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Ferzan, Kimberly Kessler, "Probing the Depths of the Responsible Corporate Officer's Duty" (2018). *All Faculty Scholarship*. 2323.

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Probing the Depths of the Responsible Corporate Officer's Duty

Kimberly Kessler Ferzan*

After reading Todd Aagaard's *A Fresh Look at the Responsible Relation Doctrine*,¹ I thought there was nothing more to say about the responsible corporate officer doctrine. I was convinced. The doctrine turns out to be uninteresting and unproblematic. Bottom line: the responsible corporate officer doctrine is nothing more than the recognition that corporate officers and employees contractually undertake to protect the public, and the doctrine does nothing more than to recognize that having engaged in this contractual undertaking, the defendants can be liable for omissions for which they fail to perform that duty.²

Then, I read Sam Buell's contribution for this symposium. Buell has a diametrically opposed view of the responsible corporate officer doctrine. Not only does he take the doctrine to be "in current form...objectionable, if perhaps bearable," he believes that applying it to more serious crimes "would require a sea change in Anglo-American theories of punishment."³

Although I agree with much of what Buell says, I am going to side with Aagaard on the question of whether we should be troubled by the application of the responsible corporate officer doctrine to serious crimes. It does not strike me as adding even a ripple to current theories of punishment. That said, my aim is to drill down on the precise contours and justifications for the duty. Although the responsible corporate officer doctrine may be no more troubling than other omission and duty cases, analyzing the duty's structure reveals several points at which, even under traditional criminal law doctrines, we should have cause for concern or further inquiry. Accordingly, my plan is to briefly set forth *Dotterweich*, *Park*, and their progeny, and then to unpack precisely the mechanics of the duty recognized by the responsible corporate officer doctrine. Ultimately, though, I think we have little to fear from the doctrine itself.

I. The Cases and the Doctrine's Evolution

The responsible corporate officer doctrine began with *Dotterweich*.⁴ The issue before the Supreme Court was the interpretation of the Food Drug and Cosmetic Act (FDCA), specifically whether "person" within the act included the president and general manager. The Court interpreted the statute to include *Dotterweich*, relying on the public welfare nature of the offense. In so doing, the Court noted that there was some unfairness within the statute, but the unfairness it addressed was not lack of actus reus but lack of mens rea: "Such legislation dispenses with the conventional requirement for criminal

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¹ Todd S. Aagaard, "A Fresh Look at the Responsible Relation Doctrine," 96 *Journal of Criminal Law and Criminology* 1245 (2006).

² *Id.* at 1284.

³ Samuel W. Buell, "The Responsibility Gap in Corporate Crime," (this issue).

⁴ 320 U.S. 277 (1943).

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 a responsible relation to a public danger.”⁵ Ultimately, Dotterweich could be held accountable for the corporation’s misbranding, even though he lacked any culpable mens rea.

Perhaps unintentionally, the Supreme Court in *Park* took the responsible corporate officer doctrine on a different course.⁶ *Park* was the CEO of Acme Markets Inc, which had 36,000 employees, 874 retail outlets, and 16 warehouses. The Baltimore warehouse allowed food to be contaminated by rodents. The defendant delegated responsibility to the Baltimore division vice president. On cross-examination, the defendant admitted that he was responsible for the operation and that the sanitation “wasn’t working perfectly.” The Court of Appeals reversed *Park*’s conviction, reasoning that although *Dotterweich* dispelled with mens rea, it had not eliminated an actus reus requirement and *Park* did not do anything.

At first, the *Park* court’s gloss on *Dotterweich* was that the responsible corporate officer doctrine was a tool to *curb* the reach of the FDCA. Not everyone can be a criminal, just those with a “responsible share.” To be clear, the idea is that the FDCA authorizes punishment of individuals under *Dotterweich*, and *Dotterweich* holds that strict liability applies to them. The worry, then, is that *everyone* who caused the violation could be on the hook. *Park*’s answer to that is that the “responsible share” language in *Dotterweich* is aimed at limiting that class of actors to those who had significant responsibility for the process that resulted in the violation. This limiting principle in *Dotterweich* arises from the settled doctrines regarding misdemeanor liability.

Within a couple pages, however, there is a shift in what the RCO is doing. It begins as a limiting principle, but then, it evolves into the duty in an “omission plus duty equals act” formulation:

Rather, where the statute under which they were prosecuted dispensed with ‘consciousness of wrongdoing’; an omission or failure to act was deemed a sufficient basis for a responsible corporate agent’s liability. It was enough in such cases that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of.⁷

The Court is not entirely clear as to what grounds this duty. At one point, it seems as though the duty is premised on the relationship between the defendant and the corporation: “The rationale of the interpretation given the Act in *Dotterweich*, as holding 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, has been confirmed by our subsequent cases.”⁸ At other points, there are also comments that the FDCA is imposing the duty: “the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.”⁹ And, at times, the Court mentions both in the

⁵ *Id.* at 281.

⁶ *U.S. v. Park*, 421 U.S. 658 (1975).

⁷ *Id.* at 671.

