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Notes

CORPORATE CRIMINAL LIABILITY FOR HOMICIDE: A STATUTORY FRAMEWORK

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ABSTRACT

Since the nineteenth century, judges, legislators, prosecutors, and academics have grappled with how best to accommodate within the criminal law corporations whose conduct causes the death of others. The result of this debate was a gradual legal evolution towards acceptance of corporate criminal liability for homicide. But, as this Note argues, the underlying legal framework for such liability is ill fitting and largely ineffective. Given the public benefit that would accrue from a clearly defined and potent liability scheme, this Note proposes a model criminal statute that would hold corporations directly liable for homicide. The proposed statute draws upon basic precepts of corporate criminal liability, as well as legislative developments in the United Kingdom and the insights of organizational theory. Ultimately, this Note argues that a statutory scheme would allow prosecutions of corporations for homicide to proceed more accurately, effectively, and fairly.

INTRODUCTION

On April 5, 2010, an explosion ripped through the Upper Big Branch coal mine in West Virginia, claiming the lives of twenty-nine miners.[1] A report commissioned by West Virginia's governor determined that the explosion was caused by the ignition of methane

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1. John M. Broder, *Fatal Mine Blast Was Preventable, Report Says*, N.Y. TIMES, Jan. 20, 2011, at A17.

and coal dust, which had built up in the mine due to insufficient ventilation and malfunctioning water-spray systems.[2] From June 2006 to April 2010, federal officials had cited Performance Coal Company, a subsidiary of Massey Energy and the owner of the Upper Big Branch mine, hundreds of times for serious safety violations.[3] In fourteen of the fifteen months leading up the explosion, the Upper Big Branch mine received citations related to its handling of coal dust—a primary cause of the April 5th explosion.[4] Despite these repeated safety violations, Upper Big Branch management did not implement an effective compliance program, instead adopting a "catch me if you can" mentality toward regulation.[5]

In April 2010, an explosion and fire on the Deepwater Horizon oil rig in the Gulf of Mexico claimed eleven lives.[6] A presidential investigatory commission found that the explosion resulted from a failure to properly seal off the well and contain the enormous pressures that had built up inside.[7] The commission also determined that the root causes of the explosion could "be traced back to underlying failures of management and communication" by BP—formerly British Petroleum—who, along with its partners, owned and operated the rig.[8] For example, BP engineers had continued to revise the procedure for sealing the well until hours before the explosion without a full risk assessment.[9] Furthermore, prior to the explosion, rig workers had worried about safe practices taking a back seat to drilling operations and about their inability to communicate their concerns to senior managers ashore.[10] Transocean, the company that operated the rig, left the crew in the dark about an "eerily similar

2. GOVERNOR'S INDEP. INVESTIGATION PANEL, UPPER BIG BRANCH: THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES 16, 23 (2011).

3. Sam Hananel, *Federal Prosecutors Are Conducting Criminal Probe in W.Va. Mine Explosion*, WASH. POST, May 15, 2010, at A16.

4. GOVERNOR'S INDEP. INVESTIGATION PANEL, *supra* note 2, at 54.

5. David A. Fahrenthold & Kimberly Kindy, *Safety Chief Details Mine's History of Violations*, WASH. POST, Apr. 28, 2010, at A2.

6. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, at vi (2011).

7. *Id.* at 115.

8. *Id.* at 122.

9. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, MACONDO: THE GULF OIL DISASTER 140 (2011).

10. Ian Urbina, *Workers on Doomed Rig Voiced Concern on Safety*, N.Y. TIMES, July 22, 2010, at A1.

near-miss" that took place on another rig a few months before the Deepwater Horizon explosion.[11]

Between June and November of 2010, six residents at North Carolina's Glen Care assisted-living center died after being infected with hepatitis B during blood-sugar checks by facility staff.[12] Upon investigation, state health inspectors found that the staff were generally untrained in disease prevention and had reused improperly sterilized equipment to check the residents' glucose levels—both of which constituted regulatory violations.[13] Although the center's management had known that precautionary training was required by state law and had offered training sessions for staff members,[14] management had failed to ensure that all of the staff members had received the necessary instruction.[15]

Each of the above examples illustrates a common flaw in the relationship between a corporation[16] and its employees or the consumers of its products. In each instance, a corporation failed to adhere to government regulations or to internal policies designed to prevent harm. Each lapse resulted in the death of at least one individual, suggesting the potential applicability of criminal homicide law. Yet none of these examples will likely result in the filing of homicide charges, let alone a successful prosecution for the crime.[17]

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11. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 6, at 124.

12. Thomas Goldsmith, *Diabetes Care Gap Feared*, NEWS & OBSERVER (Raleigh), Dec. 26, 2010, at 1A.

13. Mandy Locke, *Dirty Diabetes Test Kits Blamed*, NEWS & OBSERVER (Raleigh), Nov. 17, 2010, at 1A; *see also* Goldsmith, *supra* note 12 ("What we saw were people who were not trained in fighting infection . . . . It's not even sloppiness; it's really ignorance." (quoting Julie Henry, spokeswoman for the N.C. Division of Public Health)).

14. Glen Care of Mt. Olive, Statement of Deficiencies 1, 3–4 (N.C. Div. of Health Serv. Regulation Nov. 5, 2010) (on file with the *Duke Law Journal*).

15. *See id.* at 2–3 (noting the nonattendance of employees at a safety lecture); Locke, *supra* note 13 (describing how several employees admitted to checking blood-sugar levels even though they had not attended training sessions on the subject).

16. This Note uses the term "corporation" throughout for the sake of brevity. The term should be read to refer to all manner of business entities regardless of formal incorporation status, including partnerships, limited liability companies, and other such entities.

17. Federal prosecutors continue to investigate the Upper Big Branch mine explosion, Hananel, *supra* note 3, but a similar federal criminal investigation into a deadly explosion at a Utah mine strongly suggests that homicide charges are unlikely to be forthcoming, *see* Howard Berkes, *Still No Criminal Charges in 2007 Utah Mine Disaster*, TWO-WAY: NPR'S NEWS BLOG (June 16, 2011, 12:51 AM), http://www.npr.org/blogs/thetwo-way/2011/06/16/137213027/still-no-criminal-charges-in-2007-utah-mine-disaster ("Four years after nine coal miners and mine rescuers died underground in the Crandall Canyon mine in Utah, federal prosecutors say

This Note proceeds according to several basic premises: First, a corporation may be directly responsible for the deaths of the employees, consumers, and members of the general public with whom it interacts. Second, in situations of systemic internal misconduct or corporate recidivism, civil regulatory penalties and private lawsuits are insufficient to vindicate society's interest in punishing the entity responsible for these deaths. Third, there are instances when a corporate entity is a truly blameworthy actor, rather than—or in addition to—individual employees, and when a criminal sanction against the corporation would have the greatest effect.[18] This may be particularly true for large corporations given their complex bureaucratic structures.[19] Fourth, current homicide schemes are ill equipped to accommodate corporate defendants.[20] Historically, there have been few significant corporate prosecutions for homicide. Those that have occurred have tended to be against small companies in which ownership and management were united in the same individuals, who were also charged individually.[21] The paucity of successful prosecutions suggests that current law does not provide prosecutors with the power to bring corporate homicide charges or, that if the power exists, its lack of clarity discourages prosecutors from bringing cases.

To reconcile these basic premises, this Note proposes a statutory scheme that would allow corporate homicide prosecutions to proceed more accurately, effectively, and fairly. This proposal would improve

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they're still not ready to file criminal charges or to conclude that no charges are warranted."). The North Carolina Glen Care facility could face a $20,000 civil penalty and increased monitoring by health officials. Locke, *supra* note 13. Interestingly, reports indicate that federal authorities are at least considering bringing manslaughter charges against the companies behind the Deepwater Horizon oil spill under the federal Seaman's Manslaughter Statute, 18 U.S.C. § 1115 (2006). Jerry Markon, *Criminal Charges Considered in Oil Spill*, WASH. POST, Mar. 30, 2011, at A2.

18. To clarify, this Note does not contend that corporate liability should replace individual culpability. If culpable individuals are found, they should be prosecuted for manslaughter or homicide. Rather, the proposed statute seeks to patch a hole in the criminal-liability fabric.

19. *See* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 834 (1927) ("[I]t may on occasion, be clear enough that some individuals have committed a crime for corporate purposes, and yet not clear who those individuals are. It is moreover relatively difficult to apprehend and prosecute a number, particularly a large number, of individuals, even if their identity is known; the corporation is always readily available.").

20. *See infra* Part III.

21. *See, e.g.*, State v. Far W. Water & Sewer Inc., 228 P.3d 909, 916, 928 (Ariz. Ct. App. 2010) (affirming a sewage-treatment company's conviction for negligent homicide based on the acts of its president).

accuracy by acknowledging the true severity and blameworthiness of corporate conduct. It would increase efficacy by opening up avenues for criminal liability. And it would advance principles of fairness by providing notice to corporate actors and by advocating for sentences focused on rehabilitation. Prior scholarship on corporate homicide is limited because it was written immediately after formative doctrinal events, without the benefit of several decades of practical development.[22] Moreover, prior statutory proposals either sought to expand criminal liability to encompass life-endangering acts of corporations[23] or to limit it to workplace incidents.[24] In contrast, this Note relies on experiences in the United States and abroad to craft a statute narrow enough to avoid overcriminalization but broad enough to reach serious corporate misconduct.

Part I of this Note recounts the development of corporate criminal liability for homicide. Part II analyzes the policy rationales for and against the use of criminal law to hold corporations liable for homicide. Part III identifies failings within the current U.S. system of corporate homicide liability. Part IV reviews the corporate homicide statutory scheme enacted in the United Kingdom. And Part V proposes a corporate homicide statute, explains each section of the statute, and provides several illustrative applications.

I. THE HISTORY AND CURRENT STATE OF CORPORATE LIABILITY FOR HOMICIDE

This Part briefly reviews precedents relating to corporate criminal liability for homicide. It traces the early, largely unsuccessful attempts to hold corporations criminally liable for homicide. Then, it

22. For examples of earlier scholarship on corporate homicide, see generally Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753 (1987); Patrick Hamilton, Comment, *Corporate Criminal Liability for Injuries and Death*, 40 U. KAN. L. REV. 1091 (1992); Donald J. Miester, Jr., Comment, *Criminal Liability for Corporations That Kill*, 64 TUL. L. REV. 919 (1990); and John E. Stoner, Comment, *Corporate Criminal Liability for Homicide: Can the Criminal Law Control Corporate Behavior?*, 38 SW. L.J. 1275 (1985).

23. *See, e.g.*, W. Allen Spurgeon & Terence P. Fagan, *Criminal Liability for Life-Endangering Corporate Conduct*, 72 J. CRIM. L. & CRIMINOLOGY 400, 430–32 (1981) (advocating for the adoption of a criminal prohibition against life-endangering corporate conduct).

24. *See, e.g.*, Anne D. Samuels, Note, *Reckless Endangerment of an Employee: A Proposal in the Wake of* Film Recovery Systems *To Make the Boss Responsible for His Crimes*, 20 U. MICH. J.L. REFORM 873, 902–04 (1987) (drafting a criminal statute prohibiting the reckless endangerment of an employee).

surveys the modern developments in corporate homicide doctrine and summarizes the existing state of the law.

A. Early Prosecution Efforts

Early efforts to prosecute corporations for homicide were grounded in a pragmatic desire to balance increasing corporate power over social and economic life with the public's need to hold corporate entities accountable for their actions.[25] Reflecting this desire, a federal appellate court held in *United States v. Van Schaick*[26] that "[a] corporation can be guilty of causing death by its wrongful act."[27] *Van Schaick* arose after a steamship disaster left hundreds dead and the corporate shipowner was indicted for manslaughter under a federal maritime statute that prohibited fraudulent and negligent safety practices.[28] The court unhesitatingly dismissed the arguments against corporate liability,[29] finding that Congress had not intended "to give the owner impunity simply because it happened to be a corporation."[30] The *Van Schaick* court declined to absolve "corporate carriers by sea [that] kill their passengers through misconduct that would be a punishable offense if done by a natural person."[31]

Several years later, in 1909, the Supreme Court echoed the pragmatic reasoning of *Van Schaick* in its seminal decision in *New York Central & Hudson River Railroad v. United States*,[32] basing federal corporate criminal liability on the principle of *respondeat superior*.[33] The Court justified its extension of corporate criminal

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25. It is important to distinguish between holding the corporate entity liable for homicide and holding individual officers and employees personally liable. At the time of Blackstone, the former was unknown at common law; the latter was generally accepted. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *476 ("A corporation cannot commit treason, or felony, or other crime, in it's corporate capacity: though it's members may, in their distinct individual capacities." (footnote omitted)). This Note is concerned with the former.

