both mental state and act elements, only mental state elements, or only act elements, or whether the test applies a form of vicarious liability that requires neither mental state nor conduct.[34]

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[31] *Park*, 421 U.S. at 673-74.

[32] *Id.* at 674.

[33] *Id.* at 672.

[34] Dotterweich v. United States, 320 U.S. 277, 280-81 (1943).

Park, on the other hand, noted that the FFDCA does not require intent, but focused overwhelmingly on explaining that the responsible relation doctrine addressed the FFDCA's act elements by establishing a causal relationship between the defendant's omission and the violation of the FFDCA.[35]

Dotterweich and *Park* clearly used a public welfare rationale to justify imposing liability without a showing of intent and liability through omission. It thus would be easy to jump to the conclusion that the responsible relation doctrine implicates both mental state elements and act elements (here, failure to act) of an offense. Although both factual characteristics were present in *Dotterweich* and *Park*, and the Court invoked the responsible relation standard in both cases, the standard does not necessarily implicate both mental state and act elements. Nor is there anything in the Court's analysis in *Dotterweich* and *Park* suggesting that liability without intent and liability through omission necessarily operate in tandem in a way that requires or favors lumping them together in a single responsible relation doctrine. If the responsible relation doctrine does not involve both liability without intent and liability through omission, which does it address?

It is difficult to extract an answer to this question from *Dotterweich* and *Park*, because those cases involved both liability without intent and liability through omission, and because their discussions of the doctrinal basis for the responsible relation doctrine are so opaque. If the Court in *Dotterweich* or *Park* had explained the derivation of the responsible relation standard thoroughly, its explanation might have provided some further insight into what relationship the Court perceived between the standard and the statutory elements of an offense. But *Dotterweich* and *Park* are quite lacking in this respect. *Dotterweich* did not cite a single case in support of its explication of the doctrine; the Court essentially announced the conclusion without a supporting rationale.[36] *Park* cited a series of state court cases for the proposition that a defendant's "power to prevent the act complained of" had been previously deemed "sufficient" and "enough" to hold him liable, without explaining why it was sufficient.[37]

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[35] *Park*, 421 U.S. at 671 (noting that the responsible relation test "hold[s] criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of"); *id.* at 674 ("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.").

[36] *See Dotterweich*, 320 U.S. at 284-85.

[37] *Park*, 421 U.S. at 671 (citing People v. Schwartz, 70 P.2d 1017 (Cal. App. Dep't Super. Ct. 1937); Overland Cotton Mill Co. v. People, 75 P. 924 (Colo. 1904); Groff v. State, 85 N.E. 769 (Ind. 1908); Turner v. State, 100 S.W.2d 236 (Tenn. 1937); State v. Burnam, 128 P. 218 (Wash. 1912)).

Nevertheless, there are strong indications from *Dotterweich* and *Park*, especially *Park*, that the responsible relation doctrine pertains only to act elements and does not involve mental state. *Park* certainly did not state such a proposition outright. *Park*'s procedural posture could explain why the Court in that case focused on the FFDCA's act elements instead of mental state: this issue is the one on which the court of appeals erred. But *Park*, by focusing on the nexus between the responsible relation standard and the FFDCA's act elements without identifying a similar nexus between the test and the FFDCA's mental state elements, is at least susceptible to the interpretation that the responsible relation standard addresses only conduct and not mental state. At the very least, *Park*'s emphasis on conduct, as opposed to mental state, indicates that the Court did not see the responsible relation standard as primarily addressing mental state elements.

An additional aspect of *Dotterweich* and *Park* provides stronger support for the position that the responsible relation standard addresses only conduct and not mental state. The statute at issue in *Dotterweich* and *Park*, the FFDCA, does not require intent for any defendant, whether he directly participated in a violation of the FFDCA or is liable by virtue of the responsible relation test.[38] It makes no sense to construe *Dotterweich* and *Park* to use the responsible relation doctrine to address mental state elements because the FFDCA does not have a mental state element.[39] Thus, a close reading of *Dotterweich* and *Park* clearly suggests that the responsible relation doctrine does not affect the mental state elements of a statute.

B. FEDERAL ENVIRONMENTAL CASES

Application of *Dotterweich* and *Park*'s responsible relation doctrine in cases outside the FFDCA context confirms the conclusion that the doctrine pertains to act elements, not mental state. Courts have applied the responsible relation doctrine in a number of different settings other than the FFDCA, including meat inspection regulations,[40] state sales tax laws,[41] and alcoholic beverage control laws.[42] In military law and international

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[38] 21 U.S.C. §§ 331, 333 (2000); *see, e.g.*, United States v. Abbott Labs., 505 F.2d 565, 573 (4th Cir. 1974). A few of the specific prohibitions set forth in 21 U.S.C. § 331 do contain mental state requirements. *See, e.g.*, 21 U.S.C. § 331(gg).

[39] 21 U.S.C. §§ 331, 333.

[40] *See, e.g.*, United States v. Jorgensen, 144 F.3d 550 (8th Cir. 1998); United States v. Cattle King Packing Co., 793 F.2d 232 (10th Cir. 1986).

[41] *See, e.g.*, State v. Longstreet, 536 S.W.2d 185 (Mo. Ct. App. 1976).

[42] *See, e.g.*, People v. Byrne, 494 N.Y.S.2d 257 (N.Y. App. Term 1985).

criminal law, an analogous theory is known as *command responsibility*.[43] The responsible relation doctrine has received the most widespread attention and application in the area of environmental offenses, principally under the major federal environmental statutes,[44] but also in some state court cases.[45] In that context, the responsible relation doctrine has been labeled the *responsible corporate officer doctrine*.[46] Although the term *responsible corporate officer doctrine* also has at times been applied to prosecutions under the responsible relation doctrine outside of the environmental context,[47] the remainder of this Article, unless otherwise specified, will use *responsible corporate officer doctrine* to mean the responsible relation doctrine as it has developed and been applied in environmental cases.

This Section traces the development of the responsible corporate officer doctrine in federal environmental cases and shows how this body of law demonstrates that the responsible relation doctrine pertains to act elements rather than mental state. Federal environmental cases provide a fruitful subject of analysis and explication of the responsible relation doctrine for several reasons. First, unlike the FFDCA involved in *Dotterweich* and *Park*, most criminal penalty provisions under the major

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[43] *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 157 (2005) ("[U]nder international law a commander may be found criminally responsible for the misconduct of his subordinates if the commander had 'effective control' over the subordinates, if the commander knew or had reason to know of his subordinates' crimes, and if the commander failed to prevent or punish the offenses.") (footnote omitted); *see also* Arthur T. O'Reilly, *Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice*, 40 GONZ. L. REV. 127 (2005) (criticizing the command responsibility doctrine for not requiring knowledge of the subordinates' unlawful conduct).

[44] *See infra* cases discussed at notes 50-104 and accompanying text.

[45] *See, e.g.*, People v. Matthews, 9 Cal. Rptr. 2d 348, 351-55 (Cal. Ct. App. 1992) (holding that the president of a company could be held liable under *Dotterweich* and *Park* for failing to prevent the company from violating California Health and Safety Code provisions involving labeling and storage of hazardous wastes); People v. Int'l Steel Corp., 226 P.2d 587, 592 (Cal. Ct. App. 1951) (holding that the defendant "in charge as an officer and manager" of corporate conduct that caused air emissions that violated the California Health and Safety Code could be held criminally responsible for the violations); State v. Kailua Auto Wreckers, Inc., 615 P.2d 730, 737-40 (Haw. 1980) (holding the wrecking company's president and treasurer liable for failing to prevent or correct the company's repeated violations of Hawaii State Public Health Regulation prohibiting open burning of cars).

[46] *See, e.g.*, sources cited *infra* notes 105-107.

[47] *See, e.g.*, Proffit v. Ring, No. 1:01CV00121, 2003 WL 21281639, at *3 n.5 (W.D. Va. June 2, 2003) (noting the application of the responsible corporate officer doctrine to building code violations); *see also supra* note 10.

federal environmental statutes require knowledge. The extent to which this difference affects the application of the responsible relation doctrine illuminates the relationship between responsible relation liability and mental state.[48] Second, the responsible relation doctrine has been applied to environmental felonies in a number of cases spanning a significant period of time, with the result that a relatively stable body of precedent has evolved. The history of the development of the responsible corporate officer doctrine shows that, over the period from the late 1970s to the 1990s, the doctrine developed from early confusion as courts struggled to decide whether and how the doctrine set forth in *Dotterweich* and *Park* could apply to environmental felonies, to the point where the doctrine came to be widely accepted as a basis for criminal liability and well-defined with clear requirements.[49]

1. Early Environmental Cases

The first reported case to apply the responsible relation concept to a major federal environmental statute was the Third Circuit's 1979 decision in *United States v. Frezzo Bros.*[50] The defendants, Guido and James Frezzo, owned and operated a mushroom farming business, Frezzo Brothers, Inc., that was caught discharging pollutants in water of the United States without a permit, in violation of the Clean Water Act (CWA).[51] The indictment specifically stated that the Frezzos were being charged as individuals in their capacities as co-owners and corporate officers of Frezzo Brothers, Inc.,[52] and the Frezzos argued on appeal from their convictions that the district court erred by not instructing the jury that the Frezzos were being charged in their capacity as corporate owners and officers.[53] The court of appeals dismissed this argument summarily, noting that "[t]he Government argued the case on the 'responsible corporate officer doctrine'

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[48] *Cf.* Brickey, *supra* note 5, at 1357 (noting that most post-*Dotterweich* decisions "accomplished little in the way of clarifying ambiguities in the responsible share test [because m]ost reported decisions concerning prosecutions of corporate officers were factually similar to *Dotterweich*").

[49] This Article uses the term *requirements*—as opposed to *elements*—to describe the criteria for applying the responsible relation doctrine in order to distinguish the doctrine's requirements from the elements of the offense.

[50] 602 F.2d 1123 (3d Cir. 1979).

[51] *Id.* at 269; *see* 33 U.S.C. §§ 1311(a), 1319(c) (2000). The indictment set forth a total of six counts: four occasions of intentional discharges, and two occasions of negligent discharges in which the process runoff water overflowed the holding tank because the tank had inadequate capacity. *Frezzo Bros.*, 602 F.2d at 1129.

[52] United States v. Frezzo Bros., 461 F. Supp. 266, 272 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979).

[53] *Frezzo Bros.*, 602 F.2d at 1130 n.11.

recognized by the United States Supreme Court in *United States v. Park* and *United States v. Dotterweich*," and that the court "perceive[d] no error in the instruction to the jury on this theory."[54]

As an early foray of the responsible relation doctrine into federal environmental law, *Frezzo Bros.* is remarkably uninsightful.[55] Neither the district court's decision nor the Third Circuit's decision explained how the responsible corporate officer doctrine was applied in the case—that is, how the jury instructions stated the doctrine, and what evidence the government offered to support those elements. The court's recitation of the evidence, however, leaves the strong impression that the evidence clearly linked the Frezzos' conduct and mental state to the violations.[56]

Some commentators have cited the Third Circuit's 1984 decision in *United States v. Johnson & Towers, Inc.*,[57] as a responsible corporate officer case.[58] In that case, the government prosecuted Johnson & Towers, Inc., the corporate owner of a chemical plant; Jack Hopkins, a foreman at the plant; and Peter Angel, a manager.[59] The indictment charged that the defendants violated the Resource Conservation and Recovery Act (RCRA)[60] by pumping waste chemicals from a holding tank into a trench that flowed into a tributary of the Delaware River.[61] The Third Circuit reversed the district court's dismissal of the RCRA counts against Hopkins and Angel, and held

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[54] *Id.* (citations omitted).

[55] *Cf.* Alan Zarky, *The Responsible Corporate Officer Doctrine*, 5 TOXICS L. RPTR. 983, 990 (1991) (opining that the Third Circuit's decision in *Frezzo Bros.* should not be construed to address the proper scope of the responsible corporate officer doctrine).

