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Corporations Don't Kill People - People Do: Exploring the Goals of the United Kingdom's Corporate Homicide Bill

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CORPORATIONS DON'T KILL PEOPLE - PEOPLE DO:
EXPLORING THE GOALS OF THE UNITED KINGDOM'S
CORPORATE HOMICIDE BILL

A corporation is an abstraction. It is incapable itself of
doing any physical act or being in any state of mind.

—Lord Diplock¹

I. INTRODUCTION

A corporation is a creature of law, acting as a fictional entity in the eyes of the law.² However, a corporation is made up of and run by people, acting as agents of the corporation.³ These peoples' actions can be criminal in nature and result in death. Consequently, criminal prosecutors seek to punish someone or something for homicide.

The capsized Zeebrugge ferry, the King's Cross fire, the Clapham and Paddington Rail crashes, the "Bowtelle"-"Marchioness" boat collision, and the Hillsborough football tragedy all represent recent disasters in which the United Kingdom's Director of Public Prosecutions either decided not to prosecute or failed to successfully prosecute the corporations or organizations responsible for many deaths.⁴ These recent events⁵ inspired the United Kingdom to propose the Corporate

1. R. v. P & O European Ferries, Ltd., 93 Cr. App. R. 72, 82 (1990) (quoting Lord Diplock's speech). The court further quoted from Diplock's speech:

Yet in law it is a person capable of exercising legal rights and of being subject to legal liabilities which may involve ascribing to it not only physical acts which are in reality done by a natural person on its behalf but also the mental state in which that person did them.

2. MELVIN A. EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS, 100 (8th ed. 2000).

3. Stanley S. Arkin, *Corporate Guilty Plea*, N.Y.L.J., Oct. 10, 1985, at 1.

4. See discussion *infra* Part III.

5. See generally Jean Eaglesham, *Making an Offense Out of a Disaster: Plans to Make Directors Criminally Liable for Deaths Caused by Negligence Could Have Far Reaching Effects*, FIN. TIMES, Jun. 18, 2001, at 13; Ben Webster, *Paddington Crash Families to Fight for Prosecution*, FIN. TIMES, Oct. 25, 2001, at 12; Andrew Edgar, *Corporate Manslaughter is Just Around the Corner*, 12 INT'L CO. & COMM'L L. REV. 117 (2001); Michael Jefferson, *Recent Developments in Corporate Criminal Responsibility*, 16 CO. LAWYER 146 (1995); Richard J. McGrane & Ian M. Gault, *Corporate Manslaughter in Major Disasters*, 2 INT'L CO. & COMM'L L. REV. 166 (1991); *Corporate Manslaughter: Back on the Cards*, 22 CO. LAWYER 1 (2001).

Homicide Bill; a statute that, if passed, would make the corporate entity criminally liable for deaths that occur as a result of "management failure."⁶ This Note argues that the Corporate Homicide Bill will not deter corporate actions that result in death.

Section 1 of the Corporate Homicide Bill applies to the corporate entity and allows a court to issue a fine as punishment.⁷ A better way to deter homicide is to convict and imprison corporate functionaries in a personal capacity. Section 2 of the Corporate Homicide Bill applies to corporate officers in a personal capacity;⁸ however, §5 of the Bill de-

6. Corporate Homicide Act, 2000, at §1 (Eng.) [hereinafter *Corporate Homicide Act*].

7. *Id.* Section 1, in relevant part, reads as follows:

Corporate Killing

1. (1) A corporation is guilty of corporate killing if
 - (a) a management failure is the cause or one of the causes of a persons death; and
 - (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.
- (2) For the purposes of subsection (1) above
 - (a) there is a management failure by a corporation if the way in which its activities are managed or organi[z]ed fails to ensure the health and safety of persons employed in or affected by those activities; and
 - (b) such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.
- (3) A corporation guilty of an offense under this section is liable on conviction on indictment for a fine.

