REVITALIZING THE STATE ENVIRONMENTAL RESPONSIBLE CORPORATE OFFICER DOCTRINE

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Abstract: The responsible corporate officer doctrine is an accepted basis of liability under many federal statutes, holding individual high-ranking corporate officers criminally or civilly liable for corporate actions or omissions that violate federal law. The doctrine is a blend of statutory and common law, where legislation sets out the underlying framework that courts use to extend and develop the doctrine. Although several federal statutes incorporate the doctrine, it is particularly well developed under federal environmental statutes and has been a potent tool for federal environmental enforcement for over half a century. Indeed, the doctrine acts as a practical means of achieving remediation in situations that would otherwise lack recourse. But states have been slower to adopt the doctrine; only a handful recognize it in the civil environmental context. As a result, the state-level doctrine is often underutilized and consequently lacks academic attention. This Article fills that gap by examining the responsible corporate officer doctrine in its state environmental forms. The Article first traces the doctrine's federal development and illustrates its role in federal environmental enforcement. It then turns to the doctrine's nascent but limited development in state courts and argues that the state environmental responsible corporate officer doctrines lack cohesion, clarity, and legitimacy. Building on those observations, this Article then asserts the need to revitalize the state environmental forms of the doctrine and center it on four goals: (1) individual civil liability; (2) liability without a mens rea requirement; (3) uniformity; and (4) broad enforceability. Lastly, this Article looks to two states—Massachusetts and Oregon—as case studies for how a newly revitalized doctrine could be applied.

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INTRODUCTION

Environmental statutes are, in a word, sweeping. Their ambitious design[1] seeks to preserve and remediate the natural environment by targeting pollution at its source and preventing the environmental degradation of air,[2] water,[3] and soil.[4] Environmental statutes also protect vulnerable populations.[5] To accomplish their goals, environmental statutes cast broad nets, subjecting entire categories of individuals and entities to liability.[6] Depending on the statute, civil environmental liability is targeted at persons,[7] owners and operators,[8] generators,[9] transport-

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[1] *See, e.g.*, Robert W. Adler, *The Decline and (Possible) Renewal of Aspiration in the Clean Water Act*, 88 WASH. L. REV. 759, 761 (2013) (describing the "admittedly ambitious" objective of the Clean Water Act); RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 67–73 (2004) ("The federal environmental statutes of the early 1970s, beginning with the Clean Air Act, were dramatic, *sweeping*, and uncompromising." (emphasis added)); Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1240 (2014) (characterizing the environmental canon as "highly ambitious in their aims, consistent with the idea that a revolution was indeed at hand").

[2] *See generally* Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q (protecting the "quality of the Nation's air resources" and promoting government action to mitigate and prevent air pollution).

[3] *See generally* Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387 (protecting against the degradation of water resources).

[4] *See generally* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (coordinating the remediation of hazardous waste and establishing liabilities for entities that created, own, or previously owned hazardous waste sites); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (protecting soil quality).

[5] For legislation that protects wildlife, see generally the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544. For legislation that protects vulnerable humans, including lower income and elderly populations, see generally the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601–2697, and the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. §§ 11001–11050.

[6] *See* Amy J. Wildermuth, *Is Environmental Law a Barrier to Emerging Alternative Energy Sources?*, 46 IDAHO L. REV. 509, 520 (2010) (describing CERCLA as "cast[ing] a very wide net"); *see also supra* notes 1–5 and accompanying text.

[7] *See, e.g.*, 42 U.S.C. § 6928(a)(1) (authorizing the Administrator of the Environmental Protection Agency (EPA) to issue a civil money penalty order, compliance order, or initiate a suit in federal court for violations of the RCRA by any "person"); *id.* § 6973(a) (authorizing the Administrator to initiate a suit in federal court against any "person" who has been involved in transporting or disposing of hazardous waste when such "transportation or disposal . . . may present an imminent and substantial endangerment to health or the environment"); 33 U.S.C. § 1319 (establishing enforcement procedures against "persons").

[8] *See* 33 U.S.C. § 1321(b)(6)(A) (stating that any "owner" or "operator" of domestic or offshore oil or hazardous substance facilities will be subject to a civil money penalty for the unlawful discharge of oil or hazardous substances from these facilities); 42 U.S.C. § 9607(a)(1) (including "owner[s] and operator[s]" within the scope of liability under CERCLA).

[9] *See* 42 U.S.C. § 9607(a)(3); *see also* Massachusetts v. Blackstone Valley Elec. Co., 808 F. Supp. 912, 914 (D. Mass. 1992) (noting that CERCLA allows for "generator" liability (citing 42 U.S.C. § 9607(a)(3))).

ers,[10] individuals, corporations, states, and municipalities, among others.[11] Although the success of the environmental statutory canon is somewhat disputed,[12] few doubt that the laws are "dramatic,"[13] "highly ambitious,"[14] and, yes, the old standby, "sweeping."[15]

Despite the aspirational reach of environmental statutory liability, however, environmental statutes do not cover every instance of environmental harm. Notably, individual corporate officers, unless otherwise included as an owner, operator, or other enumerated category, can "escape liability" for acts or omissions that led to environmental violations.[16] Particularly for small, undercapitalized corporations, there is a real risk that, without individual liability, the environmental harms will be left unremedied, thwarted by judgment proof corporations.[17]

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[10] *See* 42 U.S.C. § 9607(a)(4) (capturing "any person who accepts or accepted any hazardous substances for transport" from which transport "there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance" within the scope of liability).

[11] Each of the foregoing categories are included in both RCRA's and CERCLA's definition of "person." *See id.* § 6903(15) (broadly defining the term "person"); *id.* § 9601(21) (same).

[12] *See generally* Linda A. Malone, *Looking Beyond Environmental Law's Mid-life Crisis*, 23 PACE ENV'T L. REV. 679 (2006) (describing 1970s federal environmental legislation as "naively optimistic"); Aagaard, *supra* note 1, at 1241 (noting that, at least since 1990, Congress has failed to address ongoing and new environmental challenges with effective legislation because of political polarization).

[13] Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENV'T L.J. 75, 78 (2001).

[14] Aagaard, *supra* note 1, at 1240.

[15] *See, e.g.*, Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323, 2323 (2013) (describing Congress's "sweeping" legislative response to environmental concerns in the late 1960s); Lazarus, *supra* note 13, at 78 (same).

[16] *See* United States v. Dotterweich, 320 U.S. 277, 283 (1943) ("Congress, of course, could reverse the process and hold only the corporation and allow its agents to escape. . . . But the history of the present Act, its purposes, its terms, and extended practical construction lead away from such a result . . . ."); Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs, No. 2:13-cv-02095, 2016 WL 4717986, at *14 (E.D. Cal. June 10, 2016) ("[A] corporate officer with authority over the activities underlying alleged violations should not escape liability by virtue of having delegated certain implementing tasks." (citing Waterkeepers N. Cal. v. AG Indus. Mfg., Inc., No. CIV-S-00-1967, 2005 WL 2001037 (E.D. Cal. Aug. 19, 2005))).

[17] *See, e.g.*, S. Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45, 54 (1986) (recognizing vicarious liability as a potential remedy for victims when the injurer is judgment proof); Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 312 (2012) (surveying economic analyses of vicarious tort liability and noting "that in instances where the principal has fewer assets than the agent, due to limited liability or because he is otherwise 'judgment proof,' or where sanctions on the firm level provide insufficient deterrence or are difficult to impose, holding the agent personally liable may be more beneficial" (first citing Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1366 (1982); then citing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW

For example, the New Jersey Department of Environmental Protection faced this risk as it sought to remedy permit violations from a corporation that treated hazardous waste and discharged wastewater into the Kill Van Kull, a tidal straight.[18] With an assessed penalty of $175,000, the corporation filed a bankruptcy petition before the enforcement action concluded.[19] As the Appellate Division of the New Jersey Superior Court noted, bankruptcy portended the low likelihood that the state would be able to collect money penalties from the corporation, much less whether the environmental harm would be remediated.[20] It seemed that the individual corporate officers would walk away without sanction, with their corporation's harms potentially left unresolved.[21]

The responsible corporate officer doctrine helps to plug this hole. A blend of statutory and common law, the responsible corporate officer doctrine grafts common law to statutory roots.[22] This judicially created addendum holds high-ranking corporate officers criminally or civilly liable for corporate actions or omissions that violate the law, imposing a form of strict liability on offenders.[23] Importantly, the doctrine *does not* pierce the corporate veil or constitute derivative liability.[24] Separate and apart from the corporate form, the responsi-

61 (1991); and then citing Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 858, 868–88 (1984))).

[18] *See In re* Standard Tank Cleaning Corp., 133 B.R. 562, 563 (Bankr. E.D.N.Y. 1991) (noting the discharge of wastewater into Kill Van Kull); State Dep't of Env't Prot. v. Standard Tank Cleaning Corp., 665 A.2d 753, 757–58 (N.J. Super. Ct. App. Div. 1995) (same). The corporation allegedly violated its discharge permit 172 times. *Standard Tank Cleaning Corp.*, 665 A.2d at 758.

[19] *Standard Tank Cleaning Corp.*, 665 A.2d at 762.

[20] *Id.*

[21] *See id.* (noting the possibility that the state may potentially fail to collect penalties from the bankrupt corporation, and that this risk justified seeking other parties to collect from). But for the responsible corporate officer doctrine, this could have been the outcome. Nevertheless, the state moved to add four individual corporate officers as defendants, which the appellate division upheld in part. *See id.*

[22] *See* Katrice Bridges Copeland, *The Crime of Being in Charge: Executive Culpability and Collateral Consequences*, 51 AM. CRIM. L. REV. 799, 811–15 (2014) (describing the implications of two U.S. Supreme Court decisions, *United States v. Dotterweich* and *United States v. Park*, for interpreting the preexisting statutory framework governing the responsible corporate officer doctrine); Kirk F. Marty, *Criminal Prosecution of Responsible Corporate Officers and Negligent Conduct Under Environmental Law*, NAT. RES. & ENV'T, Winter 2009, at 33, 33 ("The responsible corporate officer doctrine has its origins in two cases arising under the [Federal Food, Drug, and Cosmetic Act]."); Thomas A. Shook, Recent Development, *Ninth Circuit Rejects Narrow Interpretation of "Responsible Corporate Officer,"* 8 S.C. ENV'T L.J. 111, 113–15 (1999) (describing the origins of the responsible corporate officer doctrine).

[23] *See* Copeland, *supra* note 22, at 811 (noting the "strict liability" theory interpretation of *Dotterweich* with respect to corporate executives).

[24] *See, e.g.*, Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC, 374 F. Supp. 3d 1124, 1138 (D. Utah 2019) ("[T]he responsible corporate officer and corporate veil doctrines are conceptually distinct."); Stillwater of Crown Point Homeowner's Ass'n v. Kovich, 820 F. Supp. 2d 859, 893 (N.D. Ind. 2011) (emphasizing that individual corporate officer liability does not require piercing

ble corporate officer doctrine tags liability to individual corporate officers if, by virtue of their high-ranking position, the officer "had the power to prevent or correct the conduct which gave rise to the violation."[25] Crucially, this does not require the officer to participate personally in the violation.[26]

The doctrine is a necessary complement to other statutorily enumerated avenues of liability, such as piercing the corporate veil.[27] For most cases where the doctrine is invoked, the underlying harm would go unaddressed without the doctrine.[28] Indeed, the doctrine's invention in the mid-twentieth century and extensive development in the decades since underscore the continuing need for the doctrine.[29]

The doctrine is well developed federally, particularly in enforcement actions against pharmaceutical corporate officers.[30] This is largely because the doctrine first developed under the federal Food, Drug, and Cosmetic Act.[31] Notwithstanding this pharmaceutically focused beginning, the responsible corporate officer doctrine is most often used federally in the environmental context, both civilly and criminally.[32] Part of the doctrine's role in the environmental sphere is due to several environmental statutes including "responsible corporate officer" in their definition of who could violate the statute.[33] But, as explained in more detail below, the doctrine is also a natural fit for the goals of statutory environmental liability because it accords with the broad remedial nature of the environmental statutory canon.[34]

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the corporate veil (citing DFS Secured Healthcare Receivables Tr. v. Caregivers Great Lakes, Inc., 384 F.3d 338, 346 (7th Cir. 2004))).

[25] Barbara DiTata, *Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine*, 7 FORDHAM ENV'T L.J. 795, 806–07 (1996) (first citing United States v. Dotterweich, 320 U.S. 277 (1943); and then citing United States v. Park, 421 U.S. 658 (1975)).

[26] *Id.* at 807 (noting the potential for liability "even though the officer did not personally participate" in an offense (citing *Dotterweich*, 320 U.S. at 281)).

[27] Piercing the corporate veil is an exception to the limited liability that traditionally attends the corporate form and enables a court to look through the corporate entity to reach the personal assets of a shareholder or officer. *See* Walkovszky v. Carlton, 223 N.E.2d 6, 7 (N.Y. 1966) (noting that the general limited liability of the corporate form is "not without its limits"); DEFENSE AGAINST A PRIMA FACIE CASE § 12:14 (updated Apr. 2022), Westlaw DAPFC ("Generally, a corporate entity will be disregarded only to prevent fraud or illegality or to achieve equity.").

[28] *See infra* notes 45–96 and accompanying text.

[29] *See infra* notes 45–178 and accompanying text.

[30] *See* Copeland, *supra* note 22, at 800–04 (noting the use of the responsible corporate officer doctrine to impose individual liability on pharmaceutical executives).

[31] *See infra* notes 45–96 and accompanying text.

[32] *See* Copeland, *supra* note 22, at 809 ("In the twenty years following the *Park* decision, the overwhelming majority of responsible corporate officer prosecutions were based on violations of environmental laws rather than the [Food, Drug, and Cosmetic Act].").

[33] *See, e.g.*, 33 U.S.C. § 1319(c)(6) ("For the purpose of this subsection, the term 'person' means . . . any responsible corporate officer.").

[34] *See infra* notes 97–178 and accompanying text.

Notwithstanding its well-established federal pedigree, the doctrine is not nearly as prominent at the state level.[35] States have been slower to adopt the doctrine: only a handful recognize the doctrine in the environmental context, most of which have only recently done so.[36] As a result, the doctrine is often underemployed in the state environmental context.

That is not to say, of course, that the responsible corporate officer doctrine itself has been ignored by the academics or the government. Criminal law scholars have long grappled with the doctrine's unique qualities, including near strict liability, the ability to target individual corporate officers, and the doctrine's application to acts *or* omissions.[37] Environmental law scholars have examined the doctrine's federal forms, particularly under the CWA, CAA, and RCRA.[38] Indeed, the federal government has frequently prosecuted responsible corporate officers in environmental cases.[39] But the doctrine's emergence, use, and efficacy in the environmental context at the state level have not garnered similar attention.

This Article examines the existing state environmental responsible corporate officer doctrines. Although some states have made strides in developing the doctrine, most state forms of the doctrine are anemic versions of their federal analog. Piecemeal decisions of state courts have left fragmented doctrines that are incorporated under some state environmental statutes but left out under other comparable statutes. The scope of the doctrines is often ambiguous and opaque, only clear with respect to the particular idiosyncratic facts of the cases in which they are adopted. The result is a haphazard patchwork of doctrines that suffer from a lack of cohesion, clarity, and legitimacy.

This Article asserts the need for a revitalized state environmental responsible corporate officer doctrine. It centers this reconstituted form of the doctrine on four goals: (1) individual civil liability; (2) liability without a mens rea requirement; (3) uniformity across a state's environmental statutory canon; and (4) broad enforceability. These four elements respond to the existing cohesion,

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[35] *See infra* notes 179–325 and accompanying text.

[36] *See, e.g.*, BEC Corp. v. Dep't of Env't Prot., 775 A.2d 928, 938 (Conn. 2001) (discussing state adoption of the responsible corporate officer doctrine); *see also infra* notes 179–325 and accompanying text.

[37] *See, e.g.*, Copeland, *supra* note 22, at 811–12 (describing the various issues that scholars have addressed surrounding the responsible corporate officer doctrine). *See generally* Petrin, *supra* note 17.

[38] *See, e.g.*, Marty, *supra* note 22, at 33 (discussing the responsible corporate officer doctrine "through its modern application in the context of criminal environmental enforcement"); Shook, *supra* note 22, at 113 (describing the application of the responsible corporate officer doctrine under the Clean Water Act); Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1254 (2006) (noting that the responsible corporate officer doctrine has seen its most "widespread . . . application . . . under federal environmental statutes"); DiTata, *supra* note 25, at 806.

[39] *See infra* notes 97–178 and accompanying text.

clarity, and legitimacy concerns. They also position the doctrine as a helpful tool in the hands of state environmental enforcement and engaged citizens.

To that end, Part I sketches the history of the responsible corporate officer doctrine, focusing on its creation and development by the U.S. Supreme Court.[40] Parts II[41] and III[42] examine how federal and state courts, respectively, have adopted the doctrine under various environmental statutes. It concludes that the state environmental responsible corporate officer doctrine is plagued by inconsistency and ambiguity. Part IV asserts the need for a revitalized state environmental responsible corporate officer doctrine and articulates its key components.[43] Finally, Part V uses environmental statutes in Massachusetts and Oregon as case studies of how the revitalized state environmental responsible corporate officer doctrine can be established and applied.[44]

I. The Roots of the Responsible Corporate Officer Doctrine

For a common law doctrine, the responsible corporate officer doctrine has decidedly modern roots.[45] The U.S. Supreme Court first created the doctrine in 1943 in *United States v. Dotterweich*.[46] There, the Court was faced with a broad remedial statute characteristic of the New Deal—the Federal Food, Drug, and Cosmetic Act (FDCA).[47] This Act empowered the Food and Drug Administration (FDA) to regulate and oversee certain products to ensure consumer safety.[48] It provided strict criminal liability—albeit a misdemeanor—for those who "adulterat[ed]" or "misbrand[ed]" pharmaceuticals.[49]

The Buffalo Pharmacal Company allegedly purchased certain drugs wholesale, watered them down, repackaged them, and resold them under a new

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[40] *See infra* notes 45–96 and accompanying text.