[56] *Frezzo Bros.*, 602 F.2d at 1125 (noting, for example, that during a visit from a county health inspector, the Frezzos showed the inspector how their facility handled wastewater and stormwater); *see also Frezzo Bros.*, 461 F. Supp. at 270 (noting that the Frezzos "indicated their control and ownership of the premises" and stated that "they had constructed the storm runoff system"). The Third Circuit held that sufficient evidence supported the jury's conclusion that the Frezzos intentionally caused four of the violations and negligently caused the other two. *Frezzo Bros.*, 602 F.2d at 1128-29.

[57] 741 F.2d 662 (3d Cir. 1984).

[58] *See, e.g.*, Jill Evans, *The Lawyer as Enlightened Citizen: Towards a New Regulatory Model in Environmental Law*, 24 VT. L. REV. 229, 266 n.184 (2000); John Gibson, *The Crime of "Knowing Endangerment" Under the Clean Air Act Amendments of 1990: Is It More "Bark than Bite" as a Watchdog to Help Safeguard a Workplace Free from Life-Threatening Hazardous Air Pollutant Releases?*, 6 FORDHAM ENVTL. L. REV. 197 (1995); Noël Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 STAN. ENVTL. L.J. 283, 319 n.187 (2002).

[59] *Johnson & Towers*, 741 F.2d at 664.

[60] 42 U.S.C. §§ 6921-6939e (2000).

[61] *Johnson & Towers*, 741 F.2d at 664. The indictment also charged the defendants with conspiracy under 18 U.S.C. § 371 and with violations of the Clean Water Act, 33 U.S.C. § 1319(c). *Id.*

that the RCRA's criminal penalties provision applies not just to owners and operators of facilities subject to the RCRA's permitting requirements, but also to employees of those facilities who participate in the RCRA violations.[62] On the rationale that, because it was remanding to the district court for reinstatement of the RCRA's charges against the individual defendants, it should provide some direction to the district court, the Third Circuit proceeded to opine on the mental state elements for a RCRA unpermitted disposal offense. In that regard, the court of appeals held that the RCRA requires knowledge of all of the elements of the offense, including knowledge that a permit was required.[63] The court offered a caveat, however, by extracting from *United States v. International Minerals & Chemical Co.*[64] and *Dotterweich* the proposition that knowledge "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."[65]

Johnson & Towers is not a case that applied the responsible corporate officer doctrine. The Third Circuit's reference in *Johnson & Towers* to responsible employees concerned how to prove knowledge.[66] However

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[62] *Id.* at 664-67.

[63] *Id.* at 669-70.

[64] 402 U.S. 558 (1971).

[65] *Johnson & Towers*, 741 F.2d at 670. How the Third Circuit derived this conclusion from *International Minerals* and *Dotterweich* is perplexing. *International Minerals* generally stands for the proposition that anyone dealing with dangerous devices, products, or materials should be presumed to know of the laws that regulate them, and so ignorance of a legal requirement in cases involving their mishandling is not a defense. *See Int'l Minerals*, 402 U.S. at 564-65. Yet this is precisely contrary to the Third Circuit's proposition in *Johnson & Towers* that the RCRA requires the government to prove a defendant's knowledge of the permit requirement. The court's invocation of *Dotterweich* is also inapt, as that case disavowed any mental state elements for the offense at issue there.

[66] *Johnson & Towers*' proposition that knowledge may be inferred for responsible employees has been read different ways. Some even have read the Third Circuit to allow convictions of responsible employees for RCRA violations without any knowledge. *See, e.g.*, Cynthia H. Finn, Comment, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 AM. U. L. REV. 543, 567-68 (1996). This reading, however, stretches the court's decision beyond what its language permits. The court did not say that a defendant could be convicted without knowledge, and indeed such a proposition would be directly contrary to the court's express conclusion "that all the elements of th[e] offense must be shown to have been knowing." *Johnson & Towers*, 741 F.2d at 670. At most, the Third Circuit indicated that an employee's responsibilities in a company may give rise to a presumption that the employee knew of certain facts relating to the company's operations. Clearly the Third Circuit regarded the employees' responsibility as highly probative evidence of their knowledge. It thus is unfair and inaccurate to accuse the Third Circuit of allowing RCRA convictions without any evidence of knowledge. The employees' responsibilities are evidence of this knowledge, and the only question is whether the responsibilities are sufficiently probative evidence of knowledge to create a presumption of knowledge. But, in fact, even reading *Johnson & Towers* as suggesting a presumption of

loosely one reads *Dotterweich* and *Park*'s responsible relation standard, it is clearly not a method of proving knowledge. Among other things, *Dotterweich* and *Park* both make clear that knowledge was not required for the offense at issue in those cases.

Thus, although the idea of applying *Dotterweich* and *Park*'s responsible relation test to environmental felonies clearly was floating around in the 1970s and 1980s, the case law of that period had very little to say about the responsible corporate officer doctrine. The question of whether and how the doctrine would apply to environmental felonies was still very much up in the air.

2. Formative Cases of the Early 1990s

The year 1991 was a watershed for the development of the responsible corporate officer doctrine and, in particular, efforts by courts to ascertain the relationship between the responsible corporate officer doctrine and statutory mental state elements. Two decisions issued that year went a long way toward clarifying that relationship.

In *United States v. White*,[67] a district court rejected the government's attempt to prosecute a violation of the RCRA[68] under a formulation of the responsible corporate officer doctrine that would have allowed the jury to convict the defendant of a knowing violation of the statute if the defendant had responsibility for the employees who personally committed the violations, and knew or should have known of the employees' violations.[69] The government argued that, since *Dotterweich* and *Park* allowed prosecutions under the responsible corporate officer doctrine without proof that the defendant knew about the violations, the defendant could similarly be prosecuted for the RCRA violations without proof that he knew about

knowledge for responsible employees goes too far. A closer reading of the Third Circuit's opinion suggests that the court intended to make a narrower point: that, in many but not necessarily all cases, a defendant's position and responsibility is sufficiently probative circumstantial evidence of the defendant's knowledge of a particular fact to allow the jury to infer knowledge. Thus, the Third Circuit did not hold that, as a matter of law, individuals with a responsible relationship to a RCRA violation have the requisite knowledge to be held criminally liable for the violation. To the contrary, the court specifically left it up to the jury to decide whether to infer knowledge from an individual's job responsibilities. *Id.* (holding that knowledge "*may* be inferred *by the jury* as to those individuals who hold the requisite responsible positions with the corporate defendant") (emphases added). Indeed, the court specifically linked the jury's ability to infer knowledge to the particular circumstances of the case: "*Depending on the evidence*, the district court may also instruct the jury that such knowledge may be inferred." *Id.* at 669 (emphasis added).

[67] 766 F. Supp. 873 (E.D. Wash. 1991).

[68] 42 U.S.C. §§ 6901-6992k (2000).

[69] *White*, 766 F. Supp. at 894.

the violations.[70] The district court rejected this reasoning, noting that the offenses at issue in *Dotterweich* and *Park* were strict liability offenses that did not require knowledge, whereas the RCRA expressly required knowledge for a criminal violation.[71]

In *United States v. MacDonald & Watson Waste Oil Co.*,[72] the First Circuit similarly rejected an attempt to use the responsible corporate officer doctrine to modify the RCRA's mental state elements. The government argued, and the district court agreed, that it could establish a knowing violation either by showing that the defendant had actual knowledge of the violation or that he had a responsible relationship to the violation and knew that "illegal activity of the type alleged occurred."[73] The court of appeals reversed, concluding that the responsible corporate officer doctrine could not reduce the government's burden to meet the RCRA's express requirement that the defendant act "knowingly."[74]

Unfortunately, the clarity of *White* and *MacDonald & Watson Waste Oil* was undermined somewhat by some regrettable dicta in the Tenth Circuit's decision in *United States v. Brittain*,[75] also decided in 1991. Raymond Brittain, the public utilities director for Enid, Oklahoma, was convicted of eighteen false statement counts and two misdemeanor violations of the Clean Water Act (CWA) arising out of his management of the city's wastewater treatment plant.[76] On appeal, Brittain argued among other things that he was not a "person" under the CWA, and therefore could not be prosecuted for permit violations, unless he was the permittee or was a responsible corporate officer.[77] The Tenth Circuit rejected this argument, reasoning that Congress' use of the term "responsible corporate officer" in

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[70] *Id.* at 894-95.

[71] *Id.* at 895.

[72] 933 F.2d 35 (1st Cir. 1991).

[73] *Id.* at 50-51.

[74] *Id.* at 55. *MacDonald & Watson Waste Oil* should not, however, preclude the government from using evidence that the defendant knew of past violations to prove that the defendant knew violations would continue. The extent to which knowledge of previous violations is probative of knowledge of future violations will depend on the particular facts of the case. For example, a defendant's knowledge that his subordinates previously have engaged in sporadic instances of deliberate illegal dumping does not show that the defendant knows that such dumping will occur in the future. Indeed, in that situation, it is not even clear that the defendant is in a position to prevent future dumping. By contrast, a defendant's awareness that a facility has repeatedly violated environmental standards due to inadequate maintenance can establish a defendant's knowledge that, at least absent an infusion of maintenance, the facility will have future violations.

[75] 931 F.2d 1413 (10th Cir. 1991).

[76] *Id.* at 1414-15.

[77] *Id.* at 1418-19.

the definition of "person" was intended to invoke the responsible corporate officer doctrine, not to limit the definition of who could be a person under the RCRA.[78] This reasoning is clearly right and, had the court stopped there, all would have been well. Along the way toward reaching this conclusion, however, the Tenth Circuit characterized the responsible corporate officer doctrine as a mental state theory that, as applied to the CWA, allows prosecutions without the mental state required in the statute, because "the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility."[79] The court specifically noted that Brittain was not prosecuted under the responsible corporate officer doctrine.[80] Thus, its unnecessary characterization of the doctrine was unfortunate dicta. An additional irony of the Tenth Circuit's mischaracterization of the doctrine is that the facts of the case seemed to present a prime opportunity for application of the responsible corporate officer doctrine to hold Brittain liable for felony violations of the CWA. The Tenth Circuit specifically noted that Brittain "had primary operational responsibility for the treatment plant," that he knew the plant violated its discharge permits during heavy rains, and that he nevertheless allowed permit violations to occur without addressing or reporting them.[81] These facts match the requirements of the responsible corporate officer doctrine.[82]

3. Confirmatory Cases of the Late 1990s

Despite the Tenth Circuit's unfortunate dicta in *Brittain*, courts since 1991 generally have treated *White* and *MacDonald & Watson Waste Oil* as decisive on the issue of the relationship between the responsible corporate officer doctrine and mental state. The government undoubtedly hastened and strengthened this development by abiding by *White* and *MacDonald & Watson Waste Oil*.[83] Thus, cases since the early 1990s have assumed that the responsible corporate officer doctrine does not alter statutory mental state requirements.

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[78] *Id.* at 1419.

[79] *Id.*

[80] *Id.* at 1420 n.5.

[81] *Id.* at 1420.

[82] *See supra* text accompanying note 31.

[83] Barry M. Hartman & Charles A. De Monaco, *The Present Use of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 ENVTL. L. REP. 10,145, 10,151 (1993) ("The DOJ has followed the teachings of [*MacDonald & Watson Waste Oil*] in its environmental prosecutions.").