26. United States v. Van Schaick, 134 F. 592 (C.C.S.D.N.Y. 1904).

27. *Id.* at 602.

28. *Id.* at 595–96. The steamship's captain and the company's officers were also indicted for manslaughter. *Id.* at 594–95.

29. It was argued that the corporate defendant could not be indicted because the sole statutory penalty was imprisonment, which it could not serve. *Id.* at 602.

30. *Id.*

31. *Id.*

32. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909).

33. *Id.* at 494–95. For a richer explication of modern *respondeat superior* doctrine, see Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 64–65 (2007). Much ink has been spilled decrying and defending the *New York Central* decision. *See, e.g.*, John Hasnas, *The*

liability by highlighting the centrality of corporations to the country's economic life,[34] the corporation's ability to commit the charged offense,[35] and the public-policy benefits afforded by criminal liability.[36]

Although the federal courts in *Van Schaick* and *New York Central* were willing to construe federal statutes to cover corporate conduct, state courts were fractured in their application of general homicide statutes to corporate entities. In *State v. Lehigh Valley Railroad*[37], the Supreme Court of New Jersey permitted a negligence-based prosecution of a railroad for involuntary manslaughter.[38] The court held that it would accept corporate criminal liability "unless there is something in the nature of the crime, the character of the punishment prescribed therefor, or the essential ingredients of the crime, which makes it impossible for a corporation to be held" liable.[39] As the capacity for corporate criminal liability in negligence-based crimes was "elementary," the involuntary manslaughter charge easily fit within that scheme.[40] The court cautioned, however, that

Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability, 46 AM. CRIM. L. REV. 1329, 1338, 1358 (2009) (characterizing corporate criminal liability as violating "all three of the necessary conditions for criminal responsibility" and "inconsistent with the fundamental principles of a liberal society"); 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, 824 (1996) ("The *respondeat superior* theory was the only approach available in *New York Central* to preserve corporate criminal liability in the face of the due process challenge without completely foreclosing other constitutional protections to corporate defendants."). Nevertheless, the holding of *New York Central* is a legal fixture unlikely to be overturned. And this is for the best. Although pure *respondeat superior* may not be the perfect means of attaching criminal liability to corporations, it is by no means unjust or illogical.

34. *See N.Y. Cent.*, 212 U.S. at 495 ("[T]he great majority of business transactions in modern times are conducted through these bodies, and . . . interstate commerce is almost entirely in their hands . . . .").

35. *See id.* (noting that by prohibiting certain railroad rebates, "[t]his statute does not embrace things impossible to be done by a corporation").

36. *See id.* (warning that if corporate criminal liability were impossible, "many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy").

37. State v. Lehigh Valley R.R., 103 A. 685 (N.J. 1917).

38. *Id.* at 687.

39. *Id.* at 685–86.

40. *Id.* at 686. To support its claim that corporate liability for negligence was "elementary," the court referred to nineteenth-century developments that held corporations liable for what Professor V.S. Khanna characterizes as "all offenses that did not require criminal intent." V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1481 (1996).

"voluntary manslaughter involves ingredients quite different from those involved in involuntary manslaughter,"[41] suggesting that it would not so readily permit an indictment for the more serious homicide charge.

As intimated by the *Lehigh Valley* court's reservations about voluntary manslaughter, many state courts in the early- to mid-twentieth century held that their respective general homicide statutes did not encompass corporate entities. Absent specific legislative instruction, several courts categorically dismissed corporate indictments for manslaughter.[42] For example, New York's homicide statute, as then drafted, proscribed "the killing of one human being by the act, procurement or omission of another."[43] In rejecting an attempt to charge a corporation with manslaughter, a New York court held that, absent legislative intent "to abandon the limitation of its enactments to human beings or to include a corporation as a criminal,"[44] a homicide statute should be construed to mean a killing "by another human being."[45] The New York court acknowledged, however, that this was primarily a matter of legislative draftsmanship because a homicide statute "might have been formulated which would be applicable to a corporation."[46]

As drafted, homicide statutes implicitly reflected the belief of policymakers that there were some crimes for which corporations simply could not—or should not—be liable. Even the Supreme Court, as it was broadly expanding corporate criminal liability in *New York Central*, acknowledged that "there are some crimes, which in their nature cannot be committed by corporations."[47] This reluctance to permit corporate prosecutions for homicide persisted at the time of the Model Penal Code's (MPC) drafting in the 1950s. In the course of promulgating an alternative standard to *respondeat superior* for corporate criminal liability,[48] the MPC's drafters surveyed past corporate prosecutions and found that they were "restricted for the

41. *Lehigh Valley*, 103 A. at 686.

42. *See, e.g.*, Commonwealth v. Ill. Cent. R.R., 153 S.W. 459, 461 (Ky. 1913) ("[H]omicide, in any of its degrees, is not an offense for which a corporation may be indicted . . . ."); People v. Rochester Ry. & Light Co., 88 N.E. 22, 24 (N.Y. 1909) ("[W]e do not discover any evidence of an intent on the part of the Legislature to abandon the limitation of its enactments to human beings or to include a corporation as a criminal.").

43. *Rochester Ry. & Light*, 88 N.E. at 24 (quoting N.Y. PENAL CODE § 179 (1908)).

44. *Id.*

45. *Id.*

46. *Id.*

most part to thefts—including frauds—and involuntary manslaughter."[49] There had been no case in which "a corporation was sought to be held criminally liable for . . . murder."[50] The lack of any development of corporate liability for homicide thus continued to reflect the prevailing sentiment at the time that "homicide by its very nature lies in the field of inherently human relations."[51]

B. Modern Developments in Prosecuting Corporations for Homicide

In the 1970s and 1980s, policymakers reconceptualized corporate criminal liability for homicide. Alongside the creation of regulatory bodies charged with ensuring employee and consumer safety,[52] the judiciary interpreted statutory amendments as removing ideological and doctrinal barriers to corporate homicide prosecutions. In practice, however, these developments did not remove all of the obstacles in the path of an optimal corporate homicide scheme.

With a subtle yet significant stroke of the pen, legislatures broadened corporate criminal liability for homicide by amending the definitional provisions in state penal codes. Early attempts to charge corporations with homicide had floundered because the homicide statutes required that the victim be a "person" and that the conduct be committed "by another."[53] To remedy this limitation, legislatures amended their penal codes to include corporations within the basic definition of a "person" and to delete the requirement that certain

47. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494 (1909); *see also* Edgerton, *supra* note 19, at 841 (arguing in 1927 that there was no legal bar that "preclude[d] the commission of some crimes, like murder, . . . by corporations").

48. The MPC predicates corporate liability upon the conduct of corporate employees of sufficient standing within the corporation's power structure. *See* MODEL PENAL CODE § 2.07(1)(c) 1962) (attaching liability to conduct that has been "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment").

49. MODEL PENAL CODE § 2.07 cmts. at 150 (Tentative Draft No. 4, 1955).

50. *Id.*

51. State v. Pac. Powder Co., 360 P.2d 530, 532 (Or. 1961) (en banc) (holding that a corporation cannot be indicted for homicide); *see also* Brickey, *supra* note 22, at 753 (describing early corporate prosecutions for homicide as "anomalous").

52. *See, e.g.*, Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051–2089 (2006)) (creating the Consumer Product Safety Commission (CPSC)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2006)) (creating the Occupational Safety and Health Administration (OSHA)).

53. *See supra* notes 42–46 and accompanying text.

crimes be committed by a human being.[54] A caveat commonly accompanied these definitional amendments, however, stipulating that corporate criminal liability should attach only "where appropriate."[55]

Several courts seized upon these legislative amendments, seeing them as a manifestation of the legislature's "clear intention"[56] to expand corporate criminal liability to homicide.[57] In so doing, these courts accepted without discussion that homicide constituted a legislatively "appropriate" extension of criminal liability to corporations.[58] In at least one state, the judicial expansion of homicide liability to corporations was deemed valid not because of prior legislative action, but because of subsequent legislative inaction.[59]

In the wake of these legislative and judicial developments, prosecutors around the country began filing homicide charges against corporate actors.[60] This expanded use of corporate homicide charges was also the product of highly publicized examples of extreme

54. Brickey, *supra* note 22, at 758.

55. *See, e.g.*, KY. REV. STAT. ANN. § 500.080(12) (West 2006) ("'Person' means a human being, and *where appropriate*, a public or private corporation, an unincorporated association, a partnership, a government, or a governmental authority . . . ." (emphasis added)).

56. Commonwealth v. Fortner LP Gas Co., 610 S.W.2d 941, 942 (Ky. Ct. App. 1980).

57. *See, e.g.*, People v. Ebasco Servs., Inc., 354 N.Y.S.2d 807, 811 (Sup. Ct. 1974) (holding that after the inclusion of a corporation within the Penal Code's definition of personhood, "a corporation cannot be the victim of a homicide, [but] it may commit that offense and be held to answer therefor"); Commonwealth v. Penn Valley Resorts, Inc., 494 A.2d 1139, 1142–43 (Pa. Super. Ct. 1985) (holding that a corporation is a person within the statutory definition of involuntary manslaughter); Vaughan & Sons, Inc. v. State, 737 S.W.2d 805, 810 (Tex. Crim. App. 1987) (en banc) ("The Legislature, recognizing that for years Texas was the only jurisdiction in which corporations bore no general criminal responsibility, and aware of the previous roadblocks in case law to the prosecution of corporations for criminal offenses, enacted statutes to remedy the situation.").

58. *See* Granite Constr. Co. v. Superior Court, 197 Cal. Rptr. 3, 9 (Ct. App. 1983) (describing the *Ebasco Services* and *Fortner LP Gas* courts' expansion of liability to homicide as resting upon "a much weaker [statutory] definition" due to the presence of "when appropriate" language). The Arizona courts addressed the issue and adopted a default position of placing the impetus on the legislature to specifically exclude, rather than include, corporate liability for offenses. *See* State v. Far W. Water & Sewer Inc., 228 P.3d 909, 922–23 (Ariz. Ct. App. 2010).

59. *See* State v. Richard Knutson, Inc., 537 N.W.2d 420, 425 (Wis. Ct. App. 1995) (finding that "the legislature [had been] aware that court decisions [had] held corporations criminally liable" when it twice revised Wisconsin's homicide statutes and noting that, "and on both occasions, the legislature [had] elected not to undo corporate criminal liability").

60. *See, e.g.*, Michael B. Bixby, *Workplace Homicide: Trends, Issues, and Policy*, 70 OR. L. REV. 333, 335–56 (1991) (surveying several prosecutions that occurred between 1985 and 1991 in which employee deaths led to homicide charges against the corporate employer).

corporate misconduct that had resulted in death. For example, Ford Motor Company was prosecuted for reckless homicide after three young women died because their Ford Pinto burst into flames following a rear-end collision.[61] Similarly, the manslaughter prosecution of Film Recovery Systems after the death of an undocumented Polish factory worker made national news.[62] Finally, the front page of the *New York Times* reported the manslaughter trial of the Six Flags Corporation after eight New Jersey teenagers died in an amusement park fire.[63] One commentator describes these cases and the others brought against corporations as a "prosecutorial wave."[64] To date, at least fifteen states plus the federal government have prosecuted corporations for manslaughter or criminally negligent homicide.[65]

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61. *See* State v. Ford Motor Co., 47 U.S.L.W. 2514, 2515 (Ind. Super. Ct. 1979) (sustaining an indictment against Ford for reckless homicide because Ford "had sufficient notice of the application of . . . reckless homicide to it").

62. *See, e.g.*, Steven Greenhouse, *3 Executives Convicted of Murder for Unsafe Workplace Conditions*, N.Y. TIMES, June 15, 1985, at 1 (discussing the manslaughter conviction of the corporation and the murder convictions of individual officers); *see also* Brickey, *supra* note 22, at 770–75 (describing the prosecution of Film Recovery Systems on the basis of dangerous factory conditions and inaction from corporate officials who knew of the danger posed by cyanide vapors).

63. Donald Janson, *Great Adventure Owners Cleared of Criminal Charges in Fatal Fire*, N.Y. TIMES, July 21, 1985, at 1; *see also* David J. Reilly, Comment, *Murder, Inc.: The Criminal Liability of Corporations for Homicide*, 18 SETON HALL L. REV. 378, 393–94 (1988) (summarizing the procedural history of the Six Flags prosecution).

64. Carol L. Bros, *A Fresh Assault on the Hazardous Workplace: Corporate Homicide Liability for Workplace Fatalities in Minnesota*, 15 WM. MITCHELL L. REV. 287, 308 (1989).