8. *Id.* at §2. Section 2, in relevant part, reads as follows:

Corporate Killing

1. (1) An officer of a corporation is guilty of corporate killing if
 - (a) a management failure is the cause or one of the causes of a persons death; and
 - (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.
- (2) For the purposes of subsection (1) above
 - (a) there is a management failure by a corporation if the way in which its activities are managed or organized fails to ensure the health and safety of persons employed in or affected by those activities; and
 - (b) such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.
- (3) A corporation guilty of an offense under this section is liable on conviction on indictment to a fine or imprisonment or both.

finer "officer" narrowly,⁹ excluding from liability other corporate functionaries who may be associated with the homicide. The House of Commons should reform the Corporate Homicide Bill to exclude §1 and expand the definition of "officer" in §5 to include corporate functionaries associated with the homicide.

Part II of this note outlines various justifications and aspirations of criminal justice and punishment, discusses agency and the corporate form, and explores the history of corporate criminal liability in the United Kingdom. Part III uses recent events to illustrate that corporate fining is replacing individual imprisonment for corporate-related homicide in the United Kingdom, and demonstrates that the Corporate Homicide Bill will not effectively deter corporate-related homicide. Part IV argues that courts should imprison corporate functionaries associated with the homicide rather than fine the corporate entity for homicide. It also advocates reformation of the Corporate Homicide Bill to exclude corporate liability and expand the scope of personal liability. This note concludes in Part V that personal imprisonment of corporate functionaries associated with the homicide can deter homicide more effectively than corporate fines.

II. BACKGROUND

A. Aspirations and Justifications of Criminal Justice and Punishment

All crimes, with the exception of strict liability crimes, require an act or omission (*actus reus*) and a culpable mental state (*mens rea*).¹⁰ Society and the criminal justice system seek to punish the culpable mental states and acts underlying crimes.¹¹

Throughout history, society has justified punishment in many different ways.¹² Although modern society views the gruesome methods of punishment previously employed, in medieval times for example, as "cruel and unusual,"¹³ the concept of "an eye for an eye" has long en-

9. *Id.* at §5. Section 5 defines "officer" as "the chairman, managing director, chief executive or secretary of a corporation."

10. Rebecca Dresser, *Culpability and Other Minds*, 2 S. CAL. INTERDISCIPLINARY L. 41, 85 (1993).

11. GEORGE DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW CASES AND MATERIALS* ed. 1996).

12. See generally Catherine Scharf, *The Philosophy of Punishment: Does Punishment Terminate Crime and Keep Society Safe?* (Winter 2000), available at <http://www.publicrelat.villanova.edu/magazine/Summer%202000/Punishment.htm>.

13. *Id.* at para. 3.

duced in the criminal justice system¹⁴ and closely resembles what is known as retribution.¹⁵

Advocates of retribution argue that society should intentionally inflict pain and suffering on a criminal to the extent he deserves because he willingly committed a crime.¹⁶ However, not all legal philosophers agree with such means and justification for punishment.¹⁷ Critics of retribution view punishment as something more than mere vengeance toward the criminal in response to his misconduct.¹⁸

Another justification for punishment is rehabilitation.¹⁹ Rehabilitation aims to alter a criminal offender's behavior so that he or she no longer violates laws.²⁰ Thus, rehabilitation serves a utilitarian end;²¹ it seeks to do the greatest good for the greatest number by reforming a criminal, thereby reducing the number of criminals in society.²² Those who oppose rehabilitation characterize it as impossible or immoral.²³

A third justification for punishment, deterrence, also serves a utilitarian end;²⁴ it helps cure the sociological problem of criminal behavior, but it does not seek to punish by hurting or rehabilitating an individual.²⁵ Instead, deterrence aims to dissuade the offender and other possible offenders from committing future crimes.²⁶ Deterrence can be split into two categories: specific and general. Specific deterrence is the pressure that memories of incarceration place on a released convict, causing him or her to obey the law.²⁷ General deterrence is the pressure that a convict's pain and suffering exerts on potential criminals, causing them to obey the law.²⁸

14. *Id.* at para. 5.