In *United States v. Iverson*,[84] the Ninth Circuit affirmed the application of the responsible corporate officer doctrine to Thomas Iverson, the president of a company who encouraged and allowed his employees to discharge water containing chemical residue into the sewer.[85] The district court's jury instruction on the responsible corporate officer doctrine required the jury to find: (1) that Iverson knew that his employees were discharging pollutants into the sewer system; (2) that Iverson had the authority and the capacity to prevent the discharges; and (3) that Iverson failed to prevent the discharges.[86] On appeal, Iverson argued that these instructions erroneously allowed the jury to find him guilty of CWA violations without finding that he was actually in control of the activity that caused the discharge or that he had an express corporate duty to oversee the activity, and without finding that the discharges violated the CWA.[87] The Ninth Circuit rejected these arguments and upheld the use of the responsible corporate officer doctrine.[88] In the course of doing so, the court noted that, appropriately applied, the doctrine "relieve[s] the government only of having to prove that defendant personally discharged or caused the discharge of a pollutant. The government still had to prove that the discharges violated the law and that defendant knew that the discharges were pollutants."[89]

United States v. Ming Hong[90] was a CWA prosecution of James Ming Hong for permit violations at a wastewater treatment facility in Richmond, Virginia, owned by Avian Environmental Groups.[91] The information charged Hong with negligently violating pretreatment requirements "as a responsible corporate officer."[92] Hong argued that he could not be prosecuted as a responsible corporate officer because he was not a formally designated corporate officer of Avian and, alternatively, that he did not exert sufficient control over Avian's operations to be held responsible for the discharges from Avian's facility.[93] The Fourth Circuit rejected both arguments. It began by reviewing *Dotterweich*, which it summarized as "holding that all who had a 'responsible share' in the criminal conduct

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[84] 162 F.3d 1015 (9th Cir. 1998).
[85] *Id.* at 1018-19.
[86] *Id.* at 1022.
[87] *Id.*
[88] *Id.* at 1026
[89] *Id.*
[90] 242 F.3d 528 (4th Cir. 2001).
[91] *Id.* at 529-30.
[92] *Id.* at 531.
[93] *Id.*

could be held accountable for corporate violations of the law."[94] The court also noted that *Park* "elaborat[ed] on the concept of a 'responsible share,'" holding that a defendant may be held criminally responsible for a violation he did not directly commit if "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."[95] Based on this review, the court easily dismissed Hong's contention that the responsible corporate officer theory of liability applied only to persons formally designated as corporate officers:

> The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.[96]

In Hong's case, the answer to this question was easy. Hong controlled Avian's finances and substantially controlled its operations.[97] Moreover, he personally participated in the purchase of Avian's inadequate treatment system; he knew that the system would not adequately treat wastewater; and he was regularly present at the wastewater treatment facility when discharges were occurring.[98]

In *United States v. Hansen*,[99] the Eleventh Circuit affirmed the convictions of three individuals convicted of conspiracy and violating the CWA, the RCRA, and the Comprehensive Environmental Response, Compensation, and Liability Act.[100] The district court gave a responsible corporate officer instruction for the RCRA counts that required the jury to find, among other things, that the defendants "acted knowingly in failing to prevent, detect or correct the violation."[101] The defendants argued that the instruction allowed the jury to find them guilty based on constructive, rather than actual, knowledge, but the Eleventh Circuit rejected this argument, holding that the requirement that the defendants must have "acted knowingly" made it sufficiently clear that the jury could not find the

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[94] *Id.*

[95] *Id.* (quoting United States v. Park, 421 U.S. 658, 673-74 (1975)).

[96] *Id.* at 531.

[97] *Id.* at 532.

[98] *Id.* at 532.

[99] 262 F.3d 1217 (11th Cir. 2001). The author of this Article represented the United States in this case on appeal.

[100] 42 U.S.C. §§ 9601-9675 (2000).

[101] *Hansen*, 262 F.3d at 1252.

defendants guilty under the responsible corporate officer doctrine without finding that they had actual knowledge of the violations.[102]

At least three important observations can be drawn from *Iverson*, *Hong*, and *Hansen*. First, these cases did not break significant new ground in establishing or defining the responsible corporate officer doctrine. None of these three decisions grappled with fundamental questions about the overall validity of the responsible corporate officer doctrine, the scope of its application, or how to define its elements. Instead, they involved questions about the particular formulation of the jury instructions for the responsible corporate officer doctrine or the evidence that supported the convictions under a responsible corporate officer theory of liability. This represented a significant change from the case law of the early 1990s and shows that, by the late 1990s, the responsible corporate officer doctrine had developed in federal environmental law to the point that its validity as a basis for criminal liability was widely accepted.

Second, there is no indication that the courts in *Iverson*, *Hansen*, and *Hong* thought that the responsible corporate officer doctrine affected mental state requirements. This, too, represents a change from the cases of the early 1990s and indicates that, at least in federal environmental cases, questions of mental state had essentially been excised from the responsible corporate officer doctrine by the late 1990s.

Third, *Iverson*, *Hansen*, and *Hong* also are significant because in each case, the court readily recognized that the responsible corporate officer doctrine is concerned with the question of when a defendant can be held criminally liable for a violation in which he did not directly participate.[103] *Hong* goes a step further and explicitly describes the responsible corporate officer doctrine in terms of a failure to act, albeit without invoking any of the principles, authority, or case law of criminal omissions.[104]

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[102] *Id.* at 1252-53.

[103] *See id.* at 1248 (finding that although defendant "did not directly cause the violations," he "permitted the plant employees to process the hazardous wastes as they had in the past despite his knowledge that the procedures were in violation of environmental regulations"); *Hong*, 242 F.3d at 531 ("[T]he pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA."); United States v. Iverson, 162 F.3d 1015, 1026 (9th Cir. 1998) ("[T]he 'responsible corporate officer' instruction relieved the government *only* of having to prove that defendant *personally* discharged or caused the discharge of a pollutant.").

[104] *See Hong*, 242 F.3d at 531.

C. SCHOLARSHIP AND COMMENTARY

The government's efforts to prosecute federal environmental felonies under the responsible corporate officer doctrine in the early 1990s attracted considerable attention in legal scholarship and commentary. Articles written about the application of the doctrine to environmental felonies usually characterized the development in alarmist terms and almost uniformly described the doctrine as imposing strict liability[105] or otherwise reducing mental state requirements[106] for prosecutions of corporate officers. Those articles that did not describe the responsible corporate officer doctrine as eviscerating or circumventing statutory mental state requirements often described the doctrine as a means of proving a defendant's knowledge by using the defendant's job responsibilities as circumstantial evidence.[107] As the case law developed in the 1990s, the commentary began to subside somewhat. Surprisingly, however, commentators continued to describe the responsible corporate officer doctrine as impacting mental state requirements.[108] Articles that recognized

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[105] Ronald M. Broudy, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 KY. L.J. 1055, 1072-73 (1992); Zarky, *supra* note 55, at 987-88, 994; Finn, *supra* note 66, at 574.

[106] Lisa Ann Harig, *Ignorance Is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145, 147 (1992); Ruth Ann Weidel et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100, 1105 (1991).

[107] Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After* United States v. Dee, 59 GEO. WASH. L. REV. 862, 883-88 (1991); Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine—Can You Go to Jail for what You Don't Know?*, 22 ENVTL. L. 1347, 1357 (1992); Barbara DiTata, *Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine*, 7 FORDHAM ENVTL. L. REV. 795, 806-14 (1996); Hartman & De Monaco, *supra* note 83, at 10, 152-53; Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169, 198 (1994); Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 SW. L.J. 1199, 1200 (1991); Jeremy D. Heep, Comment, *Adapting the Responsible Corporate Officer Doctrine in Light of* United States v. MacDonald & Watson Waste Oil Co., 78 MINN. L. REV. 699, 708-10, 726-27 (1994); Alexandra Varney, Comment, *Responsible Corporate Officer Doctrine Does Not Satisfy Required Element of Knowledge Under Resource Conservation and Recovery Act*, 26 SUFFOLK U. L. REV. 895, 900 (1992). The Third Circuit's decision in *Johnson & Towers* provides some support for this position. *See* United States v. Johnson & Towers, 741 F.2d 662, 669 (3d Cir. 1984) ("[T]riers of fact would have no difficulty whatever *in inferring knowledge on the part of those whose business it is to know* . . . ." (quoting United States v. Int'l Minerals & Chems. Corp., 402 U.S. 558, 569 (1971) (Stewart, J., dissenting))).

[108] Charles J. Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L. & POL'Y F. 1, 8 (2004); Wise, *supra* note 58, at 289-90; Finn, *supra* note 66, at 574.

the developing consensus in the case law tended to characterize cases like *White* and *MacDonald & Watson Waste Oil* as rejecting the responsible corporate officer doctrine, thereby similarly assuming that the responsible corporate officer pertained only to mental state.[109] Since courts essentially had reached consensus by the mid-1990s that the responsible corporate officer doctrine did not alter statutory mental state requirements, why did commentators persist in characterizing the doctrine as affecting mental state requirements?

One possible answer lies in the seminal responsible relation case, *Dotterweich*, which commingled its discussion of mental state requirements (or lack thereof) with its discussion of the responsible relation theory.[110] By the time of the *Park* decision in 1975, however, the Court had disentangled the two concepts at least somewhat. Although *Park*'s discussion is far from clear, the Court did understand that the mental state required under the responsible relation doctrine derived from the offense, not from the responsible relation doctrine itself.[111] It follows that the mental state required to prosecute under the responsible corporate officer doctrine is merely the mental state otherwise required for the particular offense: prosecution of an intentional crime under the responsible corporate officer doctrine would require proof of intent or knowledge; prosecution of a negligent crime would require proof of a negligent mental state; and prosecution of a strict liability offense would not require proof of a particular mental state. Stated differently, just as negligent crimes impose a duty to take care that one's actions do not unintentionally cause a violation of the law, where the responsible corporate officer doctrine applies, a negligent crime prosecuted under the responsible corporate officer doctrine recognizes a duty to take care that one's failure to act does not unintentionally cause a violation of the law. Once mental state is recognized as separate from the responsible relation theory, this relationship becomes obvious. But, because *Dotterweich*—and even *Park*, albeit to a

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[109] Thus, Professor Richard G. Singer labeled the entire responsible corporate officer doctrine a "myth." Richard G. Singer, *The Myth of the Doctrine of the Responsible Corporate Officer*, 6 TOX. L. RPTR. 1378 (1992).

[110] Dotterweich v. United States, 320 U.S. 277, 280-81 (1943).

[111] *See, e.g.*, United States v. Park, 421 U.S. 658, 670 (1975) ("The principle [of holding a corporate agent responsible for a crime] had been applied whether or not *the crime required 'consciousness of wrongdoing,'* and it had been applied not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission.") (emphasis added); *id.* at 670-71 ("[T]he liability of managerial officers did not depend on their knowledge of . . . the act made criminal by the statute. Rather, where *the statute under which they were prosecuted dispensed with 'consciousness of wrongdoing,'* an omission . . . was deemed a sufficient basis for . . . liability.") (emphasis added).

lesser extent—intermingled their discussions of mental state with the responsible relation doctrine, the mental state requirements for a prosecution under the responsible relation doctrine have not been at all obvious to many courts and commentators.

A second possible, and perhaps related, answer to the question of why commentators continued to link the responsible corporate officer doctrine to mental state requirements is that, although *White* and *MacDonald & Watson Waste Oil* were clear that the responsible corporate officer doctrine cannot be used to avoid or reduce statutory mental state requirements, those decisions were not clear about the relationship between their holding and the doctrine. Were they rejecting entirely the application of the responsible corporate officer doctrine to an intentional crime, on the apparent understanding that the responsible corporate officer doctrine inherently jettisons some, or all, mental state requirements? Or were they rejecting a particular formulation of the responsible corporate officer doctrine that did not require a sufficient mental state, while preserving the possibility of another formulation that would not suffer this defect? To the extent that *White* and *MacDonald & Watson Waste Oil* are susceptible to the former interpretation, those decisions could be read to limit the scope of the responsible corporate officer doctrine to strict liability offenses, rather than to require the responsible corporate officer doctrine to conform to the mental state requirements of the particular offense to which it is being applied. Thus, in the wake of *White* and *MacDonald & Watson Waste Oil*, commentators opposed to the responsible corporate officer doctrine could cite those decisions as authority for their criticisms of the doctrine, instead of a rebuttal of those criticisms.[112]

Even taking into account the presence of these factors obscuring the distinction between the responsible relation doctrine and mental state requirements, at some point in the mid-1990s, after courts overwhelmingly had concluded that the responsible corporate officer doctrine did not circumvent statutory mental state requirements, commentators should have stopped characterizing the responsible corporate officer doctrine in terms of mental state. It also is difficult to understand why, especially once the case law had become clear, commentators opposed to the doctrine did not turn to attack it on other bases.