[41] *See infra* notes 97–178 and accompanying text.

[42] *See infra* notes 179–325 and accompanying text.

[43] *See infra* notes 326–378 and accompanying text.

[44] *See infra* notes 379–406 and accompanying text.

[45] *See, e.g.*, Marty, *supra* note 22, at 33 (describing the modern common law development of the responsible corporate officer doctrine); DiTata, *supra* note 25, at 806; Douglas S. Brooks & Thomas C. Frongillo, *Environmental Prosecutions: Criminal Liability Without Mens Rea and Exposure Under the Responsible Corporate Officer Doctrine*, 79 Def. Couns. J. 12, 15 (2012) (describing the development of the responsible corporate officer doctrine during the past seventy years).

[46] 320 U.S. 277, 278 (1943).

[47] Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301–399i).

[48] *See id.*; Paul D. Levin, *On the Inappropriate Inclusion of Medical Devices Within the Hatch-Waxman Act*, 89 J. Pat. & Trademark Off. Soc'y 456, 457 (2007) ("The Federal Food, Drug, and Cosmetic Act of 1938 . . . significantly enhanced the 1906 [Food and Drugs Act], and this expanded law forms the basis for all subsequent drug oversight legislation.").

[49] *See* 21 U.S.C. § 331(b) (prohibiting "the adulteration or misbranding of any food, drug, device, tobacco product, or cosmetic").

label.[50] The FDCA clearly proscribed such conduct and gave rise to an actionable suit against the corporation.[51] Curiously, the United States also individually charged the company's president and general manager, Joseph H. Dotterweich.[52] There was no evidence that Mr. Dotterweich had personally misbranded or adulterated the drugs.[53] Still, the United States included him within the ambit of criminal liability simply because the company had violated the FDCA under his supervision.[54]

The question before the Court, then, was whether an individual could be held individually liable for the actions of a corporation solely due to that individual's position of control and supervision over the corporation.[55] Answering in the affirmative, the Court emphasized practicality over formalism, noting that a corporation can only act through its individual constituents.[56] Thus, the agents who act on behalf of the corporation share in the corporation's guilt.[57]

The Supreme Court's conclusion in *Dotterweich* is rather striking, as imposing individual liability for corporate acts was relatively uncharted territory at the time.[58] It is an extra-textual conclusion, too, as the FDCA does not expressly cover individual corporate officers.[59] Nevertheless, the Court appeared mindful of the broad avenues of potential liability it was creating, noting that Congress was responsible for "[b]alancing relative hardships" and that, in any event, "[o]ur system of criminal justice necessarily depends on [the] 'conscience and circumspection in prosecuting officers . . . .'"[60] Shouldering Mr. Dotterweich with liability, in the Court's view, was better than subjecting the innocent public to the effects of the company's actions.[61]

The Court's wholesale creation of what has come to be known as the responsible corporate officer doctrine should be viewed in light of the *kind* of

[50] *Dotterweich*, 320 U.S. at 278; Brief for the United States at *4, *Dotterweich*, 320 U.S. 277 (No. 05), 1943 WL 54821 ("The evidence of adulteration and misbranding of the bottle of digitalis tablets was that, in violation of . . . the Act, the tablets were of less than half the potency of 1 U.S.P. unit of digitalis per tablet, which the United States Pharmacopoeia called for and which the label on the bottle represented them to have." (citations omitted)).

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

[52] *Id.*

[53] *Id.*

[54] Brief for the United States, *supra* note 50, at *2.

[55] *Id.* at *3.

[56] *Dotterweich*, 320 U.S. at 281.

[57] *Id.* at 284.

[58] *See, e.g.*, Stephen C. Jones, *Individual Liability Under the Federal Food, Drug, and Cosmetic Act: The Defenses Find a Defendant*, 39 FOOD DRUG COSM. L.J. 385, 388 (1984) ("The Supreme Court first considered the liability of an individual under the 1938 Act in *United States v. Dotterweich*.").

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

[60] *Id.* at 285 (quoting Nash v. United States, 229 U.S. 373, 378 (1913)).

[61] *Id.*

statute the Court was dealing with. As Congress flexed its legislative muscles in creating the administrative state, it did so in ambitiously designed statutes.[62] The *Dotterweich* Court understood this, and highlighted that the FDCA "was designed to enlarge and stiffen the penal net and not to narrow and loosen it."[63] The *only* way, therefore, to interpret the FDCA was through the lens of its history, "its purposes, [and] its terms . . . ."[64] Anything less would threaten "evisceration" of the statute.[65]

Although *Dotterweich* opened the door to responsible corporate officer liability under the FDCA, the Court alluded to analogous liability under other statutes.[66] After all, the Court incorporated the responsible corporate officer doctrine into a broad remedial statute that simply included a "corporation" as a potential offender.[67] How many other federal statutes have these common characteristics? The Court did not set the contours of the doctrine precisely, closing its opinion by noting that the evidence substantiated the verdict.[68] Such a fact specific conclusion left open more questions than it answered.

Thirty years later, the Court clarified its creation.[69] In 1975, the Court took up *United States v. Park*, where a corporate officer disclaimed individual liability for the FDCA violations of his corporation.[70] *Park* involved a national retail food chain, Acme Markets, Inc., that had improperly stored food at two different warehouses, which resulted in extensive rodent contamination.[71] Acme's chief executive officer admitted to receiving letters from the FDA regarding the sanitation deficiencies.[72] The question was whether the chief executive officer could be liable for Acme's admitted FDCA violations.[73]

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[62] *See, e.g.*, Susan E. Dudley, *The Ambition of the Administrative State*, GEO. WASH. UNIV. REGUL. STUD. CTR., https://regulatorystudies.columbian.gwu.edu/ambition-administrative-state [https://perma.cc/UKK4-EDZX] (Aug. 31, 2019) (noting the "lofty but vague goals" of Congress's legislation delegating authority to administrative agencies).

[63] *Dotterweich*, 320 U.S. at 282.

[64] *Id.* at 283.

[65] *Id.* at 284.

[66] *See id.* ("The Circuit Court of Appeals was evidently tempted to make such a devitalizing use of the guaranty provision through fear that an enforcement of § 301(a) as written might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment. But that is not the way to read legislation. Literalism and evisceration are equally to be avoided.").

[67] *See id.*

[68] *Id.* at 285.

[69] United States v. Park, 421 U.S. 658, 670–73 (1975) (revisiting *Dotterweich* in considering whether jury instructions were proper).

[70] *See id.* at 661 (noting that the corporation pleaded guilty to the FDCA violations).

[71] *See id.* at 660 (describing the allegations against Acme, Inc.).

[72] *Id.* at 663–65 (noting that Park received two letters from the FDA "regarding insanitary conditions at Acme's Philadelphia warehouse").

[73] *See id.* at 667 (noting the conflict in the lower courts regarding the "standard of liability of corporate officers under the [FDCA]").

Faced with an opportunity to narrow or undo the strict individual liability set forth in *Dotterweich*, the Court instead delivered a full-throated re-endorsement of the responsible corporate officer doctrine.[74] The Court, which was composed of nine justices appointed and confirmed well after *Dotterweich*,[75] defended the doctrine, noting that it "was not formulated in a vacuum."[76] The Court explained that corporate officers "had the power to prevent the act complained of" and that the agency relationship between the chief executive officer and the corporation sufficed for criminal responsibility.[77] Indeed, the FDCA "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."[78] Such requirements are, no doubt, exacting, but nonetheless essential for the welfare of the consumer public.[79]

In clarifying the responsible corporate officer doctrine, the Court also articulated a possible defense to liability where the defendant was "powerless" to prevent or correct the violation.[80] But this potential escape from liability only recognizes that the doctrine "does not require that which is objectively impossible" and underscores that the purpose of the doctrine is to hold responsible those with the "power" to "prevent or correct" conditions that lead to violations.[81] And imposition of "the highest standard of care" is merely a reflection of Congress's intent.[82]

Despite their vintage, both *Dotterweich* and *Park* remain good law and are often cited by lower courts, particularly in prosecutions under the FDCA.[83]

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[74] *See id.* at 672 (reaffirming the standard of liability established in *Dotterweich* and subsequent case law). Indeed, even the dissent agreed with the imposition of liability for responsible corporate officers, choosing to dissent because of a disagreement regarding the jury instructions. *Id.* at 678 (Stewart, J., dissenting).

[75] *See* Ben Winograd, *The Justices in 1975*, SCOTUSBLOG (June 28, 2007), https://www.scotusblog.com/2007/06/the-justices-in-1975/ [https://perma.cc/G83R-XFBL] (showing that all nine members of the Court in 1975—Chief Justice Burger and Justices Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens—were appointed after *Dotterweich*).

[76] *Park*, 421 U.S. at 670 (citing Morissette v. United States, 342 U.S. 246, 258 (1952)).

[77] *Id.* at 671.

[78] *Id.* at 672.

[79] *Id.*

[80] *Id.* at 673 (quoting United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964)).

[81] *Id.*

[82] *Id.* at 676; *see also* Meyer v. Holley, 537 U.S. 280, 287 (2003) (citing *Dotterweich* and *Park* for the proposition that "[t]his Court has applied unusually strict rules only where Congress has specified that such was its intent").

[83] *See, e.g.*, United States v. Stepanets, 362 F. Supp. 3d 22, 24 (D. Mass. 2019) (relying on *Dotterweich* and *Park*); United States v. DeCoster, 828 F.3d 626, 641–42 (8th Cir. 2016) (Beam, J., dissenting) (noting the majority and lower court reliance on *Dotterweich* and *Park*). Circuit courts routinely refer to *Dotterweich* and *Park* as the "seminal cases regarding the responsible corporate officer doctrine . . . ." *See, e.g.*, United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 51 (1st Cir. 1991). Interestingly, when faced with a challenge to the scope of the responsible corporate officer

They remain important to any discussion of the responsible corporate officer doctrine for three reasons. First, the cases represent judicial recognition of Congress's ability to sweep broadly in determining liability. The Court reasoned in both cases that it was upholding the express intent of Congress to legislate widely to protect health, safety, and welfare.[84] Considering the judicial branch's sometimes adversarial nature with Congress—particularly in the *Lochner* era[85] that immediately preceded *Dotterweich*—this judicial consent to broad congressional authority is significant. Indeed, *Dotterweich* showcases a modernizing Court, cognizant of its evolving role in the growing administrative state. In historical context, then, *Dotterweich* represents a shift toward judicial acceptance of more aggressive federal legislation. So too for *Park*. Congress was a hive of legislative activity in the late 1960s and early 1970s.[86] As many have noted, almost *all* the major federal environmental statutes were enacted during this period.[87] The scope of federal civil and criminal liability widened as Congress flexed its legislative muscles.[88] Therefore, *Park* signals an

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doctrine, the Supreme Court denied certiorari. DeCoster v. United States, 137 S. Ct. 2160 (2017). One commentator noted that the doctrine's survival continues "to perplex corporate boards." Michael W. Peregrine, *The "Responsible Corporate Officer Doctrine" Survives to Perplex Corporate Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 5, 2017), https://corpgov.law.harvard.edu/2017/07/05/the-responsible-corporate-officer-doctrine-survives-to-perplex-corporate-boards [https://perma.cc/4SUB-CKY6]; *see also* Memorandum from Brian T. McGovern, Anne M. Tompkins & Stephen Weiss, Cadwalader, Wickersham & Taft LLP, to Clients and Friends on the Responsible Corporate Officer Doctrine in the Wake of *DeCoster* (May 3, 2017), https://www.cadwalader.com/resources/clients-friends-memos/the-responsible-corporate-officer-doctrine-in-the-wake-of-decoster [https://perma.cc/GMX3-GXAS].

[84] *See* United States v. Dotterweich, 320 U.S. 277, 284 (1943) (describing the FDCA as "an important provision safeguarding the public welfare"); *Park*, 421 U.S. at 673 ("Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution.").

[85] Lochner v. New York, 198 U.S. 45 (1905) (initiating the so-called "Lochner era" that was characterized by the Supreme Court routinely striking down federal economic regulations), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1345 (2019) ("As the 1930s drew to a close, the Court executed its famous change of constitutional course. The Court approved broad delegations to federal regulatory agencies, and it expanded Congress's Article I legislative powers." (footnotes omitted) (first citing United States v. Darby, 312 U.S. 100 (1941); then citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); and then citing United States v. Carolene Prods. Co., 304 U.S. 144 (1938))). *But see* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 4 (1991) (positioning the *Lochner* era as "a transitional era that blended the tenets of early and modern American constitutionalism").

[86] *See, e.g.*, Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 LAW & HIST. REV. 965, 965 (2015) (noting that "more than a dozen major environmental statutes passed in the 1970s").

[87] *Id.*

[88] Look no further than the raft of environmental laws—each with its own scope of liability—passed during the mid-twentieth century. *See* National Environmental Policy Act of 1969, Pub. L. No.

unwavering continuation of judicial affirmation of the legislature's growing reach.

Second, and almost contradictorily, the cases represent an increased and more muscular role of the judiciary in determining statutory liability. Although *Park* and later Supreme Court opinions[89] paint *Dotterweich*'s creation of the responsible corporate officer doctrine as compelled by congressional intent, there was nothing foreordained about grafting strict liability for individuals to a statute that merely targeted "corporations."[90] Describing *Dotterweich* and *Park* decades later, a unanimous Court characterized them as "appl[ying] unusually strict rules . . . ."[91] This description rings true because the cases imposed a kind of strict *criminal* liability.[92] So anomalous a creature, the doctrine's strict criminal liability has perplexed legal scholars attempting to precisely define the contours of that strict liability and whether there is a mens rea ele-

91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4370m-12); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387); Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended in scattered sections of 16 U.S.C.); Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 §§ 1–15); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544); Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended in scattered sections of 16 U.S.C.); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (current version at 42 U.S.C. §§ 6901–6992k); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675); *see also* William H. Rodgers, Jr., *The Environmental Laws of the 1970s: They Looked Good on Paper*, 12 VT. J. ENV'T L. 1, 1–2 (2010) (listing the foregoing statutes as the "top ten" environmental laws of the 1970s).

[89] *See Park*, 421 U.S. at 673 ("Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution."); United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984) (concluding that courts "must inquire into the congressional intent to determine whether RCRA should be construed in the same manner as was the Food and Drugs Act in *Dotterweich*" (citing 320 U.S. at 280)).

[90] *See Dotterweich*, 320 U.S. at 281 ("The statute makes 'any person' who violates [the statute] guilty of a 'misdemeanor.' It specifically defines 'person' to include 'corporation.'" (quoting 21 U.S.C. § 321(e))).

[91] Meyer v. Holley, 537 U.S. 280, 287 (2003) (first citing *Dotterweich*, 320 U.S. at 280–81; then citing *Park*, 421 U.S. at 673; then citing United States v. Wise, 370 U.S. 405, 411–14 (1962); and then citing 46 U.S.C. § 12507(d)).

[92] *See Dotterweich*, 320 U.S. at 285 (explaining that criminal liability in this instance was necessary for "[o]ur system of criminal justice").

ment.[93] In any event, *Dotterweich* and *Park* show a Court that is unafraid to create sweeping avenues of liability to further the broad remedial purposes of a statute, even if it leaves important questions as to the scope of that liability open.[94]

Third, the cases provide a jurisprudential basis for the extension of the responsible corporate officer doctrine to other statutes. After all, neither *Dotterweich* nor *Park* concluded that the responsible corporate officer doctrine was unique to the FDCA. To the contrary, the reasoning of both was that adding individual corporate officer liability was merely consistent with the FDCA's broad goals.[95] But if the Court could find a responsible corporate officer doctrine in the FDCA's targeting of any "corporation," what other statutes could support the responsible corporate officer doctrine? Or maybe the better question is which statutes could *not* support such a means of liability? The next section explores these questions as they were answered in the context of federal environmental legislation.[96]

II. The Federal Environmental Responsible Corporate Officer Doctrine

The responsible corporate officer doctrine of *Dotterweich* and *Park* has since blossomed, becoming a major enforcement tool under a number of federal statutes.[97] Particularly in the healthcare industry, the responsible corporate officer doctrine is a potent means of ensuring corporate compliance.[98] The doctrine's use has also expanded to many other industries ranging from meat branding to securities and other financial products.[99]

[93] *See* Copeland, *supra* note 22, at 811–15 (noting, among other things, the ambiguity surrounding the mens rea requirement with respect to strict criminal liability under the responsible corporate officer doctrine).

[94] *See Dotterweich*, 320 U.S. at 285 (leaving the broad responsible corporate officer doctrine largely unrefined).

[95] *See id.* at 284 (describing the purpose of the FDCA); *Park*, 421 U.S. at 673 (noting that the courts should enforce Congress's onerous liability on responsible corporate agents).

[96] *See infra* notes 97–178 and accompanying text.

[97] *See, e.g.*, Peter J. Henning, *A New Crime for Corporate Misconduct?*, 84 MISS. L.J. 43, 55–59 (2014) (discussing federal enforcement of the doctrine under a variety of statutes including, for example, "public welfare provisions . . . regulating meat branding and inspections" (first citing United States v. Jorgensen, 144 F.3d 550, 560 (8th Cir. 1998); and then citing United States v. Cattle King Packing Co., 793 F.2d 232, 235 (10th Cir. 1986))).

[98] *See id.* at 56 (describing the application of the responsible corporate officer doctrine to a pharmaceuticals case). *See generally* Jane Kim, *Staying Responsible Within the Healthcare Industry in the Era of the Responsible Corporate Officer Doctrine*, 14 IND. HEALTH L. REV. 129 (2017).

[99] Petrin, *supra* note 37, at 290.