65. *See* United States v. Van Schaick, 134 F. 592, 602–05 (C.C.S.D.N.Y. 1904) (permitting the indictments of a corporation and its individual officers for manslaughter under a federal maritime statute); State v. Far W. Water & Sewer Inc., 228 P.3d 909, 916 (Ariz. Ct. App. 2010) (affirming the conviction of a corporation for criminally negligent homicide); Granite Constr. Co. v. Superior Court, 197 Cal. Rptr. 3, 4 (Ct. App. 1983) (permitting the indictment of a corporation for manslaughter under California law); People v. O'Neil, 550 N.E.2d 1090, 1098 (Ill. App. Ct. 1990) (reversing the involuntary manslaughter conviction of an Illinois corporation and its individual officers based on mutually exclusive mental states); *Ford Motor Co.*, 47 U.S.L.W. at 2515 (sustaining an indictment against Ford for reckless homicide under Indiana law); Commonwealth v. Fortner LP Gas Co., 610 S.W.2d 941, 943 (Ky. Ct. App. 1980) (upholding the indictment of a corporation for second-degree manslaughter under Kentucky law); Commonwealth v. Angelo Todesca Corp., 842 N.E.2d 930, 934 (Mass. 2006) (affirming the conviction of a corporation for motor-vehicle homicide under Massachusetts law); People v. Gen. Dynamics Land Sys., Inc., 438 N.W.2d 359, 361 (Mich. Ct. App. 1989) (sustaining the indictment of a corporation for involuntary manslaughter under Michigan law); State v. Lehigh Valley R.R. Co., 103 A. 685, 687 (N.J. 1917) (upholding the indictment of a corporation for involuntary manslaughter under New Jersey law); People v. Ebasco Servs. Inc., 354 N.Y.S.2d 807, 811–12 (Sup. Ct. 1974) (permitting, as a matter of New York law, the indictment of a corporation for criminally negligent homicide but dismissing the indictment in the case on other

Nonetheless, the current state of corporate homicide doctrine suggests that the wave has lost its momentum. In jurisdictions where corporate liability for homicide is accepted as a basic theoretical premise, its reach has been constrained by judicial construction.[66] The reported cases of corporate homicide suggest that prosecutions are skewed toward small businesses.[67] Punishments for corporations—even large ones—convicted of homicide at the state level tend to be disproportionately smaller than the harm the corporation caused.[68] Lastly, the diminished and suboptimal state of corporate homicide doctrine is reflected in the willingness of prosecutors to undercharge a corporate entity even when its conduct is particularly egregious and results in a loss of life.[69]

grounds); State v. Consol. Rail Corp., C.A. No. L-81-033, 1981 WL 5726, at *3 (Ohio Ct. App. July 24, 1981) (requiring the trial court to address the validity of a corporate indictment for vehicular homicide under Ohio law); Commonwealth v. McIlwain Sch. Bus Lines, Inc., 423 A.2d 413, 420 (Pa. Super. Ct. 1980) (sustaining the indictment of a corporation for criminal homicide by vehicle under Pennsylvania law); Vaughan & Sons, Inc. v. State, 737 S.W.2d 805, 814 (Tex. Crim. App. 1987) (en banc) (affirming the conviction of a corporation for criminally negligent homicide under Texas law); State v. Richard Knutson, Inc., 537 N.W.2d 420, 429 (Wis. Ct. App. 1995) (affirming the conviction of a corporation for criminally negligent homicide under Wisconsin law); Patrick J. Schott, Comment, *Corporate Criminal Liability for Work-Site Deaths: Old Law Used a New Way*, 71 MARQ. L. REV. 793, 805 (1988) (describing the Connecticut prosecution of PGP Industries Inc. for criminally negligent homicide that was ultimately dismissed during the trial); Randall Chase, *Refinery Fined in Deadly Blast*, PHILA. INQUIRER, July 9, 2003, at B03 (reporting that a corporation pled no contest to charges of criminally negligent homicide under Delaware law).

66. *See, e.g.*, *O'Neil*, 550 N.E.2d at 1101 (reversing the convictions of the corporate and individual defendants charged in the Film Recovery Systems case because the convictions were "legally inconsistent," given that the "same conduct [was] used to support offenses which ha[d] mutually exclusive mental states"); People v. Warner-Lambert Co., 414 N.E.2d 660, 665–66 (N.Y. 1980) (dismissing the indictment against a corporate defendant for a factory explosion that killed six employees because there was insufficient proof that the corporation could have foreseen the explosion).

67. *See* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 42 VAND. L. REV. 1343, 1344 n.1 (1999) ("On average, small privately held businesses account for more than 95% of all corporate convictions each year.").

68. *See infra* note 227.

69. For example, in 2006, Atlantic States Cast Iron Pipe Company and several individual managers were convicted of criminal conspiracy, obstruction of justice, and other offenses related to the death of an employee who was driving an unsafe forklift. The evidence showed that for months prior to the accident, managers and supervisors knew that employees were being required to drive forklifts with inoperable brakes and other defects. United States v. Atl. States Cast Iron Pipe Co., 627 F. Supp. 2d 180, 328–29 (D.N.J. 2009). Strikingly, neither the company nor the individual managers were charged for homicide.

II. IS PROSECUTING CORPORATIONS FOR HOMICIDE SOUND POLICY?

Although this Note ultimately endorses a redesigned regime of corporate criminal liability for homicide,[70] it is worth pausing to discuss this proposal's policy implications. The use of public policy in the development of corporate criminal liability extends back one century to the Supreme Court's decision in *New York Central*.[71] This Part considers whether the extension of corporate criminal liability to homicide best serves society's needs. It first makes the normative case for criminal liability. Then it considers and rebuts several counterarguments, including the sufficiency of civil remedies—e.g., private litigation or civil regulatory schemes—and the potential for overdeterrence and overburdening businesses.

A. Policy Goals Served by Prosecutions

1. *Corporate Entities May Be To Blame for the Loss of Life*. Modern corporations exercise great influence over social, political,[72] and economic life. Corporations also enjoy significant constitutional and legal rights.[73] The possession and proper exercise of this kind of power are cornerstones of capitalism. Regrettably though, there are instances in which corporate misconduct has caused significant harm to communities.[74] And even more regrettably, some of these

70. *See infra* Part V.

71. *See supra* notes 34–36 and accompanying text.

72. For example, from 1998 to 2010, twelve of the top twenty entities with the greatest political lobbying expenditures were individual corporations; the *twentieth*-ranked company spent over $100 million during that thirteen-year period. Ctr. for Responsive Politics, *Lobbying: Top Spenders*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/top.php?showYear=a&indexType=s (last visited Sept. 5, 2011). Another seven of the top spenders were industry interest groups. *Id.*

73. *See generally* 1 JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS § 1.04 (2d ed. 2003) (describing the constitutional rights of corporations); Henning, *supra* note 33 (describing the constitutional rights of corporations recognized by the Supreme Court as being in the criminal realm). In 2010, the Supreme Court held that corporate political speech unaffiliated with a specific political campaign enjoyed First Amendment protection, thereby broadening the list of corporate rights beyond what courts had previously recognized. Citizens United v. FEC, 130 S. Ct. 876, 913 (2010). One commentator opines that after *Citizens United*, it has become easier to argue for corporate criminal liability because "an entity that has political will also has free will." Christopher Slobogin, Citizens United *& Corporate & Human Crime*, 14 GREEN BAG 2D 77, 79 (2010).

74. Recent large-scale corporate malfeasances have included massive accounting frauds and longstanding corporate initiatives to bribe public officials around the globe. *See* Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481,

occasions have led to the deaths of employees,[75] consumers,[76] and members of the general public.[77] This recitation is not intended to suggest that corporations are bad. Rather, it is intended to illustrate that in those rare cases when a corporation exercises its power and violates the law, that corporation has "the ability to engage in misconduct that dwarfs that which could be accomplished by individuals."[78]

Criminal law should—and does—apply to blameworthy corporate conduct that merits condemnation and punishment.[79] Arguments that corporations are mere legal fictions without distinct identities, cultures, and moralities ignore the reality of the situation.[80] Organizational theorists recognize that an organization's culture is closely intertwined with its leadership.[81] Management may create a culture that sacrifices safety for profits, or it may create a safety-first culture.[82] The desire for profits can be a powerful—even irresistible—force that can cause a corporation to hazard great risks.[83] In such

1484 (2009) (noting that Siemens AG pled guilty for paying "more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East, and Latin America, using its slush funds"); Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 91–95 (2004) (recounting examples of recent corporate financial frauds).

75. *See supra* notes 1–7 and accompanying text.

76. *See infra* note 156.

77. *See* Daniel Barstow Magraw, *The Bhopal Disaster: Structuring a Solution*, 57 U. COLO. L. REV. 835, 835 (1986) (noting that the release of poisonous gas from a Union Carbide India Ltd. plant in Bhopal, India, "resulted in an estimated 2000 deaths and hundreds of thousands of other personal injuries").

78. Beale, *supra* note 74, at 1484.

79. *See id.* at 1482 (defending corporate criminal liability because corporations "are enormously powerful, and very real, actors whose conduct often causes very significant harm both to individuals and to society as a whole").

80. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 493 (2006) ("The truth is that institutions *do* produce wrongdoing."); *see also id.* at 493–95 (surveying psychological studies that describe how "people often behave differently—sometimes better, sometimes worse—in institutional settings").

81. *See* EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 3 (4th ed. 2010) ("[C]ulture is ultimately created, embedded, evolved, and ultimately manipulated by leaders.").

82. *See* Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1532 (2007) ("Companies can develop distinctive cultures (or an ethos) including values that are contrary to general norms, which they encourage their employees to flout.").

83. *See* MODEL PENAL CODE § 2.07 cmts. at 148–49 (Tentative Draft No. 4, 1955) (acknowledging that "there are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain"); 1 COX & HAZEN, *supra* note 73, § 8.21, at 384 (noting that when corporate employees "feel compelled to risk penal sanctions to earn status, approval, or security

cases, the corporation may be the truly blameworthy actor, rather than any one employee.[84] Thus, there are instances in which individual "human behavior, including behavior legally defined as criminal, . . . is explicable (even *describable*) only with reference to the institutional settings where it arises."[85]

When a loss of life has occurred and a corporation itself is the blameworthy entity, criminal law provides society with a uniquely powerful tool to both express its condemnation of the corporation's actions and reform the corporation to ensure that its conduct will conform with societal expectations going forward.[86] Reflecting on the Ford Pinto prosecution, for example, one commentator argues that the prosecution's principal significance was not its "attempt to establish precedent for a new weapon to be deployed regularly against corporate crime."[87] Instead, it was the prosecution's "attempt to make a corporation answer to a jury when business practices are perceived as transgressions of a community's moral boundaries."[88] The expression of a community's moral condemnation, even when applied to corporations, is unique to criminal law and goes beyond the utilitarian goals of rehabilitation and deterrence.[89] There is significant intrinsic value to this expressive force when it is applied to corporations in the same way that it is applied to individuals.[90]

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in the corporate organization," the "imposition of criminal liability on the *corporation* may be necessary if undesired conduct is to be controlled" (emphasis added)); Spurgeon & Fagan, *supra* note 23, at 413 n.66 (citing evidence that corporate managers perceived their colleagues as unable to forsake increased profits and keep potentially dangerous products off the shelves).

84. *See* Beale, *supra* note 82, at 1532 ("[T]here are many reasons to think that corporations and other entities are more than simply the sum of all of their employees and that punishing individual employees individually for criminal conduct will not always be sufficient."); *see also* Brickey, *supra* note 22, at 784 (contending that rather than seeking individual scapegoats for an organizational failure, "[t]he unfairness inherent in that prospect suggests compelling grounds for declining to pierce the corporate veil").

85. Buell, *supra* note 80, at 476.

86. *See id.* at 477–78 (arguing that "[b]ecause of its communicative force and preference-shaping authority, only criminal process fully produces these effects of legally imposed entity blame").

87. William J. Maakestad, State v. Ford Motor Co.*: Constitutional, Utilitarian and Moral Perspectives*, 27 ST. LOUIS U. L.J. 857, 862 (1983).

88. *Id.*

89. *See* Buell, *supra* note 80, at 537 ("[E]ntity criminal liability instantiates a social practice of blaming institutions for crime that is characteristic of criminal law in its morally infused message, and in the stigmatic impact of that message.").

90. Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009) ("As an expression of the community's moral judgment,

Homicide is not an "artificial" crime.[91] A corporation's criminal homicide sanction signifies that its conduct was grossly inimical to society's interests.