⁸ *Id.*

⁹ *Id.* at 672.

same breath: “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.”¹⁰

Although it seems that the most perspicuous way to understand what the Court is doing is imposing a duty in instances of omissions—a duty grounded in both the statute and the contractual undertaking—there is language in the opinion that also suggests that the “duty” at work is the “duty of care” for negligence. The majority opinion states that the duty requires “no more exertion than it might reasonably exact from one who assumed his responsibilities.”¹¹ It also states, “The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.”¹² In dissent, Justice Stewart’s views the duty as a “duty of care” and “[t]his is the language of negligence.”¹³ But if the defendant is responsible when he has a duty, but has a duty when he is responsible,¹⁴ then Justice Stewart worries that we are left with an empty concept. He views the jury instructions as essentially instructing, “You must find the defendant guilty if you find that he is to be held accountable for this adulterated food.”¹⁵ Such an instruction is “nothing more than a mere tautology”¹⁶ but this is because he takes a duty of care to need a content—such as a reasonable person—so saying you are responsible if you are responsible fails this test. Because he never sees the duty as the sort of duty attendant to omissions, the entire inquiry is utterly mysterious and empty to him. Justice Stewart has a point, but he fails to locate precisely the underlying criminal law notions. He is wrong to think that the entire inquiry sounds in negligence. I will return to Justice Stewart’s worry later. For now, it is enough to see that the *Park* majority is not truly after negligence. It is after the question of the scope of one’s employment.¹⁷

From these two Supreme Court cases, we have seen some twists, turns, and seismic shifts. First, *Park*’s responsible corporate officer formulation has been read to supplant *Dotterweich* by at least one circuit court. In *Ballistrea*, the Second Circuit seems not to have understood that *Park* provided two alternative roles for the responsible corporate officer doctrine—a limiting principle for causation cases and a duty principle for omission cases. Instead, we are left with the latter:

Park is irrelevant to the present case, however, because the Government did not prosecute Ballistrea for *failing to prevent* a violation of the FDCA by third parties under his authority. Rather, it prosecuted him for personally violating the FDCA by his own conduct of causing unapproved medical devices and drugs to be introduced into interstate commerce.¹⁸

...

¹⁰ *Id.* at 674.

¹¹ *Id.* at 658.

¹² *Id.* at 674.

¹³ *Id.* at 679.

¹⁴ Yes, there is an equivocation here on the notion of responsibility, but Justice Stewart’s worry was that the Court needed to give these concepts content for the jury.

¹⁵ *Id.* at 658 (Stewart, J. dissenting).

¹⁶ *Id.*

¹⁷ The affirmative defense of impossibility, which once raised must, according to *Park*, be disproven beyond a reasonable doubt is akin to requirement that a defendant have the ability to perform an act. *Cf. Model Penal Code* § 2.01 (defendant must be physically capable of performing the omission).

¹⁸ *U.S. v. Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996).

The statute makes no distinction as to whether the person who has personally introduced or caused the introduction of an unapproved or unregistered product into commerce is a “responsible party.”¹⁹

...

Park held that parties charged with failing to prevent violations of the FDCA can be convicted only if they held positions of authority enabling them to rectify or prevent the violations; it did not impose a similar requirement of responsible party status when the defendant is charged with personally violating the FDCA by his own conduct of introducing, or causing the introduction of, unapproved devices and drugs into interstate commerce.²⁰

So much for *Park’s* gloss on *Dotterweich*.

Second, because the Court was unclear about precisely from whence the duty arises (statute or contract), future courts have struggled to figure out how to determine what the content of that duty is. For instance, in *New England Grocers Supply*, the court stated, “The line drawn by the Court between a conviction and on corporation position alone and one based on a ‘responsible relationship’ to the violation is a fine one, and arguably no wider than a corporate bylaw.”²¹ In contrast, the Ninth Circuit’s view is that the content of the duty comes from the relationship to the violation and position in the corporation—“This concept of responsibility is not limited to an examination of corporate by-laws and operating procedures.”²² Notably, one court has specifically argued that the responsible corporate officer doctrine is based on the common-law theory of liability and therefore the relevant question is not “whether the legislature explicitly has adopted the responsible corporate officer doctrine in [the statute], but rather whether [the statute] is the type of statute to which the doctrine generally may apply.”²³

Third, the responsible corporate officer doctrine has been applied to other areas of law. That “persons” also applies to responsible corporate officers for Sherman Act violations was settled by the Supreme Court in *US v. Wise*.²⁴ It has been employed in various areas of civil and criminal law from the civil provisions within the Radiation Control for Health and Safety Act of 1968,²⁵ to the strict liability recording keeping provisions of the Comprehensive Drug Abuse Prevention and Control Act.²⁶ California applies it to public welfare offenses writ large: “Such an affirmative duty is properly placed on corporate officers by strict liability statutes regulating the public welfare.... In our view, persons holding significant shares of corporate responsibility and power are subject to prosecution and conviction for strict liability crimes unless they have exercised their responsibilities and power so as to have undertaken all objectively possible means to discover, prevent and remedy any and all violations of such laws.”²⁷ Connecticut applied the responsible corporate officer doctrine to its Water Pollution to Control Act,

¹⁹ *Id.*

²⁰ *Id.*

²¹ 488 F. Supp. 230, 234 (D. Mass. 1980).

²² *U.S v. Starr*, 535 F.2d 512, 514 (9th Cir. 1976).

²³ *Celetano v. Rocque*, 923 A.2d 709 (Conn. 2007).

²⁴ 370 U.S. 405 (1961).

²⁵ *US v. Hodges*, 759 F.2d 557 (6th Cir. 1985).