Notwithstanding the doctrine's pharmaceutical roots, the lion's share of the doctrine's development has been in the environmental arena.[100] The reasons for this are threefold. First, Congress amended major environmental statutes to expressly include responsible corporate officers in their scope of liable parties. As detailed further below, Congress amended both the Clean Water Act and the Clean Air Act—perhaps the nation's lodestar environmental statutes—to expressly include "responsible corporate officer" in their definition of "person" for purposes of criminal violations.[101] For criminal violations, at least, Congress has been explicit about responsible corporate officer liability under environmental statutes.[102]

Second, the sweeping scope of environmental statutes and their remedial nature make them particularly well suited for the doctrine. *Dotterweich* and *Park* centered on the intent of the FDCA, namely its ambitious nature that was designed to broaden liability.[103] The U.S. Supreme Court created the responsible corporate officer doctrine to *fulfill* Congress's intent in passing the FDCA, that is, ensuring safe, unadulterated food and drugs.[104] The doctrine is merely a judicial appendage to the congressional structure, a means of ensuring that no bad actor falls through the cracks.[105] These goals—fulfilling Congressional intent and preventing bad actors from escaping liability—apply with equal force in the environmental arena. Indeed, the federal environmental statutory canon is designed to be comprehensive and remedial in much the same way as the FDCA.[106] Conceptually, then, federal environmental statutes are ideal frameworks for the doctrine.

Third, environmental law provides fertile ground for the kind of liability gap filling that the responsible corporate officer doctrine is designed to com-

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[100] *See* Aagaard, *supra* note 38, at 1263 ("[B]y 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."); Copeland, *supra* note 22, at 809 ("In the twenty years following the *Park* decision, the overwhelming majority of responsible corporate officer prosecutions were based on violations of environmental laws rather than the FDCA.").

[101] For a detailed discussion of these statutory changes, see *infra* notes 114–118, 137–139 and accompanying text.

[102] Congress has been less clear about civil liability for responsible corporate officers under federal environmental statutes. *See infra* notes 125–129, 139 and accompanying text.

[103] United States v. Dotterweich, 320 U.S. 277, 282 (1943).

[104] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[I]t is evident that one of the Act's core objectives is to ensure that any product regulated by the FDA is 'safe' and 'effective' for its intended use." (quoting 21 U.S.C. § 393(b)(2))); United States v. Lane Labs-USA Inc., 427 F.3d 219, 226 (3d Cir. 2005) ("[P]rotecting consumer health and safety is a primary purpose of the FDCA." (citing 21 U.S.C. §§ 321(p), 393(b))).

[105] *See Dotterweich*, 320 U.S. at 283 ("Congress, of course, could reverse the process and hold only the corporation and allow its agents to escape. . . . But the history of the present Act, its purposes, its terms, and extended practical construction lead away from such a result . . . .").

[106] *See supra* notes 1–15 and accompanying text.

bat. The Court's concern in *Dotterweich* about escape hatches for wrongdoers is robustly apparent in environmental cases. Environmental cases often target diffuse, longstanding harms.[107] In these cases, the corporate form can act as a means of avoiding responsibility, particularly in instances of historical contamination where traditional liability would only target long extinct corporate forms. For most of the cases where the responsible corporate officer doctrine is invoked, the harm would go unaddressed without the doctrine.[108] The responsible corporate officer doctrine, then, is a natural fit for environmental cases.

Now, onto the specific federal environmental statutes. This Part details the development of federal enforcement under environmental statutes. Each statute is discussed separately because the responsible corporate officer doctrine's development has been statute dependent. Section A discusses the Clean Water Act.[109] Section B discusses the doctrine under the Clean Air Act.[110] Section C discusses the development of the doctrine under the Resource Conservation and Recovery Act (RCRA).[111] Section D analyzes the doctrine under other federal statutes, including the Toxic Substances Control Act (TSCA).[112] Finally, Section E offers a summation of the federal responsible corporate officer doctrine in the environmental context.[113]

A. The Clean Water Act

Enacted in 1972, the CWA is a remarkably ambitious law designed to achieve fishable and swimmable waters across the United States by 1983 and eliminate all discharges of pollutants by 1985.[114] To accomplish those goals, the CWA casts a broad liability net, including criminal provisions for "knowing" violations by any "person."[115] Significantly, the CWA defines "person" in its criminal penalties provisions to include "any responsible corporate of-

[107] *See* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 745–47 (2000) (noting that environmental law focuses on "[i]rreversible, [c]atastrophic, and [c]ontinuing injury" that is "[p]hysically [d]istant" and "[t]emporally [d]istant").

[108] *See* State Dep't of Env't Prot. v. Standard Tank Cleaning Corp., 665 A.2d 753, 762 (N.J. Super. Ct. App. Div. 1995) (noting that the defendant corporation's bankruptcy would preclude effective penalties against it, and that this was a proper basis for adding individual defendants); *supra* notes 45–96 and accompanying text.

[109] *See infra* notes 115–134 and accompanying text.

[110] *See infra* notes 135–141 and accompanying text.

[111] *See infra* notes 142–153 and accompanying text.

[112] *See infra* notes 154–171 and accompanying text.

[113] *See infra* notes 172–178 and accompanying text.

[114] *See* Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 651 (2004) (noting that the goal of the Clean Water Act provisions was "fishable/swimmable waters," which "[d]idn't happen"); 33 U.S.C. § 1251(a)(1)–(3) (providing for "the [r]estoration and maintenance" of the "Nation's waters").

[115] 33 U.S.C. § 1319(c)(3), (6).

ficer."[116] Coming nearly thirty years after *Dotterweich*, this demonstrates the legislative intent that *Dotterweich* should apply to the CWA.[117]

When Congress strengthened the Clean Water Act's criminal provisions in the late 1980s, which was well after the Court decided *Park*, it retained the definition of "person" that included "responsible corporate officer[s]."[118] Courts view Congress's decision to maintain the doctrine in light of *Park* as congressional ratification of the Supreme Court's doctrinal modifications.[119]

But there are two important differences between the CWA's responsible corporate officer doctrine and that articulated by the Court. For one, the CWA provides that responsible corporate officers can be guilty of a felony, a markedly more significant penalty than the misdemeanors imposed in *Dotterweich* and *Park*.[120] Additionally, the CWA expressly requires that a criminal violation be "knowing," thereby adding a mens rea element that the Court appears not to have previously imposed.[121] The CWA's responsible corporate officer doctrine is thus more aggressive and more targeted.

Armed with a means of prosecuting criminal liability against top corporate officers, federal prosecutors have used the CWA's criminal liability in a wide variety of cases.[122] Federal courts have largely sustained these prosecutorial decisions, holding responsible corporate officers liable under the CWA.[123]

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[116] *Id.* § 1319(c)(6).

[117] United States v. Iverson, 162 F.3d 1015, 1023 (9th Cir. 1998).

[118] *See id.* at 1024 ("In 1987, after the Supreme Court decided *Park*, Congress revised and replaced the criminal provisions of the CWA. . . . Congress made no changes to its 'responsible corporate officer' provision. That being so, we can presume that Congress intended for *Park*'s refinement of the 'responsible corporate officer' doctrine to apply under the CWA." (quoting United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991))).

[119] *Id.*

[120] *See* 33 U.S.C. § 1319 (establishing felony liability); *supra* notes 45–96 and accompanying text.

[121] 33 U.S.C. § 1319(c)(2)–(3) (imposing a mens rea requirement). There is significant debate about whether *Dotterweich* and *Park* require a mens rea element. *Compare* Kimberly Kessler Ferzan, *Probing the Depths of the Responsible Corporate Officer's Duty*, 12 CRIM. L. & PHIL. 455, 460 (2018) ("Does the responsible corporate officer doctrine do away with *mens rea*? The answer to this question is 'no.'"), *with* Copeland, *supra* note 22, at 805 ("The Supreme Court has upheld the constitutionality of public welfare offenses that punish conduct in the absence of a *mens rea* requirement.").

[122] *See generally* United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001) (affirming a judgment of criminal liability under the Clean Water Act); United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001) (same); *Iverson*, 162 F.3d 1015 (same); United States v. House of Raeford Farms, Inc., Nos. 1:12CR248-1, 1:12CR248-2, 2012 WL 3283396 (M.D.N.C. Aug. 10, 2012) (noting an indictment of the defendant for violating the CWA).

[123] *See, e.g.*, *Brittain*, 931 F.2d at 1419 ("We hold that defendant, as an 'individual,' is a 'person' subject to criminal liability under the Act." (quoting 33 U.S.C. § 1362(5))).

It is perhaps this success that has led the CWA's criminal responsible corporate officer doctrine to become a "widely accepted" basis of liability.[124]

Critically, however, the CWA is not limited to a criminal responsible corporate officer doctrine; federal courts have augmented the doctrine by finding a *civil* responsible corporate officer doctrine. Although the phrase "responsible corporate officer" only appears in the CWA's criminal penalties provision, the U.S. Court of Appeals for the Sixth Circuit held in the context of an analogous non-environmental statute that "the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty."[125] Although that case involved a non-environmental statute—the Radiation Control for Health and Safety Act—other courts have imputed that reasoning to the CWA.[126] The result is that corporate officers can be—and have been—liable for civil penalties for CWA violations.[127] Although the initial push for CWA civil responsible corporate officer liability appears to be from the federal government,[128] private litigants have since taken up the charge through citizen suits.[129]

The expansion of CWA responsible corporate officer liability to civil liability has two important effects. First, it allows environmental advocates and non-profit groups to police CWA compliance through civil citizen suits.[130] Citizen suits comprise a substantial number of enforcement actions under federal environmental laws.[131] They serve the critical role of democratizing enforce-

[124] *See* Aagaard, *supra* note 38, at 1263. Professor Aagaard referred to the doctrine's prominence in environmental law generally, but his point applies with particular force to the CWA. *See id.*

[125] United States v. Hodges X-Ray, Inc., 759 F.2d 557, 561 (6th Cir. 1985).

[126] *Id.* at 560. *See, e.g.*, Stillwater of Crown Point Homeowner's Ass'n v. Kovich, 820 F. Supp. 2d 859, 891–92 (N.D. Ind. 2011) (discussing *Hodges X-Ray* and finding that the CWA's responsible corporate officer doctrine applied to civil violations); City of Newburgh v. Sarna, 690 F. Supp. 2d 136, 160–61 (S.D.N.Y. 2010) (same); Waterkeepers N. Cal. v. AG Indus. Mfg., Inc., No. CIV-S-00-1967, 2005 WL 2001037, at *12–13 (E.D. Cal. Aug. 19, 2005) (same).

[127] *See Stillwater*, 820 F. Supp. 2d at 892–93 (holding that "the responsible corporate officer doctrine extends to civil violations under the Clean Water Act," and that there was a genuine issue of material fact as to the defendant's personal liability "under the applicable responsible corporate officer doctrine for CWA violations").

[128] *See* United States v. Osborne, No. 1:11-CV-1029, 2012 WL 1096078, at *5 (N.D. Ohio Mar. 30, 2012) (ruling on the federal government's responsible corporate officer allegations under the CWA).

[129] *See, e.g.*, *Stillwater*, 820 F. Supp. 2d at 893 (noting that plaintiffs homeowner's association and its members brought a civil CWA citizen suit against developers as responsible corporate officers). Non-governmental plaintiffs can sue through the CWA's citizen suit provision, codified in 33 U.S.C. § 1365(a).

[130] 33 U.S.C. § 1365(a).

[131] *See* James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 3 (2003) ("Since the first environmental citizen suit in 1970, and 880 more by 1988, citizens of all walks and pursuits, some with environmental interests, others economic, have

ment of the law, thereby permitting community buy in and ownership of resolving environmental harms.[132] Allowing civil responsible corporate officer liability strengthens these tenets of citizen suits by expanding their reach. Indeed, the broadened scope of civil liability results in increased deterrence.[133]

Second, civil responsible corporate officer liability generally does not require a mens rea element. As discussed,[134] the extent of a mens rea requirement under the criminal responsible corporate officer doctrine is disputed, but there is little doubt that a civil claim does not require it. Without a mens rea element, civil responsible corporate officer claims under the CWA are easier to prove.

B. The Clean Air Act

The CAA mirrors the CWA's incorporation of the responsible corporate officer doctrine.[135] Like the CWA, the CAA is an ambitious and comprehensive statute, designed "to protect and enhance the quality of the Nation's air resources . . . ."[136] In 1977, Congress expanded the definition of "person" in the CAA to include "any responsible corporate officer."[137] Again, this post-*Park* amendment is evidence of congressional approval of the doctrine. And, like the CWA, federal prosecutors have used the CAA's criminal provision to target individual corporate officers.[138] Courts have likewise grafted civil responsible corporate officer responsibility onto the CAA.[139]

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filed more than 2,000 citizen suits." (footnotes omitted)). *But see* David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 388 (2020) ("Drawing on empirical studies of citizen suits filed under the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) between 2001 and 2016, we observe striking differences in the type, location, and number of suits filed.").

[132] *See* May, *supra* note 131, at 5 ("[Citizen suits] foster the rule of law, agency accountability, representational democracy, and environmental stewardship." (citing David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1651–52 (1995))).

[133] *See* Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 82 (1995) ("Encouraging citizen suits by community-based groups in poor and minority neighborhoods may further deter the practice of targeting such communities for polluting activity because of lax compliance and less costly cleanups.").

[134] *See supra* note 121 and accompanying text.

[135] 42 U.S.C. § 7401(b)(1).

[136] *Id.*

[137] Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC, 374 F. Supp. 3d 1124, 1137 (D. Utah 2019).

[138] *See, e.g.*, United States v. Mac's Muffler Shop, Inc., No. C85-138R, 1986 WL 15443, at *7 (N.D. Ga. Nov. 4, 1986) (finding a corporate officer individually liable under the CAA). The *Mac's Muffler Shop* court reasoned that civil penalties were available against responsible corporate officers under the CAA because other courts adopted the doctrine under the CWA. *See id.*

[139] *See, e.g.*, *Utah Physicians for a Healthy Env't*, 374 F. Supp. 3d at 1137 ("Although the Tenth Circuit has not spoken on this issue, a number of other courts have held responsible corporate officers

For all its similarities to the CWA, though, the CAA has a less developed responsible corporate officer doctrine. Citizen suit and government enforcement of the doctrine under the CAA pales in comparison to that of the CWA.[140] In fact, the most detailed examination of whether the CAA allows for a civil responsible corporate officer doctrine comes from a 2019 U.S. District Court for the District of Utah opinion that admitted the lack of circuit court guidance and some "outlier decisions."[141] That this decision came some forty years after the CAA was amended to include responsible corporate officer liability only further underscores that the doctrine is less used under the CAA.

C. The Resource Conservation and Recovery Act

The RCRA is the nation's keystone law for solid and hazardous waste, imposing a "cradle to grave" regulatory scheme.[142] Like the CWA and CAA, the RCRA is a broad public welfare statute.[143] But unlike those other statutes, the RCRA does not contain an explicit recognition of the responsible corporate officer doctrine. Indeed, the statute's definition of "person" does not include "responsible corporate officer."[144]

That is not to say that the RCRA lacks a responsible corporate officer doctrine. In the late 1980s and early 1990s, the federal government targeted

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can be held liable in CAA and Clean Water Act civil enforcement actions, despite the absence of specific language to that effect in the citizen enforcement provisions." (footnotes omitted) (first citing *Mac's Muffler Shop*, 1986 WL 15443, at *7; then citing Humboldt Baykeeper v. Simpson Timber Co., No. C 06-04188, 2006 WL 3545014, at *4 (N.D. Cal. Dec. 8, 2006); and then citing City of Newburgh v. Sarna, 690 F. Supp. 2d 136, 160 (S.D.N.Y. 2010))); *Humboldt Baykeeper*, 2006 WL 3545014, at *4 (applying the Clean Water Act and noting that "courts consistently have held that individuals whose acts or omissions have led to such pollution may be held responsible individually, notwithstanding the fact that they may have been acting in their capacity as an employee or officer of a company" (citing United States v. Iverson, 162 F.3d 1015, 1022–26 (9th Cir. 1988))); *Sarna*, 690 F. Supp. 2d at 160 ("The few courts . . . that have expressly considered the question of whether the responsible corporate officer doctrine applies in a civil CWA case have concluded that it does." (citing *Humboldt Baykeeper*, 2006 WL 3545014, at *4)), *aff'd in part, appeal dismissed in part*, 406 F. App'x 557 (2d Cir. 2011).

[140] *See Summary of Criminal Prosecutions*, EPA, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm? [https://perma.cc/S9RK-4K6C] (Jan. 28, 2023) (showing four criminal CWA responsible corporate officer cases in the past decade and zero criminal CAA responsible corporate officer cases during the same time period). There is also less case law on the CAA's responsible corporate officer doctrine compared to the CWA, further signaling that it is less frequently used.

[141] *See Utah Physicians for a Healthy Env't*, 374 F. Supp. 3d at 1137–38 (noting that the U.S. Court of Appeals for the Tenth Circuit had not yet spoken on whether responsible corporate officers could be personally liable in "CAA and Clean Water Act civil enforcement actions" (footnote omitted)).

[142] DiTata, *supra* note 25, at 796; 42 U.S.C. §§ 6901–6992k.

[143] *See* DiTata, *supra* note 25, at 796 (noting that the RCRA "has been recognized as a public welfare statute").