15. *Id.*

16. Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1150 (1990).

17. *See id.*; JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 82-3 (1975).

18. GIBBS, *supra* note 17.

19. *See id.*; *see also* Blecker, *supra* note 16; Scharf, *supra* note 12.

20. GIBBS, *supra* note 17, at 72.

21. Scharf, *supra* note 12, at para. 6.

22. *Id.*

23. Blecker, *supra* note 16.

24. Scharf, *supra* note 12.

25. *Id.*

26. *See id.*; *see also* Blecker, *supra* note 16; GIBBS, *supra* note 17.

27. Blecker, *supra* note 16.

28. *Id.*

Most theories of corporate punishment primarily rely on deterrence as a justification.²⁹ The United Kingdom's Corporate Homicide Bill embodies such a theory, aiming to deter management failure that results in death.³⁰

B. Agency and the Corporate Form

The corporate form dates back as far as the thirteenth century.³¹ The earliest corporations were ecclesiastical entities that managed church property.³² Later, municipalities and governmental bodies began to take advantage of the corporate form,³³ and the government incorporated organizations such as hospitals and universities.³⁴ The government incorporated early trades based on whether they provided the community with basic necessities.³⁵ Henry II chartered the earliest trade organizations, the weavers.³⁶ During the 14th and 15th Centuries, the goldsmiths, mercers, haberdashers, fishmongers, vintners, and merchant tailors were incorporated.³⁷

To form a corporation today, one must file formal statements with a governmental body announcing his or her intention to incorporate.³⁸ The corporation then achieves entity status: The newly formed corporation has become a legally separate being through the operation of the law.³⁹ The corporation exists separately from its incorporator(s) existence;⁴⁰ it is, so to speak, a fictional person.⁴¹ It can exercise

29. See BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME, AND ACCOUNTABILITY* (1993).

30. See generally Corporate Homicide Act 2000; Celia Wells, *The Law Commission Report on Involuntary Manslaughter: The Corporate Manslaughter Proposals: Pragmatism, Paradox, and Peninsularity*, CRIM. L. REV. 545 (Aug. 1996); Bob Sullivan, *Corporate Killing - Some Government Proposals*, CRIM. L. REV. 31-39 (Jan. 2001).

31. Arkin, *supra* note 3.

32. LARRY D. SODERQUIST, ET.AL., *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS* (5th ed. 2001).

33. *Id.*

34. W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 382 (1922).

35. Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 108-09 (1888).

36. *Id.*

37. *Id.*

38. EISENBURG, *supra* note 2, at 107.

39. *Id.* at 100.

40. *Id.*

41. *Id.*

rights and have power in its own name; it can sue and be sued; it can hold property; and it must pay taxes.⁴² Can it commit a crime?

Because corporations are separate legal entities run entirely by people, they are governed largely by the principles of agency law.⁴³ An agent is someone who acts on behalf of a principal⁴⁴ – the corporation. A principal controls an agent.⁴⁵

When the corporation causes harm, problems arise as to whether liability should rest with the corporation as a whole or with its agents.⁴⁶ Corporations are organized to limit managers', directors', and officers' liability, rendering only the corporation as a whole liable for any harm it causes.⁴⁷ This is especially problematic when the harm can be characterized as criminal, because criminal law is primarily focused on a person's action and mental state, not those of a corporate entity.⁴⁸ Therefore, punishing a corporation undermines the theoretical foundations of criminal law, which presuppose that crimes involve an act and a culpable mental state.⁴⁹ Furthermore, crime is necessarily an *ultra vires*⁵⁰ act of a corporation; liability cannot be imputed to it because one cannot legally form a corporation for purposes of committing crime.⁵¹

C. *The History of Corporate Criminal Liability in England*

Legal scholars historically advanced the position that a corporation could not be punished.⁵² In 1250, Pope Innocent IV stated that a corporation could not be excommunicated because it did not have a soul.⁵³ Later, Edward, first Baron Turlow, expanded upon Innocent's

42. *Id.*

43. *Id.* at 1.