²⁶ *US v. Poulin*, 926 F. Supp. 246 (D. Mass. 1996).

²⁷ *People v. Matthew*, 7 Cal App. 4th 1052, 1062 (Cal. Ct. App.1992).

specifically distinguishing the doctrine from vicarious liability or piercing of the corporate veil, and noting instead that the case was predicated on an omission.²⁸ Statutes have also adopted the responsible corporate officer language.²⁹

The expansion of the responsible corporate officer doctrine has been troubling at times. Some courts have engaged in amorphous analysis with potentially broad reaching implications. For instance, the Arizona Court of Appeals upheld an arbitration award in a civil securities case. After citing the responsible corporate officer doctrine for providing for the omission-type analysis discussed above, the court took the doctrine a leap too far, concluding that the responsible corporate officer doctrine authorizes “vicarious liability.”³⁰ New York approved the conviction of one brother, with a fifty percent share in a tavern, for the other brother’s serving beer to two minors on one occasion in violation of the Alcoholic Beverage Control Act.³¹ In contrast, under similarly attenuated facts, a New York court refused to extend responsibility based on “power to prevent” an oil spill under its Navigation Law.³² And at least one jurisdiction has counteracted potential unfairness by imposing mens rea requirements for the responsible corporate officer even when the underlying criminal statute was one of strict liability.³³

We now reach the critical question. What about mens rea in instances in which the underlying statute requires negligence or more? Does the responsible corporate officer doctrine do away with mens rea? The answer to this question is no. Many courts have recognized that when the underlying statute is *not* strict liability, then the RCO doctrine does not supplant the underlying mens rea requirement.³⁴

The First Circuit has been crystal clear on this legal point:

But while *Dotterweich* and *Park* thus reflect what is now clear and well-established law in respect to public welfare statutes and regulations lacking an express knowledge or other *scienter* requirement, we know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute.³⁵

As has the Third Circuit:

Unlike cases under the Federal Food and Drug Act, where Congress dispenses with a “consciousness of wrongdoing” or *scienter* element and therefore failure to act was deemed to be a sufficient basis for a responsible corporate agent’s liability..., labor standards statutes that include the term “willful” have been interpreted to require knowledge on the part of the corporate officer.³⁶

²⁸ BEC Corp v. Department of Environmental Protection, 775 A.2d 928 (Conn. 2001).

²⁹ 33 U.S.C.A. § 1319(c)(6) (Clean Water Act).

³⁰ Wittenberg v. Gallagher, 2001 WL 34048121 (Ariz. Ct. App. 2001).

³¹ People v. Byre, 128 Misc.2d 448 (N.Y. Ct. App. 1985).

³² State v. Markowitz, 273 A.D.2d 637 (N.Y. Ct. App. 2000).

³³ Kaites v. Pennsylvania Department of Environmental Resources, 529 A.2d 1148 (Pa. Cmwlth. Ct. 1987).

³⁴ Aagaard, *supra* note 1, at 1247.

³⁵ US v. MacDonald & Watson Waste Oil Co, et al, 933 F.2d 35, 51-52 (1st Cir. 1991).

³⁶ Facchiano Contruction, Co., Inc. v. US Dept. of Labor, 987 F.2d 206, 214 (3d Cir. 1994).

Other circuits are in accord.³⁷

Where does this leave us? Despite the harrowing cries of commentators and practitioners that the sky is falling,³⁸ these Chicken Littles' concerns seem to be misplaced.³⁹ There is simply insufficient doctrinal support for the claim that the responsible corporate officer doctrine is one of strict vicarious liability.⁴⁰ Any court that thinks otherwise is an outlier.⁴¹

To be sure, when the underlying statute is one of strict liability, we do have cause for concern.⁴² To the extent that you believe, as I do, that neither strict liability nor negligence is blameworthy, you are rightly concerned with the use of these "culpability" requirements within the criminal law. Moreover, as noted more than five decades ago by theorists such as Glanville Williams and Sandy Kadish, the moral force of the criminal law will be diluted by conjoining crimes that warrant stigma with those that do not.⁴³ These are problems with strict liability.

In addition, commentators are correct to decry the collateral consequences that are attaching to some regulatory offenses. If a corporation can plead guilty, but the non-party responsible corporate officer can be excluded from an industry based on that plea, lawyers are right to worry.⁴⁴ But this, too, is not about the responsible corporate officer doctrine. Just as we may worry about how to view immigration consequences that attach to criminal conviction, we may worry about collateral consequences for individuals. That a corporation's plea may be used against a non-party gives rise to further concerns about procedural protections. I am not suggesting that this regulatory twilight zone is

³⁷ See, e.g., *US v. Iverson*, 162 F.3d 1015 (9th Cir. 1998); *US v. Cattle King Packing Co., Inc.* 793 F.2d 232, 241 (10th Cir. 1986). Notably, there is *dicta* in a different Tenth Circuit case under the Clean Water Act, wherein the court suggests that the responsible corporate officer doctrine *imputes* the willfulness or negligence required under the statute. See *US v. Brittain*, 931 F.2d 1413 (10th Cir. 1991); see also Aagaard, *supra* note 1 (considering the discussion to be "some regrettable dicta").