[144] *See* 42 U.S.C. § 6903(15) (defining "person" and omitting "responsible corporate officer" from this definition).

several responsible corporate officers under RCRA.[145] They did so with mixed success. In 1987, the U.S. District Court for the Northern District of Indiana agreed that a corporate officer could be criminally targeted under RCRA because they were a "person" under RCRA and because including corporate officers was consistent with the statute's broad remedial purpose.[146] The district court, however, did not expressly graft *Dotterweich*'s responsible corporate officer doctrine onto the RCRA.[147]

When federal prosecutors attempted to expressly incorporate *Dotterweich* into the RCRA, the U.S. Court of Appeals for the First Circuit disagreed.[148] In a 1991 opinion, the First Circuit noted that RCRA's criminal provisions required a mens rea element of "knowledge."[149] The strict liability doctrine envisioned by *Dotterweich* and *Park* did not comport with this express statutory requirement.[150]

The U.S. Court of Appeals for the Tenth Circuit took a different tack in a 1993 RCRA case, noting that the "knowingly" requirement did not prevent the introduction of "circumstantial evidence, including position and responsibility of defendants . . . ."[151] In other words, the strict liability responsible corporate officer doctrine may be inappropriate under the RCRA's statutory language, but there is still room under the RCRA to prosecute responsible corporate officers, at least in instances where "knowledge" is implied by the evidence.[152]

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[145] *See, e.g.*, United States v. Conservation Chem. Co. of Ill., 660 F. Supp. 1236, 1246 (N.D. Ind. 1987); *see also* United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 55 (1st Cir. 1991); United States v. Self, 2 F.3d 1071, 1088 (10th Cir. 1993).

[146] *See Conservation Chem. Co.*, 660 F. Supp. at 1246 (denying motion to dismiss "because [the defendant] is a 'person' within the meaning of section 3008(a) . . . and because holding corporate officers liable under RCRA is consonant with [c]ongressional intent").

[147] *See id.* (holding a corporate officer liable under the RCRA but omitting *Dotterweich* from the legal analysis).

[148] *See MacDonald & Watson Waste Oil Co*., 933 F.2d at 55 ("In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge.").

[149] *Id.*

[150] *Id.* This conclusion ignores that both the CWA and the CAA have versions of the doctrine with a mens rea element of "knowingly." Although, to be fair, both the CWA and CAA do so in express terms. 33 U.S.C. § 1319(c)(2) (CWA); 42 U.S.C. § 7413(c) (CAA).

[151] United States v. Self, 2 F.3d 1071, 1088 (10th Cir. 1993) (quoting *MacDonald & Watson Waste Oil Co.*, 933 F.2d at 55).

[152] DiTata, *supra* note 25, at 814. The U.S. Court of Appeals for the Third Circuit, for example, has found this type of liability under the RCRA despite the absence of a strict liability responsible corporate officer doctrine under the statute:

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

This analysis places the RCRA's version of the doctrine largely in line with the CWA and CAA forms.

In short, courts have not extended the responsible corporate officer doctrine under the RCRA to the same extent as under the CWA or the CAA. Indeed, there does not appear to be a civil form of the doctrine under the RCRA.[153] Despite the lack of clear statutory language, however, the responsible corporate officer doctrine continues to exist under the RCRA in limited circumstances.

D. Other Federal Environmental Statutes

The responsible corporate officer doctrine does not exist under other federal environmental statutes. The patchwork of other federal environmental statutes—the TSCA,[154] the Safe Drinking Water Act (SDWA),[155] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[156] to name a few—do not include "responsible corporate officer" in their definitions of liable parties.[157] Some statutes, however, like the SDWA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), name "agents" of any corporation as potentially liable parties.[158] But most others, like CERCLA, do not.[159]

Congress's decision to include "responsible corporate officers" in some environmental statutes (the CWA and the CAA), "agents of any corporation" in others (the SDWA and the FIFRA), and not in others (the TSCA and the CERCLA) is inscrutable. Scholars have suggested three possible reasons for the discrepancies: (1) an intentional choice to heighten corporate officer liability

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United States v. Johnson & Towers, Inc., 741 F.2d 662, 670 (3d Cir. 1984).

[153] That is not to say, of course, that RCRA lacks civil penalties. On the contrary, the RCRA has robust civil penalty provisions that some courts have characterized as "strict liability offenses not requiring proof of willful intent." United States v. Liviola, 605 F. Supp. 96, 100 (N.D. Ohio 1985). But no case illustrates application of the responsible corporate officer doctrine to the RCRA's civil penalties. This has led at least one commentator to argue that "responsible corporate officers should be held strictly liable for civil violations of RCRA." Noël Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 STAN. ENV'T L.J. 283, 336 (2002).

[154] 15 U.S.C. §§ 2601–2629.

[155] 42 U.S.C. § 300f.

[156] *Id.* §§ 9601–9675.

[157] *See id.* § 300f(12) (defining "person"); *id.* § 9601(21) (same).

[158] *See* Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENV'T AFFS. L. REV. 579, 587 n.29 (1993) (describing liable parties under the SDWA and FIFRA); David W. Tundermann, *Personal Liability for Corporate Directors, Officers, Employees and Controlling Shareholders Under State and Federal Environmental Laws*, 31 ROCKY MTN. MIN. L. INST. § 2.03(1) (1985).

[159] *See* 42 U.S.C. § 9601(21) (omitting "agents").

under the CWA and the CAA but not others; (2) an intentional choice to differentiate between "agents of any corporation" on the one hand and proprietors, general partners, or controlling shareholders on the other; or (3) an oversight.[160] Other scholars have noted that it is "unlikely that Congress meant to convey any important message regarding the extent of individual liability simply through its use of inconsistent terms throughout the various federal environmental statutes."[161] In other words, the discrepancies may be unintentional. Indeed, because the statutes were passed by different Congresses, it appears that the conflicting language is an oversight.

Whatever the reason, the differing statutory language has made an impact. Consider CERCLA, for instance. In 1986, just six years after the statute's passage, federal prosecutors sought to impose individual liability on corporate officers under CERCLA.[162] The U.S. Court of Appeals for the Eighth Circuit agreed, noting that CERCLA's use of "person" "does not exclude corporate officers or employees."[163] Moreover, the court observed that limiting CERCLA to impose liability on the corporate entity alone to the exclusion of its constituents that act on behalf of it would create an impermissible statutory loophole.[164] On those facts—where the corporate officer had personal involvement in the violations—individual liability was appropriate.[165]

That caveat—that the corporate officer must be personally involved in the violation—soon swallowed the rule. When the federal government subsequently attempted to criminally prosecute two principal corporate shareholders under CERCLA, the U.S. Court of Appeals for the Third Circuit limited liability to "those who actively participate" in the violation.[166] Relying on CERCLA's plain language, the Third Circuit denied the government's request to impose liability on control group constituents of a corporation that did not participate in the wrongful acts.[167]

The Third Circuit's decision has effectively ruled out responsible corporate officer liability under CERCLA. Indeed, limiting individual liability under CERCLA to "those who actively participate" is a far cry from the responsible corporate officer doctrine's purpose of holding accountable those in positions

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[160] *See* Tundermann, *supra* note 158, § 2.03(1)(a); *see also* Oswald, *supra* note 158, at 587 n.29.

[161] Oswald, *supra* note 158, at 588 n.29.

[162] *See* United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986) (describing the government's arguments for holding an individual corporate officer liable under CERCLA).

[163] *Id.* (citing 42 U.S.C. § 9601(21)).

[164] *Id.*

[165] *See id.* at 744 (holding a corporate officer "liable because he personally participated in the wrongful conduct").

[166] United States v. USX Corp., 68 F.3d 811, 824–25 (3d Cir. 1995).

[167] *Id.* at 822.

of responsibility to *prevent* violations.[168] And, of course, those who "actively participate" in a violation would likely be liable under enumerated categories of CERCLA liability, such as operators, generators, and transporters.[169] Consequently, it appears that the federal government has not since tried a CERCLA responsible corporate officer case.[170] In fact, when two responsible corporate officers were recently convicted for conspiracy to commit violations of the CWA, the RCRA, and the CERCLA, the federal government made plain on appeal that it intended for the jury instructions on the responsible corporate officer doctrine to apply *only* to the CWA.[171] Even the federal government appears to believe that the CERCLA does not contain the doctrine.

Thus, outside of the CWA, the CAA, and the RCRA, the responsible corporate officer doctrine is not available under federal environmental statutes.

E. The Federal Environmental Responsible Corporate Officer Doctrine

The earlier discussion on three separate environmental statutes—the CWA, CAA, and RCRA—and the development of the responsible corporate officer doctrine within them elicits three observations.

First, the responsible corporate officer doctrine is statute dependent. The CWA's inclusion of the doctrine and its subsequent development contrasts with the doctrine's stilted development under the RCRA, which does not specifically include it.[172] This statute-specific nature of the responsible corporate officer doctrine precludes large scale adoption or wholesale changes. Doctrinal and prosecutorial developments must happen on a statute-by-statute basis. This has important implications for the doctrine's adoption at the state level, more fully discussed below.[173]

Second, the statutory inclusion of the responsible corporate officer doctrine is insufficient to promote use and application of the doctrine. The CAA has the same statutory language as the CWA but has had far fewer recorded cases—and accordingly fewer doctrinal developments in its responsible corpo-

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[168] *Id.* at 824.

[169] *See generally* 42 U.S.C. § 9607 (delineating "covered persons").

[170] *See* Wise, *supra* note 153, at 329 n.246 (arguing for responsible corporate officer liability under CERCLA but noting that "[i]t is not surprising that so few courts have considered whether the [responsible corporate officer] doctrine applies to CERCLA as the government has generally failed to allege the doctrine as a theory of liability in its cases").

[171] *See* Brief for the United States at 45–46, United States v. Hansen, 262 F.3d 1217, (11th Cir. 2001) (No. 99-11638-DD), 1999 WL 33607471 (noting that "the clarifying instruction could only have been understood for what it was: a clarification of the statutory definition of 'person' in the CWA charge").

[172] *See supra* notes 142–153 and accompanying text.

[173] *See infra* notes 325–371 and accompanying text.

rate officer doctrine.[174] A federal district court decided only a few years ago—with an admitted lack of precedent—that there was a civil form of the doctrine under the CAA.[175] This demonstrates that prosecutorial discretion plays a large role in the doctrine's development.

Third, although prosecutorial results may be mixed, the federal environmental responsible corporate officer doctrine is widespread and a key component of federal environmental law. As one commentator put it, "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."[176] Recent cases[177] and continuing scholarly interest[178] in the federal form of the doctrine illustrate the responsible corporate officer doctrine's continuing role in the modern canon.

III. The State Environmental Responsible Corporate Officer Doctrines

In addition to the well-established federal environmental responsible corporate officer doctrine, several states have recognized the state environmental responsible corporate officer doctrine. Some have done so legislatively, whereas others have done so judicially. As a general matter, states have adopted the doctrine in the civil context. This Part details the existing ten state environmental responsible corporate officer doctrines.[179] It concludes by critically analyzing the state of the various doctrines.[180]

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[174] *See supra* notes 126–131 and accompanying text.

[175] *See* Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC, 374 F. Supp. 3d 1124, 1137–38 (D. Utah 2019) (noting that the Tenth Circuit has not considered the issue of civil liability for responsible corporate officers under the CWA).

[176] Aagaard, *supra* note 38, at 1263.

[177] *See, e.g.*, *Utah Physicians for a Healthy Env't*, 374 F. Supp. 3d at 1138 (analyzing the responsible corporate officer doctrine as recently as 2019).

[178] *See, e.g.*, Ferzan, *supra* note 121, at 459 (discussing the responsible corporate officer doctrine); John Hasnas, *The Real Danger of the Responsibility Surplus*, 17 GEO. J.L. & PUB. POL'Y 935, 939 (2019) (discussing the "significance" and trajectory of the responsible corporate officer doctrine).

[179] *See infra* notes 180–325 and accompanying text (to separate out the various states). Several other states may have broad environmental statutes that *could*, conceivably, cover responsible corporate officers in certain circumstances. *See, e.g.*, FLA. STAT. § 403.412(2)(a) (2022) (authorizing any "citizen of the state" to "maintain an action for injunctive relief against" "[a]ny person" for violations of "any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state"). But those states are not included here for two reasons: (1) their current liability regimes do not expressly recognize responsible corporate officer liability, making comparisons unwieldy and future adoption of the doctrine possible; and (2) there is no jurisprudential evidence that the possibility of liability of responsible corporate officers in certain circumstances has, in fact, led to liability for individual corporate officers.

[180] *See infra* notes 313–325 and accompanying text.

A. Alabama

Alabama's state version of the Clean Water Act—the Alabama Water Pollution Control Act (AWPCA)—takes from its federal counterpart and includes "responsible corporate officer" in its definition of "person."[181] In theory, at least, this should subject responsible corporate officers to criminal liability for willful or grossly negligent violations of the AWPCA.[182]

But a statute is only as strong as its enforcement, and Alabama has rarely targeted responsible corporate officers under the AWPCA. Indeed, there is only one recorded instance of the state seeking responsible corporate officer liability under the statute.[183] And in that case the state only targeted a responsible corporate officer after the federal government first filed suit against the officer for CWA and RCRA violations.[184]

B. California

California has adopted the responsible corporate officer doctrine under both its Hazardous Waste Control Act (HWCA) and its laws governing the underground storage of hazardous substances.[185]

It incorporated the doctrine into the HWCA almost *sub silento* in *People v. Matthews*.[186] There, a corporate president was charged with violating the HWCA by illegally storing and disposing of hazardous waste.[187] The corporation, which was also charged, pleaded nolo contendere in exchange for the state dropping its charges against the corporate president.[188] Then, over the

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[181] ALA. CODE § 22-22-1(b)(7) (2022).

[182] *Id.* § 22-22-14(a) ("Any person who willfully or with gross negligence violates any provision of the chapter, or rule, regulation or standard adopted under this chapter, or any condition or limitation in a permit issued under this chapter shall be punished by a fine of not less than $2,500.00 nor more than $25,000.00 per day of violation or by imprisonment for not more than one year, or by both."). Alabama's mens rea of "willfully or with gross negligence" is higher than the CWA's "knowingly." *Compare id.* ("Any person who willfully or with gross negligence violates . . . ."), *with* 33 U.S.C. § 1319(c)(2)–(3) ("Any person who knowingly violates . . . .").

[183] *See* United States v. Ilco, Inc., No. CV85-H-823-S, 1990 WL 300298, at *3 (N.D. Ala. Dec. 10, 1990) (noting that Alabama and the Alabama Department of Environmental Management brought a claim under the Alabama Water Pollution Control Act (AWPCA) as intervening plaintiffs).

[184] *See id.* at *2–3 (noting that the United States filed numerous claims against the president and principal owner of the corporation and that Alabama later intervened and filed additional state AWPCA violations against the owner).

[185] *See* People v. Matthews, 9 Cal. Rptr. 2d 348, 351–54 (Ct. App. 1992) (analyzing the application of the responsible corporate officer doctrine under the Hazardous Waste Control Act (HWCA)); People v. Roscoe, 87 Cal. Rptr. 3d 187, 195 (Ct. App. 2008) (expressly holding that the responsible corporate officer doctrine applies to California hazardous substance tank storage laws); CAL. HEALTH & SAFETY CODE § 25189.5 (West 2022); *id.* § 25299(a)(6).

[186] *Matthews*, 9 Cal. Rptr. 2d at 351–54.

[187] *Id.* at 349.

[188] *Id.*

state's objection, the corporate president moved to seal and destroy the records of his booking and arrest.[189] In reversing the trial court's granting of the president's motion to seal, the California Court of Appeals noted that the HWCA was a public welfare statute that imposed strict liability for violations.[190] Although the court never used the phrase "responsible corporate officer," it opined that "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."[191] This notion, of course, is the premise of the responsible corporate officer doctrine.

A subsequent California Court of Appeals cited *Matthews* as adopting responsible corporate officer liability under the HWCA.[192] In that case—*People v. Roscoe*—the court explicitly adopted the responsible corporate officer doctrine under the laws governing underground storage of hazardous substances, referred to as "tank laws."[193] Two corporate officers faced individual charges stemming from an underground storage tank that leaked thousands of gallons of gasoline.[194] The corporate officers maintained that the tank laws only imposed liability, per the statute's terms, on "any operator," defined as "any person."[195]

The *Roscoe* court disagreed. It detailed the scope and extent of the responsible corporate officer doctrine, beginning with *Dotterweich* and *Park* and referring to several other state's adoptions of the doctrine.[196] Noting that the tank laws could be interpreted to impose liability on corporate officers,[197] the court held that the responsible corporate officer doctrine comported with the legislature's history of broadening liability under the statute through amendments. Indeed, the tanks laws are exactly "the type of strict liability public welfare statute" to which the doctrine has traditionally attached.[198] The doctrine's incorporation under the tank laws, therefore, was appropriate.[199]

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[189] *Id.*

[190] *Id.* at 351.

[191] *Id.* at 354.

[192] People v. Roscoe, 87 Cal. Rptr. 3d 187, 193 (Ct. App. 2008) (noting the application of the responsible corporate officer doctrine to the HWCA in *Matthews*).

[193] *Id.* at 195.

[194] *Id.* at 189.

[195] *See id.* at 191 (observing the officers' argument that they should not be personally liable because the corporation was found to be the "owner and operator" of the tank).

[196] *See id.* at 191–94 (tracing the roots of the responsible corporate officer doctrine).

[197] *Id.* at 194.

[198] *Id.* at 195.

[199] *Id.*

Despite the responsible corporate officer doctrine's adoption under California's hazardous waste laws, it does not appear to have been adopted under other California environmental laws.

C. Connecticut

Connecticut has a well-developed environmental responsible corporate officer doctrine. In 1993, the Connecticut Supreme Court appeared to graft common law principles onto the state's environmental statutes, noting that the Connecticut Water Pollution Control Act (CWPCA) was "intended to track and incorporate the common law of public nuisance."[200] The court accordingly held that an innocent landowner could be liable for environmental harms caused by the previous landowner.[201]

Less than ten years later, the court did much the same thing with the responsible corporate officer doctrine. In *BEC Corp. v. Department of Environmental Protection*, the state targeted two corporate officers for individual liability under the CWPCA.[202] The court found that the CWPCA supported such liability as it defined a liable "person" as "any officer . . . of any . . . corporation . . . ."[203] Although not as clear as the definitions under the CWA or the CAA, the language in the CWPCA nevertheless convinced the court to conclude that the responsible corporate officer doctrine applied under the statute.[204]

Much like the U.S. Supreme Court in *Dotterweich*, the Connecticut Supreme Court first noted that the statutory language compelled the responsible corporate officer doctrine.[205] Building on that language, and relying heavily on a Minnesota Court of Appeals formulation of the doctrine, the Connecticut Supreme Court then articulated the contours of the CWPCA's responsible corporate officer doctrine, concluding that it was applicable to "actions or inactions" and distinct from derivative liability.[206] Importantly, in so doing, the court adopted a strict liability version of the doctrine.[207] The doctrine is consistent

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200 Starr v. Comm'r of Env't Prot., 627 A.2d 1296, 1309 (Conn. 1993); CONN. GEN. STAT. §§ 22a-416 to -599 (2022).