Finally, criminal law provides society with an important tool to effectuate change within a corporate organization in a way that fosters future conformity with societal expectations.[92] A criminally liable corporation is one in which individual employees take erroneous actions and the necessary structures are not in place to counter those erroneous choices. Put plainly, deficiencies exist at the micro and macro levels within the organization.[93] In response to a sharp rebuke of its practices, the corporation is likely "to reevaluat[e] . . . group arrangements, not just [to rethink] individual choice[s]."[94] Beyond this self-motivated change, criminal law may also provide an avenue for court-supervised reevaluation and restructuring as part of a criminal sentence.[95]

2. *Supplementing Regulatory Efforts.* Corporate homicide liability may also supplement existing regulatory regimes by forcing recidivist violators to comply with health and safety regulations and acting as a backstop against lax regulatory oversight. Corporations determined to undercut or work around regulations are motivated by a simple cost-benefit analysis. Health and safety regulatory systems are successful only "where the expected costs of honoring . . . regulations are less than or equal to the expected costs of punishment."[96] The expected cost of punishment depends on "the

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there is a significant value to applying the criminal law to organizations that act through their agents . . . .").

91. Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279, 1280 (2007). Thornburgh characterizes many of the crimes springing from the regulatory state as "artificial" in the sense that "they do not meet the criteria traditionally employed in determining that particular conduct deserves society's most severe condemnation." *Id.* Homicide liability thus eludes many criticisms of increased corporate exposure to criminal sanctions.

92. *See* Peter J. Henning, *Should the Perception of Corporate Punishment Matter?*, 19 J.L. & POL'Y 83, 93 (2010) ("Demanding concrete changes in how an organization conducts itself is a reasonable means of responding to the psychological perception that corporations can be blameworthy.").

93. *See* Buell, *supra* note 80, at 502 ("A message of institutional fault says something different than a message of individual fault: not just that somebody pursued faulty preferences, but that the group arranged itself badly.").

94. *Id.*

95. For a more detailed discussion of this potential, see *infra* Part V.B.6.

96. Samuels, *supra* note 24, at 883.

probability of inspection, the expected number of violations detected, and the average penalty per violation."[97] The lower the cost of punishment, the easier it is to accept serial regulatory violations to protect the bottom line. Existing enforcement capabilities may skew this analysis in favor of noncompliance.[98] A homicide prosecution, with its harsher moral and punitive sanctions, might change the equation in particularly egregious cases and tip the scales toward preemptive compliance.

For example, Massey Energy, the owner of the coal mine in which twenty-nine miners died in an explosion, was known for playing a cat-and-mouse game with federal mine-safety regulators.[99] Although Massey operated some of the most unsafe mines in the nation,[100] it was able to avoid regulation by "persuad[ing] regulators to forgo safety rules on a case-by-case basis" and by "contest[ing] federal citations in a manner that ma[de] it virtually impossible for the government to force quick safety overhauls."[101] Recently, federal authorities sought to employ their most powerful civil remedy by going to court to close a Massey-owned mine and force a safety overhaul of Massey's operations.[102] But Massey "sidestepped" federal authorities and closed the mine on its own, keeping regulators "from interfering with the company's day-to-day operations."[103]

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97. *Id.*

98. From 2006 to 2010, OSHA statistics reflected a significant increase in the number of both willful and repeat violations. *2010 Enforcement Summary*, OSHA, http://www.osha.gov/dep/2010_enforcement_summary.html (last visited Sept. 5, 2011). Yet over that same period, the number of cases referred for criminal prosecution never exceeded fifteen per year. *Id.* And even then, the maximum criminal penalty for the first willful violation that resulted in death was a $10,000 fine and six months in prison 29 U.S.C. § 666(e) (2006). For a second conviction, the penalty doubled. *Id.*

99. *See supra* notes 3–5 and accompanying text. In January 2011, Massey Energy agreed to sell itself to a rival coal company. Interestingly, the purchasing company has a strong record of environmental and safety compliance. Michael J. de la Merced, *Massey Energy Is To Be Sold to Alpha Natural Resources*, N.Y. TIMES DEALBOOK (Jan. 29, 2011, 7:09 PM), http://dealbook.nytimes.com/2011/01/29/massey-energy-is-to-be-sold-to-alpha-natural-resources.

100. *See* Kimberly Kindy, *Longtime Tug of War on Mine Safety*, WASH. POST, Jan. 4, 2011, at A1 (reporting that Massey Energy owns the most mines of any company on the federal mine-safety agency's list of those in danger of being shut down).

101. *Id.*; *see also* GOVERNOR'S INDEP. INVESTIGATION PANEL, *supra* note 2, at 77 (describing Massey as "relish[ing] the opportunity to challenge inspectors' enforcement actions by disputing findings and arguing about what the law requires").

102. *See generally* Complaint, Solis v. Freedom Energy Mining Co., No. 7:10-cv-00132-ART (E.D. Ky. Nov. 3, 2010) (filing by the Secretary of Labor to close the mine).

103. Kindy, *supra* note 100.

Consider also the case of McWane Industries. Between 1995 and 2003, the manufacturing company had an egregious record: nine employees killed on the job, and citations for federal health and safety violations that exceeded those of its "six major competitors combined."[104] In eight of the nine fatalities, the circumstances reflected either "deliberate violations of federal safety standards" or "[s]afety lapses" that contributed to the deaths.[105] Nonetheless, government regulators were initially unable to coordinate an effective response. Finally, after an exposé on McWane made national news, the company was convicted of criminal charges based on operations at six subsidiaries.[106] More importantly, the company hired a new safety director, spent $300 million to improve its health and environmental safety, and embarked on creating a new culture of safety.[107]

Criminal law is admittedly a blunt instrument, but it may be necessary to force a company to take corrective actions. Massey Energy and McWane Industries are examples of companies that were determined to avoid compliance with regulatory standards over sustained periods of time. Shuttering a mine or taking post hoc remedial action cannot abrogate a criminal indictment. As the case of McWane exemplifies, criminal prosecutions may be successful as a measure of last resort to bring about cultural change within a corporation.

Criminal law can also serve a gap-filling function to ensure that the public is not without recourse when government regulation is lax. Budgets of regulatory agencies ebb and flow depending upon an administration's goals. During lean years, inspections are curtailed, and violations go unnoticed or unpunished.[108] The presidential commission investigating the Deepwater Horizon oil-rig fire

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104. David Barstow & Lowell Bergman, *At a Texas Foundry, an Indifference to Life*, N.Y. TIMES, Jan. 8, 2003, at A1.

105. David Barstow & Lowell Bergman, *Deaths on the Job, Slaps on the Wrist*, N.Y. TIMES, Jan. 10, 2003, at A1.

106. James Sandler, *The McWane Prosecutions*, FRONTLINE (Feb. 5, 2008), http://www.pbs.org/wgbh/pages/frontline/mcwane/etc/prosecutions.html.

107. *See* Dave Johnson, *10 Essentials of McWane's Culture Change*, ISHN (June 3, 2010), http://www.ishn.com/Articles/Cover_Story/BNP_GUID_9-5-2006_A_10000000000000836462 (interviewing the new safety director at McWane and reporting on the hiring of more health and safety staffers to increase incident reporting and accountability).

108. *See* Kindy, *supra* note 100 (noting that under the George W. Bush administration, the ranks of federal mine-safety inspectors were reduced by nine percent while the remaining inspectors were rebranded as "compliance assistance specialists").

recounted how the absence of effective regulatory oversight had contributed to deficient practices by private industry.[109] Similarly, a state commission investigating the Upper Big Branch explosion found that mine-safety officials had performed their supervisory function inadequately.[110] Given the powerful interests opposing strong regulatory regimes,[111] state and federal prosecutors, who are more insulated from political pressures, can serve as effective watchdogs of last resort.

B. Rebuttal of Arguments for Limiting Corporate Homicide Liability

1. *Civil-Law Remedies Are Preferred*. Critics of corporate criminal liability argue that civil law achieves deterrence and victim restitution at a lower cost to society.[112] But the deterrent effect of civil suits upon a serial regulatory violator is doubtful, particularly when private lawsuits are settled for damages without imposing conditions of structural reform.[113] Private litigants, who do not enjoy access to corporate treasuries to fund litigation, are incentivized to settle their disputes out of court before incurring expensive trial costs.[114] Corporate defendants are also motivated to avoid the adverse

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109. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 6, at 126 ("[N]either the regulations nor the regulators were asking the tough questions or requiring the demonstration of preparedness that could have avoided the . . . disaster.").

110. *See* GOVERNOR'S INDEP. INVESTIGATION PANEL, *supra* note 2, at 77–78 (describing the deficiencies in government regulatory efforts).

111. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 6, at 126 (recounting how "efforts to expand regulatory oversight, tighten safety requirements, and provide funding to equip regulators with the resources, personnel, and training needed to be effective were either overtly resisted or not supported by industry, members of Congress, and several administrations").

112. *See, e.g.*, Khanna, *supra* note 40, at 1532 ("Due to expensive procedural protections and sanctioning costs from higher reputational penalties, sending the message [that society condemns a corporate action] through corporate criminal proceedings costs society more than sending the message through civil liability . . . ."); Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 AM. CRIM. L. REV. 1459, 1479 (2009) (advocating for the diminution of corporate criminal prosecutions and "for reforming, restoring, and enhancing private civil suits and agency regulation").

113. *See* Samuels, *supra* note 24, at 880 ("Despite burgeoning civil judgments against corporate defendants, corporate decisionmakers assessing the need for precautionary measures too often find that the cost-efficient solution is also the most dangerous for their employees.").

114. *Id.* at 886.

publicity of a public trial.[115] Criminal law, on the other hand, deals in the unquantifiable—behavioral and moral reformation.[116]

A more forceful critique of corporate criminal liability is that convicted corporations may face collateral debarment or delicensing proceedings that jeopardize the corporate existence, even if the criminal sanctions themselves are minimal.[117] For example, companies convicted of violating the Foreign Corrupt Practices Act of 1977[118] are barred from receiving government contracts in the United States and the European Union.[119] Corporate operators of a nursing home face the loss of Medicare and Medicaid licensing upon a criminal conviction.[120] Because rehabilitation, not destruction, should be the goal of a corporate homicide scheme, these are serious concerns. But there are two rebuttals to this argument. First, civil proceedings or government regulatory action may also produce debarment and delicensing proceedings, so arguments that these consequences are unique harms of criminal law are unavailing.[121] Second, evidence shows that prosecutors understand these collateral consequences and

115. *Id.* at 886–87.

116. *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1018 (7th Cir. 2011) ("Civil liability of corporations, even when it allows the award of punitive as well as compensatory damages, is not a perfect substitute for [criminal punishment] because not all business activity that society wants to deter inflicts monetizable harms."); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 36 ("[C]rime is distinguished from other externalities because society has determined that in these instances, the social benefits of preference shaping through the criminal justice system outweigh the social costs because society values the utility derived from only one side of the incompatible preferences.").

117. *See, e.g.*, Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2039 (1992) (suggesting that the existence of debarment and delicensing mechanisms obviates the need for criminal sanctions like corporate probation).

118. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

119. *See* FAR 9.406 (2010) (allowing discretionary debarment when it would be in the public interest); Council Directive 2004/18, art. 45, 2004 O.J (L 134) 144 (EC) (barring any "candidate or tenderer" convicted of certain corrupt practices from participation in public contracts).

120. *See, e.g.*, 42 C.F.R. § 424.535(a)(3) (2010) (granting the authority to revoke Medicare privileges when any "provider, supplier, or . . . owner of the provider or supplier" is convicted of certain felonies); 105 MASS. CODE REGS. § 153.018(F) (1994) (providing for the denial of, revocation of, or refusal to renew the licenses of long-term-care facilities for certain criminal acts).

121. *See, e.g.*, 9 C.F.R. §§ 500.1–.2 (2011) (authorizing the U.S. Department of Agriculture's Food Safety and Inspection Service to take certain "regulatory control action[s]," including the stoppage of production, in the case of violations); Beale, *supra* note 74, at 1502 (noting that certain civil judgments, such as those for fraud, also result in the debarment of government contractors).

that authorities have been willing to craft compromise solutions without sacrificing the societal and rehabilitative ends served by a criminal conviction.[122]

Critics also point to the comparable basket of punitive and remedial measures available through a civil judgment.[123] But this argument can be turned on its head: If civil and criminal ends are equal, why is the criminal proceeding so unpalatable? Indeed, in a criminal prosecution, a corporate defendant enjoys certain protections, such as a higher burden of proof, that are unavailable in a civil proceeding.[124] Although a stigma accompanies a criminal trial and conviction, it is no different than the one faced by individual defendants who do not have immunity from prosecution. The criminal law's overarching value is its singular ability to "convey[] the particular moral condemnation that expressive retribution contemplates."[125] When a corporation faces only civil liability for conduct that would give rise to criminal charges for an individual, it allows "the corporation qua corporation to purchase exemption from moral condemnation."[126]

2. *Overdeterrence and Increased Costs of Doing Business*. Critics allege that an unwieldy use of criminal law will cause costly or inefficient overdeterrence that unnecessarily burdens businesses. These critics point to the danger that under a broad criminal statute, prosecutors might second-guess the "reasoned business judgments" of

122. *See* Sue Reisinger, *Don't Call It Bribery*, CORP. COUNS., May 2010, at 15, 17 (characterizing the Justice Department's willingness to "pull[] its punches" and let BAE Systems plead to a conspiracy charge not subject to immediate debarment rather than to a substantive FCPA violation that would be subject to debarment as a "compromise settlement"); Sandler, *supra* note 106 (describing how the EPA, after receiving evidence from McWane Industries about its improved regulatory compliance, revised its initial recommendation of debarment and instead imposed a fixed-term probationary exclusion from receiving government contracts).