³⁸ E.g., Michael E. Clark, "The Responsible Corporate Officer Doctrine," 14 *Journal of Health Care Compliance* 5 (2011). ("The 'Responsible Corporate Officer doctrine' (RCO doctrine) is a procedural contrivance that regulators and prosecutors have rediscovered and now are applying aggressively against businessmen in administrative, civil, criminal actions. The RCO doctrine has been aptly described as the 'crime of doing nothing' because it largely focuses upon a person's *position* in an entity as the basis for imposing liability and not whether he or she had a culpable intent, was aware of any wrongdoing, or had any direct involvement whatsoever.")

³⁹ See also Kathleen F. Brickey, "The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform," 4 *Iowa Law Review* 115, 125 (1998).

⁴⁰ Hustis and Gotanda find that within the context of environmental crimes, courts are requiring mens rea, and the fact that the defendant is a responsible corporate officer serves only as circumstantial proof of knowledge. Brenda S. Hustis and John Y. Gotanda, "The Responsible Corporate Officer: Designated Felon or Legal Fiction?," 25 *Loyola Univ. Chicago Law Journal* 171 (1994).

⁴¹ See, e.g., *US v. White*, 766 F. Supp. 873, 895 (E.D. Wash. 1991) ("The 'responsible corporate officer' doctrine would allow a conviction without showing the requisite intent.")

⁴² Of course, there is the separate question of when statutes are formally strict (no mens rea required) versus substantively strict (commission of the crime is not morally blameworthy). See generally Kenneth W. Simons, "When is Strict Liability Just?" 87 *Journal of Criminal Law and Criminology* 1075 (1997). Purposefully smiling at someone is an example of the latter.

⁴³ Sanford H. Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations," 30 *University of Chicago Law Review* 423 (1963) (citing Glanville Williams).

⁴⁴ Andrew C. Baird, "The New Park Doctrine: Missing the Mark," 91 *North Carolina Law Review* Rev. 949, 990 (2013).

unproblematic. But the root of the problem has nothing to do with the responsible corporate officer's doctrine's ability to supply a duty.

To grasp, then, what a nonevent this doctrine seems to be, consider *United States v. Jorgensen*.⁴⁵ Dakota Lean sold meat to its customers with various representations about the quality of the meat and the diet of the cattle. Thereafter, in the face of overwhelming demand, Dakota Lean began buying beef trim from outside suppliers, and this meat did not meet the representations Dakota Lean was making. Nevertheless, Dakota Lean continued to make these representations, thus violating the misbranding provisions of the Federal Meat Inspection Act. Now, in the actual case, there was evidence that each of the individual defendants lied themselves or personally directed employees to lie. And, the crime required an "intent to defraud." But the defendants did not have to act personally. It was enough for them to be responsible corporate officers. The court states, "the jury could convict a defendant corporate officer if it found a defendant" (1) had intent to defraud; and (2) either personally participated in the misbranding or was in a 'responsible relationship' within the company regarding the misbranding of the meat."⁴⁶ At first blush, that seems like a perfectly good principle of law to have. And, so I am left to wonder, what is wrong with the responsible corporate officer doctrine? I mean, really, where's the beef?

II. A Closer Look at the Duty

Perhaps before we hastily dismiss the concerns about the doctrine, we should look at what justifies it and precisely how this duty is supposed to work.

Let's start with *Robot*.

Robot. Alice creates a robot that cleans houses. However, she knows that once she presses the start button the robot will injure any person (other than its operator) that it comes into contact with unless Alice presses the "do not injure" (DNI) button within five minutes of when the robot sees the person. Betty, unaware of the possibility of injury, hires Alice to use her robot. Alice presses start and leaves, knowing Betty is in the home.

Alice engages in an action. She is at best reckless and potentially acting with knowledge as to injury to Betty. Voluntary act plus culpable mental state equal unproblematic case. Let's add a complication:

Robot II. Same as *Robot*, except that Alice stays with Robot, intending to press the DNI button. But right after the Robot sees Betty, Betty insults Alice. Alice then decides not to push the DNI button.

In this case, at t_1 , when Alice starts the robot, she may not have the necessary mens rea. At t_2 , when she would need to prevent the injury, she then acts recklessly or knowingly. There is a tiny puzzle here as to whether to call this an act or an omission because of the failure of concurrence of the elements for the act. T_1 has an act but no culpable mens rea. T_2 has an omission (with a cause of peril) plus the mens rea. We could have a bit of a debate about whether this ought to be characterized as an act or an omission,

⁴⁵ 144 F.3d 550 (8th Cir. 1998).

⁴⁶ *Id.* at 560.

but no one would seriously doubt that if Alice does not press the button, she should and will be held responsible for the robot.⁴⁷

Let's complicate matters a bit more:

Robots R Us. Alice's robots are successful. She starts a small company. She hires Carla to supervise the cleaning of Betty's house by a robot. Carla takes her phone with her and decides to play Candy Crush. Carla knows that by playing the game, she may become distracted and fail to notice that she needs to push the DNI button. Carla fails to notice the robot has interacted with Betty.

Robots R Us at least creates some more interesting normative relationships, though nothing law and morality are unequipped to handle. Alice owes a duty to Betty. Carla owes a duty to Alice. But does Carla owe a duty to Betty? I think the answer is clearly yes, but let's put one more person in play:

Robot Supervisor. Darla is assigned to supervise Carla and five other "household monitors." She sits at a computer that is hooked into each individual employee's cell phone so that she can see what they are doing in each house. She sees that Carla is playing Candy Crush. Further, she can push a button that will register a small electric shock through the cell phone that will alert Carla to do her job. Darla also has the power to shut down the robot from Darla's remote location. Darla knows Betty is home and knows that Carla is playing an app on her phone. However, because Darla is currently gluing together parts of a model airplane, she does not want to put down the pieces to push either of the buttons available to her.