201 *See Starr*, 627 A.2d at 1309–11 (noting that the CWPCA applies to "landowners who were passively maintaining a nuisance" and those "who had actively created or established a source of pollution" in the past).

202 775 A.2d 928, 930 (Conn. 2001).

203 *Id.* at 937 (emphasis omitted) (quoting § 22a-423).

204 *Id.* at 936.

205 *See id.* at 937 (noting that the "language of § 22a-423 strongly suggests" responsible corporate officer liability); United States v. Dotterweich, 320 U.S. 277, 282–83 (1943).

206 *BEC Corp.*, 775 A.2d at 938 (citing *In re* Dougherty, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992)). The court mistakenly referred to the *Dougherty* case as authored by the Minnesota Supreme Court. *Id.* at 937.

207 *Id.* at 937–38 (adopting Minnesota's approach to the responsible corporate officer doctrine, which imposes strict liability); *see* Ventres v. Goodspeed Airport, LLC, 881 A.2d 937, 962–63 (Conn.

with a liberal construction of the CWPCA, and resolves issues "against the landowner and in favor of the public and clean water . . . ."[208] Moreover, the doctrine is consistent with the robust body of federal case law applying the environmental responsible corporate officer doctrine.[209]

Subsequent cases have only further established and expanded the responsible corporate officer doctrine under Connecticut law. In 2007, in *Celentano v. Rocque*, for example, the Connecticut Supreme Court held that the responsible corporate officer doctrine also applies to the state statute governing dam inspection and repair.[210] Although that statute did not include "officers" in its definition of "person," the court reasoned that it did not need to consider the legislature's express language, but rather whether the statute was of the class to which the doctrine traditionally attached.[211] Because the dam statute "is a strict liability public welfare statute," the responsible corporate officer doctrine comported with the legislative goal of establishing broad liability.[212]

More recently, the Connecticut Supreme Court has tempered its embrace of a pervasive responsible corporate officer doctrine. In 2015, the court stepped back from endorsing the responsible corporate officer doctrine under *every* public welfare statute.[213] The court concluded that the Aquifer Protection Act did not permit a civil responsible corporate officer doctrine, despite the definition of "person" being the same as the dam statute in *Celentano*.[214] Curiously, the court nonetheless reaffirmed that the Aquifer Protection Act provided for criminal responsible corporate officer liability, just not *civil*.[215]

2005) (describing *BEC Corp.* as "based on a case imposing liability on corporate officers for strict liability public welfare offenses" (citing *BEC Corp.*, 775 A.2d at 937)).

[208] *BEC Corp.*, 775 A.2d at 940 (quoting Starr v. Comm'r of Env't Prot., 627 A.2d 1296, 1314 (Conn. 1993)).

[209] *Id.*

[210] 923 A.2d 709, 721–23 (Conn. 2007); CONN. GEN. STAT. §§ 22a-401 to -411 (2022).

[211] *Celentano*, 923 A.2d at 722.

[212] *Id.* at 722–23.

[213] *See* Comm'r of Env't Prot. v. Underpass Auto Pts. Co., 123 A.3d 1192, 1208–11 (Conn. 2015) (holding that the responsible corporate officer doctrine does not apply to civil violations under the Aquifer Protection Act).

[214] *Id.* at 1209, 1211 (interpreting the Aquifer Protection Act, for which "person" is defined by General Statutes of Connecticut § 22a-2(b)); *cf. Celentano*, 923 A.2d at 722 (interpreting § 22a-402, the dam repair and inspection act, for which "person" is also defined by § 22a-2(b)).

[215] *Underpass Auto Parts*, 123 A.3d at 1209, 1211. This is the opposite conclusion of most courts. *See* United States v. Hodges X-Ray, Inc., 759 F.2d 557, 561 (6th Cir. 1985) ("Hodges attempted to distinguish *Park* and *Dotterweich* with the argument that they applied to criminal, rather than civil liability. However, the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty. The fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation that violate health and safety statutes renders *civil* liability appropriate as well.").

D. Delaware

Curiously, Delaware, a state that is generally perceived as solicitous to corporate interests,[216] has a state environmental responsible corporate officer doctrine, albeit a limited one. In 1993, the Delaware Supreme Court concluded that a corporate officer could be individually liable under the state's hazardous waste law.[217] After all, the analogous federal hazardous waste statute—the RCRA—provided for responsible corporate officer liability.[218] And the state hazardous waste law included "responsible party" in its definition of liable parties.[219]

But when adopting the responsible corporate officer doctrine, the Delaware Supreme Court limited liability to corporate officers who "directed, ordered, ratified, approved, or consented to the improper disposal" of hazardous waste.[220] This narrow view of the doctrine contrasts with the "acts or omissions" language employed in other contexts.[221] Moreover, the language effectively cabins the doctrine's applicability to those responsible corporate officers who would have been liable under other traditional bases of liability.

Perhaps as a result, Delaware's environmental responsible corporate officer doctrine has rarely been used. Even in the 1993 case the court adopted the doctrine but noted that it did not apply on that case's facts.[222] No subsequent cases have developed the doctrine further.

E. Hawaii

Somewhat unusually, Hawaii's legislature has made responsible corporate officer liability a component of its penal code.[223] The penal code contains two

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[216] *See, e.g.*, Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html [https://perma.cc/M88N-Z78L] ("Delaware today regularly tops lists of domestic and foreign tax havens because it allows companies to lower their taxes in another state . . . .").

[217] *See* T.V. Spano Bldg. Corp. v. Dep't of Nat. Res. & Env't Control, 628 A.2d 53, 60–61 (Del. 1993) (noting that the definition of "person" under Delaware's hazardous waste disposal law is "broad enough to include a corporate officer as a responsible party"); DEL. CODE ANN. tit. 7, §§ 6301–6309 (2022).

[218] *T.V. Spano*, 628 A.2d at 61.

[219] *See id.* at 60 (citing tit. 7, § 6302(10)).

[220] *Id.* at 61 (citing 3A TIMOTHY P. BJUR & J. JEFFREY REINHOLTZ, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 1135 (perm. ed., rev. vol. 1990)).

[221] *See* Humboldt Baykeeper v. Simpson Timber Co., No. C 06-04188, 2006 WL 3545014, at *4 (N.D. Cal. Dec. 8, 2006) (noting that "courts consistently have held that individuals whose acts or omissions have led to such [CWA] pollution may be held responsible individually, notwithstanding the fact that they may have been acting in their capacity as an employee or officer of a company"); *supra* notes 97–178 and accompanying text.

[222] *T.V. Spano*, 628 A.2d at 62.

[223] HAW. REV. STAT. § 702-228 (2022).

provisions that appear to codify individual responsible corporate officer liability:

> [a] person is legally accountable for any conduct the person performs or causes to be performed in the name of a corporation or an unincorporated association or in its behalf to the same extent as if it were performed in the person's own name or behalf;[224]

and

> [w]henever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or the unincorporated association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon the agent.[225]

The Hawaii Supreme Court interpreted these provisions—along with *Dotterweich* and *Park*—as permitting a form of the responsible corporate officer doctrine under a state environmental statute.[226] In 1980, in *State v. Kailua Auto Wreckers, Inc.*, the state charged two corporate officers whose company openly burned automobiles in violation of a state open burning regulation, and the court had little trouble concluding that the regulation included responsible corporate officer liability because it was a "strict liability" statute "intended to protect the public from the harmful effects of air pollution."[227] Indeed, "[t]o find otherwise . . . would be to permit corporate officers to escape liability by claiming ignorance,"[228] a rationale commonly employed in adopting the doctrine.[229]

Nonetheless, for all the Hawaii Supreme Court's broad language, the court has not addressed the doctrine since. Although the legislature has since expressly added the responsible corporate officer doctrine to the state's water

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224 *Id.* § 702-228(1).

225 *Id.* § 702-228(2).

226 615 P.2d 730, 736–40 (Haw. 1980).

227 *Id.* at 738–39.

228 *Id.* at 739–40.

229 *See* United States v. Dotterweich, 320 U.S. 277, 283 (1943) ("Congress, of course, could reverse the process and hold only the corporation and allow its agents to escape. . . . But the history of the present Act, its purposes, its terms, and extended practical construction lead away from such a result . . . ."); Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs, No. 2:13-cv-02095, 2016 WL 4717986, at *14 (E.D. Cal. June 10, 2016) ("[A] corporate officer with authority over the activities underlying alleged violations should not escape liability by virtue of having delegated certain implementing tasks." (citing Waterkeepers N. Cal. v. AG Indus. Mfg., Inc., No. CIV-S-00-1967, 2005 WL 2001037, at *12–13 (E.D. Cal. Aug. 19, 2005)).

pollution act,[230] it does not appear that the doctrine has been judicially adopted under any other state environmental statute or that it has been litigated further.

F. Illinois

Illinois, too, has a robust state responsible corporate officer doctrine under its environmental laws. Part of this is due to Illinois's omnibus environmental statute, the Illinois Environmental Protection Act (IEPA).[231] Unlike other state environmental statutes that typically regulate a single area or industry, the IEPA covers almost everything.[232] Described as the state's comprehensive, unified approach to environmental regulation[233] the IEPA covers air pollution,[234] water pollution,[235] land pollution and refuse disposal,[236] toxic chemical reporting,[237] and oil spills,[238] among others.[239] It also functions as "the state's 'mini-superfund' provision . . . ."[240]

Spanning these disparate areas, the IEPA allows for responsible corporate officer liability. Illinois courts first articulated the IEPA's incorporation of the doctrine in a 1995 case—about the same time that the federal environmental responsible corporate officer doctrine solidified under the CWA, CAA, and RCRA.[241] In *People ex rel. Burris v. C.J.R. Processing, Inc.*, the state filed a civil complaint against a corporate officer for various violations of the IEPA, including transporting and storing large quantities of solid waste.[242] In the context of a motion to dismiss for failure to state a claim, the Illinois Appellate Court noted that federal courts have long held corporate officers liable for vio-

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[230] *See* HAW. REV. STAT. § 342D-37 (2022) ("For the purpose of this chapter, the term 'person' means, in addition to the definition contained in section 342D-1, any responsible corporate officer."). Presumably, this clarification to the state's water pollution statute is modeled on the CWA, which also expressly adopts the doctrine. *See supra* notes 114–134 and accompanying text.

[231] 415 ILL. COMP. STAT. 5/1 to /58.17 (2022).

[232] *Statutes & Regulations*, ILL. ENV'T PROT. AGENCY, https://www2.illinois.gov/epa/about-us/rules-regs/Pages/default.aspx [https://perma.cc/F5FF-8WF2] (noting that the Act establishes a "unified, state-wide" environmental program).

[233] *Id.*

[234] 415 ILL. COMP. STAT. 5/8 to /10.

[235] *Id.* 5/11 to /13.9.

[236] *Id.* 5/20 to /62.

[237] *Id.* 5/25b-1 to -6.

[238] *Id.* 5/25c-1.

[239] *See Environmental Safety (415 ILCS 5/) Environmental Protection Act*, ILL. GEN. ASSEMBLY, https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1585&ChapterID=36 [https://perma.cc/X8J7-DY2Y] (listing the other areas within the IEPA's scope).

[240] Richard M. Kuntz, *The Rise and Fall of Joint and Several Liability in Illinois Environmental Actions*, ILL. BAR J., Feb. 1997, at 79, 79.

[241] People *ex rel.* Burris v. C.J.R. Processing, Inc., 647 N.E.2d 1035, 1038 (Ill. App. Ct. 1995); *see also supra* notes 97–178 and accompanying text.

[242] *C.J.R. Processing*, 647 N.E.2d at 1036.

lations of environmental protection statutes.[243] The court concluded that under the IEPA, like under the federal environmental statutes, refraining from finding corporate officer liability under the Act would fail to carry out the legislative purpose.[244] Moreover, the targeted corporate officer was "a person" within the meaning of the IEPA.[245]

Subsequent Illinois courts have, time and again, affirmed the inclusion of responsible corporate officer liability under the IEPA.[246] The IEPA's ubiquity in the state's environmental schema—and the responsible corporate officer doctrine's well-established place within it—has led to the doctrine's adoption under other state statutes. In *People ex rel. Madigan v. Petco Petroleum Corp.*, for example, the state targeted a corporate officer under the state's Oil and Gas Act (OGA).[247] The appellate court ultimately declined to "definitively resolve th[e] issue" because it concluded that the trial court's ruling was "not manifestly erroneous."[248] Nonetheless, the court "agree[d] with the [s]tate that the language of [the OGA] appear[ed] broad enough to include corporate officers . . . ."[249] Indeed, the OGA provides liability for any "person" just like the IEPA does.[250]

In sum, Illinois has a well-developed responsible corporate officer doctrine under its state environmental laws. This is in part due to the state's comprehensive environmental law that has allowed the doctrine to develop uniformly, and not in the piecemeal fashion that characterizes the doctrine in other states and at the federal level.[251]

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[243] *See id.* at 1038 (tracing the imposition of corporate officer liability under the RCRA).

[244] *Id.*

[245] *Id.* at 1039.

[246] *See, e.g.*, People *ex rel.* Madigan v. Tang, 805 N.E.2d 243, 255 (Ill. App. Ct. 2004) (acknowledging liability for responsible corporate officers under the IEPA but holding that the state's allegations were insufficient to support such liability in this case); People *ex rel.* Ryan v. Agpro, Inc., 803 N.E.2d 1007, 1019 (Ill. App. Ct. 2004) (finding defendant corporate officer's conduct "exactly the type of 'personal involvement' or 'active participation' . . . required to hold a corporate officer individually liable under the Act" (quoting *C.J.R. Processing*, 647 N.E.2d at 1038)); Cmty. Landfill Co. v. Ill. Pollution Control Bd., No. 3-09-1026, 2011 WL 10468007, ¶ 1 (Ill. App. Ct. July 27, 2011) (affirming "Illinois Pollution Control Board's order affixing personal liability to corporate officers for corporation's violations of the [IEPA]").

[247] 841 N.E.2d 1065, 1073–74 (Ill. App. Ct. 2006); 225 ILL. COMP. STAT. 725/1 to /28.1 (2022).

[248] *Petco Petroleum Corp.*, 841 N.E.2d at 1073–74.

[249] *Id.* at 1073.

[250] *Id.*

[251] *See supra* notes 97–178 and accompanying text.

G. Indiana

Although some Indiana environmental statutes appear to have incorporated a criminal responsible corporate officer doctrine as early as the 1980s,[252] the Indiana Supreme Court did not formally adopt the civil form of the doctrine until 2001.[253] In *Commissioner, Department of Environmental Management v. RLG, Inc.*, the state attempted to hold a sole corporate officer liable for violations of the state's Environmental Management Act.[254] The trial court found that "[t]here [was] no evidence the defendant . . . ever acted in an individual capacity personally with respect to the activities which surrounded the management and operation of [the corporation] . . . ."[255] Thus, if the officer was to be liable at all, it was only through the responsible corporate officer doctrine.[256]

The Indiana Supreme Court began by tracing the doctrine back to its *Dotterweich* and *Park* roots and recounting the doctrine's development under federal environmental statutes.[257] The court then reasoned that if the state environmental laws expressly provided for criminal responsible corporate officer liability, the statute supported civil liability under the state's Environmental Management Act.[258] The court reached this conclusion even though the criminal provision specified a "responsible corporate officer" and the civil provision did not.[259] As "civil liability is more expansive than criminal liability," the court adopted the doctrine under the state's Environmental Management Act.[260]

In the two decades since, however, Indiana state courts have not adopted the doctrine under any other state environmental statutes. In 2004, for instance, the Indiana Court of Appeals withheld decision on whether the doctrine was

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[252] *See, e.g.*, DeHart v. State, 471 N.E.2d 312, 313 n.1 (Ind. Ct. App. 1984) (citing a now-repealed provision of the state's hazardous waste law that includes "any responsible corporate officer" in its definition of "person" (citing IND. CODE § 13-7-13-3(c)(2) (repealed 1996))).

[253] *See* Comm'r, Dep't of Env't. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 559–63 (Ind. 2001) (holding a corporate officer "personally liable for civil penalties" under the responsible corporate officer doctrine). Criminal prosecutions for responsible corporate officers appear infrequent; a Westlaw search does not show any such prosecutions since *DeHart* in 1984.

[254] *Id.* at 558.

[255] *Id.*

[256] *See id.* (implying that the responsible corporate officer doctrine is the only potential route for establishing individual liability because the defendant, per the evidence, had not participated individually in the acts).

[257] *Id.* at 559–60.

[258] *Id.* at 560–61.

[259] *Id.*

[260] *Id.*; *see* Comm'r, Dep't of Env't Mgmt. v. Roland, 775 N.E.2d 1188, 1194 (Ind. Ct. App. 2002) (observing that the Indiana Supreme Court adopted the responsible corporate officer doctrine in *RLG* and describing the doctrine as "the newly adopted responsible corporate officer doctrine").

available under the state's solid and hazardous waste statute.[261] Noting that *RLG* concerned a different statute, the court concluded that "*RLG* [was] not dispositive of whether the doctrine" applied to the solid and hazardous waste statute.[262] Although the court's review was confined to whether the state's denial of a permit abused the state's discretion, the court declined to rule on the application of the doctrine to these facts.[263]

Although the Indiana Supreme Court affirmed its adoption of the responsible corporate officer doctrine under the state Environmental Management Act, it has not yet broadened the doctrine's application to other statutes.[264]

H. Minnesota

Minnesota's responsible corporate officer doctrine is a study in contrasts. On the one hand, a 1992 Minnesota Court of Appeals endorsement of the doctrine has become nationally persuasive and has been cited approvingly by courts in California, Connecticut, Illinois, and Indiana.[265] On the other hand, Minnesota has not subsequently adopted the doctrine under any other environmental statute and the Minnesota Supreme Court has never opined on the 1992 court of appeals case.