123. *See, e.g.*, Howard E. O'Leary, Jr., *Corporate Criminal Liability: Sensible Jurisprudence or Kafkaesque Absurdity?*, CRIM. JUST., Winter 2008, at 24, 28 (describing how a civilly liable corporation could be required to pay victim restitution and penalties and acquiesce to injunctive relief, and, "with the exception of a criminal fine, the corporation would be subject to all of the relief obtainable in a criminal prosecution").

124. *See* Khanna, *supra* note 40, at 1512–20 (discussing how several criminal procedural safeguards apply to corporate defendants).

125. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 854 (2000).

126. *Id.* at 858.

"legitimate commercial activity."[127] Moreover, the prospect of criminal liability might have desultory effects on industries that are ill equipped to withstand such scrutiny[128] or that lack the funds to survive it.[129] But these concerns do not support an absolute prohibition on criminal sanctions so much as they emphasize the need for its measured and balanced application. Whether civil or criminal proceedings are used, the ultimate goal should remain the same: to deter and prevent conduct that will lead to deaths. Industry itself recognizes the importance of this goal, and many corporations already have policies that place enhanced safety before saving time and money.[130] In exercising their discretion, prosecutors should assess both the egregiousness of the corporation's misconduct and the likelihood that the regulatory system will be able to reform the misconduct. Not every case should result in homicide charges. But industry should be on notice that mere financial hardship cannot excuse criminal behavior when a corporation's conduct is particularly blameworthy.[131]

III. DEFICIENCIES IN THE STRUCTURE OF CORPORATE LIABILITY FOR HOMICIDE

Despite the expansion of corporate liability for homicide in the United States since the 1970s, there remains room for improvement. The scheme is marked by a startling lack of clarity and efficacy.[132]

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127. Brickey, *supra* note 22, at 783.

128. *See, e.g.*, Richard M. Dunn, Sherril M. Colombo & Allison E. Nold, *Criminalization in Aviation: Are Prosecutorial Investigations Relegating Aviation Safety to the Back Seat?*, BRIEF, Spring 2009, at 10, 20 ("[C]riminal investigations impede aviation safety by chilling the free flow of information concerning the causes of accidents, but they fail to deter the negligent acts they are prosecuting because most aviation accidents are not caused by willful or intentional conduct.").

129. *See, e.g.*, Goldsmith, *supra* note 12 (reporting an assisted-living facility industry lobbyist's position that increased training of care providers is impossible because government programs "don't include enough money to pay for higher levels of training").

130. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 6, at 126, 232–33 (detailing the "top-down safety culture" at major oil firms ExxonMobil and Shell that "reward[s] employees and contractors who take action when there is a safety concern even though such action costs the company time and money").

131. *See* Buell, *supra* note 80, at 535 ("Prosecutorial guidelines ought to counsel the selection of cases that will convey the message that a serious institutional lapse that produces crime is deviant.").

132. *See* Brickey, *supra* note 22, at 754 (identifying the lack of "a comprehensive rule of law under which corporations and their officers are held criminally responsible for workplace deaths and injuries" as "the most perplexing problem confronting the business community").

First, it remains uncertain whether a corporation may be held liable for homicide in some jurisdictions. Second, the scheme is unable to account for latent organizational failures that set the stage for loss-of-life incidents. The inability to penalize latent failures is one result of an overall doctrinal deficiency and has resulted in a poor track record of bringing criminal charges against large corporations, let alone of securing convictions.

A. Definitional Deficiencies

That existing homicide statutes are nebulous in their application to corporate defendants is unsurprising given that their drafters historically focused on individual conduct.[133] Recall that legislatures corrected the most glaring definitional impediments to corporate homicide prosecutions by amending their penal codes to include a corporation as "persons" and deleting the requirement that the crime be committed "by another."[134] Courts in several jurisdictions, though, remained reluctant to impose criminal liability for certain offenses, including homicide, without more specific legislative action.

For example, in 1961, the Oregon Supreme Court construed the state's manslaughter statute to preclude corporate liability, following the legislature's command to allow criminal liability "unless the context requires otherwise."[135] The court read the common-law phraseology that homicide was the killing by one person of "another" to exclusively mean a "human being."[136] In response, the Oregon legislature amended the criminally negligent homicide provision to encompass situations when "[a] person . . . causes the death of another person."[137] But the general homicide provision retained the language that homicide is when "[a] person . . . causes the death of another *human being*."[138] As one commentator notes, these statutory amendments left unsettled the larger doctrinal question "as to

133. *See* Bixby, *supra* note 60, at 356 ("Many of these [criminal] statutes were initially drafted with individual conduct in mind and failed to indicate whether the statute applied to actions taken, or not taken, by a business entity.").

134. *See supra* notes 54–55 and accompanying text.

135. State v. Pac. Powder Co., 360 P.2d 530, 532 (Or. 1961) (en banc) (interpreting OR. REV. STAT. § 161.010 (repealed 1971)).

136. *Id.*

137. OR. REV. STAT. § 163.145 (2009).

138. *Id.* § 163.005 (emphasis added).

whether a party committing manslaughter must be a natural person."[139]

The Alabama Court of Criminal Appeals also seized upon the "where appropriate" proviso in the state's penal code[140] to hold that a corporation could not be convicted of perjury.[141] The court found that "the Legislature has found it 'appropriate' to impose criminal liability on corporations only for certain crimes enumerated in the Code: i.e., those crimes in which the Legislature has specifically provided for corporate liability."[142] This definitional uncertainty serves neither prosecutors, who are left unsure of their power to indict a corporation for homicide, nor corporations, who are left without sufficient notice of the fact that they may be indicted for homicide.[143]

B. Latent Failures and Causation

Any prosecution of a corporation for homicide must prove that the corporation's conduct was causally linked to the death.[144] A narrow judicial construction of causality can result in no liability for a corporate actor even though its policies, practices, or culture created the conditions necessary for an act to prove deadly. For example, in *People v. Warner-Lambert Co.*,[145] the corporate defendant was charged with second-degree manslaughter for a factory explosion that killed six employees.[146] Several months prior to the explosion, the corporation's insurer notified management that the factory's

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139. RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION § 7.01, at 7-4 (13th version 2011).

140. ALA. CODE § 13A-1-2(11) (LexisNexis 2005) (defining a person as "[a] human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government, or a governmental instrumentality").

141. State v. St. Paul Fire & Marine Ins. Co., 835 So. 2d 230, 234 (Ala. Crim. App. 2000).

142. *Id.* at 233; *see also* Commonwealth v. Orkin Exterminating Co., 10 Va. Cir. 118, 118 (Cir. Ct. 1987) (declining to "extend corporate responsibility to crimes of personal violence" because "[i]f public policy requires the extension of corporate responsibility in this area, that is a matter for the Legislature and not this Court").

143. *See* Samuels, *supra* note 24, at 891 (critiquing traditional homicide laws as "fail[ing] to give adequate notice to corporations and their decisionmakers that their actions fall within the scope of these statutory prohibitions and fail[ing] to set adequate guidelines to govern corporate behavior").

144. *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 26 (15th ed. 1993) (summarizing causation in criminal law as "requiring that the accused's conduct be a substantial factor in causing the harmful result or that it be the proximate, primary, direct, efficient, or legal cause of such harmful result").

145. People v. Warner-Lambert Co., 414 N.E.2d 660 (N.Y. 1980).

146. *Id.* at 661.

machinery was susceptible to combustible residue buildups.[147] The corporation decided to wait and replace the machinery gradually over several months, and the fatal incident occurred in the interim.[148] The court dismissed the indictment because the corporation's conduct could neither be reckless nor negligent when there existed only "a broad, undifferentiated risk of an explosion."[149] For homicide liability to exist, there must be "proof sufficient to support a finding that defendants foresaw or should have foreseen *the* physical cause of the explosion."[150] In other words, it must be proven that the corporation foresaw the precise conduct that caused the deadly explosion even if the explosion itself—a sufficiently dangerous event—was foreseeable.[151]

Although the *Warner-Lambert* court found no basis for liability, insights from organizational theory suggest that the corporation's "latent" failure could be a sufficient basis for criminal charges.[152] A latent failure occurs when one or more latent conditions—design failures, insufficient training, and inadequate supervision, for example—"combine with local circumstances and active failures"—in other words, the acts by "front-line" personnel that have immediate, adverse effects.[153] Active failures are generally the result of discrete, individual lapses, but latent conditions are the product of management decisions whose dire consequences may not be apparent for some time.[154] It is easier to focus on active failures because of their

147. *Id.* at 662–63.

148. *Id.* at 663.

149. *Id.* at 661.

150. *Id.* at 665 (emphasis added).

151. *See* People v. Roth, 604 N.E.2d 92, 94 (N.Y. 1992) ("For purposes of criminal liability, it was not enough to show that, given the variety of dangerous conditions existing at the site, an explosion was foreseeable; instead the People were required to show that it was foreseeable that the explosion would occur in the manner that it did."). *But see* State v. Far W. Water & Sewer Inc., 228 P.3d 909, 930 (Ariz. Ct. App. 2010) (affirming the homicide conviction of a corporation because its conduct "set in motion a series of events that led to the incident and which were not so unforeseeable that it would be unfair to hold [the corporation] criminally liable," regardless of the fact that the "precise result or injury" could not have been foreseen); People v. Deitsch, 470 N.Y.S.2d 158, 164–65 (App. Div. 1983) (sustaining the indictment for criminally negligent homicide of a corporation "who maintains what is, in effect, a fire trap, no matter what the cause of the fire").

152. *See* Celia Wells, Derek Morgan & Oliver Quick, *Disasters: A Challenge for the Law*, 39 WASHBURN L.J. 496, 499–501 (2000) ("Rarely, according to [the organizational approach], are errors and disasters the product of the last link in the chain, i.e., the active error.").

153. JAMES REASON, MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS 10 (1997).

154. *See id.* at 11 (noting how latent conditions are "spawned in the upper echelons of the organization").

immediate effects, but active failures "are now seen more as consequences than as principal causes."[155] Without the latent conditions created by management, active failures might not take place, or they might not have such devastating results.

A vivid example of a latent failure is the deadly fire on the Deepwater Horizon rig.[156] A presidential commission found that "[m]ost, if not all, of the failures at [the rig could] be traced back to underlying failures of management and communication" by BP and its partners, who owned and operated the rig.[157] Due to breakdowns in information sharing, "individuals often found themselves making critical decisions without a full appreciation for the context in which they were being made (or even without recognition that the decisions *were* critical)."[158] For example, those managing the rig's drilling operations were unaware of the venture's chain of command and of who was responsible for setting drilling procedures.[159] Evidence suggests that there was no systematic process for testing drilling methods—including the ineffective technique of sealing off the well that caused the explosion—before they were used on the rig,.[160] Cost-saving efforts in the drilling timetable were not carefully balanced against the need to "not adversely affect overall risk."[161] Thus, latent failures in technical design, personnel training, operational

155. *Id.* at 10.

156. For a discussion of the Deepwater Horizon incident, see *supra* text accompanying notes 6–11. The Deepwater Horizon incident is far from the only example of a latent failure that proved to be deadly. In January 2009, one of the largest food recalls in American history took place because of the presence of salmonella in peanut products. Gardiner Harris, *Peanut Plant Broadens Product List Under Recall*, N.Y. TIMES, Jan. 29, 2009, at A15. Salmonella poisoning from peanut butter has been linked to nine fatalities and hundreds more illnesses. *Investigation Update: Outbreak of* Salmonella *Typhimurium Infections, 2008–2009*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 29, 2009), http://www.cdc.gov/salmonella/typhimurium/update .html. The peanut processor knew that its products had tested positive for salmonella on twelve separate occasions prior to the deadly incident, but it failed to conduct an internal overhaul or to review food-safety measures. Harris, *supra*.

157. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 6, at 122.

158. *Id.* at 123.

159. *See id.* at 326 n.159 (recounting how the rig's "Engineering Team Leader" responded to a question about who formulated operational procedures by asking "to look at [BP's] chart of roles and responsibilities").