44. *Id.* at 6.

45. *Id.*

46. *Id.* at 100.

47. *Id.*

48. L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 3-4 (1969).

49. *See Dresser, supra* note 10.

50. *Ultra vires* is defined as being in excess of the powers of a corporation. STEVEN H. GIFIS, *DICTIONARY OF LEGAL TERMS: A SIMPLIFIED GUIDE TO THE LANGUAGE OF LAW* 514 (3d. ed. 1998).

51. LEIGH, *supra* note 48, at 3.

52. Arkin, *supra* note 3, at 28.

53. *Id.*

position in his highly quoted statement that a corporation has "no soul to be damned and no body to be kicked."⁵⁴

Early English courts did not recognize corporate criminal liability.⁵⁵ In 1612, the King's Bench stated corporations could not commit crimes.⁵⁶ In 1701, Chief Justice Holt held that "a corporation is not indictable, but the particular members of it are."⁵⁷

However, courts later began to hold corporations liable for certain crimes.⁵⁸ In 1842, a corporation did not obey a court order to build a bridge, and the Queens Bench held the it liable⁵⁹ for nonfeasance,⁶⁰ which equates to what is now known as criminal contempt of court. In 1846, a corporation created a nuisance by building a bridge that interfered with a highway, and the Queen's Bench held the corporation criminally liable⁶¹ for malfeasance.⁶²

Industries and corporations became widespread forms of business during the late 1800s, and corporate criminal law evolved to accommodate theories of corporate liability.⁶³ In 1866, the Queen's Bench held a quarry company liable for criminal nuisance when employees threw stone into a river that hindered navigation.⁶⁴ The court adopted a vicarious liability theory from tort law⁶⁵ to find corporations criminally liable for employee misconduct within the scope of employment.⁶⁶

54. *Id.*

55. *See* Anonymous, 88 Eng. Rep. 1518 (K.B. 1701); *In Re Sutton's Hospital*, 77 Eng. Rep. 937 (K.B. 1612).

56. *Id.* at 973. This was a civil case concerning whether a hospital had entity status as a corporation. However, the court outlined, *in dicta*, certain actions that a corporation could and could not theoretically perform.

57. Anonymous, 88 Eng. Rep. at 1518. This quote represents Holt's opinion in its entirety.

58. *See* Queen v. Birmingham & Gloucester Ry., 3 Q.B. 223 (1842); Queen v. Great N. of Eng. Ry., 9 Q.B. 315 (1846).

59. Nonfeasance is defined as the omission to perform a required duty. G1FIS, *supra* note 50, at 322.

60. Birmingham & Gloucester Ry., 3 Q.B. at 233.

61. Great N. of Eng. Ry., 9 Q.B. at 326.

62. Malfeasance is defined as a wrongful act, which the actor has no legal right to do. G1FIS, *supra* note 50, at 287.

63. Arkin, *supra* note 3, at 28.

64. *See* Queen v. Stephens, 1 L.R. 702 (Q.B. 1866).

65. *Id.*

66. G1FIS, *supra* note 50, at 527.

Vicarious liability became a dominant theory in prosecuting corporations throughout the late 1800s and early 1900s.⁶⁷ Most cases involved minor statutory offenses, which Parliament intended to be strict liability offenses; the master (corporation) was strictly liable for the servant's (employee's) criminal conduct.⁶⁸ However, corporations still could not possess the intent required for crimes involving death or personal violence;⁶⁹ at that time, corporations had only been convicted of crimes involving negligence or strict liability.