Although Darla's role is more attenuated, I do not think that Darla presents any issues not already inherent in *Robots R Us*. Darla may be the more typical "responsible corporate officer" but her Hohfeldian relations with Alice and with Betty don't seem any different than Carla's.

So, let's start with this. One is right to ask, after *Dotterweich* and *Park*, whether we have a broad duty as both of those cases rested their holdings, at least in part, on Congressional intent. Carla and Darla are not FDCA cases. Nevertheless, the criminal law principle that one may be held responsible for an act when one omits and one has a duty to perform the action one omitted is hardly groundbreaking. The idea that lifeguards must rescue drowning swimmers even when nearby sunbathers need not do so is a typical approach of the criminal law.

The question then is whether there is any reason why, if Betty is seriously injured by the robot, and Carla and Darla both consciously disregarded the risk of that injury so they can engage in trivial activities, Carla and Darla ought not to be punished for the resulting harms.

A. *Duty to Whom?*

One worry is that the duty that Carla and Darla owe is to Alice, not to Betty. I think this concern is misplaced. But let's at least create this gap and then see whether it is applicable to Carla and Darla.

Burgled. Ed will be out of town for a week so he enters into a written contract with Fred that Fred will come to Ed's house every night and turn on the outside lights, returning to turn them

⁴⁷ Douglas Husak, "Courses of Conduct," in Dana K. Nelkin and Samuel C. Rickless (eds.), *The Ethics and Law of Omissions* (forthcoming Oxford University Press, manuscript on file with author).

off in the morning. Ed has told Fred that the purpose of this contract is to make sure that the lights scare away burglars. On Wednesday, Fred goes to Ed's house to turn on the lights but sees that Greg (who lives across the street) is about to be burgled. (He sees two men with ski masks and a ladder sneaking around back.) Fred worries that if he turns on Ed's lights, it will scare the burglars away, and Fred hates Greg and would very much like to see Greg burgled. Fred intentionally omits to turn on the lights in order to facilitate the burglary.

Can Fred be held accountable for the burglary? Let's leave to the side precisely what the crime would be. Rather, I want to concentrate on this: Clearly if Fred did not have the contract with Ed, Fred would be under no duty to rescue, which in this case could be calling the cops or scaring the burglars away. Alternatively, if Fred had a duty to Greg to prevent burglaries, then Fred would have to rescue, just as lifeguards do. But here, the objection is that Fred owes a duty to Ed—a duty that Fred breaches—and so is this sufficient to count as an act vis-à-vis harm to Greg?

Tort and contract law would reject that Greg could sue Fred. As a matter of third party beneficiary law, the contract was not entered into to benefit Greg. Allowing any foreseeable downstream actor to have rights within a contract would seemingly frustrate the intentions of the parties who do not intend to grant broad rights to the public. Similarly, consider an analogy to tort law. *Negligence per se* claims aren't valid if the plaintiff is not within the class of plaintiff protected by the statute.⁴⁸ Fred could credibly say that the duty he had to turn on the lights was not a duty owed to Greg.

I am inclined to think that that is correct, but I think we should consider the counterargument first before abandoning the idea that Fred can be criminally liable. Generally, we have strong autonomy interests in not being forced to be a mere resource for the greater good. Just as we may not be pushed in front of runaway trolleys, the criminal law cannot co-opt our bodies to force us to rescue others.⁴⁹ However, once an actor is required to perform the act because she has undertaken a contractual duty, she has waived this strong autonomy claim. From here, the argument would run that once one has not fulfilled her duty—to whomever it might be owed—her omission can count as an act for criminal law purposes. So, if we have mens rea as well, there seems to be no impediment to calling this a crime.

Although superficially appealing, I don't think that it is ultimately correct. As Larry Alexander and I argue elsewhere, not all downstream harms are part of one's recklessness calculation.⁵⁰ If you duck to avoid being shot by a bullet, you need not ask whether this will allow the bullet to hit the person behind you. With omissions, the person potentially injured must have a claim that you rescue her, not just that you rescue someone. That the obligation Fred has to Ed does not entail any duty to rescue Greg becomes apparent once we consider two other cases:

⁴⁸ *Restatement (Third) of Torts: General Principles* (1999) § 12.

⁴⁹ See Larry Alexander, "The Means Principle," in Kimberly Kessler Ferzan and Stephen J. Morse (eds.), *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* 251 (2016); Kimberly Kessler Ferzan, "Omissions, Acts, and the Duty to Rescue," in Dana K. Nelkin and Samuel C. Rickless (eds.), *The Ethics and Law of Omissions* (forthcoming Oxford University Press, manuscript on file with author).

⁵⁰ Larry Alexander and Kimberly Kessler Ferzan, *Reflections on Crime and Culpability: Problems and Puzzles* ch. 2 (forthcoming Cambridge University Press, manuscript on file with author).

Light Delay. Same as *Burgled* only Fred waits for the burglars to exit Greg's house and then he turns on the lights.