Not all scholarship addressing the responsible corporate officer doctrine fell into the trap of analyzing the doctrine in terms of its perceived

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[112] *Compare, e.g.*, Broudy, *supra* note 105, at 1056, 1069-72 (characterizing *MacDonald & Watson Waste Oil* as rejecting the responsible corporate officer doctrine), *with* Varney, *supra* note 107, at 899-901 (characterizing *MacDonald & Watson Waste Oil* as clarifying the responsible corporate officer doctrine).

effects on mental state requirements. This Article is not the first to suggest that the responsible corporate officer doctrine does not change statutory mental state requirements but instead is a means of holding responsible those supervisors and managers who allowed environmental violations to occur but did not actively participate in or aid and abet the violations.[113] However, none of these articles explored this possibility in any depth or attempted a full justification of the doctrine as a species of the law of omissions.

Alan Zarky, a white-collar criminal defense attorney, wrote a commentary on the responsible corporate officer doctrine in 1991 in the *Toxics Law Reporter*.[114] Zarky criticized the doctrine's application to environmental felonies on the ground that it was being used to circumvent or reduce statutory mental state requirements.[115] Zarky acknowledged, however, the "complicated nature" of the doctrine, including its susceptibility to differing interpretations.[116] Under one of these interpretations, he noted, the doctrine "could impose the mental elements normally required under the particular statute, but simply make clear that failure to act renders the officer just as culpable as acting."[117] Moreover, Zarky continued, such a reading of the doctrine might comport with principles of criminal law recognizing criminal omissions that arise out of, among other things, employment.[118] Such an interpretation of the doctrine "would comport with most people's concept of a fair rule and would still be consistent with traditional notions of personal accountability."[119] In the end, however, Zarky, writing without the benefit of *White* and *MacDonald & Watson Waste Oil*, concluded that the responsible corporate officer doctrine would not be limited to addressing criminal omissions—what he called "the action-inaction question"—and necessarily would be used to reduce mental state requirements, to which he strongly objected.[120]

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[113] *See, e.g.*, Susan F. Mandiberg, *Moral Issues in Environmental Crime*, 7 FORDHAM ENVTL. L. REV. 881, 898-907 (1996) (exploring the possibility that the responsible corporate officer doctrine addresses the act element of the offense and, in particular, a duty to act to prevent violations); Zarky, *supra* note 55, at 988 (suggesting that the responsible corporate officer doctrine could be interpreted to provide "that failure to act renders the officer just as culpable as acting" and noting authority for the proposition "that a duty to act can arise based on one's employment status").

[114] Zarky, *supra* note 55.

[115] *Id.* at 987-94.

[116] *Id.* at 990, 988.

[117] *Id.* at 988.

[118] *Id.*

[119] *Id.* at 989.

[120] *Id.*

Professor Susan Mandiberg wrote an essay in 1996 in which she posited that the responsible corporate officer doctrine is best explained as dealing with act elements, not mental state elements.[121] In conjunction with this insight, Mandiberg also recognized that the responsible corporate officer doctrine addressed omissions.[122] Mandiberg criticized *Dotterweich* and *Park* for "not articulat[ing] a jurisprudential basis for inferring a duty for corporate officers."[123] In searching for such a duty, however, Mandiberg did not escape the widespread misapprehension that the rationale for the responsible corporate officer doctrine is rooted in the idea that regulatory offenses protect the public health and safety.[124] Accordingly, for the source of the responsible corporate officer's duty to act, Mandiberg looked to the relationship between the defendant and the public and overlooked the contractual relationship between the defendant and his employer.[125] Mandiberg's focus on the relationship between the defendant and the public as the source of the defendant's duty to act is a significant shortcoming because it fails to differentiate the responsible corporate officer from any other person who knowingly fails to prevent an environmental violation.[126]

In addition to Mandiberg's and Zarky's articles, a student comment in the *Journal of Criminal Law and Criminology* offered some insightful criticisms of the conventional analysis of the responsible corporate officer doctrine.[127] The comment correctly recognized that *Dotterweich* and *Park*'s "innovation" did not relate to mental state but rather to holding corporate officers liable for violations in which they did not directly participate.[128] The comment also criticized limiting the responsible corporate officer to "public welfare offenses."[129] The comment's prescriptions, however, had their own problems. According to the comment, the responsible corporate officer doctrine is justified on policy grounds by the difficulty of proving

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[121] Mandiberg, *supra* note 113, at 896-98.

[122] *Id.* at 898; *see also id.* at 902 ("[V]oluntary omission to perform the duty suffices for proof of the act element.").

[123] *Id.* at 902.

[124] *See id.* at 901; *infra* Section IV.

[125] *Id.* at 898, 907.

[126] To be fair, Mandiberg forthrightly acknowledged that her essay did not resolve the issues she addressed but instead merely suggested some possible answers. *Id.* at 882. Nevertheless, her essay was clearly an important step toward elucidating the relationship between the responsible corporate officer doctrine and traditional criminal law doctrines.

[127] Amiad Kushner, Comment, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681 (2003).

[128] *Id.* at 694-95.

[129] *Id.* at 700-05.

that a corporate officer affirmatively authorized a violation.[130] The comment posited that, to alleviate the government's burden of proving affirmative authorization, the responsible corporate officer doctrine creates a presumption that a corporate officer who knowingly fails to prevent a violation has affirmatively authorized it.[131] The fact that an element may be difficult to prove, however, would not justify using a presumption to shift the burden of proof to the defendant. Indeed, using presumptions to prove an element of an offense raises serious due process concerns.[132] The comment's policy-based rationale for the responsible corporate officer doctrine led its author to conclude that application of the doctrine should not be determined by a particular test, but rather that courts should develop factors to apply in a case-specific inquiry.[133] But the substantive law governing a criminal offense is largely defined through jury instructions, and jury instructions are by necessity tests. Moreover, the comment overlooked the fact that courts already had settled on a test for the responsible corporate officer doctrine. Finally, the comment posited that the responsible corporate officer doctrine substitutes the "responsible relation" test for a traditional act requirement.[134] A better description, incorporating the understanding that the doctrine involves omissions, would be that the doctrine substitutes a breach of a duty to act for the conventional act requirement.

IV. THE PUBLIC WELFARE EXPLANATION

To date, neither courts nor commentators have adequately explained why the responsible relation doctrine is a valid basis for criminal liability. To the extent commentators and scholars have inquired into the theoretical underpinnings of the responsible relation doctrine, they have tended to focus on the idea of public welfare offenses.[135] The obvious inspiration for this focus is *Dotterweich* and *Park*, which relied heavily on the idea of public welfare offenses to justify their holdings.[136] But there are problems

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[130] *Id.* at 683.

[131] *Id.* at 704.

[132] *See* Mandiberg, *supra* note 113, at 891 n.50.

[133] Kushner, *supra* note 127, at 699, 704 n.148.

[134] *Id.* at 707.

[135] *See, e.g.*, DiTata, *supra* note 107, at 806-07; Harig, *supra* note 106, at 151-56; Morgan & Obermann, *supra* note 107, at 1202-04; Wise, *supra* note 58, at 316-18; Finn, *supra* note 66, at 545-46; *see also* Mandiberg, *supra* note 113, at 901 & n.92 (arguing that the responsible corporate officer doctrine can apply under statutes that regulate public health and safety, even if they are not public welfare offenses as the Supreme Court now defines that term).

[136] See *supra* Section II for discussion of *Dotterweich* and *Park*.

with using the idea of public welfare offenses to justify the responsible relation doctrine.

First, as the Supreme Court used the idea of public welfare offenses in *Dotterweich* and *Park*, the concept is so general that it does not provide a principled basis for deciding where and why the responsible relation doctrine should apply. In essence, *Dotterweich* and *Park* held that it was appropriate to hold responsible corporate officers liable because doing so would deter violations of a statute intended to protect the public health and welfare.[137] This deterrence rationale, taken to its logical conclusion, would hold anyone liable who could prevent a violation, or at least anyone who could prevent a violation without significant cost or risk to herself. But there are innumerable situations in which the law does not reach out to hold persons criminally liable for violations they could have prevented. For example, a person who knows a crime is going to be attempted but does not try to stop it is not liable for the crime unless she actively assisted it.[138] It would certainly improve deterrence and protect the public at large to hold such persons liable, but we nevertheless do not. *Dotterweich* made some attempt to limit its deterrence rationale to situations in which the benefits of deterrence outweigh the costs, apparently assuming that public welfare offenses invariably involved situations in which the benefits of deterrence achieved by imposing liability on persons under a responsible relation theory outweigh the costs.[139] *Park* noted the public's special interest in deterring offenses that threatened the purity of food.[140] But neither of these supplemental factors would adequately limit the scope of liability. To use the same example, it is almost always less costly for a person who knows a crime is going to be attempted to report it to the police than it is for the police or the potential victim to detect the attempt on their own. However important the purity of food is, there are numerous other offenses that pose an equally grave threat to public health and welfare. Thus, *Dotterweich* and

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[137] *See* United States v. Park, 421 U.S. 658, 669-72 (1975); United States v. Dotterweich, 320 U.S. 277, 284-85 (1943).

[138] *See, e.g.*, United States v. Bailey, 405 F.3d 102, 110-11 (1st Cir. 2005); United States v. Gordon, 290 F.3d 539, 543-44 (3d Cir. 2002); United States v. Pipola, 83 F.3d 556, 563 (2d Cir. 1996).

[139] *Dotterweich*, 320 U.S. at 285 ("Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illict commerce, rather than to throw the hazard on the innocent public who are wholly helpless.").

[140] *Park*, 421 U.S. at 671.

Park's deterrence rationale cannot explain the relevance of public welfare offenses to the responsible relation doctrine.[141]

A second major problem with the public welfare offense justification is that the idea of public welfare offenses is generally used to justify imposing criminal liability without knowledge of certain factual elements.[142] The responsible relation doctrine, however, does not excuse or circumvent knowledge requirements.[143] Since the responsible relation doctrine is not used to excuse mental state requirements, the public welfare offense concept is unnecessary and irrelevant to the responsible relation doctrine. To the extent that an offense requires certain knowledge, or can be classified as a public welfare offense such that certain knowledge is not required, those questions would depend on the offense. They would not depend on whether the defendant is prosecuted under the responsible relation doctrine. Thus, if the idea of a public welfare offense is relevant to a mental state issue, it is relevant regardless of whether the offense is prosecuted under the responsible relation doctrine.

In sum, the two themes that dominate examinations of the responsible relation doctrine—the doctrine's relationship to mental state and the public welfare rationale—are red herrings. If the responsible relation doctrine is to find a robust defense, we must look elsewhere.

V. AIDING AND ABETTING?

The most obvious place to begin looking for a justification of the responsible relation doctrine, as an alternative to the public welfare offense explanation, is the law of aiding and abetting.[144] After all, there is a fine

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[141] In other words, the public welfare offense doctrine's deterrence rationale provides a reason why criminal liability should be broader for public welfare offenses than for other crimes but "provides no basis" for deciding which persons should be liable for a violation. *See* Kushner, *supra* note 127, at 703.

[142] *See, e.g.*, Liparota v. United States, 471 U.S. 419, 432-33 (1985) (holding that unauthorized acquisition or possession of food stamps was not a public welfare offense and required knowledge that acquisition or possession was not authorized); United States v. Int'l Minerals & Chems. Co., 402 U.S. 558, 560 (1971) (holding that shipping mislabeled corrosive liquids was a public welfare offense that did not require knowledge of the regulation prohibiting such shipment).

[143] *See supra* Section III.