160. *Id.* at 125. The commission found no evidence that BP or its partners "conducted *any* sort of formal analysis to assess the relative riskiness of available alternatives." *Id.*

161. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 9, at xi.

supervision, and team communication were responsible for causing a preventable accident.[162]

Greater accountability for latent failures would also remedy an undesirable tendency not to bring homicide charges against large corporations.[163] This lack of accountability is unsurprising given that the difficulties in discerning latent conditions and linking them causally to a loss of life are exacerbated when applied to large corporate bureaucracies. Previous corporate homicide prosecutions have largely been against small companies in which both ownership and day-to-day management are vested in the same individuals.[164] The owner-operators of small businesses, though, are more likely to be individually charged with homicide, rendering corporate charges superfluous.[165] In a large corporation, on the other hand, individual liability is much more likely to be shrouded in complex organizational and decisionmaking structures that complicate the search for a readily identifiable individual defendant.

IV. DEVELOPMENTS IN THE UNITED KINGDOM'S CORPORATE HOMICIDE LIABILITY SCHEME

In 2007, the United Kingdom's Parliament adopted a new statutory regime for corporate criminal liability for homicide.[166] The Act "broke dramatically" from past judicial precedent by providing a specific and expanded process for holding corporations liable.[167] A long time in the making,[168] the Act was the product of public outcry

162. *See id.* at x ("Better management of personnel, risk, and communications by BP and its contractors would almost certainly have prevented the blowout.").

163. In this respect, the United States is not alone. This failure was the primary impetus behind the United Kingdom's passage of a new statutory regime for corporate homicide, as discussed in Part IV, *infra*.

164. *See, e.g.*, People v. Deitsch, 470 N.Y.S.2d 158, 163, 165 (App. Div. 1983) (sustaining an indictment against a corporate defendant whose senior managers were responsible for maintaining the condition that led to a fatality).

165. *See supra* note 21 and accompanying text.

166. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19 (U.K.).

167. Beale, *supra* note 74, at 1495–97.

168. *See* James Gobert, *The Corporate Manslaughter and Corporate Homicide Act 2007—Thirteen Years in the Making but Was It Worth the Wait?*, 71 M.L.R. 413, 413 (2008) (explaining that a corporate homicide act was first recommended in a Law Commission report dating from the mid-1990s).

after corporate actors escaped criminal liability for several deadly incidents.[169]

The Act provides that a corporation[170] is guilty of corporate manslaughter "if the way in which its activities are managed or organised . . . causes a person's death, and . . . amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."[171] The "relevant duty of care" owed to the deceased sounds in civil-negligence duties, including those owed to employees, to occupiers of the corporation's premises, and to those who receive the corporation's goods.[172] A gross breach is one in which the corporation's conduct "falls far below what can reasonably be expected of the organisation in the circumstances."[173] Akin to the MPC's "high managerial agent" requirement,[174] the Act links corporate liability to the conduct of "senior management [as] a substantial element in the breach."[175]

To assist jurors in determining whether a gross breach has occurred, the Act focuses their attention on several factors. The jury is *required* to consider whether the corporation "failed to comply with

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169. *See* Editorial, *Deadly Negligence*, INDEPENDENT (London), Mar. 6, 2007, at 26 (condemning the fact that only six corporations had been successfully prosecuted for manslaughter in the twenty years following the prosecution of a corporate ferry operator for an incident in which 193 people died); David Millward, *Network Rail Fined £4m for Crash That Left 31 Dead*, DAILY TELEGRAPH (London), Mar. 31, 2007, at 12 (reporting that families of victims in a deadly railway crash were calling for a corporate manslaughter law); Mark Milner, *Executives Cleared of Train Crash Blame*, GUARDIAN (London), Sept. 7, 2005, at 6 (reporting that the dismissal of charges against companies whose negligence caused a deadly railway crash spurred momentum for revisions in corporate manslaughter law).

170. The Act applies to all manner of business entities. *See* Corporate Manslaughter and Corporate Homicide Act § 1(2)(a), (d) (applying the Act to corporations, partnerships, and other employers). Interestingly, the Act also applies to all manner of government entities. *Id.* § 1(2)(b)–(c), sch. 1. Although beyond the scope of this Note's proposed statutory framework, the extension of liability to governmental bodies is a matter for future consideration. It is conceivable that through collusion or dereliction of duty, government regulators could facilitate corporate conduct that results in death. *See* GOVERNOR'S INDEP. INVESTIGATION PANEL, *supra* note 2, at 77–78 (suggesting that because of oversight failures by mine-safety regulators, mines failed to correct known safety abuses at the Upper Big Branch mine).

171. Corporate Manslaughter and Corporate Homicide Act § 1(1)(a)–(b).

172. *Id.* § 2(1).

173. *Id.* § 1(4)(b).

174. MODEL PENAL CODE § 2.07(1)(c) (1962).

175. Corporate Manslaughter and Corporate Homicide Act § 1(3). Senior management is defined as those persons who play "significant roles in . . . the making of decisions about how the whole or a substantial part of [the corporation's] activities are to be managed or organised, or . . . the actual managing or organising of the whole or a substantial part of those activities." *Id.* § 1(4)(c).

any health and safety legislation that relates to the alleged breach, and if so, . . . how serious that failure was . . . [and] how much of a risk of death it posed."[176] In effect, this requirement supplements and enhances the deterrent effect of existing regulations by forcing juries to consider violations of those regulations in weighing the manslaughter charge. The jury is also permitted to consider whether "there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure [to comply with health and safety legislation], or to have produced tolerance of it."[177] With such latitude, the jury may consider the corporate culture and policies that yield latent conditions as a component of the corporation's culpability.

By design, the dual requirements that (1) the corporation's conduct must fall far below what is expected and that (2) senior management must play a substantial role in the breach largely cabin the Act's reach to "systemic failures."[178] This circumscription stands in contrast to standard health and safety regulatory violations, which may involve "operational" failures that often only require that the corporation fall just below "the standard of reasonable practicability."[179] The Act's dual requirements also anticipatorily rebut any argument that a corporate defendant might face criminal liability solely on the basis of a low-level employee's unauthorized acts. The threshold established by the Act's two prongs—a gross breach and the involvement of senior management—will exclude those cases in which a low-level employee's unauthorized acts inflicted harm, but will not allow corporations that have clearly engaged in culpable behavior to escape liability.[180]

With respect to sentencing, the Act provides three tools. First, courts may issue a "remedial order" requiring the corporation to remedy "any matter that appears . . . to have resulted from the relevant breach and to have been a cause of the death."[181] The remedial-order power also permits a sentencing authority to address systemic failings "in the organisation's policies, systems or practices"

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176. *Id.* § 8(2).

177. *Id.* § 8(3)(a).

178. SENTENCING GUIDELINES COUNCIL, CORPORATE MANSLAUGHTER & HEALTH AND SAFETY OFFENCES CAUSING DEATH: DEFINITIVE GUIDELINE 3 (2010).

179. *Id.*

180. *Id.* at 4.

181. Corporate Manslaughter and Corporate Homicide Act § 9(1)(b).

related to the charged conduct.[182] Second, courts may issue a "publicity order" requiring a corporation to publicize its conviction and the relevant details of its offense and sentence.[183] Finally, courts may levy a fine on a convicted corporation.[184]

Although only one corporation has been prosecuted under the new Act,[185] it has engendered much debate.[186] Particular criticism has been targeted at the Act's stringent requirement that senior managers play a substantial role in the breach, as opposed to a lesser standard under which managers must play only an intervening or contributing role.[187] The senior-manager requirement may make it harder to convict a large corporation in which authority is diffused through a complex organizational structure.[188]

Nonetheless, the Act is expected to have important "symbolic effects."[189] It makes clear that, as a doctrinal matter, corporations "are capable of committing crimes as grave as manslaughter."[190] With juries empowered to look more globally at corporate policies, corporations must "take a fresh look at their culture and ethos."[191] And perhaps most importantly, indictment and conviction for corporate manslaughter will almost certainly carry greater deterrent

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182. *Id.* § 9(1)(c).

183. *Id.* § 10(1); *see also* SENTENCING GUIDELINES COUNCIL, *supra* note 178, at 8 (stating that publicity orders "should ordinarily be imposed in a case of corporate manslaughter" to serve the goals of "deterrence and punishment").

184. Corporate Manslaughter and Corporate Homicide Act § 1(6).

185. Although the Act was passed in response to major incidents involving numerous fatalities and large corporate actors, the only subsequent prosecution to date is of a small engineering-consulting firm that was convicted in February 2011 and sentenced to pay a £385,000 fine. *Gloucestershire Firm Fined £385,000 over Trench Death*, BBC NEWS, http://www.bbc.co.uk/news/uk-england-gloucestershire-12491199 (last updated Feb. 17, 2011, 14:46 ET). But reports suggest that authorities are considering prosecuting a large, global private-security firm. Paul Lewis & Matthew Taylor, *G4S Faces Possible Corporate Killing Charge over Death of Deportee*, GUARDIAN (London), Mar. 17, 2011, at 20.

186. One commentator criticizes the Act as being "limited in its vision and lacking in imagination." Gobert, *supra* note 168, at 414.

187. *See id.* at 429 ("In the absence of [a command-responsibility] provision, organisations will be able . . . to render themselves virtually manslaughter-proof by placing a junior member of staff in charge of potentially lethal dimensions of a company's business or safety generally.").

188. *See* Brenda Barrett, *Liability for Safety Offences: Is the Law Still Fatally Flawed?*, 37 IND. LAW J. 100, 107 (2008) ("The only managers who have been convicted of manslaughter following work-related fatalities have been managers or employers in small businesses.").

189. Gobert, *supra* note 168, at 431; *see also* Barrett, *supra* note 188, at 117 (claiming that the Act may also have an important impact in areas with little regulatory control).

190. Gobert, *supra* note 168, at 431.

191. *Id.* at 432.

and punitive weight than liability for violating health and safety regulations.[192]

V. A STATUTORY PROPOSAL AND EXPLANATION

This Part seeks to initiate a discourse on corporate criminal liability for homicide by proposing a comprehensive statutory framework.[193] Just as legislatures enacted measures to expand corporate criminal liability to homicide, those same bodies should now reevaluate the efficacy of their efforts and take the lead in refining corporate homicide doctrine.[194] The provisions discussed in this Part were devised with two primary goals in mind: (1) providing notice of the proscribed conduct to those subject to the statute and to those enforcing it,[195] and (2) ensuring that prosecutions under the statute satisfy the public's need for accountability and yet are tempered by the ultimate benefits of corporate rehabilitation.[196]

A. A Proposed Corporate Homicide Statute

To address the concerns and imperfections in the existing corporate homicide regime, the following statutory language is proposed:

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192. *See* Barrett, *supra* note 188, at 117 (arguing that, at a minimum, a "corporation will suffer a greater stigma [for a corporate manslaughter conviction] than [for] being convicted under [the Health and Safety at Work Act], which is too readily perceived as merely regulatory legislation"); Gobert, *supra* note 168, at 431 ("All would regard manslaughter as a serious offence; in contrast, health and safety violations are often viewed as involving technical breaches of overly protective rules laid down by a nanny state.").

193. There is an easier option than comprehensive statutory reevaluation: amend the existing homicide statutes to specifically permit charges against corporations. This is not a solution to be favored, however. Businesses presumably would favor the neutral-sounding offense of corporate homicide over the more reprehensible charges of manslaughter or murder. Moreover, comprehensive drafting offers greater opportunities for doctrinal reform to address underlying systemic deficiencies in areas like causation and punishment.

194. It is accepted that a well-crafted, comprehensive statute best serves principles of legality. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985).

195. *See id.* at 205 ("Notice is essential to fairness.").

196. *See* Henning, *supra* note 90, at 1429 ("The goal . . . should be on molding punishment to the remediation of any harm and reforming the corporation, so that retribution would play no role in determining the appropriate criminal sanction.").

Model Corporate Homicide Statute

1. An organization is guilty of corporate homicide when it knowingly, recklessly, or negligently causes the death of a human being.
2. First-degree corporate homicide occurs when:
    a. through the actions or omissions of an owner, management official, or other similarly situated individual;
    b. an organization knowingly or recklessly creates or tolerates a condition under circumstances manifesting extreme disregard for human life; and
    c. that condition causes the death of a human being.
3. Second-degree corporate homicide occurs when:
    a. through the actions or omissions of an owner, management official, supervisor, or other similarly situated individual;
    b. an organization recklessly or negligently creates or tolerates a condition; and
    c. that condition causes the death of a human being.
4. As provided in Sections 2 and 3:
    a. an organization's culpability may be established by the knowledge and actions, whether individually or collectively, of owners, officers, management officials, supervisors, or other similarly situated individuals with a duty or responsibility to communicate their knowledge to someone else within the organization;
    b. in determining liability of the organization, the following may be considered as evidence:
        i. prior health or safety regulatory violations pertaining to the condition causing death, except when the organization did not have notice of the violation;
        ii. organizational policies, practices, and culture.
5. An organization found guilty under Sections 2 or 3 of this Act:
    a. shall be fined up to a maximum of ten million dollars per victim; and
    b. may be subject to a period of probation not to exceed five years, with the sentencing court to consider as conditions of probation:

i. the remedying of the condition(s) that led to the loss of life;
ii. the adoption and implementation of an effective corporate compliance program;
iii. the reassignment of those owners, management officials, supervisors, or other similarly situated individuals whose conduct was causally linked to the loss of life;
iv. the efforts by the organization to refine or restructure its operations or organization to guard against the recurrence of the condition(s) that led to the loss of life.