The 1992 case—*In re Dougherty*—involved the state's enforcement of civil administrative penalties against a responsible corporate officer. In facts that were "strikingly similar to *Park*,"[266] *Dougherty* involved a corporate officer who was in regular contact with the Minnesota Pollution Control Agency over mishandled acid waste at his company's metal galvanizing business.[267] Despite being told by the agency to correct the hazardous waste violations on site, Dougherty did almost nothing to that effect.[268] The agency commissioner

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[261] Ind. Dep't of Env't Mgmt. v. Boone Cnty. Res. Recovery Sys., Inc., 803 N.E.2d 267, 275 n.12 (Ind. Ct. App. 2004); IND. CODE. §§ 13-19-1-1 to -7-7 (2022).

[262] *Boone Cnty.*, 803 N.E.2d at 275 n.12.

[263] *Id.*

[264] *See* Reed v. Reid, 980 N.E.2d 277, 298 (Ind. 2012) (noting and affirming that "under certain circumstances" the responsible corporate officer doctrine would apply to hold a corporate officer liable for corporate-level violations of the Indiana Environmental Management Act (citing *RLG*, 755 N.E.2d at 558)).

[265] *See In re* Dougherty, 482 N.W.2d 485, 489–90 (Minn. Ct. App. 1992) (holding that the responsible corporate officer doctrine applies to violations of Minnesota environmental laws); People v. Roscoe, 87 Cal. Rptr. 3d 187, 193 (Ct. App. 2008) (noting *Dougherty* as relevant state law authority for applying the responsible corporate officer doctrine to state statutes); BEC Corp. v. Dep't of Env't Prot., 775 A.2d 928, 938 (Conn. 2001) (adopting the scope of liability for corporate officers described in *Dougherty*); People *ex rel.* Burris v. C.J.R. Processing, Inc., 647 N.E.2d 1035, 1038 (Ill. App. Ct. 1995) (same); *RLG*, 755 N.E.2d at 560 (same).

[266] *Dougherty*, 482 N.W.2d at 490 (citing United States v. Park, 421 U.S. 658, 660–61 (1975)).

[267] *Id.* at 487.

[268] *See id.*

issued an administrative penalty order requiring corrective action and a $10,000 penalty, both of which were enforceable against Dougherty individually.[269]

The court of appeals upheld the administrative penalty order and adopted the responsible corporate officer doctrine in the process.[270] Drawing on *Dotterweich* and *Park*, the court noted that the doctrine was suited for public welfare statutes, such as the hazardous waste laws at issue, that "pervasively affect activities which threaten human health and safety as well as the environment."[271] Indeed, environmental statutes are particularly "appropriate" for the doctrine.[272] And the doctrine is "especially appropriate" in the civil context.[273]

Citing *Dotterweich* and *Park*, the court identified three factors for civil corporate officer liability:

> (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.[274]

These factors have been adopted by other state courts as the essential elements of the doctrine.[275] Thus, where Dougherty was the sole shareholder of the business, had control over the business's operations, and had personally met with the agency about the violations, the court concluded that individual corporate officer liability was appropriate.[276]

Despite the widespread endorsement of the case outside of Minnesota, the doctrine is relatively modest within the state. The Minnesota Supreme Court denied review of *Dougherty* and it has yet to opine on the doctrine.[277] And the

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[269] *Id.* at 488.

[270] *See id.* at 488–91 (noting that the corporate officer was individually liable because he met the three elements of the responsible corporate officer doctrine, namely that he was "in a position of responsibility" that allowed him to "influence corporate policies or activities," there was a "nexus between" his position and "the violation in question," and his "actions or inaction facilitated the violations").

[271] *Id.* at 489 (first citing United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986); and then citing United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984)); MINN. R. §§ 7045.0020–.1400 (2022).

[272] *Dougherty*, 482 N.W.2d at 489 (citing United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 745 (8th Cir. 1986)).

[273] *Id.* (citing United States v. Hodges X-Ray, Inc., 759 F.2d 557, 561 (6th Cir. 1985)).

[274] *See id.* at 490 (first citing United States v. Park, 421 U.S. 658, 673–74 (1975); and then citing United States v. Dotterweich, 320 U.S. 277, 284 (1943)).

[275] *See, e.g.*, BEC Corp. v. Dep't of Env't Prot., 775 A.2d 928, 938 (Conn. 2001) (adopting the *Dougherty* elements for the responsible corporate officer doctrine).

[276] *Dougherty*, 482 N.W.2d at 490–91.

[277] To be fair, other Minnesota Courts of Appeals have cited the case approvingly. *See, e.g.*, Jacobsen v. Yocum Oil Co., Nos. C9-92-1508, C3-92-2007, 1993 WL 152313, at *3 (Minn. Ct. App.

responsible corporate officer doctrine has not developed in the environmental context outside of the state's hazardous waste statutes; subsequent invocations of the doctrine have only occurred under the state's human rights statute[278] and building codes.[279]

I. New Jersey

New Jersey's responsible corporate officer doctrine is extensive, largely due to doctrinal augmentation by two branches of government. On the legislative front, the state's CWA analog—the New Jersey Water Pollution Control Act—expressly includes "any responsible corporate official" in its definition of "person."[280] Furthermore, the statute's definition of "person" states that responsible corporate officers are included in the definition "for the purpose of an enforcement action . . . ."[281] In 1995, in *State Department of Environmental Protection v. Standard Tank Cleaning Corp.*, such clear statutory language led the Appellate Division of the New Jersey Superior Court to "construe the term 'responsible corporate official' . . . in conformity with the concept of 'responsible corporate officer' developed in *Dotterweich* and *Park* . . . ."[282] In addition, the state environmental agency augmented its Flood Hazard Area Control Act by adding the term "responsible officer" to its definition of "person,"[283] thereby widening the liability net.[284]

More recently, on the judicial front, New Jersey courts have incorporated the doctrine into several state environmental statutes. In 2012, in *State Department of Environmental Protection v. T. Fiore Demolition Co.*, the Appellate Division of the New Jersey Superior Court held corporate officers individually

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May 11, 1993) (citing *Dougherty* approvingly); Matthews v. Eichorn Motors, Inc., 800 N.W.2d 823, 832 (Minn. Ct. App. 2011) (same); State v. Arkell, 657 N.W.2d 883, 886–87 (Minn. Ct. App.) (same), *rev'd*, 672 N.W.2d 564 (Minn. 2003) (holding the responsible corporate officer doctrine inapplicable but not considering the doctrine's merits).

[278] *See Matthews*, 800 N.W.2d at 832 (noting that the responsible corporate officer doctrine does not apply to claims under the state's human rights statute).

[279] *See Arkell*, 672 N.W.2d at 569(holding that the Uniform Building Code is not a "strict liability public welfare statute" under which the responsible corporate officer doctrine can be invoked); MINN. STAT. § 16B.69 (2000) (repealed 2008).

[280] N.J. STAT. ANN. § 58:10A-3(*l*) (West 2022); *see* State Dep't of Env't Prot. v. Standard Tank Cleaning Corp., 665 A.2d 753, 764 (N.J. Super. Ct. App. Div. 1995) (discussing statutory language).

[281] *Standard Tank Cleaning Corp.*, 665 A.2d at 763 (citing § 58:10A-10).

[282] *Id.* at 764.

[283] N.J. ADMIN. CODE § 7:13-1.2 (2022) ("'Person' means an individual, corporation, corporate officer, partnership, association, the Federal government, the State, a municipality, a commission or political subdivision of the State or any interstate body.").

[284] *See* Asdal Builders, LLC v. N.J. Dep't of Env't Prot., 46 A.3d 575, 584 (N.J. Super. Ct. App. Div. 2012) (finding no corporate officer liability where actions occurred prior to 2006 amendments).

liable under the state's Solid Waste Management Act.[285] It did so with little discussion of whether such liability was grounded in the text of the statute, instead broadly summarizing its precedent under the state's CWA analog—which included the term "responsible corporate official" in its definition—to hold responsible corporate officers liable.[286]

New Jersey courts have continued to generously interpret this precedent in cases involving New Jersey's Safe Dam Act.[287] In the most recent of these decisions, the Appellate Division of the New Jersey Superior Court upheld the state environmental agency's claims that corporate officers could be individually liable under the Safe Dam Act.[288] The court rejected the defendants' argument that the narrow definition of "person," which excluded "responsible corporate officer," restricted the scope of the Act.[289] Indeed, countenancing such a notion would have permitted the defendants to "shirk responsibility for maintaining the dam using holding companies."[290] Thus, even without express legislative intent to target responsible corporate officers, New Jersey courts have embraced the doctrine under a number of environmental statutes.

J. Washington

Washington's responsible corporate officer doctrine centers on two cases. The first, a 1999 Washington Court of Appeals decision entitled *Department of Ecology v. Lundgren*, adopted a limited version of the doctrine under the state's Water Pollution Control Act.[291] The second case, *K.P. McNamara Northwest, Inc. v. Department of Ecology*, endorsed the doctrine under environmental statutes generally and the state's Hazardous Waste Management Act particularly.[292]

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[285] *See* No. C-257-09, 2012 WL 1379948, at *5 (N.J. Super. Ct. App. Div. Apr. 23, 2012) (holding the officers individually liable); N.J. STAT. ANN. §§ 13:1E-1 to -48.

[286] *T. Fiore Demolition Co.*, 2012 WL 1379948, at *4.

[287] *See* Dep't of Env't Prot. v. Centennial Land & Dev. Corp. (*Centennial I*), No. A-4708-13T2, 2016 WL 6134929, at *11 (N.J. Super. Ct. App. Div. Oct. 21, 2016) (noting that the omission of the phrase "responsible corporate officer" from the Safe Dam Act does not limit the application of the statute to responsible corporate officers); Dep't of Env't Prot. v. Centennial Land & Dev. Corp. (*Centennial II*), Nos. A-1414-17T3, A-1616-17T3, 2019 WL 6954156, at *8 (N.J. Super. Ct. App. Div. Dec. 19, 2019) (noting the broad liability established under the Safe Dam Act); N.J. STAT. ANN. §§ 58:4-1 to -14.

[288] *Centennial II*, 2019 WL 6954156, at *8 (affirming individual liability under the Safe Dam Act).

[289] *Centennial I*, 2016 WL 6134929, at *11.

[290] *Centennial II*, 2019 WL 6954156, at *8.

[291] 971 P.2d 948, 951–53 (Wash. Ct. App. 1999); WASH. REV. CODE §§ 90.48.010–.907 (2022).

[292] 292 P.3d 812, 824 (Wash. Ct. App. 2013); *see also* DP2 Props., LLC v. Dep't of Ecology, No. 82046-0-I, 2021 WL 5564408, at *2 n.2 (Wash. Ct. App. Nov. 29, 2021) (citing *K.P. McNamara* for the proposition that the state could have held a corporate officer personally liable under the responsible corporate officer doctrine for wetlands violations).

In *Lundgren*, the state sought to hold a sole shareholder of the corporate operator of a sewage treatment plant individually liable for discharging pollutants, including raw sewage, without a state permit.[293] The civil penalty was a hefty $250,000.[294] The targeted responsible corporate officer successfully convinced the state administrative hearing body that he was not individually liable for the penalty.[295]

On appeal, the court began—as is now surely familiar—by recounting the responsible corporate officer doctrine articulated in *Dotterweich* and *Park*.[296] The court noted the doctrine's particular applicability in the clean water context and its use under the CWA.[297] But the court stopped short of full-throatedly endorsing the doctrine.[298] Instead, focusing on the facts at hand, the court noted that "Lundgren controlled the facility with knowledge of the violations . . . ."[299] This fact alone sufficed for individual liability.[300] *Lundgren* thus adopted a circumscribed view of the doctrine that appears to require knowledge *and* actual control of the violations.

Nevertheless, in 2013, *McNamara* widened the doctrine's scope.[301] There, a facility that refurbished and deconstructed plastic storage containers repeatedly mishandled hazardous waste.[302] Despite multiple inspections and instructions on how to comply with the state's Hazardous Waste Management Act, the facility and its owner continued to accept, treat, and dispose of dangerous waste without the required permits or protocols.[303] The state targeted McNamara individually for civil penalties.[304]

Relying in part on *Lundgren*, the court of appeals agreed with the state.[305] The court noted that *Lundgren* supported the application of the doctrine to state environmental statutes and that the federal hazardous waste law—the RCRA—

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[293] *Lundgren*, 971 P.2d at 950.

[294] *Id.*

[295] *Id.*

[296] *See id.* at 952 (discussing the foremost cases, *Dotterweich* and *Park*, for the responsible corporate officer doctrine).

[297] *See id.* at 952–53 (noting that "the responsible corporate officer doctrine has been applied to violations of the Federal Clean Water Act").

[298] *See id.* (finding liability for a responsible corporate officer without expressly approving of the doctrine).

[299] *Id.* at 953.

[300] *Id.*

[301] K.P. McNamara Nw., Inc. v. Dep't of Ecology, 292 P.3d 812, 831 (Wash. Ct. App. 2013) (broadening the responsible corporate officer doctrine to include situations where the officer's "ability to prevent or correct a violation of the relevant statute" could result in liability (citing *Lundgren*, 971 P.2d at 952)).

[302] *See id.* at 815–17.

[303] *Id.*

[304] *Id.* at 817.

[305] *See id.* at 830–31.

had a version of the doctrine.[306] Flipping the script, the court stated that McNamara's argument that the doctrine should not apply under the Act failed.[307]

The court then centered the doctrine on "the corporate officer's ability to prevent or correct a violation of the relevant statute . . . ."[308] Indeed, "McNamara knew of the violations and had the capacity to prevent or correct them."[309] The responsible corporate officer doctrine, then, "requires no further determination to impose personal liability . . . ."[310]Although *McNamara* appears to retain a knowledge requirement, it nonetheless broadened the doctrine's scope from actual control to "capacity to prevent or correct . . . ."[311] This formulation is more line with *Dotterweich* and *Park.*[312]

K. The State of the State Environmental Responsible Corporate Officer Doctrine

Several observations may be drawn from these ten state environmental responsible corporate officer doctrines. As an initial matter, state environmental responsible corporate officer doctrines are piecemeal. Even in states that have well developed forms of the doctrine, the doctrine operates on an independent statute-by-statute basis.[313] Adopting the doctrine under a particular state's hazardous waste management statute often has little bearing on whether that state's water pollution law includes the doctrine, or vice versa.[314] The state forms of the doctrine are thus fragmented.

Relatedly, and perhaps because of their piecemeal nature, the state versions of the doctrine are often confoundingly amorphous and opaque. A state court might adopt the doctrine under one state environmental statute with a typical definition of "person" but not do so under a different statute with a

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[306] *See id.* at 831.

[307] *Id.*

[308] *Id.* (citing Dep't of Ecology v. Lundgren, 971 P.2d 948, 952 (Wash. Ct. App. 1999)).

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *See supra* notes 45–96 and accompanying text.

[313] *See, e.g.*, DeHart v. State, 471 N.E.2d 312, 313 n.1 (Ind. Ct. App. 1984) (citing a now-repealed provision of the state's hazardous waste law that is one of the earliest iterations of a criminal responsible corporate officer doctrine); Comm'r, Dep't of Env't Mgmt. v. RLG, Inc., 755 N.E.2d 556, 559–63 (Ind. 2001) (holding, under a different statute, a corporate officer *civilly* liable under the responsible corporate officer doctrine).

[314] *See, e.g.*, BEC Corp. v. Dep't of Env't Prot., 775 A.2d 928, 937–38 (Conn. 2001) (holding that the responsible corporate officer doctrine applies under the Connecticut Water Pollution Control Act (CWPCA)); Celentano v. Rocque, 923 A.2d 709, 721–23 (Conn. 2007) (holding that the responsible corporate officer doctrine applies under the state's dam inspection and repair statute).

nearly identical definition of "person."[315] And state courts do not always explain the precise contours of what they are adopting. Is there a mens rea requirement? Is the adoption of the doctrine under a particular statute based on the text of the statute? Or is the state responsible corporate officer doctrine accepted under *any* environmental statute with a similarly broad public welfare purpose? Often, state courts do not delve into these questions.[316] Instead, state courts frequently adopt the doctrine as applied to the facts of that particular case.[317] But such an approach leaves significant questions about the scope of the doctrine unanswered.

Perhaps unsurprisingly then, the trend has not been widely adopted. Forty states—the vast majority—have not adopted the doctrine. And even in the ten states that have adopted the doctrine, state supreme courts have often been recalcitrant to review appellate court rulings endorsing the doctrine.[318] Although there are certainly state environmental responsible corporate officer doctrines, they are limited, narrow, and concentrated.

The result is a haphazard patchwork of independent state doctrines. Different state courts within the same state may offer different rationales or scope for the doctrine.[319] In Connecticut, for example, the doctrine exists criminally but not civilly—a baffling incongruity.[320] The state environmental responsible corporate officer doctrines, then, lack consistency and clarity.

As a result, the doctrine suffers from a lack of legitimacy. Legal scholarship, particularly in the criminal law field, has been highly critical of the doctrine.[321] For instance, one commentator recently "scrutiniz[ed] the shortcom-

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[315] *Compare Celentano*, 923 A.2d at 721–23 (holding that the responsible corporate officer doctrine applies under the state's dam inspection and repair statute), *with* Comm'r of Env't Prot. v. Underpass Auto Pts. Co., 123 A.3d 1192, 1208–11 (Conn. 2015) (holding that the responsible corporate officer doctrine does not apply to civil violations under the Aquifer Protection Act).