[144] *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1417-19 (2002) (characterizing *Dotterweich* as an aiding and abetting case). Indeed, *Dotterweich* cited the aiding and abetting statute, which it characterized as a doctrine that holds criminally liable everyone "responsible" for a crime, in support of its responsible relation standard. *Dotterweich*, 320 U.S. at 281 (citing 18 U.S.C. § 550); *see* Weiss, *supra*, at 1418 n.355 (noting that, at the time *Dotterweich* was issued, the aiding and abetting statute was codified

line between responsible relation cases, in which the defendant essentially has acquiesced to another's illegal conduct, and aiding and abetting cases in which the defendant has endorsed or encouraged illegality. It may not seem too much of a stretch to characterize the responsible relation doctrine defendant's acquiescence as an implicit mandate, endorsement, or encouragement of illegal conduct.[145] Where a business organization has given an individual the responsibility to prevent certain violations, and the person knows about violations but does nothing to stop them, some might say that the person has essentially assisted the violations.[146]

Aiding and abetting, however, requires the defendant to have known of the crime, wanted it to succeed, and acted affirmatively to assist it.[147] A long line of cases holds that mere acquiescence in criminal activity is not aiding and abetting.[148] The responsible relation doctrine, however, requires only that the defendant failed, or knowingly failed if the offense requires knowledge, to prevent the violation. The doctrine does not require intent for the crime to succeed and does not require affirmative assistive conduct. It is a circumstance in which criminal liability is imposed for acquiescence, and therefore cannot be a type of aiding and abetting.

In *Criminal Law: The General Part*,[149] Glanville Williams posited a principle that would read aiding and abetting broadly enough to include the responsible relation doctrine.[150] Although Williams noted the general rule that "passive acquiescence" cannot constitute aiding and abetting, he interpreted a line of cases to support the principle that, "[w]here a person has the right to control another his inactivity may be taken as evidence of encouraging the conduct, making him guilty as abettor."[151] The cases on

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at 18 U.S.C. § 550).

[145] Somewhat similar is the situation in which a supervisor directs employees to take actions without specifying that the actions will be undertaken in a way that would violate the law, but knowing that is how the employees will proceed. *See, e.g.*, United States v. Greer, 850 F.2d 1447 (11th Cir. 1988); United States v. Ward, 676 F.2d 94 (4th Cir. 1982).

[146] Of course, if the responsible relation doctrine were confined to situations covered by aiding and abetting, this actually might undermine the doctrine, because there would be no need for a responsible relation doctrine separate from aiding and abetting law. Courts facing situations in which the responsible relation doctrine might apply could simply give juries a standard instruction on aiding and abetting.

[147] *See* United States v. Hunt, 272 F.3d 488, 493 (7th Cir. 2001); United States v. Smith, 546 F.2d 1275, 1285 (5th Cir. 1977).

[148] *See, e.g.*, United States v. Bailey, 405 F.3d 102, 111-12 (1st Cir. 2005); United States v. Gordon, 290 F.3d 539, 543 (3d Cir. 2002); United States v. Pipola, 83 F.3d 556, 563 (2d Cir. 1996).

[149] GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (2d ed. 1961).

[150] *Id.* § 122, at 360-61.

[151] *Id.* at 360.

which Williams relied, primarily British, included owners of cars who knowingly allowed their drivers to drive dangerously and were found guilty of aiding and abetting dangerous driving, and masters who knowingly allowed servants to act illegally.[152]

Williams' principle could encompass the responsible relation doctrine. The doctrine requires that the defendant failed to exercise her authority and capacity to prevent a violation;[153] in other words, she failed to exercise control. Williams' principle asserts that a failure to exercise control to prevent illegal conduct may constitute aiding and abetting.

The first problem with using Williams' principle to justify and explain the responsible corporate officer doctrine is that it is not clear, at least in American law, the extent to which the principle accurately characterizes the prevailing weight of authority. Williams cites only one American case as support for his principle.[154] Although the court there described the defendant's liability as a form of aiding and abetting, it failed to analyze why it fit within the scope of aiding and abetting, and relied on cases that upheld a defendant's conviction under similar circumstances but without characterizing the situation as one of aiding and abetting.[155] Indeed, Williams himself did not fully stand by the principle he asserted. For example, he noted that not all failures to control illegal activity are aiding and abetting, even in the context of a special relationship between the person engaging in the illegal conduct and the person who acquiesces in it.[156] Moreover, elsewhere in his book Williams asserted that a corporate officer's acquiescence in the misconduct of the company's employees does not make him responsible for their illegal actions.[157] Yet such a situation would seem to fall squarely within Williams' principle that a failure to control can be aiding and abetting.

Rather than attempt to squeeze a failure to control into the category of aiding and abetting by creating an exception to the rule that passive acquiescence is not aiding and abetting, it makes more sense to characterize a failure to control as a form of criminal omission. The defendant who fails to exercise control over conduct that violates the law is not assisting the

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[152] *Id.* at 361.

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

[154] See WILLIAMS, *supra* note 149, § 122, at 360 n.3 (citing Story v. United States, 16 F.2d 342 (D.C. 1926)).

[155] *Story*, 16 F.2d at 344 (citing Commonwealth v. Sherman, 78 N.E. 98 (Mass. 1906); *Ex parte* Liotard, 217 P. 960 (Nev. 1923); People v. Scanlon, 117 N.Y.S. 57 (N.Y. App. Div. 1909)).

[156] WILLIAMS, *supra* note 149, § 122, at 361 (noting that a husband who allows his wife to kill their children does not aid and abet her act of murder).

[157] *Id.* § 284, at 866.

conduct, but she is failing to prevent the violation. And if she had a duty to prevent the illegality, she has implicated herself in the illegal conduct by virtue of breaching her duty.[158] Indeed, Williams' own discussion characterizes the cases on which he relies as "imposing a positive duty."[159] As the remainder of this Article argues, principles of criminal omissions offer a strong foundation for the responsible relation doctrine, much stronger than Williams' expansion of aiding and abetting to include acquiescence.

In any event, there is another reason why the responsible relation doctrine cannot be lumped into the category of aiding and abetting. For aiding and abetting, there must be "commission of the substantive offense by someone else."[160] That is, there is no aiding and abetting without an underlying *crime*. As explained *infra* in further detail, however, the responsible relation doctrine holds liable persons who fail to prevent violations of the law, regardless of whether those who actively participate in the violations are guilty of a *crime*.

VI. CRIMINAL OMISSIONS

The responsible relation doctrine is best viewed as a form of criminal omission: the defendant is liable for his failure to act to prevent or correct a violation, rather than for affirmative misconduct. Given that Justice Murphy's dissent in *Dotterweich*[161] and the majority opinion in *Park* both expressly recognized that the responsible relation test imposed liability for omissions,[162] characterizing the responsible relation doctrine as a form of criminal omission is not a startling revelation. But a robust analysis of the responsible relation doctrine can hardly stop at the point of identifying the doctrine as a form of criminal omission. In particular, if the goal is to determine whether or why the responsible relation doctrine is a valid basis for criminal liability, the mere insight that the doctrine punishes omissions rather than affirmative misconduct raises more questions than it answers. Indeed, since it is widely accepted that most omissions, even morally reprehensible omissions, are not punished as crimes,[163] identifying a

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[158] *See infra* Section VI (describing the circumstances in which an omission can subject one to criminal liability).

[159] WILLIAMS, *supra* note 149, § 122, at 361.

[160] United States v. Teffera, 985 F.2d 1082, 1086 n.3 (D.C. Cir. 1993).

[161] United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting)

[162] United States v. Park, 421 U.S. 658, 671 (1975).

[163] *See, e.g.*, Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 916 (2001); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 590 (1958); Rollin M. Perkins, *Negative Acts in Criminal Law*, 22 IOWA L. REV. 659, 668-69 (1937).

doctrine as a form of omission, if anything, highlights the difficulty of showing that the doctrine is a valid basis for criminal liability.

Considerable scholarship has examined the question of why some failures to act are punished as crimes while others are not.[164] This Section will review the two primary paradigms that have arisen for answering that question, and then show that the responsible relation doctrine is a valid theory of criminal liability under either of the two paradigms.

Before addressing the two theories of criminal omissions, some caveats are in order. First, the two theories of criminal omissions discussed herein are not necessarily the only important or valid explanations of criminal omissions. It does appear, however, that these general theories encompass enough of the thinking and scholarship about criminal liability that, if this Article can show that the responsible relation doctrine is consistent with both of those theories, then it has made a convincing case that the doctrine is a valid basis for criminal liability. Because this Article does not undertake an exhaustively comprehensive study of the theories of criminal omissions, it cannot foreclose the possibility that there is a valid theory of criminal omissions that cannot be reconciled with the responsible relation doctrine. If this were true, it would be a serious strike against the doctrine.

Second, the goal of this Section is not to determine which theory of criminal omissions is the best. To the contrary, a robust explanation of the responsible relation doctrine in terms of criminal omissions should comport with any theory of criminal omissions that is not demonstrably inadequate. The more theories of criminal omissions with which the responsible relation doctrine can be shown to be consistent, the more people should be persuaded of the legitimacy of the doctrine.

A. THEORIES OF CRIMINAL OMISSIONS

The starting point for analyzing criminal omissions in American law is invariably the historical tradition in Western European and American law that disfavors making a failure to act a criminal offense. Scholars disagree

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[164] *See, e.g.*, WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2d ed. 2003); Hughes, *supra* note 163; Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547 (1988); Perkins, *supra* note 163; Daniel L. Rotenberg, *An Essay on Criminal Liability for Dutyless Omissions that Cause Results*, 62 BROOK. L. REV. 1159 (1996); Patricia Smith, *Legal Liability and Criminal Omissions*, 5 BUFF. CRIM. L. REV. 69 (2001); Orvill C. Snyder, *Liability for Negative Conduct*, 35 VA. L. REV. 446 (1949); Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Liability*, 25 AM. J. CRIM. L. 385 (1998); Sandra Guerra Thompson, *The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3 (2002).

somewhat whether this tradition rose to the level of a general presumption against criminalizing failures to act, or instead merely reflected a relative scarcity of such crimes compared to crimes involving active misconduct. However, it is clear that until the twentieth century crimes of omission were quite rare,[165] and that even now they remain far less prevalent than crimes of malfeasance.[166] This imbalance persists even though many failures to act are considered morally culpable. For example, although most would consider it morally abominable to decline to rescue someone who could be saved with minimal risk or effort, the law generally does not impose a legal duty to rescue in such situations.[167] So what separates criminal omissions from omissions that are not criminal?

The easy cases in which to answer that question are statutory crimes that expressly provide criminal penalties for failing to act. A commonly cited example of such a crime is the failure to file an income tax return.[168] Because the tradition against punishing omissions, whether it is a general presumption or just a relative preference, was never a strict rule,[169] nor constitutionally mandated, there is little question that a legislature has the authority to criminalize failures to act if it wishes to do so.[170] Accordingly, offenses involving explicit statutory duties to act are both easy to identify and theoretically untroubling. The legislature has the authority to create a duty to act, and it has done so explicitly.

The more difficult cases in which to justify imposing criminal liability for an omission are those in which the crime does not, on its face, reach

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[165] *See* Hughes, *supra* note 163, at 590-97; Kirchheimer, *supra* note 164, at 615-17.

[166] *See* LAFAVE, *supra* note 164, § 6.2, at 434.

[167] *See, e.g.*, Perkins, *supra* note 163, at 662.

[168] 26 U.S.C. § 7203 (2000).

[169] *See, e.g.*, Hughes, *supra* note 163, at 590-97 (noting that "our criminal law in its progress has only occasionally and almost reluctantly admitted the offense of omission within its scope," but offering examples of criminal omissions from Roman law and nineteenth century English commentators). Other scholars regard criminal omissions as a more commonly occurring aspect of historical criminal law, although all agree that crimes of omission are rare compared to crimes involving active misconduct. *See* Kirchheimer, *supra* note 164, at 615-17 (noting historical examples of criminal omissions from Roman law through eighteenth century criminal codes); Snyder, *supra* note 164, at 449 ("It was until recent times rare for the State to punish directly the offense of mere omission." (quoting EDWARD JENKS, THE NEW JURISPRUDENCE 207 (1933)).