Contractual Spirit. Same as *Burgled*, only after hearing of Greg's burglary, Ed sues Fred for breach of contract for failing to turn on the lights. Fred counters that he purposefully did not turn on the lights because he believed that allowing the burglars to steal from Greg would reduce the chance of stealing from Ed the next evening, when Fred would turn on the lights.

Notice that the relevance of the harm to Greg drops out in either of these hypotheticals. In the first, we see that the way in which Fred performs his duty is wholly unrelated to the injury to Greg. In the second, we see that we might understand the duty not as "turn on the lights" but "prevent a burglary of my house." However, these questions are resolved, we see that the duty owed to Ed does not entail a right to rescue held by Greg.

Although this detour reveals that the duty owed to the corporation and harm to the public can come apart, I think it is highly unlikely that they will come apart in responsible corporate officer cases. Rather, the appropriate analogies are to cases in which there is a third party beneficiary. If Alice owes Betty money, and Alice and Carla create a contract whereby Carla will pay Alice's debt, Betty is the third party beneficiary of the contract. Indeed, the contract was constructed—and the price was set—with the precise purpose of relieving Alice's debt obligation to Betty.

In the cases under consideration, the third party is the public and the employee is being hired to protect the public by doing his job. The corporation owes the public a duty, and the employee is hired to ensure that that duty is fulfilled. So, for instance, the job of a corporate officer is to make sure that there is not rodent urine in our flour. That's his job. I have a right to complain if his failure results in the contamination of products I buy.⁵¹

B. Contract or Cause of Peril?

To this point, I have simply taken the common law category of contractual undertaking as a given, but we could also ask whether the work is done by the contract or by the fact that the defendant is the cause of peril. For instance, in my example above, is it the corporate officer's contract that leads to his wronging me when I use the contaminated flour? Or is it my reliance that because he has his job, I believe I can make chocolate chip cookies without fear?

Larry Alexander has constructed a hypothetical to test our intuitions on this question.⁵² We are to imagine that Concerned lives next to Negligent.⁵³ Negligent is always leaving her children unattended near the pool. Concerned hires her gardener, Gardener, offering to pay him an additional \$1 an hour if he will keep an eye on the kids and call 911 or rescue them if they fall in the pool. Neither Child nor

⁵¹ Granted, a tremendous amount hangs on whether the public is truly the third party beneficiary of the defendant's contract with the corporation. As Martin Petrin details, courts struggle to determine when individuals can be held accountable in tort for the failure to supervise or manage an employee. Martin Petrin, "The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law," 59 *American University Law Review* 1661 (2010).

⁵² Larry Alexander, "Criminal Liability for Omissions: An Inventory of Issues," in Stephen Shute and Andrew Simester (eds.), *Criminal Law Theory: Doctrines of the General Part* 121 (2002)

⁵³ Alexander did not dub her "Negligent" nor would he given his views about the reasonable person test. But it suffices for our purposes.

Negligent are aware of the contract. Had Gardener not contracted with Concerned, she would not have otherwise provided for the rescue of the children. Child falls in the pool, Gardener, aware that Child is about to drown, does not rescue, and Child dies. Alexander tells us, “No one to whom I have presented this hypothetical believes that the gardener should be guilty of homicide despite his contractual obligation to rescue the children. What seems to explain this is the fact that the gardener’s contract has not induced anyone’s detrimental reliance and has not therefore created or worsened the children’s peril.”⁵⁴ Although Alexander does not rule out the possibility that contracts might create duties, he believes that “for many, if not all, cases of criminal liability based on contract, the real basis of criminal liability would appear to be detrimental reliance, which is but itself but a subcategory of causation of peril.”⁵⁵

I find it harder to be confident in this conclusion. There are questions about the hypothetical but also an underlying question about what the moral force of promising is. The hypothetical is somewhat odd because Concerned should really either mind her own business or go talk to Negligent. Concerned’s hiring her gardener to watch Negligent’s kids strikes me as potentially infringing on Negligent’s rights. Now, that may be too strongly stated, but I find it hard to get my intuition juices going.

More importantly, the hypothetical, and the underlying question, depend upon the answer to the deeper philosophical question about the bindingness of promises. If, like Heidi Hurd, you think that promises are not binding unless there is reliance, then it is no wonder that contractual undertakings would collapse into causation of peril.⁵⁶ I, on the other hand, like my normative powers to be consistently morally magical, not just half the time.⁵⁷ Either way, though, many individuals subscribe to the Hurdian view, or are otherwise skeptical of the force of what Joseph Raz calls a “bare reason” to keep a promise.⁵⁸ Moreover, the vast majority of broken promises and contracts involve some harm because the individual relied, so it is not surprising that we might be able to recast most contractual duties as causes of peril.

Still, third party beneficiary cases strike me as cases where reliance would typically not be required. Assume that Henry and Ira are brothers who have just inherited a parcel of land. Feeling fond of his daughter in a spur of the moment decision, Henry offers to pay Ira \$75,000 if Ira will leave his half of the property to Henry’s daughter, Julie, in his will. Henry never tells Julie, Henry dies, and Ira does not leave Julie the property. Does anyone doubt that Julia has a claim against Ira and his heirs? Even if, had Ira said no, Henry would have just dropped the matter?

The other worry with shifting from contract to causation is that we don’t just move the bump in the carpet—the bump gets bigger. No one has demonstrated more thoroughly than Alexander how incredibly difficult it is to justify the cause of peril duties and to articulate principled limitations to

⁵⁴ Alexander, *supra* note 50, at 138.