[316] *See, e.g.*, *supra* notes 200–215 and accompanying text.

[317] *Compare Celentano*, 923 A.2d at 721–23 (adopting the responsible corporate officer doctrine under the state's dam inspection and repair statute), *with Underpass Auto Pts.*, 123 A.3d at 1208–11 (refusing to adopt the responsible corporate officer doctrine for civil violations under the Aquifer Protection Act).

[318] *See, e.g.*, *In re* Dougherty, 482 N.W.2d 485, 489–90 (Minn. Ct. App. 1992) (holding that the responsible corporate officer doctrine applies to violations of Minnesota environmental laws).

[319] *Compare* People v. Matthews, 9 Cal. Rptr. 2d 348, 354 (Ct. App. 1992) (broadly finding responsible corporate officer liability because "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"), *with* People v. Roscoe, 87 Cal. Rptr. 3d 187, 195 (Ct. App. 2008) (narrowly finding responsible corporate officer liability because of "the legislative history of the tank laws, specifically their purposes and the evolution of the statutory language").

[320] *See supra* notes 200–215 and accompanying text.

[321] *See* Copeland, *supra* note 22, at 804 (arguing that the responsible corporate officer doctrine is "misguided" in some circumstances).

ings" of the doctrine and opined that the doctrine was "flawed."[322] Other commentators go further, arguing that the "doctrine represents an unwarranted augmentation of corporate agents' duties and runs contrary to established tort, criminal, and corporate law principles."[323] Although these critiques address the federal criminal form of the doctrine, their reasoning applies with particular force to the state iterations of the doctrine, which are less textually grounded and less developed. Practitioners, too, routinely critique the doctrine and advocate for a more limited state responsible corporate officer doctrine in criminal enforcement cases.[324] Other practitioners have asserted deep discomfort with the doctrine's general lack of a mens rea requirement.[325]

After reviewing the state environmental responsible corporate officer doctrines, one can sympathize with these critiques even if one does not agree with them. Even advocates of the doctrine must acknowledge its current shambolic state.

IV. Revitalizing the State Environmental Responsible Corporate Officer Doctrine

The previous Part illustrates the condition of the state environmental responsible corporate officer doctrine.[326] This Part proposes and articulates its revitalization.

A. The Need for a Revitalized State Environmental Responsible Corporate Officer Doctrine

State environmental enforcement is more critical now than ever. Since the 1990s, federal environmental enforcement has decreased.[327] Even before Pres-

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[322] *Id.*

[323] Petrin, *supra* note 37, at 286.

[324] *See* Michael Dore & Rosemary E. Ramsey, *Limiting the Designated Felon Rule: The Proper Role of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of New Jersey's Environmental Laws*, 53 RUTGERS L. REV. 181, 214 (2000) (noting that the role of the responsible corporate officer doctrine should be limited to situations where the legislature has expressly called for its application to an environmental statute).

[325] *See* Brooks & Frongillo, *supra* note 45, at 12–13 (noting the absence of a mens rea requirement under the responsible corporate officer doctrine); Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You* Don't *Know?*, 22 ENV'T L. 1347, 1348–51 (1992) (noting that the responsible corporate officer doctrine "does not provide a means by which criminal knowledge may be imputed . . . to a supervising corporate officer who was unaware that the violations were occurring").

[326] *See supra* notes 179–325 and accompanying text.

[327] *See, e.g.*, Joel A. Mintz, *The Uncertain Future Path of Environmental Enforcement and Compliance*, 33 ENV'T L. 1093, 1094 (2003) (reviewing CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE-FEDERAL RELATIONSHIP (2003)) (noting the "'devolution' of responsibility for environmental enforcement" in the 1990s).

ident Trump took office, the downward enforcement trend was clear.[328] But the Trump Administration's business-friendly policies decreased federal environmental enforcement even further.[329] The COVID-19 pandemic only exacerbated these trends, as shown by the EPA's March 2020 memorandum describing its intention to exercise discretion regarding violations of certain environmental reporting and monitoring requirements.[330] Many saw this announcement as tantamount to a suspension of myriad environmental enforcements.[331] Indeed, for the fiscal year ending on September 30, 2020, EPA data show just how significant the impact was:

> the Trump Administration EPA had the lowest number of civil judicial environmental cases concluded (82), the lowest number of civil judicial cases referred for prosecution (81), the lowest number of inspections (8,544), and the fourth lowest Superfund cleanup and cost recovery totals ($815 million) in the last 20 years, with figures adjusted for inflation.[332]

This decrease in federal environmental enforcement has not been accompanied by a corresponding decrease in environmental pollution. If anything, environmental issues are more pressing than ever. The United States experienced higher levels of air pollution in 2017 and 2018 than it ever had before.[333]

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[328] Bob Holden & Elise Henry, *EPA Data Show Downward Enforcement Trend Began Before Trump Administration*, BLOOMBERG L. (Nov. 13, 2020), https://news.bloomberglaw.com/environment-and-energy/epa-data-show-downward-enforcement-trend-began-before-trump-administration?context=article-related [https://perma.cc/T82T-U8B6] (noting a "downward trend in civil enforcement" by the EPA).

[329] *See New EPA Enforcement Data Show Continued Downward Trend During Trump Administration*, ENV'T INTEGRITY PROJECT (Jan. 14, 2021), https://environmentalintegrity.org/news/epa-enforcement-data-downward-trend-during-trump-administration/ [https://perma.cc/VV4H-GSP8] (noting the "long-term decline in many areas of environmental enforcement in 2020").

[330] *See* Charles M. Denton, Richard E. Glaze & Ashley E. Parr, *EPA's COVID-19 Enforcement Policy Under Attack in the Courts*, AM. BAR ASS'N (Mar. 5, 2021), https://www.americanbar.org/groups/litigation/committees/environmental-energy/articles/2021/spring2021-epa-covid-19-enforcement-policy-under-attack-in-the-courts/ [https://perma.cc/YNL2-UTW5] (describing the EPA's temporary enforcement policy during the pandemic and the legal responses to it).

[331] *See, e.g.*, Sophie Lewis, *"An Open License to Pollute": Trump Administration Indefinitely Suspends Some Environmental Protection Laws During Coronavirus Pandemic*, CBS NEWS, https://www.cbsnews.com/news/coronavirus-trump-administration-epa-suspends-environmental-protection-laws/ [https://perma.cc/QV64-2L92] (Mar. 31, 2020) (noting that the Trump Administration EPA's enforcement policies were essentially an exemption from the "consequences for polluting").

[332] *New EPA Enforcement Data Show Continued Downward Trend During Trump Administration*, *supra* note 329.

[333] Christopher Ingraham, *Air Pollution is Getting Worse, and Data Show More People Are Dying*, WASH. POST (Oct. 23, 2019), https://www.washingtonpost.com/business/2019/10/23/air-pollution-is-getting-worse-data-show-more-people-are-dying/ [https://perma.cc/U36S-ZSQH].

Stormwater runoff has worsened.[334] And many of America's toxic waste sites are threatened by climate change.[335] Still, as federal environmental enforcement decreases, some states have tried to address the gap through environmental enforcement.[336] But state environmental enforcement faces a series of challenges—from resource constraints to political barriers—that hinder their ability to do so.[337] This Article does not—and, indeed, could not—assert that a robust state environmental responsible corporate officer doctrine is the panacea for these broader trends. But it does contend that providing state environmental enforcers with another tool for enforcement can help.

In addition to the heightened need for state environmental enforcement, the very situations that the responsible corporate officer doctrine is designed to prevent (that is, responsible parties escaping liability) are increasingly present. Recent adoptions and applications of the doctrine show that the need for a state responsible corporate officer doctrine is as urgent as ever. A considerable amount of the development of state forms of the doctrine has occurred in the past decade.[338] These developments have only come about in response to pressing environmental problems and the creative and assertive environmental enforcers seeking to remedy them.

A revitalized state environmental responsible corporate officer doctrine can also address problems of consistency, clarity, and legitimacy that plague the current forms of the doctrine. Rather than ad hoc adoption, a revitalized state environmental responsible corporate officer doctrine could be founded on a common set of principles that provide a cohesive and comprehensive determination of individual corporate officer liability. Such consistency would dispel the uncertainty surrounding the current iterations of the doctrine, for the

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[334] *See* Catherine Kozak, *Stormwater Issues Worsen as Climate Warms*, COASTAL REV. (June 30, 2020), https://coastalreview.org/2020/06/stormwater-issues-worsen-as-climate-warms/ [https://perma.cc/T2EP-JWFE] (describing recent mounting issues with stormwater).

[335] *See* Harmeet Kaur, *America's Many Toxic Waste Sites Are in Areas at Risk of Worsening Natural Disasters*, CNN, https://www.cnn.com/2019/11/20/us/superfund-sites-climate-change-scn-trnd/index.html [https://perma.cc/79LD-HKXR] (Nov. 20, 2019) (noting that "[a]bout 60% of more than 1500 Superfund sites" are located in areas that are high risk in light of the consequences of climate change, including flooding and storm surges).

[336] *See* Kari Lydersen, *As EPA Backs Off Enforcement, States and Cities Have Little Capacity to Fill Gap*, ENERGY NEWS NETWORK (Apr. 27, 2020), https://energynews.us/2020/04/27/as-epa-backs-off-enforcement-states-and-cities-have-little-capacity-to-fill-gap/ [https://perma.cc/5GBF-R6QR] (describing the potential state agency role in environmental regulation in light of the EPA's lax approach to enforcement under the Trump administration).

[337] *See* INST. FOR POL'Y INTEGRITY, N.Y. UNIV. SCH. OF L., IRREPLACEABLE: WHY STATES CAN'T AND WON'T MAKE UP FOR INADEQUATE FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAWS (2017), https://policyintegrity.org/files/media/EPA_Enforcement_June2017.pdf [https://perma.cc/RHG5-WKD3] (noting the financial and political barriers to effective policing of environmental violations by the states).

[338] *See generally supra* notes 179–325 and accompanying text.

enforcers and enforced alike. And adding consistency and clarity to the doctrine bolsters its legitimacy by providing a shared, common understanding of where the doctrine operates.

B. What a Revitalized State Environmental Responsible Corporate Officer Doctrine Looks Like

This Section proposes a revitalized state environmental responsible corporate officer doctrine based on four key principles. Subsection 1 begins this proposal by focusing on individual civil liability.[339] Subsection 2 focuses on the notion of responsibility without a mens rea requirement.[340] Subsection 3 discusses the uniform application of the doctrine to all state environmental statutes that protect human health and welfare.[341] Finally, Subsection 4 discusses the principle of broad enforceability.[342]

1. Individual Civil Liability

The hallmark of the responsible corporate officer doctrine is individual liability.[343] The purpose of individual liability is to prevent responsible wrongdoers from escaping liability by using a corporate shield.[344] Additionally, individual liability deters future bad acts or omissions.[345]

To date, the main critiques of the doctrine's inclusion of individual liability are aimed at the criminal liability under the doctrine.[346] It is easy to see why: criminal liability carries far graver consequences and far greater constitutional protections.[347] There is considerable discomfort with permitting the judi-

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[339] *See infra* notes 343–358 and accompanying text.

[340] *See infra* notes 359–364 and accompanying text.

[341] *See infra* notes 365–368 and accompanying text.

[342] *See infra* notes 369–378 and accompanying text.

[343] *See* Copeland, *supra* note 22, at 802 (outlining the responsible corporate officer doctrine, which is used to individually prosecute corporate executives).

[344] *See* United States v. Dotterweich, 320 U.S. 277, 283 (1943) (noting that, in the context of the FDCA, Congress did not intend for "agents to escape").

[345] *See* Copeland, *supra* note 22, at 802 ("Thus, the FDA, [Office of the Inspector General of Health and Human Services], and [Department of Justice] shifted their focus in pharmaceutical fraud cases from simply pursuing pharmaceutical companies to pursuing misdemeanor criminal charges against individual executives . . . [which] may be more likely to deter individual executives and incentivize effective monitoring.").

[346] *See, e.g.*, Petrin, *supra* note 37, at 286 (noting that the responsible corporate officer doctrine, *inter alia*, "runs contrary to established tort, criminal, and corporate law principles").

[347] *See* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 854 (2000) ("Notwithstanding the retributive character of some aspects of civil liability (a punitive damages award, for example), only criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates." (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW

ciary to augment statutes to include criminal liability except in the clearest cases.[348] Indeed, state legislatures have largely chosen not to include responsible corporate officer liability within the criminal provisions of environmental laws.[349]

But civil liability is different. It does not carry the harsh punitive effects and reputational and social consequences that criminal liability does.[350] This is not to suggest that civil liability is toothless; it still changes behavior and provides deterrence.[351] Indeed, for much of environmental enforcement, civil liability is the modus operandi.[352]Accordingly, the state environmental responsible corporate officer doctrine should include individual civil liability—and *only* civil liability. The exclusion of criminal liability addresses the frequent critiques that the doctrine is extreme and illegitimate. And the inclusion of individual civil liability provides sufficient punitive effects as to ensure compliance through deterrence.

Limiting the doctrine to individual civil liability also more closely conforms to the U.S. Supreme Court's original vision of the doctrine. To be sure, both *Dotterweich* and *Park* involved criminal liability.[353] But both involved misdemeanor criminal liability during a time when the immediate and collat-

& CONTEMP. PROBS. 401, 405 (1958))). *See generally* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996) (describing the recent increase in the application of criminal liability under environmental laws); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793 (1996).

[348] *See, e.g.*, Dore & Ramsey, *supra* note 324, at 214 (arguing that the responsible corporate officer doctrine, rather than imposing liability "even in the absence of any legislative endorsement," should be "limited to circumstances where the legislature" has clearly endorsed its applicability to a given statute).

[349] *See supra* notes 179–325 and accompanying text. Of course, at the federal level both the CWA and the CAA have criminal penalties for violating responsible corporate officers. *See supra* notes 97–178 and accompanying text.

[350] *See, e.g.*, Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 500–03 (2006) (noting the reputational consequences of entity criminal liability, including the reputational consequences on an entity's members); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 289 (2008) ("[C]ivil penalties or the pervasiveness standard could discourage wrongdoing more effectively than the threat of going out of business under the existing regime of entity liability.").

[351] *See* Hamdani & Klement, *supra* note 350, at 290 ("Once the probability of [criminal] conviction exceeds a certain threshold . . . civil fines would contain misconduct more effectively.").

[352] *See, e.g.*, TSCA, 15 U.S.C. §§ 2601–2697 (imposing civil liability); *see also* Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379, 396 (2002) ("[W]e have a mixed system of civil liability and environmental regulation.").

[353] *See* United States v. Dotterweich, 320 U.S. 277, 281 (1943) ("The statute makes 'any person' who violates [the FDCA] guilty of a 'misdemeanor.'" (quoting 21 U.S.C. § 321(e))); United States v. Park, 421 U.S. 658, 660 (1975) (same).

eral consequences of criminal convictions were less severe than today.[354] The Supreme Court's original view of the doctrine—as a gap filler to both prevent escaped liability and preserve the legislature's intent in passing a general welfare statute—is well satisfied by civil liability.

Further, imposing criminal liability in circumstances where the legislature has not expressed clear intent to do so is antithetical to modern conceptions of justice.[355] As concerns about the era of mass incarceration have been raised,[356] so too have notions of leniency[357] and *lex mitior* ("the milder law").[358] The trend is away from unduly harsh or punitive forms of criminal liability. Individual civil liability is consistent with these trends. It should therefore be the sole means of liability under the environmental responsible corporate officer doctrine.

2. Responsibility Without a Mens Rea Requirement

With liability limited to civil cases, the need for a mens rea requirement dissipates. Mens rea is a feature that is almost uniquely criminal in nature; it rarely applies to civil cases.[359] For that reason alone, civil liability should not

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[354] *See* Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 235 (2018) ("In the last half of the twentieth century, courts invalidated few, if any, collateral consequences . . . ."); John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 FEDERALIST SOC'Y REV. 36, 36 (2018) (noting that "restrictions have proliferated in America since the 1980s").

[355] *See* Dick Thornburgh, *The Challenge of Over-Criminalization*, PA. LAW., Nov./Dec. 2011, at 36, 37 ("[C]onsiderable misgiving has developed about over-criminalization and the threat it poses to established institutions and ways of life.").

[356] *See, e.g.*, Jonathan Simon, *Ending Mass Incarceration Is a Moral Imperative*, 26 FED. SENT'G REP. 271, 271 (2014) (describing the view that mass incarceration is a "social problem").

[357] *See, e.g.*, Roger J. Marzulla, *Lenity: An Essential Rule for Interpreting Environmental Crimes Statutes*, ENGAGE, Oct. 2012, at 65, 65, https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/QmAIBOhzCJSYek82Qoxodrzusi2qPwxDcdVRDIfv.pdf [https://perma.cc/L6DB-D7Y8] (arguing for the principle of lenity in light of ambiguous environmental laws, as these laws can be a trap for the unwary corporate officer); David E. Filippi, Note, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENV'T L. 923, 923 (1996) ("The rule of lenity has long provided American courts with a means for resolving ambiguity in criminal statutes. With its origin in the common law, the rule protects criminal defendants by requiring courts to strictly construe ambiguous statutory and regulatory provisions in a manner most favorable to defendants.").

[358] *See* Peter Westen, Lex Mitior*: Converse of* Ex Post Facto *and Window into Criminal Desert*, 18 NEW CRIM. L. REV. 167, 168–69 (2015) ("[I]n contrast to the law of most American jurisdictions, European states embrace a doctrine known as '*lex mitior*' ('the milder law'). . . . [*L*]*ex mitior mandates* retroactivity . . . by mandating that criminal defendants whose prosecutions are not final enjoy the retroactive benefits of statutes that either decriminalize conduct altogether or reduce punishment for it.").