[170] There may, however, be due process concerns about a crime of omission if a defendant might not be aware of her duty. *See, e.g.*, Lambert v. California, 355 U.S. 225, 227-28 (1957) (holding that municipal code provision requiring felons to register with the police department "violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge").

omissions, but has been interpreted to do so. The remainder of this Section will examine the two dominant theories for analyzing such cases.

1. Conventional Duty-Based Theories

For each omission that can be prosecuted as a crime, the traditional theoretical approach to explaining criminal omissions identifies the source of a duty to act and then explains why violations of that duty should be punished as a crime. Scholarship examining criminal omissions has identified several categories of circumstances in which a duty to act may arise in the criminal law. Although the formulation of the categories varies somewhat, there is a general consensus about the types of situations that are commonly accepted to give rise to a duty to act that, if breached, can constitute a criminal omission. Under this theory, therefore, the test for the responsible relation doctrine is whether it falls within one of these generally accepted situations, so that the doctrine can be said to be consistent with accepted principles of criminal law.

For the purposes of this Article, it is unnecessary to reconcile the somewhat differing categorizations of duties that can give rise to criminal omissions or to decide which particular characterization of the types of duties makes the most sense or is the most insightful.[171] Rather, it suffices

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[171] Otto Kirchheimer's 1942 *Harvard Law Review* article on criminal omissions identified three categories of situations in which duties arise that, if breached, may constitute criminal omissions: (1) "Personalized Relationships," such as a parent's duty to care for a child; (2) "Professional and Group Affiliation," such as a doctor's duty to render care when summoned to help a stranger; and (3) "Contractual Obligations," such as the duty of a guide to protect a mountain climber or a captain's duty to a sailor. Kirchheimer, *supra* note 164, at 621-36.

Graham Hughes' 1958 *Yale Law Journal* article on criminal omissions identified five categories of duties that, if breached, may constitute criminal omissions: (1) duties imposed "by operation of law," such as the duty to register for the selective service; (2) duties imposed "by virtue of a status relationship between individuals," such as the duty of a parent to care for a child or the duty of a ship's captain to care for his crew; (3) duties imposed "as a result of the defendant's exercise of a privilege to practice a calling or engage in a business or trade," which Hughes does not explain but which may correspond to Kirchheimer's category for professional affiliations; (4) duties that "stem from the individual's decision to participate in some permitted sphere of public activity," such as the duty of a motorist to stop when he is in an accident; and (5) duties "to discharge properly burdens which one has undertaken by contract or even gratuitously." Hughes, *supra* note 163, at 599-600.

Wayne LaFave's *Substantive Criminal Law* treatise identifies seven categories of duties that may give rise to criminal omissions: (1) duties based on personal or professional relationships, such as a parent's duty to protect a child or a sea captain's duty to rescue a sailor; (2) duties based on statute, such as the statutory duty of a person involved in a car accident to assist others injured in the accident; (3) duties based on contract, such as a lifeguard's duty to assist swimmers; (4) duties based on a voluntary assumption of care, such as a person who assumes responsibility for a child or sick person; (5) duties based on

that there is a general consensus that a contractual relationship may create a duty to act that, if breached, constitutes a criminal omission, at least where the contractual relationship imposes a duty to protect or to prevent certain harms.[172] As explained later, the responsible relation doctrine falls within this category of contractually based duties.

2. Causation-Based Theories

The dominant alternative to the traditional duty-based theories for analyzing criminal omissions is a causation-based theory. Causation-based theories of criminal omissions generally hypothesize that a person's failure to act can give rise to criminal liability only if society would expect the person to act, such that the person's failure to act would be considered a

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creation of the peril, such as someone who accidentally starts a fire in a building in which someone becomes trapped; (6) duties to control the conduct of others, such a parent's duty to keep her children from harming others; and (7) duties of landowners, such a nightclub owner's duty to provide proper fire escapes. LAFAVE, *supra* note 164, § 6.2(a).

Rollin Perkins and Ronald Boyce's *Criminal Law* treatise identified four categories of criminal omissions: (1) "an express provision of law," that is, a statutory duty to act; (2) "a legal relation," such as a parent's duty to care for a child; (3) "a factual situation," such as a friend's duty to forbid an intoxicated friend from driving under the influence; and (4) "a contract," which may involve either a duty to protect a certain person or a duty to protect the public from certain hazards. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 664-67 (3d ed. 1982); *see also* Perkins, *supra* note 163, at 670-71. As an example of this latter type of contractual duty, Perkins and Boyce cited railroad watchmen with a duty to signal or close a gate when a train approaches. PERKINS & BOYCE, *supra*, at 667.

More recently, Arthur Leavens identified five types of duties that are generally considered to give rise to criminal omissions: (1) "[d]uty based on relationship," such as a parent's duty to care for a child or a ship captain's duty to care for her crew; (2) "[d]uty arising from contract," such as a duty to care for a dependent person; (3) "[d]uty of landowner and duty to control others," such as a landowner's duty to keep safe premises or a master's duty to keep his servants from injuring others; (4) "[d]uty arising from creation of peril," such as a person's duty to rescue someone whom she has imperiled; and (5) "[d]uty arising from voluntary assumption of care," such as when a person volunteers aid in a way that deters others from offering aid, but then fails to effectuate the aid. Leavens, *supra* note 164, at 557-59.

[172] *See, e.g.*, LAFAVE, *supra* note 164, § 6.2(a)(3), at 314 (criminal omissions may arise from duties based on contract, such as a lifeguard's duty to assist swimmers); PERKINS & BOYCE, *supra* note 171, at 664-67 (criminal omissions may arise from "a contract," which may involve either a duty to protect a certain person or a duty to protect the public from certain hazards); Hughes, *supra* note 163, at 599-600 (criminal omissions may arise from duties "to discharge properly burdens which one has undertaken by contract or even gratuitously"); Kirchheimer, *supra* note 164, at 630-35 (criminal omissions may arise from "Contractual Obligations," such as the duty of a guide to protect a mountain climber or a captain's duty to a sailor); Leavens, *supra* note 164, at 557-58 (criminal omissions may arise from "[d]uty arising from contract," such as a duty to care for a dependent person).

proximate cause of the harm the relevant criminal statute is intended to prevent.[173]

Causation-based theories have raised two principal criticisms of the conventional, duty-based analysis of omissions. First, the idea that criminal omissions require a breach of a duty does not explain what is required for such a duty to arise.[174] Clearly not all civilly enforceable duties are sufficient, because not all breaches of civilly enforceable duties are criminal omissions.[175] Thus, duty-based approaches to criminal omissions are not really theories at all, but rather simply a compendium of situations in which courts have generally accepted criminal omissions.[176] Second, causation-based theories tend to regard duty-based approaches as unduly limited in the scope of situations that would constitute a criminal omission.[177] Causation-based theorists often conclude that duty-based approaches, operating without a general principle by which to guide their analysis and against a backdrop that has disfavored criminal omissions, are underinclusive.

In the end, it is unclear whether the concept of proximate cause is more satisfying than the concept of duty in explaining criminal omissions.[178] The upshot of the causation-based theories' critique of duty-based approaches, however, is that causation-based approaches generally agree that criminal liability should attach in the situations in which duty-based approaches assert that omissions are criminal. In other words, causation-based theorists, although critical of the idea that criminal omissions should be explained by reference to duties, tend to agree with the categories of situations that duty-based approaches regard as appropriate for criminal omissions, but contend that causation principles provide a better explanation than the concept of duty for why these categories of situations may give rise to criminal omissions. To the extent that causation-based theorists disagree with duty-based theorists about the scope of criminal

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[173] *See, e.g.*, JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 126-86 (1984); Leavens, *supra* note 164, at 551; Rotenberg, *supra* note 164.

[174] FEINBERG, *supra* note 173, at 152-53; Leavens, *supra* note 164, at 557.

[175] Leavens, *supra* note 164, at 555.

[176] *See* Snyder, *supra* note 164, at 449 ("While there has developed a large and miscellaneous class of wrongs involving affirmative duties, these have not been based on any broad general principles but grounded in merely a number of fixed relations to which custom or precedent have attached such duties for reasons peculiar to themselves . . . .") (footnotes and internal quotation marks omitted).

[177] FEINBERG, *supra* note 173, at 161.

[178] *See, e.g.*, Smith, *supra* note 164 (arguing that causation-based theories of criminal omissions do not rely on factual and objective judgments, but instead inevitably involve societal judgments of responsibility, including duty).

omissions, causation-based theorists tend to regard the duty-based theorists' categories as underinclusive. Thus, for example, Joel Feinberg lists the situation in which "A had a special duty to do X in virtue of his job, his socially assigned role, or his special relationship to B" as one of several circumstances in which it was "reasonable to expect A to do X," so A's failure to do X may constitute a criminal omission.[179]

As this discussion of the two predominant approaches to criminal omissions suggests, there is no clear rule explaining which failures to act can justifiably be prosecuted as crimes and which cannot. The duty-based approach is really little more than a list of situations in which courts generally agree that a failure to act may give rise to criminal liability. The duty-based approach generally does not attempt to offer a unifying principle that encapsulates these situations.[180] The causation-based approach, on the other hand, offers a general principle that defies operationalization.[181] Where the duty-based approach attempts to articulate a general principle, it suffers similarly.[182] Because neither approach provides a clear rule for distinguishing valid criminal omissions from invalid ones, the most convincing way to prove that a failure to act can give rise to criminal liability is to show that it falls within one or more of the categories of well-established criminal omissions.[183] Thus, given that the responsible relation doctrine establishes criminal liability for failures to act, the validity of the doctrine can be proven by showing that the situations the doctrine covers fall within the categories of well-established criminal omissions.

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[179] FEINBERG, *supra* note 173, at 161.

[180] *See, e.g.*, PERKINS & BOYCE, *supra* note 171, at 664 ("[T]he criminal law will recognize a negative act if—and only if—the one who has failed to take affirmative action was under a legal duty to do what was not done, with the explanation that such a legal duty may exist because of (1) an express provision of law, (2) a legal relation, (3) a factual situation or (4) a contract."); Kirchheimer, *supra* note 164, at 635-36 ("To sum up, the duty to act may be derived from family relationship or from personal ties which create a state of mutual reliance, from a professional or group status, from the mere fact of human coexistence as well as from contractual obligations.").

[181] *See, e.g.*, Leavens, *supra* note 164, at 576-77 ("Only those individuals whose failure to act is inconsistent with the common expectation that they will prevent a particular harm can be said to cause that harm.").

[182] *See, e.g.*, Hughes, *supra* note 163, at 600 ("[I]n the immense complexity and interdependency of modern life, those who elect to pursue certain activities or callings must, for the welfare of their fellow citizens, submit to a host of regulations, some of which will naturally and properly impose positive duties to act.").

[183] *See supra* note 171 (summarizing various descriptions of the categories).

B. RESPONSIBLE RELATION LIABILITY AS A CRIMINAL OMISSION

The responsible relation doctrine falls squarely within the category of criminal omissions where a failure to act (1) breaches a contractual obligation, and (2) allows an outcome to occur that would be a criminal offense if it were caused by affirmative conduct. For the responsible relation doctrine, the relevant contractual relationship is the defendant's relationship to his employer.[184] It is the defendant's employment that gives rise to his duty to act by virtue of his authority and responsibility within the business. Or, to use a causation-based characterization, the defendant's employment responsibilities distinguish him from other persons who also may have been able to prevent or correct a violation, but who have too attenuated a connection to the violations to be held criminally responsible.