6. For the purposes of this Act,
   a. "organization" means any entity registered or licensed to do business within the jurisdiction and any entity, whether charitable or not, engaged in the manufacture, distribution, transportation, sale, or provision of goods or services within the jurisdiction;
   b. "owner" means any natural person or legal entity with an ownership stake in the organization;
   c. "management official" means any officer, director, or other individual responsible for formulating or implementing policies across the organization or within the particular business unit where the condition existed;
   d. "supervisor" means any employee to whom subsections (b) and (c) above do not apply and who is responsible for supervising the operational activities of the organization or a portion thereof, and the employees carrying them out.

B. Commentary on the Proposed Statute

1. *Section One: Establishment of the Offense.* The first section of the proposed statute creates a new offense of corporate homicide. It immediately resolves any uncertainty courts might have about the legislature's intent to hold corporations criminally liable for homicide. The statute is also narrowly drawn to encompass only those conditions that cause a death.[197] It rejects previous proposals that

197. Such narrow tailoring is intended to deflect criticism that this proposal adds to the unprincipled overbreadth of criminal law. *See* William J. Stuntz, *The Pathological Politics of*

sought to extend criminal liability to all life-endangering conduct whether or not a death resulted.[198] A life-endangering offense would sweep too broadly in situations in which the best remedy is the civil regulatory scheme and in which early recourse to criminal law would diminish its forcefulness. But the proposed corporate homicide offense would apply to any person whose death was caused by corporate action or inaction, regardless of that person's relationship to the corporation—employee, consumer, or member of the general public.

2. *Section Two: First-Degree Corporate Homicide*. The second section of the proposed statute sets forth the elements of the most serious level of corporate homicide. For the statute to apply, a corporation must have acted knowingly or recklessly, evidencing an extreme disregard for human life by creating or tolerating a condition that resulted in death.[199] The mens rea element may also be satisfied when corporate officials deliberately avoid attaining knowledge of the condition.[200] Thus, liability ensues when a corporation takes affirmative steps to create a deadly condition or when it is aware of a condition but declines to remedy it.

By specifying the individuals whose conduct may be attributed to the corporation, the section reaches a middle ground between *respondeat superior* and the MPC's section 2.07. The liability

Criminal Law, 100 MICH. L. REV. 505, 508 (2001) ("American criminal law's historical development has borne no relation to any plausible normative theory—unless 'more' counts as a normative theory."). Because homicide was one of the traditional common-law crimes, Professor Stuntz believes that modifications to homicide doctrine do not present the same concerns about overbreadth that are presented by other expansions of criminal law. *See id.* at 512–13 (noting that for crimes of violence, the "definitions are not substantially broader today than they were generations or even centuries ago").

198. *See* Spurgeon & Fagan, *supra* note 23, at 432–33 (advocating that Congress create an offense for life-endangering conduct); Samuels, *supra* note 24, at 902 (proposing a reckless-endangerment-of-an-employee offense).

199. This language is derived from the MPC's homicide statute. *See* MODEL PENAL CODE § 210.2(1) (1962) ("[C]riminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.").

200. Federal courts routinely permit jury instructions that explain that the knowledge requirement can be satisfied by "deliberate ignorance" or "conscious avoidance." United States v. Alston-Graves, 435 F.3d 331, 338 (D.C. Cir. 2006); *see also id.* at 338 n.2 (citing federal appellate cases that discuss jury instructions related to the knowledge requirement). In *United States v. Ramirez*, 574 F.3d 869 (7th Cir. 2009), for example, the court explained that criminal knowledge may be inferred when evidence suggests that a defendant remained deliberately ignorant, provided that his conduct rose above "mere negligence." *Id.* at 877.

prescribed in this section is more limited than *respondeat superior* because corporate officials must be of a certain seniority for their conduct to qualify. But it is more expansive than section 2.07's "high managerial agent" requirement because it broadly defines management officials and includes those employees within the particular business unit where the condition existed.[201] This provision attempts to account for the decentralized nature of modern corporations, with their many far-flung and distinct business units. In sum, first-degree corporate homicide reflects a belief that the most serious cases are those in which blameworthiness reaches the more senior levels of the corporate ranks.[202]

3. *Section Three: Second-Degree Corporate Homicide*. The proposed statute's third section sets forth the less severe level of corporate homicide: the corporation must have acted recklessly or negligently in creating or tolerating a condition that caused death. Second-degree corporate homicide adopts an approach akin to *respondeat superior*. It simultaneously expands the number of corporate employees whose conduct may be the basis for liability by including supervisors[203] and lowers the minimum mens rea to negligence.

Although some commentators worry that recklessness- or negligence-based liability is too flexible because it relies on a "prevailing reasonable standard of care,"[204] those concerns are outweighed by the costs of the alternative. To predicate liability solely upon a minimum mens rea of knowledge would require that

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201. *Cf.* U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. n.3(B) (2010) (defining "high-level personnel" to include "a director; an executive officer; an individual in charge of a major business or functional unit of the organization . . . ; and an individual with a substantial ownership interest").

202. *Cf. id.* § 8C2.5(b) (prescribing an enhancement to a defendant corporation's sentence if either "high-level personnel of the [business] unit" or personnel with "substantial authority" were involved).

203. *Cf. id.* § 8A1.2 cmt. n.3(C) (defining a subcategory of "corporate officials" as those "who exercise substantial supervisory authority," such as "a plant manager [or] a sales manager").

204. Spurgeon & Fagan, *supra* note 23, at 422. For Spurgeon and Fagan, this is problematic because what is reasonable might shift in the time between the corporate actions that caused a death and the subsequent indictment. *Id.* It can be assumed that Spurgeon and Fagan are concerned with protecting conduct regarded as reasonable at the time it was taken, but which became unreasonable by the time of the indictment. But it seems unlikely that prevailing concepts of reasonable precautions will evolve so substantially in this time period to cause an unjust indictment.

corporate actors were "practically certain" death would result from their actions or omissions.[205] The situations in which corporate actors will know to a high degree of certainty that their conduct will result in death seem limited. Indeed, it is conceivable that evidence of repeated regulatory violations related to a condition that caused death could actually support a contrary position: How could the corporate actors have been certain that death would result when the unsafe condition had existed for some time without adverse consequences? A reasonable duty of care standard ensures that not all failures to take potentially preventative action will result in criminal liability, but it also ensures that an organization will "provide adequate defences against the[] unsafe consequences" that may arise from operations.[206] The reasonableness requirement entrenched within the recklessness and negligence duties of care sets the bar high enough to avoid creating a situation in which a corporation feels legally bound to take all possible precautions regardless of their reasonableness.

4. *Section Four: Collective Knowledge.* The fourth section of the proposed statute presents both a single-actor—the conventional means of finding corporate liability—and a collective knowledge approach to corporate liability. Under the single-actor model, a corporation may be liable only when one of its employees or agents possesses the requisite mens rea for each element of the offense.[207] Collective knowledge, on the other hand, works "by aggregating the individual knowledge of several corporate employees so as to create a collective state of mind for the corporation."[208] The collective knowledge standard proposed here also limits the scope of employees whose mens rea may be imputed to the corporation to those with a responsibility—whether imposed by law or through internal policy—to report their knowledge to someone else in the organization.[209]

The basic rationale for collective knowledge, as elucidated by the

205. MODEL PENAL CODE § 2.02(2)(b) (1962).

206. JAMES REASON, HUMAN ERROR 206 (1990).

207. V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 357 (1999).

208. 1 COX & HAZEN, *supra* note 73, § 8.21, at 380.

209. *See* United States v. Ladish Malting Co., 135 F.3d 484, 493 (7th Cir. 1998) (approving a jury instruction that allowed the jury to consider knowledge gathered by "supervisor[s] or employee[s]" against the corporation, so long as those persons "ha[d] some duty to communicate that knowledge to someone higher up in the corporation").

First Circuit in *United States v. Bank of New England, N.A.*,[210] is that "[t]he acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment."[211] The collective knowledge doctrine is a response to the reality that modern "[c]orporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components."[212] Collective knowledge also recognizes the unique capacities for information retention, diffusion, and usage possessed by organizations.[213] This mode of analysis is also supported by organizational theory, which "does not attempt to reduce corporate actions to individual intentions."[214]

The concept of collective knowledge is not without harsh skeptics in academia and on the bench.[215] But the statute proposed here does not rise and fall with collective knowledge. The provision may be readily severed by any jurisdiction that declines to adopt the collective knowledge approach. Nonetheless, the debate over collective knowledge is one worth having because it cuts to the heart of corporate liability, given modern organizational and bureaucratic realities.

5. *Section Four: Evidence of Corporate Practices, Culture, and Prior Regulatory Violations*. Section 4.b of the proposed Act allows prosecutors to introduce evidence of organizational culture and policies to prove that a corporation created or tolerated a deadly

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210. United States v. Bank of New Eng., N.A., 821 F.2d 844 (1st Cir. 1987).

211. *Id.* at 856.

212. *Id.*

213. *See Ladish Malting Co.*, 135 F.3d at 492 ("Files may be destroyed, and people may forget *about* data in file cabinets, but a memorandum . . . remains in the corporation's knowledge as long as the memo itself continues to exist (and, even after its destruction, as long as a responsible employee remembers it).").

214. Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CALIF. L. REV. 1287, 1300 (1990).

215. *See, e.g.*, United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1274 (D.C. Cir. 2010) (holding that, in the False Claims Act context, "'collective knowledge' provides an inappropriate basis for proof of scienter because it effectively imposes liability . . . for a type of loose constructive knowledge" (quoting United States v. Philip Morris USA Inc., 566 F.3d 1095, 1122 (D.C. Cir. 2009) (internal quotation marks omitted))); Commonwealth v. Life Care Ctrs. of Am., Inc., 926 N.E.2d 206, 212 (Mass. 2010) (rejecting the collective knowledge doctrine and adhering to the principle that "a corporation acts with a given mental state . . . only if at least one employee who acts (or fails to act) possesses the requisite mental state"); Hasnas, *supra* note 33, at 1338 n.38 ("The collective knowledge doctrine is probably more vulnerable to objections than the *New York Central* [respondeat-superior] standard.").

condition. Corporate culture is an important underlying cause of corporate misconduct.[216] Culture is an organic part of an organization and reflects the desires and actions of its leadership.[217] For example, a corporate culture that encourages increased speed and profitability at the unreasonable expense of safety will inevitably produce corporate culpability evidence. Likewise, the absence of corporate policies to ensure safe operations indicates an organization's willingness to tolerate risk.[218] Indeed, as corporate policies "are often the results of more than a simple aggregation of individual choices,"[219] they constitute some of the most direct evidence against the corporation as a singular entity.[220] The use of evidence of corporate culture to prove a corporation's mens rea is also well established in other common-law jurisdictions.[221]

Section 4.b additionally authorizes factfinders to hear evidence of relevant prior regulatory violations. It recognizes that a corporation's affirmative decision to ignore or to insufficiently cure a dangerous condition is particularly probative "where there ha[s] been

216. *See* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1127 (1991) (surveying organizational studies and concluding that "(1) each corporation is distinctive and draws its uniqueness from a complex combination of formal and informal factors; (2) the formal and informal structure of a corporation can promote, or discourage, violations of the law; and (3) this structure is identifiable, observable, and malleable"); James A. Fanto, *Recognizing the "Bad Barrel" in Public Business Firms: Social and Organizational Factors in Misconduct by Senior Decision-Makers*, 57 BUFF. L. REV. 1, 17–18 (2009) ("[T]he culture of a business firm . . . permeates the organization and normalizes certain conduct.").

217. *See* REASON, *supra* note 153, at 193–94 (describing "culture" as something that a business "has" rather than "is" and which is modifiable through management's efforts).

218. *See, e.g.*, State v. Far W. Water & Sewer Inc., 228 P.3d 909, 926 (Ariz. Ct. App. 2010) (describing evidence that a defendant corporation charged with criminally negligent homicide "did not hold safety meetings and had no written safety polices [*sic*] or written records regarding safety training").