[359] *See* Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the* Mens Rea *Standards of Federal Criminal Laws*, 7 J.L. ECON. & POL'Y 685, 693 (2011) ("[T]he culpability element in federal criminal law is often the only term that separates civil liability from criminal liability."). *See generally* Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939) (discussing the mens rea doctrine).

include a mens rea requirement. But there are other, more practical reasons to dispense with a mens rea requirement under the state environmental responsible corporate officer doctrine. Most obviously, civil liability is easier to prove without a mens rea requirement: it marks one less element for plaintiffs to prove. In turn, that makes successful prosecutions of civilly responsible corporate officers more likely.

A mens rea requirement is also at odds with the Supreme Court's original understanding of the doctrine. Recall that *Dotterweich* and *Park* appear to impose strict liability, that is, liability without a mens rea requirement.[360] And the environmental statutory schema already accounts for wrongdoing individuals as owners, operators, generators, transporters, and producers.[361] The responsible corporate officer doctrine operates when these background categories of liability do not—where a responsible actor can claim ignorance or omission for the violations of their corporation.[362] After all, the doctrine is designed to cover the gaps in the statutory holes.[363] Imputing a mens rea requirement into the doctrine only further narrows its already limited scope.[364]

3. Uniform Application to All State Environmental Statutes

A revitalized state environmental responsible corporate officer doctrine also should uniformly apply to all state environmental statutes. As discussed,[365] the current state environmental responsible corporate officer doctrine is fragmented. Indeed, a piecemeal doctrine can exist under one statute but not under another, despite both having similar public welfare purposes and identical or nearly identical scopes of liability.[366] This fragmented nature, of course, is the result of courts adopting the doctrine one case at a time, opining only on the statute before them.[367] But it leads to a lack of cohesion in the doctrine. And it leaves unanswered how far, exactly, the doctrine extends.

Consistent application of the doctrine to the full complement of a state's environmental statutes solves these problems. With the doctrine applicable to all state environmental laws, all potential individual corporate officer defendants are amply on notice as to the extent of their liability. And the inconsisten-

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[360] *See supra* notes 91–94 and accompanying text.

[361] *See, e.g.*, 42 U.S.C. § 9607(k)(1) (including "owner[s]" and "operator[s]" within the scope of liability under CERCLA).

[362] Humboldt Baykeeper v. Simpson Timber Co., No. C 06-04188, 2006 WL 3545014, at *4 (N.D. Cal. Dec. 8, 2006) (noting that courts have found individual actors who have violated the Clean Water Act to be individually liable notwithstanding the fact that they work for a company).

[363] *See supra* notes 105–106 and accompanying text.

[364] *See id.*

[365] *See supra* notes 313–325 and accompanying text.

[366] *See id.*

[367] *See id.*

cies between some statutes with the doctrine and some statutes without are removed. As a matter of fundamental fairness, creating a level playing field for regulated actors and industries is essential.[368] The upshot is a more consistent and cohesive doctrine.

Uniformity also sends a strong signal as to the importance of a state's environmental laws. The current piecemeal application of the doctrine in some states suggests that certain state environmental laws are more crucial than others. Alternatively, at the very least, piecemeal application suggests that certain state environmental laws receive more attention from state agencies than others. In any event, uniform application raises all state environmental laws to the same level, a mark of the environmental statutory scheme's significance as a whole.

4. Broad Enforceability

Finally, the state environmental responsible corporate officer doctrine should be broadly enforceable, providing a tool for both state government and the public. This means that, in addition to state environmental enforcers having the doctrine at their disposal, the public should be able to bring a suit through a citizen suit provision.

Providing a mechanism for citizen enforcement of the responsible corporate officer doctrine mitigates concerns about state enforcers being unwilling or unable to use the doctrine. Indeed, not every state is keen (or able) to press environmental liabilities that already exist, and there is no reason to think that these states would enforce new environmental liabilities should they become available.[369] Citizen enforcement of the doctrine sidesteps these resource and political limitations on states.

Citizen enforcement also allows for public buy-in and ownership of environmental laws from those who are most affected by environmental violations. Indeed, citizen suits "foster the rule of law, agency accountability, representa-

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[368] *See, e.g.*, Seema Kakade & Matt Haber, *Detecting Corporate Environmental Cheating*, 47 ECOLOGY L.Q. 771, 785 (2020) ("It offends fundamental notions of the rule of law to let cheaters gain a competitive advantage by avoiding the cost of compliance. Cheating undermines not only the goals of regulation but also the ability of corporate entities to operate on a level playing field.").

[369] *See* INST. FOR POL'Y INTEGRITY, *supra* note 337, at 3 ("A state regulator may be reluctant to adequately penalize its jurisdiction's largest and most politically powerful industrial facilities. Similarly, a state regulator may be unwilling to assess a penalty against a polluter whose emissions primarily harm residents of other—downwind or downstream—states." (footnotes omitted) (first citing Eric Helland, *The Revealed Preferences of State EPAs: Stringency, Enforcement, and Substitution*, 35 J. ENV'T ECON. & MGMT. 242, 243 (1998); then citing Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 LAW & SOC'Y REV. 939, 942 (2007); and then citing Richard Revesz, Opinion, *According to Scott Pruitt, States Only Have the Right to Pollute, Not Protect Their Environments*, L.A. TIMES (Mar. 20, 2017), https://www.latimes.com/opinion/op-ed/la-oe-revesz-pruitt-epa-federalism-20170320-story.html [https://perma.cc/G5CW-BSC7])).

tional democracy, and environmental stewardship."[370] This is particularly important as environmental law reorients and commits itself toward environmental justice, which citizen suits have the potential, though not the certainty, to remedy.[371] Including a citizen suit provision is also consistent with other environmental statutes. There is a long history of citizen suits in federal environmental statutes, which Congress included to address the risk of underenforcement of environmental laws.[372] And these federal environmental citizen suits provisions have garnered enthusiastic,[373] though not unanimous,[374] praise.

For these reasons, allowing citizen enforcement of the responsible corporate officer doctrine is a critical component of a functioning and just means of environmental liability.

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The close reader may observe that these four elements—individual civil liability, responsibility without mens rea, uniform application, and enforceability by citizens and state government—are not new ideas, exactly; they are, in part, distillations of the federal environmental responsible corporate officer doctrine. The federal version of the doctrine is largely civil in nature[375] and generally lacks a mens rea requirement.[376] Citizen suits are commonplace in federal environmental statutes, making enforcement of the doctrine a shared responsibility between federal agencies and the public.[377] The federal version, however, lacks uniformity across the environmental statutory scheme.[378] But rather than simply copy the federal form, the state version of the doctrine should improve upon it. The next part describes how states can accomplish that.

V. New Applications of the State Environmental Responsible Corporate Officer Doctrine

With only a handful of states adopting the environmental responsible corporate officer doctrine, there is ample room for additional state adoption. And there is also room for improved clarity, consistency, and uniformity in the states that have adopted the doctrine. This Article asserts that states can and

[370] May, *supra* note 131, at 5 (citing Hodas, *supra* note 132, at 1651–55).

[371] *See, e.g.*, Gauna, *supra* note 133, at 5–6 (noting that "citizen suits are underutilized in the environmental justice context").

[372] *See id.* at 4 (noting that "[p]rivate enforcement . . . continues to play a key role in environmental protection").

[373] *See* May, *supra* note 131, at 5 (advocating for citizen suits in an environmental context).

[374] *See, e.g.*, Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891, 892 (2014) (noting criticism of the citizen suit tactic by various groups).

[375] *See supra* notes 97–178 and accompanying text.

[376] *See supra* note 121 and accompanying text.

[377] *See supra* notes 371–372 and accompanying text.

[378] *See supra* notes 97–178 and accompanying text.

should adopt a revitalized environmental responsible corporate officer doctrine under their state environmental statutes. Below are two examples of how a state's environmental statutory regime can accommodate that adoption. The deep dives into these states' environmental laws are intended to be models as to the mechanics by which the responsible corporate officer doctrine can be adopted within existing statutes. These states—Massachusetts and Oregon—were chosen for their geographic diversity and strong histories of environmental protection. In other words, both states offer realistic opportunities for a revitalized state environmental responsible corporate officer doctrine.

A. Massachusetts

Massachusetts has not adopted the responsible corporate officer doctrine under its environmental statutes. Nevertheless, the Commonwealth is an ideal jurisdiction for adoption.

First, the Commonwealth has a robust set of environmental laws that are explicitly public welfare statutes.[379] These are precisely the kinds of laws the doctrine is designed to supplement.[380] Indeed, the Commonwealth's environmental canon has long led the way in comprehensive and effective environmental progress. From early seventeenth-century fish and game laws[381] to the 1919 creation of the Department of Conservation[382] to the 1957 passage of the Conservation Commission Act,[383] Massachusetts has a strong history of environmental protection. Massachusetts has also been a leader in combating climate change.[384] Notably, the Commonwealth was the lead plaintiff in the most important environmental U.S. Supreme Court case of the past several decades.[385] The Commonwealth has also passed several climate change bills that are among the most progressive in the nation.[386] All of which is to say that

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[379] *See generally* Donald R. Frederico & Richard H. Baird, *Introduction: A Brief Overview of Federal and Massachusetts Environmental Laws*, 75 MASS. L. REV. 91 (1990) (describing Massachusetts environmental laws).

[380] *See supra* notes 45–96 and accompanying text.

[381] *The History of the Massachusetts Environmental Police*, MASS.GOV, https://www.mass.gov/service-details/the-history-of-the-massachusetts-environmental-police [https://perma.cc/LR5R-VCTE].

[382] *Id.*

[383] *A History of Wetlands Protection in the United States*, BERKSHIRE ENV'T ACTION TEAM, https://www.thebeatnews.org/BeatTeam/history-federal-wetland-protection/ [https://perma.cc/KF38-E789].

[384] *See* Massachusetts v. EPA, 549 U.S. 497, 497 (2007) (noting that Massachusetts joined the petition calling for the EPA to more effectively regulate climate change).

[385] *Id.*

[386] Press Release, Governor's Press Off., Governor Baker Signs Climate Legislation to Reduce Greenhouse Gas Emissions, Protect Environmental Justice Communities (Mar. 26, 2021), https://www.mass.gov/news/governor-baker-signs-climate-legislation-to-reduce-greenhouse-gas-emissions-protect-environmental-justice-communities [https://perma.cc/XG4D-X2M5]; Steve LeBlanc, *Massa-*

Massachusetts provides fertile grounds for a doctrine that seeks to further environmental protection by increasing the scope of liability.

Second, Massachusetts is an ideal jurisdiction for adoption of the environmental responsible corporate officer doctrine because its environmental statutes contain nearly—if not exactly—identical definitions of the term "person." Under the Commonwealth's Hazardous Waste Management Act,[387] Water Management Act,[388] Environmental Endangerment Act,[389] and Oil and Hazardous Material Release Prevention and Response Act,[390] the definition for "person" is strikingly consistent. This uniformity starkly contrasts with the myriad definitions of "person" found in the federal environmental laws[391] and other state environmental statutes.[392] The import of this consistency is that any judicial adoption of the responsible corporate officer doctrine under one environmental statute easily translates to the doctrine's adoption under another. The logistics of Massachusetts adopting the environmental responsible corporate officer doctrine, then, are very feasible.

Third, the definition of "person" that Massachusetts has under many of its environmental statutes appears to contemplate the responsible corporate officer doctrine. The definition of "person" under the Massachusetts Hazardous Waste Management Act, for instance, includes "any agency or political subdivision of the federal government or the commonwealth, any state, public or private corporation or authority, individual, trust, firm, joint stock company, partnership, association, or other entity, and *any officer, employee or agent of said person*, and any group of said persons."[393] Crucially, this definition includes "any . . . corporation . . . *and any officer, employee, or agent* of said person."[394] Thus, the statute expressly includes corporate officers. This is exactly the kind of definition that other courts have found to encompass the responsible corporate officer doctrine.[395] Indeed, it would be minor judicial augmentation to fit the doctrine within those statutory inclusions.

With this background, Massachusetts is an ideal jurisdiction for judicial adoption of a revitalized environmental responsible corporate officer doctrine.

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chusetts Governor to Sign Sweeping Climate Change Bill, AP NEWS (Mar. 25, 2021), https://apnews.com/article/legislature-climate-climate-change-legislation-charlie-baker-043ecea823bd4e7a833225578a4d2877 [https://perma.cc/PMK6-DECK].

[387] *See* MASS. GEN. LAWS ch. 21C, § 2 (2022) (defining "person").

[388] *See id.* ch. 21G, § 2 (defining "person").

[389] *See id.* ch. 21L, § 1 (defining "person").

[390] *See id.* ch. 21E, § 2 (defining "person").

[391] *See supra* notes 97–178 and accompanying text.

[392] *See supra* notes 179–325 and accompanying text.

[393] MASS. GEN. LAWS ch. 21C, § 2 (emphasis added).

[394] *Id.* (emphasis added).

[395] *See, e.g.*, BEC Corp. v. Dep't of Env't Prot., 775 A.2d 928, 930 (Conn. 2001) (finding that a statute with similar language encompasses the responsible corporate officer doctrine).

All it would take is for one advocate to convince one judge that the Commonwealth's environmental statutes encompass the doctrine. And this doctrine should be recognized to include individual civil liability, responsibility without mens rea, and uniform application among the Commonwealth's environmental statutes.

Nevertheless, it appears unlikely that a Massachusetts environmental responsible corporate officer doctrine would include citizen suits, as none of the commonwealth's environmental statutes appear to directly allow for them.[396] Thus, citizen suits would likely require statutory changes.

B. Oregon

Like Massachusetts, Oregon lacks a responsible corporate officer doctrine. Nevertheless, it too has a robust series of environmental statutes that are expressly public welfare statutes.[397] It also has a strong history of environmental protection.[398] But, for purposes of adopting the responsible corporate officer doctrine, the similarities end there. Oregon has several inconsistent definitions of "person" in its environmental statutes.[399] That is not to say that they do not encompass a responsible corporate officer, but simply that judicial adoption of the doctrine would have to be piecemeal, statute by statute.

Consider, for example, how "person" is defined under the state's solid waste management statute: "'Person' means the United States, the state or a public or private corporation, local government unit, public agency, individual, partnership, association, firm, trust, estate or any other legal entity."[400] And then examine how this list differs from the definition of "person" under the state's hazardous waste statute: "'Person' means an individual, trust, firm, joint stock company, joint venture, consortium, commercial entity, partnership, association, corporation, commission, state and any agency thereof, political subdivision of the state, interstate body or the federal government including any agency thereof."[401] Additionally, observe the slightly different definition of "person" under the state's environmental quality statute: "'Person' includes individuals, corporations, associations, firms, partnerships, joint stock compa-

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[396] *See, e.g.*, MASS. GEN. LAWS ch. 21C, § 9 (assigning enforcement of violations to "the department"); *id.* ch. 21G, § 14 (same).

[397] *See, e.g.*, OR. REV. STAT. § 459.005–.995 (2022) (solid waste management); *id.* § 465.003–.992 (hazardous waste and hazardous materials); *id.* § 468.005–.997 (environmental quality generally); *id.* § 468A.005–.992 (air quality); *id.* § 468B.005–.555 (water quality).

[398] *See, e.g.*, Georgia Armitage, *Earth Day: Collection Highlights*, STATE OF OR. L. LIBR. (Apr. 21, 2021), https://soll.libguides.com/blog/Earth-Day-Collection-Highlights [https://perma.cc/PD8N-S3V3] (describing the history of environmental policy in Oregon).

[399] *See infra* notes 400–402 and accompanying text.

[400] OR. REV. STAT. § 459.005(19) (2022).

[401] *Id.* § 465.200(21).

nies, public and municipal corporations, political subdivisions, the state and any agencies thereof, and the federal government and any agencies thereof."[402]

Of course, the differences between these definitions are modest. And, to be fair, the state's environmental quality statute's definition of "person" *does* apply to some other statutes, including—importantly—the state's air and water quality statutes.[403] Thus, there is some modicum of cohesion to the statutory schema. But for a doctrine so dependent on its adoptive statute's text, those differences may prevent any wholesale adoption of the doctrine.

Further, the definitions in Oregon's environmental statutes are not as conducive to adopting the doctrine as they are in Massachusetts. Certainly, the definitions of "person" include "individuals,"[404] which could be sufficient to include individual corporate officer liability.[405] But the definitions lack any express recognition that individual officers of corporations can be liable for the acts or omissions of their corporations.[406]

Judicial adoption of a revitalized responsible corporate officer doctrine under Oregon's environmental statutes would therefore require a courageous judiciary unafraid of reading between the statutory lines. And it would need multiple efforts to adopt the doctrine under different statutes to create uniformity. This, of course, can be done. But, when compared to Massachusetts, Oregon presents a less straightforward opportunity for the doctrine's judicial adoption. To that end, legislative adoption would be more comprehensive. A single statute could create a uniform category of individual civil liability without a mens rea requirement that is enforceable by the state and citizens alike.

CONCLUSION

The state environmental responsible corporate officer doctrine is ripe for revitalization. Although it has a robust presence at the federal level, the state environmental forms of the doctrine are piecemeal and scattered. This Article proposes a renewed doctrine, with facets that will bring cohesion, stability, and functionality to the doctrine. As Massachusetts and Oregon demonstrate, this

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[402] *Id.* § 468.005(5). This definition also applies to other statutes, including statutes that concern sewage, air quality, and water quality. *Id.*

[403] *Id.*

[404] *Id.*

[405] Some other states have held just that. *See, e.g.*, People v. Roscoe, 87 Cal. Rptr. 3d 187, 194–95 (Ct. App. 2008) (finding individual liability where the statute defined "person" as, *inter alia*, any "individual").

[406] *Cf.* MASS. GEN. LAWS ch. 21C, § 2 (2022) (including "any . . . corporation . . . *and any officer, employee, or agent* of said person" (emphasis added)).

revitalized responsible corporate officer doctrine is ready for judicial and legislative adoption. It only remains, then, for state judiciaries or legislatures to recognize it.