Indeed, although none of the major scholarship addressing criminal omissions appears to have cited the responsible relation doctrine as an example of a criminal omission arising out of contractual responsibilities, several scholars have offered examples of contractually-based criminal omissions that involve employment responsibilities and that easily could fall within the ambit of the responsible relation doctrine. LaFave cites the example of a railroad gateman who has a duty to lower the gate to prevent approaching trains from colliding with cars crossing the tracks.[185] Kirchheimer offered two examples of "administrative misdemeanors" involving omissions that resemble a responsible relation theory of liability: "a ground bailiff of a mine whose plain duty it is to take care of its ventilation system"; and "a shipowner who does not inquire carefully enough into the ship's safety equipment before the departure."[186]

As Perkins and Boyce observed, contractually based omissions fall into two types: those in which the defendant has assumed a contractual obligation to protect a certain person, and those in which the defendant has assumed a contractual obligation to protect the general public from certain hazards.[187] The responsible relation doctrine is of the second type because

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[184] Using the terms *employment* and *employer* is not meant to imply that the responsible corporate officer doctrine requires an employer-employee relationship, to the exclusion of other close analogs. For example, a defendant could be the owner of a closely held corporation, the proprietor of a business, a member of a corporate board, or an independent contractor.

[185] LAFAVE, *supra* note 164, § 6.2(a)(3), at 314.

[186] Kirchheimer, *supra* note 164, at 640. The general principle that Kirchheimer derives from these cases is remarkably similar to the principle that Glanville Williams articulated for aiding and abetting. *Compare id.* ("Whenever somebody is in a position to exercise actual control in a given situation, an omission to do so makes him criminally liable for the consequences."), *with supra* notes 149-159 and accompanying text.

[187] PERKINS & BOYCE, *supra* note 171, at 666-67.

the defendant's duty to prevent certain violations is a duty to protect the public from the harm caused by those violations.[188] But that the purpose of the duty is to protect the public should not obscure the fact that the source of the duty underlying the responsible relation doctrine is the defendant's relationship to the corporation, not his relationship to the public.[189] The defendant's relationship with the corporation is what imposes on him a legal duty to act that differentiates him from any other person who is in a position to prevent or correct a violation of the law but who does not commit a crime by failing to do so, such as the person who fails to report a crime.

The defendant held liable under the responsible relation doctrine commits a crime because her duty to the corporation imposes a legal duty to act. The corporation relies and depends on the defendant to keep it from violating the law. To be more specific, the corporation, which may be criminally liable if its agents violate the law in the course of their activities on behalf of the corporation,[190] delegates to the "responsible relation" defendant the duty to prevent the corporation (through its agents under the defendant's authority) from committing such violations. Thus, the situation of the responsible relation defendant is similar to other situations in which contractual duties are an established basis for criminalizing a failure to act. The corporation that depends on an individual to prevent regulatory violations is analogous to the railroad that depends on the watchman to warn the public of oncoming trains, and to the parents who rely on the babysitter to take care of their child. Although it would not appear that this is necessarily determinative, it is interesting to note, moreover, that in each of these situations the delegator itself has a duty to act that, if not fulfilled, could subject the delegator to criminal liability. For example, the parents may face criminal liability for failing to care for their child.[191] Delegating the responsibility to act either transfers or shares the potential criminal liability with the delegatee. In the case of a corporation that delegates the

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[188] *See* Mandiberg, *supra* note 113, at 907.

[189] The same is true for the examples that Perkins and Boyce offered of contractual duties that protect the public—for example, the railroad watchman, by virtue of his employment relationship with the railroad, incurs an obligation to warn the public of oncoming trains. *See* PERKINS & BOYCE, *supra* note 171, at 667.

[190] *See, e.g.*, United States v. Inv. Enters., 10 F.3d 263, 266 (5th Cir. 1994) ("[A] corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent."); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972); Cont'l Baking Co. v. United States, 281 F.2d 137, 149-51 (6th Cir. 1960).

[191] *See, e.g.*, FLA. STAT. § 827.03(a) (2003); IOWA CODE § 726.3 (2006); TENN. CODE ANN. § 39-15-401(a) (2006).

responsibility to one or more of its agents, potential criminal liability is shared rather than transferred, because the corporation can be held criminally liable for the conduct of its agents. Where the delegator is a person, potential criminal liability is probably transferred rather than shared, at least unless the delegator knows—or, for negligence offenses, has reason to know—that the delegatee will not fulfill her obligation.

Another way to illustrate the relationship between the responsible relation doctrine and the law of criminal omissions is to explain the requirements of the responsible relation doctrine as a straightforward application of widely accepted principles of the law of criminal omissions. Although formulations of the responsible relation doctrine vary somewhat, the doctrine's requirements generally can be characterized as: (1) the defendant had the requisite mental state with respect to the violation; (2) the defendant had the authority and the capacity to prevent or correct the violation; and (3) the defendant failed to prevent or correct the violation.[192]

The first requirement pertains to mental state. As explained above, the responsible relation doctrine does not independently require a particular mental state; the mental state requirements of the doctrine simply reflect the statutory mental state requirements of the offense. If the offense requires knowledge, the first requirement of the doctrine requires knowledge. If the offense requires negligence, the first requirement of the doctrine requires negligence. If the offense did not require knowledge, the first requirement would not apply.

The second requirement is really two distinct requirements: the defendant's *responsibility* to prevent or correct the violation, and the defendant's *authority* to prevent or correct the violation. The first of these, the responsibility to act, requires the jury to find that the defendant's employment imposed a duty to act. The defendant has a duty to prevent or correct violations because he has willingly assumed that role by virtue of his employment relationship with the corporation (or other business). The corporation, which can only act through its agents, has delegated to the defendant—and perhaps to others as well—the duty to prevent certain violations of the law. As has been shown, it is widely accepted that such a duty to act can give rise to criminal liability if the duty is breached.

The remaining part of the second requirement, the defendant's authority to act, reflects another widely accepted principle in the law of criminal omissions: that a defendant should not be held responsible for a failure to do something that was impossible.[193] This is because the duty to

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[192] United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir. 1998).

[193] *See, e.g.*, United States v. Spingola, 464 F.2d 909 (7th Cir. 1972) (reversing conviction of union secretary-treasurer for failing to timely file union's annual financial

act is inherently limited to the duty to do what is possible; in other words, the idea of a culpable omission inherently includes the ability to do that which is omitted.[194]

The third requirement—that the defendant failed to prevent or correct the violation—establishes the defendant's breach of his duty to act, that is, his omission.

Thus, far from being a dangerous form of vicarious liability, the responsible relation doctrine falls squarely within the generally recognized boundaries of criminal omissions. The duties to act recognized under the responsible relation doctrine are analogous to other duties to act that have been widely accepted in modern criminal law. The source of the duties to act under the responsible relation doctrine is the defendant's contractual relationship with the corporation, whereby the corporation assigns to the defendant a duty to prevent the corporation from committing particular violations. Where a corporate officer, manager, or supervisor breaches this duty by failing to prevent a violation of the type the corporation has assigned him to prevent, his breach—his failure to act—is a proximate cause of the violation. The requirements of the doctrine define the situations in which a person can become criminally liable for a violation on the basis of a failure to act. The requirements are not peculiar to the responsible relation doctrine, but rather reflect well-established principles of the law of criminal omissions.

Linking the responsible relation doctrine to the line of cases that imposes criminal liability for omissions that violate contractual duties provides an additional benefit. As explained above,[195] *Dotterweich* and *Park*'s exposition and explanation of the responsible relation doctrine are notoriously muddy, and the lack of a clear foundation for the doctrine has impeded its development and cast doubt on its application outside of the precise scenario in which it arose in *Dotterweich* and *Park*. Linking the responsible relation doctrine to the line of cases that imposes criminal liability for omissions that violate contractual duties provides the robust justification for the doctrine that is missing from *Dotterweich* and *Park* and obviates the need to rely on the analysis in those cases. Thus, in the end it may not matter much whether *Dotterweich* and *Park* can support the

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report, where defendant was not allowed to present evidence that submission of report was not within his control); MODEL PENAL CODE § 2.01(1) (2001); Perkins, *supra* note 163, at 678-79; Ann Smart, *Criminal Responsibility for Failing to Do the Impossible*, 103 LAW Q. REV. 532 (1987). Indeed, *Park* itself stated that impossibility would be a defense. *See* United States v. Park, 421 U.S. 658, 673 (1975) ("[T]he Act, in its criminal aspect, does not require that which is objectively impossible.").

[194] Perkins, *supra* note 163, at 678-79.

[195] *See supra* Section III.A.

responsible relation doctrine as it has evolved, because the contemporary responsible relation doctrine, in particular as it is applied in the form of the responsible corporate officer doctrine, has a justification independent of *Dotterweich* and *Park*.

VII. THE SCOPE OF THE RESPONSIBLE RELATION DOCTRINE

What does explaining the responsible relation doctrine as an application of a widely accepted category of criminal omissions say about the scope of offenses to which the doctrine may apply?[196] The first step toward answering that question is to recognize that the foundational reasoning for the doctrine essentially creates a precondition for its application, in addition to the requirements stated in the doctrine itself. The previous Section established that the foundation of the responsible relation doctrine is the defendant's contractual obligation to her employer to prevent violations within her area of responsibility. The employer delegates to the defendant the responsibility to prevent violations, and by accepting this delegation, if the defendant should fail to meet her obligation, she shares potential criminal liability with the employer. Thus, the precondition for the application of responsible relation liability is that the violation occurred within the scope of the defendant's employment. The requirements for the responsible relation doctrine are by now familiar to readers of this Article: (1) the defendant had the requisite mental state with respect to the violation; (2) the defendant had the authority and the capacity to prevent or correct the violation; and (3) the defendant failed to prevent or correct the violation.[197] These requirements define when a defendant may be held criminally liable under the responsible relation doctrine for violations that occur within the scope of her employment.

Equally important as specifying what is required for the responsible relation doctrine to apply is noting what is not required. To this end, the

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[196] In two federal environmental statutes, Congress answered that question expressly, albeit obliquely, by referencing "responsible corporate officers" in the statute. *See* Clean Water Act § 309(c)(6), 33 U.S.C. § 1319(c)(6) (2000) ("[T]he term 'person' means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer."); Clean Air Act § 113(c)(6), 42 U.S.C. § 7413(c)(6) ("For the purposes of this subsection, the term 'person' includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer."); *see also Iverson*, 162 F.3d at 1023 ("Because Congress used [the term *responsible corporate officer*] in the CWA, we can presume that Congress intended that the principles of *Dotterweich* apply under the CWA."). *But see* Mandiberg, *supra* note 113, at 900 (positing that statutory language mentioning responsible corporate officers could be read to indicate "that Congress meant only to ensure that corporate officers be treated just like everyone else").

[197] *Iverson*, 162 F.3d at 1022.

aforedescribed groundwork helps to highlight some of the factors that might appear necessary to the application of the responsible relation doctrine but that in fact are not.

First, the responsible relation doctrine is not limited to corporate officers. What matters instead is whether a business organization has delegated to the defendant the responsibility to prevent certain violations. Thus, the doctrine does not require the employer to be a corporation, as opposed to some other type of business organization. The employer can be large or small. The doctrine does not require the defendant to hold any particular title or office in the organization. The defendant can be a corporate officer, but she also can be a manager, supervisor, or line employee.[198] The defendant may have the authority and responsibility over an entire division of a large corporation, or the operations of a facility, or a single valve or instrument at the facility. Regardless, if she knowingly fails to perform her duties, thereby causing her employer to violate the law, then the responsible relation doctrine holds her accountable for the violation.[199] Nor does the contractual relationship between the business organization and the defendant need to be an employer-employee relationship, as opposed to, say, an independent contractor relationship. For example, if a company contracts with an outside individual (or firm) to monitor and prevent environmental violations at the company's facilities, and the contractor knowingly fails to prevent a violation, the situation would fall squarely within the foundation, and the responsible relation doctrine could apply.