⁵⁵ *Id.*

⁵⁶ Heidi M. Hurd, “Promises Schmomises,” 36 *Law and Philosophy* 279 (2017).

⁵⁷ Cf. Heidi M. Hurd, “The Moral Magic of Consent,” 2 *Legal Theory* 121 (1996).

⁵⁸ Joseph Raz, “Is There A Reason to Keep a Promise?” in Gregory Klass, George Letsas, and Prince Sepai (eds.), *Philosophical Foundations of Contract Law* (2015).

them.⁵⁹ As but one example, consider Michael Phelps who simply wants a nice relaxing day at the beach. Mildred, a weak swimmer, would not have gone in the ocean *but for* the fact that she saw Phelps. If she gets in over her head, must he rescue her? He was the cause of her peril, at least in a but-for sense. But if so, then it seems that others can just decide to rely on you, put themselves in peril, and potentially create a duty on your part. That’s normatively troubling. In contrast, I know exactly what it is to decide that I will phi if you pay me. In terms of explaining why our autonomy interest is not undermined, contracts provide a more thorough normative grounding than causation. At least, unless and until we figure out cause of perils limits.

Ultimately, the interesting question, here, is not “which duty does the work,” but how that question will bear on the content of the duty. What happens if contract and cause diverge? There is no reason to believe there is perfect overlap between these two notions. To see this, and the puzzles within its vicinity, let’s turn to the content questions.

C. *Duty to Do What?*

What is the content of the responsible corporate officer’s duty? What is unfortunate about *Park* is that because we get an amalgamation of bases for the duty, we get an amalgamation of content. We can’t just look at the contract, or the statute, or the cause of peril.

Let’s start with what it is not. I think that some objections to the responsible corporate officer doctrine stem from failing to parse the difference between corporate law duties and the content of the contractual duty of the responsible corporate officer. When specific conditions are met, under *Caremark*, board members may be sued in shareholder derivative suits for failing to prevent criminal violations.⁶⁰ But that’s just a different question.⁶¹ The content of the duty that a board member owes to his shareholders is simply a different question than whether Darla is responsible if Carla’s robot kills Betty. The job that Darla has is essentially to protect Betty. A board member owes distinct fiduciary duties to shareholders. Indeed, the duty that Darla owes is not a duty to root out crime wherever she may find it. It is a specific duty to rescue directly related to the type of harm that her product can cause.

But what is the content of the duty? As I suggested earlier, one way to read *Dotterweich* and *Park* is that the duty is imposed by statute.⁶² That would make it perhaps the most poorly drafted positive obligation to perform an act statute in the long and substantial history of poor statutory drafting. Most of the time when the state wants us to perform an act, the statute flat out says it. I don’t have to read between the lines to know I need to pay my taxes.

Viewing this as a duty created by statute raises two questions: duty to do what, and what grounds that duty. Let me take the latter first. When the state requires us to do something—pay taxes,

⁵⁹ Alexander, *supra* note 50. We try our hand at some of these puzzles in *Reflections on Crime and Culpability*, *supra* note 48.

⁶⁰ *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

⁶¹ Accord Martin Petrin, “Circumscribing the ‘Prosecutor’s Ticket to Tag the Elite’—A Critique of the Responsible Corporate Officer Doctrine,” 84 *Temple Law Review* 283, 305 (2012). Petrin notes that these doctrines may work at cross purposes.

⁶² This is how the Supreme Court has more recently read the case. See *Meyer v. Holley*, 537 U.S. ____ (2003) (noting “[t]his Court has applied unusually strict rules only where Congress has specified that such was its intent”). The Court held the corporation was vicariously liable for the discrimination by the realtor but the corporate officer was not.

serve in the military, etc—it needs to have a good reason to do so. I suspect the argument here would be something along the lines of those who undertake to provide products into commerce in which the consumers will not be situated to determine whether the products are adulterated or misbranded will have to make sure the products are not contaminated, and this will be the corporation’s, as well as its employees’, responsibility to positively check that there are not problems. If you are going to deploy robots that might harm people, then you have to be the one to make sure to stop the robot. That’s the price you pay by entering the market to begin with. (Again, we are only talking about the justification for imposing an affirmative duty to act, not the justification for strict liability.)

Of course, if the duty is imposed by statute, then expansions will turn on the specific statutes. Then, we might wonder whether courts really should be reading the responsible corporate officer doctrine into statutes.

More importantly, the content of that duty will be determined by the statute. That might mean that what the responsible corporate officer doctrine means in one context is not the same as what it means in another. Each statute’s justification will determine the scope of the duty.

Allowing the statute to impose a duty on someone, not based on his contractual undertaking, but simply his connection to the corporation, could lead to expansive relationships between the defendant and the potential harm. This is not a claim the defendant acted, or even omitted where he had a duty. This is the claim that the actor is being co-opted by the state to make sure the corporation does not harm others. Ultimately, though, I think the central concern here is that it makes criminal law statutes even more opaque than they already are. It is as though a statute which says, “don’t willfully file a false tax return” imposes a duty on my dog to file a tax return.⁶³ There seems to be a wide gap between what the statute purports to criminalize (a specific offense) and what the statute actually requires.