219. Foerschler, *supra* note 214, at 1302.

220. *See id.* at 1303 ("[C]orporate policies . . . should be attributed to the corporate structure as a whole and considered as conceptually independent from the intents of the individuals within the corporation.").

221. The Australian federal criminal code permits evidence that "a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance" with the prohibitive statute. *Criminal Code Act 1995* (Cth) s 12.3(2)(c) (Austl.). It defines a corporate culture as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place." *Id.* at s 12.3(6). Similarly, the United Kingdom's corporate manslaughter statute permits the jury to consider evidence of "attitudes, policies, systems or accepted practices" that "were likely to have encouraged" the corporation's misconduct. Corporate Manslaughter and Corporate Homicide Act 2007, c. 19, § 8(3)(a) (U.K.).

a prior warning by a government employee of claimed statutory violations."[222] The subsection also builds upon the collective knowledge doctrine to impute awareness to a corporation regardless of whether the employees who maintained the dangerous condition were different from those who interacted with the regulators.[223]

Section 4.b emphasizes the proposed statute's role as a buttress for existing regulatory regimes. Corporations are on notice that ignoring the warning signs of regulatory violations may have adverse repercussions in a subsequent criminal proceeding. Past regulatory violations are probative of criminal intent because regulatory statutes already reflect legislative or administrative policy determinations that certain conduct must be prohibited.[224] To circumscribe liability, a jurisdiction may choose to enumerate the specific health and safety regulations that apply to corporate homicide.[225]

6. *Section Five: Punishment.* Punishment for corporate homicide is bipartite, melding economic and structural sentencing policies to achieve the foremost goal of rehabilitation.[226] The first part of Section 5 consists of a fine of up to $10 million per victim. Criminal fines are the standard form of corporate punishment. To omit a fine or to provide for too minimal of a fine could subject the statute to skepticism regardless of whether the maximum fine was ever imposed.[227] But a criminal fine alone has limited deterrent and

222. United States v. Sawyer Transp., Inc., 337 F. Supp. 29, 31 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972).

223. *See id. at* 30–31 (finding that the defendant trucking company had willfully violated a criminal prohibition against maintaining false logs given that regulators had warned company officials several times about the practice, despite the fact that those officials were not the ones maintaining the logs).

224. *See* Spurgeon & Fagan, *supra* note 23, at 432 ("By enacting regulatory statutes that specify allowable behavior, Congress has in effect decided which deaths caused by the industrial process are to be excusable.").

225. *See id.* at 408 & n.42 (providing an example in which a proposed federal reckless-endangerment statute creates liability only for violations of certain enumerated regulatory statutes).

226. The "Economic Model" of sentencing prefers the "us[e of] fines in lieu of corporate probation." Wray, *supra* note 117, at 2020. The "Structural Reform Model," on the other hand, relies on probationary measures "that will directly penetrate the bureaucratic web." *Id.*

227. For example, two large corporations convicted of homicide were sentenced to fines of $11,500 and $7,500, respectively—both of which were the statutory maximum. Chase, *supra* note 65 (reporting that Motiva Enterprises, an oil refiner, received the maximum fine of $11,500 for its homicide conviction, an amount that the judge later increased through an additional compensatory fine of $100,000); *General Dynamics Land Systems Pleads No Contest in Worker's Death*, ASSOCIATED PRESS, May 12, 1992, *available at* Factiva, Doc. No.

rehabilitative powers.[228] If a corporation fails to undertake internal restructuring to prevent a recurrence of the criminal conduct and instead simply pays a fine, "society is merely pricing, not sanctioning, offenders' behavior."[229]

To ensure that the sentencing scheme accommodates societal and rehabilitative interests, the proposed statute expressly provides for the correction of fundamental deficiencies in corporate structure and management through probation. Its rationale is comparable to the justification behind the remedial measures provided for in the federal Organizational Sentencing Guidelines[230] and in the United Kingdom's corporate manslaughter statute.[231] Corporations charged or found guilty of corporate homicide presumably would be self motivated to undertake an internal restructuring without prompting by the court. But if the court finds that faulty internal controls—nonexistent lines of communication between safety directors and operational supervisors, for example—or culpable employees remain unaddressed at the date of sentencing,[232] it should have the authority to order remedial action.[233] A corporate probation may be "flexibly tailored to corporate circumstances"[234] to minimize the loss of managerial independence and maximize the penological value.[235]

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asp0000020011106do5c00z2u (reporting that General Dynamics was fined $7,500—the maximum under Michigan law—for involuntary manslaughter).

228. *See* Khanna, *supra* note 40, at 1511 (advocating reliance on "cash fines until their deterrent effect is exhausted and then [the] use [of] other legally imposed sanctions").

229. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 652 (1996).

230. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B1.2(a) (2010) (authorizing sentencing courts to use remedial orders to "eliminate or reduce the risk that the instant offense will cause future harm"). The Guidelines offer an illustrative example of ordering "a product recall for a food and drug violation." *Id.* § 8B1.2 cmt. background.

231. *See supra* notes 181–182 and accompanying text.

232. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.5 (noting that "[a]dequate discipline of individuals responsible for an offense is a necessary component of [the] enforcement" of an organization's criminal sentence).

233. *See id.* § 8D1.1(a)(6) (instructing courts to sentence convicted corporate defendants to probation when "necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct").

234. Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1, 106 (1988).

235. *See* John C. Coffee, Jr., *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 452 (1981) ("Ultimately, the relatively modest loss of managerial autonomy involved in such a temporary period of probation might prove as effective a deterrent as the financial penalties today imposed on corporations.").

Through corporate probation, a sentencing court may be able to draw upon the expertise of regulators to assist in monitoring corporate compliance and oversee the implementation of internal reforms.[236] Probation may also require a convicted corporation to publicize its wrongful conduct—a sort of modern-day version of being placed in the public stocks.[237] Even critics of corporate probation concede that it may be particularly useful against recidivist corporations "unresponsive to monetary penalties,"[238] whom this statute is expressly designed to target.

C. Illustrative Applications of the Proposed Statute

1. *Upper Big Branch Mine.* Of the three illustrations, Massey Energy's operation of the Upper Big Branch mine presents the closest case for charging first-degree corporate homicide. To prove causation, prosecutors could rely on the evidence of repeated mine-safety violations over a prolonged period for the very conditions that federal investigators believe caused the explosion.[239] The requisite corporate mens rea could be found based on the knowledge of the Massey employees responsible for interacting with regulators and supervising mining operations who disregarded warning signs.[240]

The key element for sustaining an indictment of first-degree corporate homicide is the presence of circumstances showing an extreme disregard for human life. Here, prosecutors could rely not only on evidence related to the direct causes of the explosion but also to Massey's corporate practices and culture. A report to West Virginia's governor about the incident found that "evidence strongly suggests" that the company did not place safety before profits.[241] An investigation into the operation of Upper Big Branch uncovered a

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236. Gruner, *supra* note 234, at 105.

237. The United Kingdom's corporate homicide sentencing regime incorporates a "publicity order" component. Corporate Manslaughter and Corporate Homicide Act 2007, c. 19, § 10 (U.K.). For a discussion of the pros and cons of publicity orders, see Khanna, *supra* note 40, at 1503; and Miester, *supra* note 22, at 942–44.

238. Wray, *supra* note 117, at 2021.

239. *See* Broder, *supra* note 1 (mentioning the many citations Massey had received for noncompliance with health and safety regulations).

240. One report suggests that high-ranking executives for the Massey Energy subsidiary operating Upper Big Branch instructed a mine foreman not to worry about the ventilation problems cited by regulators a few months before the explosion. Steven Mufson, *Mine Inspectors Found Negligence in January*, WASH. POST, Apr. 23, 2010, at A2. Officials believe these ventilation problems were ultimately the cause of the explosion. *Id.*

241. GOVERNOR'S INDEP. INVESTIGATION PANEL, *supra* note 2, at 95.

host of "deviant [safety] practices [that] became normalized."[242] Notes of federal mine-safety inspectors show that senior managers told lower-level employees who reported safety problems to disregard them.[243] Evidence also suggests that Massey made it a corporate practice to appeal citations issued by federal regulators rather than to implement more stringent safety programs.[244] If Massey were convicted, it would face a maximum fine of $290 million—$10 million per victim—and, more important, would be subject to a review of its internal safety and compliance programs by the sentencing court.

2. *Deepwater Horizon*. Assuming that BP was primarily responsible for the joint-venture operations on the Deepwater Horizon rig,[245] a case could be built for second-degree corporate homicide. The presidential investigatory commission found that "management breakdown[s] . . . affected many of the operational aspects of designing and drilling the well."[246] Some of these breakdowns included "inadequate communication" and "excessive compartmentalization of information" between onshore engineers and rig operators.[247] Evidence suggests that rig operators utilized untested drilling techniques and were left uninformed about an earlier incident that was similar to the Deepwater Horizon explosion.[248] Moreover, in its drive to increase cost-efficient drilling operations, BP failed to properly account for the new operational risk paradigm.[249]

These past practices and policies may demonstrate BP's failure to exercise reasonable care when drilling for oil on the seabed. At the least, they could constitute negligence on the part of BP, a highly

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242. *Id.* at 97; *see also id.* at 97–99 (detailing the unsafe practices at Upper Big Branch).

243. Mufson, *supra* note 240.

244. *See* GOVERNOR'S INDEP. INVESTIGATION PANEL, *supra* note 2, at 99–100 ("Fighting the violations allowed Massey to pay only a third of the assessed penalties over a ten-year period while accelerating profits, thus negating the punitive intent of the fines.").

245. BP leased the rig from its owner, Transocean, and employed workers from Halliburton to help operate the rig. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 6, at 2–3.

246. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 9, at 225.

247. *Id.* at 227–28. For a full analysis of management failures, see *id.* at 225–50.

248. *See supra* note 160 and accompanying text.

249. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 9, at 242 (finding that although BP understandably sought to manage costs, it failed "to properly account for risk or to assess the overall impact of decisions" on rig operations as a whole).

experienced party in drilling operations, for failing to appreciate the deadly risks of its dysfunctional management structure and operation. If BP were found guilty, a sentencing court might require the corporation and its partners to restructure its joint venture to remedy the kinds of latent conditions that proved so deadly, in addition to imposing a fine up to the $110 million statutory maximum.

3. *Glen Care Nursing Home*. Glen Care presents a likely case of second-degree corporate homicide. The assisted-living center permitted untrained health aides to check the glucose levels of residents without implementing basic disease-prevention measures.[250] Evidence suggests that Glen Care offered a training session on proper disease prevention, but it failed to ensure that its employees attended the session.[251] By having untrained employees provide medical care, Glen Care executives may have created a condition through their negligence that caused the death of six residents. Evidence of prior training lapses or inattention to health regulations might signify recklessness on the part of the corporation, but it would likely not establish the extreme indifference to human life necessary for a first-degree charge.

Glen Care would face a statutory maximum fine of $60 million. Given that Glen Care is a small business, however, any fine levied should be well under the maximum. Again, it would be more important for a sentencing court to ensure that Glen Care took proper remedial measures to prevent a recurrence. Following its criminal conviction, Glen Care might also need to negotiate with state and federal regulators to ensure that it would not be debarred from receiving Medicare funds.[252]

CONCLUSION

For more than a century, a legal tension has existed between proponents and opponents of extending criminal homicide law to corporations. As a result of this debate—a subset of the larger

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250. *See supra* note 13 and accompanying text.

251. *See supra* notes 14–15 and accompanying text.

252. The North Carolina Department of Health and Human Services may refuse to renew a license for an adult-care home if the facility "shows a pattern of noncompliance with State law . . . or otherwise demonstrates disregard for the health, safety, and welfare of residents." N.C. GEN. STAT. § 131D-2.4(b) (West 2010). Providers may not receive Medicaid funds from North Carolina if they are "not licensed or certified as required by federal and state law." 10A N.C. ADMIN. CODE 22F.0302 (2010); *see also supra* note 120.

discussion over corporate criminal liability—the law has slowly evolved. Whereas corporate liability for homicide was once widely rejected, many jurisdictions have now come to accept the basic premises of this form of liability. Nonetheless, both as a matter of doctrine and in practice, corporate homicide liability continues to suffer from several deficiencies that leave prosecutors unable or reluctant to bring homicide charges against corporate defendants. Sound public policy commends that jurisdictions confront these deficiencies and create an effective and fair scheme to hold corporations criminally liable when their blameworthy conduct leads to the loss of life.

This Note seeks to assist jurisdictions by providing model language for a corporate homicide statute. A specially crafted statute is the best means for legislatures to balance putative corporate defendants' concerns about overcriminalization against society's need for an effective—but fair—response to egregious corporate conduct. The deadly incidents described in this Note and others like them confirm the pressing need for legislation; it is now up to policymakers to decide the way forward.