Second, the type of violation to which the responsible relation doctrine applies need not be a regulatory offense.[200] The determinative criterion of the types of violations that the doctrine can cover is whether the violation is of the type that the organization has given authority and responsibility to

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[198] Commentators sometimes have criticized the responsible corporate officer doctrine for singling out corporate officers for criminal liability. *See, e.g.*, Morgan & Obermann, *supra* note 107, at 1199; Finn, *supra* note 66, at 572-74. That always has been an unfair criticism that is based on the unfortunately misleading name that has attached to the doctrine, rather than how the doctrine functions. Nothing about the responsible corporate officer doctrine confines its application to corporate officers or even high-level managers.

[199] The level of a person in the hierarchy of the business organization will affect whether the person can be held liable under the responsible corporate officer doctrine, but it is difficult to generalize how this effect plays out. A low-level employee may not have sufficient authority to prevent or correct a violation, and a high-level employee may not have sufficient knowledge to satisfy the applicable mental state requirement. But these factors will depend on the facts of a particular case, and the doctrine itself does not limit its application to persons at a particular level in the overall organization.

[200] As explained in Section IV, *supra*, the responsible corporate officer doctrine traditionally has been linked to and defined with respect to public welfare or regulatory offenses. Indeed, the Supreme Court in *Dotterweich* and *Park* made such a link.

someone to prevent or correct. This criterion does not necessarily limit the doctrine to regulatory offenses. That being said, it would be surprising if the overwhelming majority of offenses to which the responsible relation doctrine applies are not regulatory offenses, because most violations that meet the two criterion will be regulatory offenses. To the extent that a company might assign someone responsibility to prevent or correct illegality that is not a regulatory violation, the nature of the violation should not itself prevent the doctrine from applying. Thus, if an airline assigns certain supervisors the responsibility of preventing or correcting its employees from stealing from its customers' luggage, the doctrine could hold liable a supervisor who knowingly fails to prevent or correct such theft.

VIII. WHAT THE LAW OF CRIMINAL OMISSIONS CAN TELL US ABOUT THE RESPONSIBLE RELATION DOCTRINE

Recognizing that the responsible relation doctrine is a species of criminal omission that can be justified by reference to generally accepted principles of criminal law is itself significant. It affirms the propriety of the doctrine and provides a framework for determining its appropriate scope. Recognizing the doctrine as a form of criminal omission also allows it to benefit from a body of case law and scholarship from which it has been largely isolated. The law of criminal omissions undoubtedly can provide many insights into how the responsible relation doctrine should apply in different situations. This Section offers three examples of such insights.

A. THE RESPONSIBLE RELATION DOCTRINE (KIND OF) INVOLVES MENTAL STATE AFTER ALL

The proposition that the responsible relation doctrine does not change an offense's mental state requirements is one of this Article's central themes.[201] But, although the doctrine does not change the level of knowledge required, it does affect precisely what the defendant has to know. This is because the knowledge required for an omission to be intentional is somewhat different than the knowledge required for affirmative misconduct to be intentional. Since the responsible relation doctrine involves a criminal omission, it follows that the knowledge required in a responsible relation doctrine case differs from the knowledge required in a standard case involving the same offense but involving affirmative misconduct rather than failure to act. The general definition of knowing that applies in cases of affirmative misconduct is that "[a]n act is

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[201] *See supra* Section III.

done knowingly if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason."[202] For criminal omissions, however, this simple statement does not suffice, because the defendant is accused of not acting. For a defendant's failure to act in a particular situation to be knowing, the defendant must be aware of both the duty to act and the facts of the situation that trigger the duty.[203] Applying this principle to responsible relation cases involving intentional offenses yields the following rule: the government must prove both that the defendant was aware of the violation that he failed to prevent or correct, and that the defendant was aware that this type of violation fell within his authority and responsibility.

That being said, the government can meet the requirement that the defendant knew the facts that triggered her duty to act by showing that the defendant deliberately chose not to inform herself of such facts.[204] Moreover, if the defendant's position imposes on her a duty to keep informed of certain matters, that fact is relevant to the question of whether the defendant's failure to keep informed was deliberate or not. This conclusion is consistent with criminal omission cases holding that a defendant's duty may include a duty to know the facts, not just a duty to take action when the facts are known.[205] Where, as with the responsible relation doctrine, the duty to act arises out of the defendant's employment duties, those duties also may obligate the defendant to acquaint herself with certain facts.[206] A defendant's failure to inform herself of facts does not, however, meet the mental state requirement for an intentional offense if the defendant's lack of knowledge was the result of negligence rather than deliberate ignorance.

There is at least one other connection between the responsible relation doctrine and mental state. As noted above,[207] as a matter of law, application of the responsible relation doctrine does not affect whether the offense

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[202] 22 C.J.S. CRIMINAL LAW § 36 (1989).

[203] Kirchheimer, *supra* note 164, at 637 ("[I]n order to find the defendant guilty, his 'guilty mind' must be established in relation to the specific duty which he failed to perform.").

[204] United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) ("Every court of appeals has approved one or another version of an ostrich instruction," which "informs the jury that actual knowledge and deliberate avoidance of knowledge are the same thing."). Theoretically the concept of deliberate avoidance or willful ignorance also could be used to show that the defendant understood his authority and responsibility, but it seems much more likely that a defendant would claim ignorance of the facts of a violation than ignorance of his employment authority and responsibility.

[205] *See, e.g.*, Cornell v. State, 32 So. 2d 610 (Fla. 1947).

[206] Perkins, *supra* note 163, at 677-78.

[207] *See supra* Section III.

requires the defendant to have acted knowingly. But, as a factual matter, a defendant is probably less likely to have knowledge of the violation—to have acted knowingly—if she is being charged on the basis of an omission rather than an affirmative act. Thus, not only does a prosecution under the responsible relation doctrine require proof of knowledge (assuming the offense generally requires knowledge), but such prosecutions may tend to be particularly difficult cases in which to meet the burden of proving knowledge.

B. THE RESPONSIBLE RELATION DOCTRINE IS NOT A FORM OF IMPUTED, DERIVATIVE, OR VICARIOUS LIABILITY

Courts and commentators sometimes have referred to the responsible relation doctrine as a form of vicarious, derivative, or imputed liability, on the ground that the defendant is being held criminally liable for the crimes of her subordinates.[208] This perception is understandable because in most cases the defendant prosecuted under the responsible relation doctrine is being held accountable for violations that occur through the criminal conduct of the defendant's subordinates and in which the defendant did not actively participate. But this understanding of the doctrine is too limited in at least two respects.

First, unlike cases where liability is imputed to the defendant from the criminal conduct of another, the defendant who is liable under the responsible relation doctrine meets all the elements of the offense without reference to another's mental state or conduct.[209] Accordingly, the responsible relation doctrine does not require that another person committed the offense. The doctrine focuses exclusively on the defendant, except to the extent of requiring a violation of the law. As noted above,[210] this characteristic of the responsible relation doctrine stands in marked contrast to aiding and abetting, which requires "commission of the substantive offense by someone else."[211] There is no aiding and abetting without an

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[208] *See, e.g.*, United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991) (ruling that under the doctrine, "the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility."); Babbitt et al., *supra* note 108, at 8 (stating that under the doctrine, criminal liability is "imputed to a corporate officer, with no actual knowledge of the conduct, merely on the basis of his or her position in the company"); Kushner, *supra* note 127, at 690-91 (stating that, when the requirements of the doctrine are satisfied, "criminal participation will be imputed to the officer as a matter of law").

[209] *See supra* Section VI.B (matching the requirements of the responsible corporate officer doctrine to the elements of the offense).

[210] *See supra* Section V.

[211] United States v. Teffera, 985 F.2d 1082, 1086 n.3 (D.C. Cir. 1993); *accord* Edwards v. United States, 286 F.2d 681, 683 (5th Cir. 1960); United States v. Horton, 180 F.2d 427,

underlying crime. The guilt of the aider and abettor is derivative of, or imputed from, the guilt of the principal. And indeed it must be, because—unlike defendants convicted under the responsible relation doctrine—the aider and abettor does not meet all of the elements of the offense.

Second and related, unlike cases of derivative or imputed liability, the defendant in a responsible relation doctrine case may be the only person guilty of a crime. The most obvious way this could arise would be a violation that occurs without the knowledge of those more directly involved. For example, a maintenance worker mistakenly leaves open a valve that releases hazardous wastes onto the ground, in violation of the RCRA. The plant's environmental manager, whose duty is to keep the plant in compliance with environmental standards, notices the violation and does nothing. The manager could be liable under the responsible relation doctrine for knowingly failing to correct the RCRA violation, even though the maintenance worker did not have the requisite mental state to be held criminally responsible for the violation. Thus, the responsible relation doctrine concerns the defendant's failure to prevent or correct the violation, regardless of how the violation occurs, who else is involved, or whether the violation is otherwise a crime.

Third, even though the defendant convicted under the responsible relation doctrine may not have acted affirmatively to cause the violation, he nevertheless personally participated in the violation by way of his failure to prevent it. Because the defendant had a duty to act to prevent the violation and did not act, the defendant personally participated in the violation, albeit through an omission rather than affirmative conduct.

C. IMPOSSIBILITY MAY BE A DEFENSE, OR IT MAY CHANGE THE NATURE OF THE DUTY

This Article previously has noted that the responsible relation doctrine's requirement that the defendant have the capacity or ability to prevent or correct the violation is a form of an impossibility defense.[212] Even where a defendant can show that she was unable to fulfill her duty to prevent or correct a violation through the normal exercise of her authority, the inability to fulfill a duty in one manner may give rise to a duty to take

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431 (7th Cir. 1950); *see also* United States v. Campa, 679 F.2d 1006, 1013 (1st Cir. 1982) (noting that the principal need not be prosecuted and convicted of the substantive offense, but the government must prove that someone committed the offense).

[212] *See supra* notes 193-194 and accompanying text. Although impossibility is usually described as a defense, *Park* states that the government bears the ultimate burden of proof on the issue. United States v. Park, 421 U.S. 658, 673 (1975); *see also* United States v. New Eng. Grocers Supply Co., 488 F. Supp. 230, 235-36 (D. Mass. 1980).

an alternate action that otherwise would not be required.[213] For example, where a defendant cannot stop his employees from violating the law because the violations are a result of a lack of proper equipment or other resources, the defendant may have a duty to inform the corporate board, regulatory authorities, or both, that the company is unable to comply with the law.[214]

IX. CONCLUSION

Courts, scholars, and commentators applying and supporting the responsible relation doctrine and its alter ego, the responsible corporate officer doctrine, understandably have looked to the Supreme Court's decisions in *Dotterweich* and *Park* to define and explain the doctrine. However, the muddiness—indeed, some might say vacuousness—of the Court's reasoning in those cases and their intermingling of issues of mental state with the doctrine are more of a hindrance than an aid to such endeavors. The law of criminal omissions, although not invoked in *Dotterweich* or *Park*, can justify responsible relation liability, because the responsible relation doctrine is consistent with a well-established principle of criminal omissions that holds individuals criminally liable for failing to take action that they have assumed a contractual obligation to take. Once the responsible relation doctrine is situated within this principle, *Dotterweich* and *Park* essentially become irrelevant. Moreover, this explanation illuminates a straightforward test for determining where the responsible relation doctrine may apply—where a business has assigned to an individual the responsibility for preventing certain violations of the law. Finally, the law of criminal omissions provides a fruitful source of insights about how the responsible relation doctrine should operate in situations that have yet to arise in the reported case law.

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[213] Perkins, *supra* note 163, at 678.

[214] For example, one of the defendants in *Hansen* argued on appeal that, "under the laws of bankruptcy and corporate governance, he lacked the authority to close the plant or to allocate the funds for the needed capital improvements" that could have brought the plant into compliance with environmental standards. United States v. Hansen, 262 F.3d 1217, 1237 (11th Cir. 2001). The court of appeals rejected this argument, in part on the ground that there was "no indication that he asked the Hanlin Board or the bankruptcy court to close the plant." *Id.* at 1238.