If the statute does not supply the duty, then a natural place to look is the contract.⁶⁴ Why is the corporate officer required to do that which he is not doing? Because it is his job. A babysitter babysits; Carla pushes the DNI button; and Park keeps the rodents out of our food.

This invites, though, the question of whether the scope and import of the contract are co-extensive with what we think the responsible corporate officer doctrine captures. One question is whether breach of contract ought to be a crime. I don’t do my job; fire me. Don’t put me in jail. To be sure, there are times such a claim has purchase. But do we really think that lifeguards, bodyguards, and babysitters whose jobs are to protect other people should not be held criminally accountable if they culpably fail to protect their charges?

Indeed, even in contract law, there is recognition that the contractual relation to the promisee may depart from the more robust duties that are granted to the third party beneficiary.⁶⁵ As Melvin Eisenberg demonstrates, this can be true in will cases. If A is the testator and she contracts with B, her attorney, to craft her will to leave everything to C, and B fouls it up, what happens? A is dead. And C wants to sue B. What B owed A was a well drafted will, but what C wants from B is her inheritance.

⁶³ I don’t have a dog. Let’s be clear about that IRS.

⁶⁴ Aagaard, *supra* note 1, at 1278, 1282.

⁶⁵ I thank Gregg Strauss for suggesting this to me.

Here, too, it does not seem problematic to think that the scope and content of the duties might diverge. And, as Eisenberg notes, the parties will contract with this in mind. The fact that B is exposed to liability to C will determine the fee he charges A.⁶⁶

At least post *Park* and *Dotterweich* responsible corporate officers can negotiate their salaries commensurate with these liabilities. Being a lifeguard, for example, is a significant job, and potential lifeguards may seek compensation that not only takes into account that they will place their lives in danger but also that they are exposing themselves to civil and criminal liability. Lifeguards are not allowed to sunbathe and play Candy Crush, as bystanders are. Rather, they are undertaking a responsibility to swimmers, a responsibility for which the swimmers can call them to account.

But lawyers are sneaky. So, the question is, if the duty is really imposed by contract, why not contract around it? And this brings us full circle to *Park* and its negligence talk. The question of whether one has a duty to act and can thus be held responsible for omitting is an altogether different question than the question of whether someone breached his duty of care. The first concept, and the one we have been discussing, is the idea that usually one does not have to act. The failure to perform that action does not satisfy the actus reus. Negligence as a standard of care applies to both acts and omissions.

But what should we make of *Park's* references to reasonableness? Recall in *Park* that the majority opinion states that the duty requires “no more exertion than it might reasonably exact from one who assumed his responsibilities.”⁶⁷ It also states that “The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.”⁶⁸ Justice Stewart’s dissent seems to view the duty as a “duty of care” and “[t]his is the language of negligence.”⁶⁹

So, one way to think about this is that the contractual undertaking may be one to engage in reasonable actions to prevent harm. Assume that Carla diligently follows Robot around, but she sneezes once. In that blink of an eye, Robot sees Betty but Carla does not notice it. Because Carla does not notice it, she does not push the DNI button. If Carla’s contract says, “push DNI when robot sees humans,” then Carla will satisfy the actus reus because she omitted to do something she had an obligation to do: push the DNI button. However, Carla is not negligent to the extent that sneezing does not drop her below the standard of care. But if Carla’s contract says, “undertake reasonable efforts to push the DNI button when necessary,” then Carla is not just nonnegligent; Carla does not satisfy the actus reus.⁷⁰

But this is where the play in the joints on the question of what grounds the duty in *Park* gets interesting. Assume that Betty only hires *Robots R Us* because she knows that Carla will be around to push the DNI button, just like I only buy flour because I assume it is someone’s job to make sure it is not adulterated. Then, even if the contract does not cover Carla’s duty, don’t we then have the cause of peril duty doing the work? That is, we might wonder whether the corporate officer can limit her duties

⁶⁶ Melvin Aron Eisenberg, “Third Party Beneficiaries,” 92 *Columbia Law Review* 1358 (1992).

⁶⁷ *Park* at 658.

⁶⁸ *Id.* at 674.

⁶⁹ *Id.* at 679; see also *US v. Decoster*, 828 F.3d 626 (8th Cir. 2016)(Gruender, J. concurring).

⁷⁰ For those clever time framers out there, if you worry that Carla still acts at t_1 by setting up the robot, then imagine Alice sets it up and then leaves so Carla’s only job is to push the DNI button.

if the fact that there is someone with her job description is what the public relies on in buying regulated products. If this is true, then we cannot avoid the theoretical thicket that is the “cause of peril” duty. It will supplant the contract whenever there is broader reliance than the contractual duty provides.

Ultimately, we may conclude that a reliance based duty here is less problematic. After all, unlike Phelps’ desire to just have an ordinary day at the beach, corporate officers are undertaking roles where their job is to monitor the corporate’s functioning. They can hardly be held to complain that they aren’t doing anything to invite reliance.

III. Concluding Thoughts

The responsible corporate officer doctrine hardly seems to supplant our traditional notions of criminal responsibility. Rather, to the extent that we have any worries, it is just an interesting case study in why we ought to have concerns about the aspects of duties we take for granted within criminal law. We may want to proceed cautiously, and of course, better explanations by courts of where this duty is coming from would be a welcome amendment to the current jurisprudence. But there is not much to dislike, much less to fear, from the responsible corporate officer doctrine.