The "directing mind" theory, which developed throughout the 1900s, provided a way for prosecutors to indict and convict corporations for crimes outside the scope of negligence and strict liability.⁷⁰ Lord Denning, in 1956, outlined the directing mind theory, which suggested that the guilty mind of directors or managers could make a company guilty of crimes requiring a guilty mind or culpable *mens rea*.⁷¹ Denning, explaining the rationale of the theory, stated:

A company may in many ways be likened to a human body. They have a brain and a nerve [center] which controls what they do. They also have hands which hold the tools and act in accordance with directions from the [center]. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. . . . Whether their intention is the companies intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case.⁷²

In 1971, the House of Lords acknowledged Lord Denning's rationale in an appeal from the English Court of Appeals, stating that case-

67. See *Queen v. Stevens*, 1 L.R. 702; *Mousell Bros. v. London and N.W. Rail. Co.*, 1916-1917 All E.R. 1101 (K.B. 1917); *D.P.P. v. Kent and Sussex Contractors, Ltd.*, 1 All E.R. 119 (K.B. 1944); *R. v. I.C.R. Haulage, Ltd.*, 1 All E.R. 691 (Crim. App. 1944).

68. R.J. Wickens & C.A. Ong, *Confusion Worse Confounded: The End of the Directing Mind Theory*, J. Bus. L. at 532 (Nov. 1997).

69. See *R. v. Cory Bros. & Co.*, 1 K.B. 810 (1927).

70. See generally Wickens & Ong, *supra* note 68.

71. *H.L. Bolton Co. v. T.J. Graham & Sons*, 3 All E.R. 624, 630 (C.A. 1956).

72. *Id.*

law showed companies can be convicted of intent-based crimes: Nevertheless, the court held that a shop assistant was not a directing mind of a company that owned many supermarkets.⁷³ Thus, the directing mind theory seems to represent a middle-ground between strict liability and no liability.⁷⁴

Corporations have since been convicted of such crimes as conspiracy to defraud,⁷⁵ aiding and abetting regulatory offenses,⁷⁶ contempt of court,⁷⁷ and, for the first time in 1994, manslaughter.⁷⁸

III. TRENDS OF CORPORATE LIABILITY AND THE INADEQUACY OF THE CORPORATE HOMICIDE BILL

Recent events have spawned public interest in creating a new theory to hold corporations liable for crimes.⁷⁹ In 1987, the *Herald of Free Enterprise*, a ferry with more than 500 people aboard, departed the Belgian port of Zeebrugge for England with its bow doors open.⁸⁰ It subsequently took on water and capsized killing 188 people.⁸¹ The United Kingdom's Director of Public Prosecutions initiated involuntary manslaughter charges against the company P & O European Enterprises and some of its agents, including the assistant bosun who fell asleep and neglected his duty to close the bow doors.⁸² Justice Turner

73. *Tesco Supermarkets v. Natrass*, 2 All. E.R. 127 (H.L. 1971). Tesco was convicted of a breach of the Trade Descriptions Act for displaying misleading prices and appealed to the House of Lords, who reversed the conviction.

74. *Id.* For a detailed account of the Tesco case and cases decided in that time period relating to the directing mind theory, see Wickens & Ong, *supra* note 68, at 525-545.

75. See *I.C.R. Haulage*, 1 All E.R. 691 (Crim. App. 1944).

76. See *Accrete's Air Travel Ltd. v. D.P.P.*, 1 All E.R. 933 (1950); *John Henshall Quarries Ltd. v. Harvey*, 2 Q.B. 233 (1965).

77. See *R. v. Odham's Press* 3 W.L.R. 796 (1956).

78. *Gary Slapper, PLC, What Is Your Plea?*, *TIMES*, Dec. 13, 1994 (reporting on *R. v. O.L.L. Ltd.*, an unreported case decided in the Crown Court five days earlier). Four school friends were killed when their canoes capsized in Lyme Bay on a trip the defendants organized. The defendants were aware that they employed inadequate safety precautions; the managing director failed to warn the harbor authorities, did not employ competent instructors, and did not use flares or look-outs. His wrongs were imputed to the company through the directing mind theory. However, the company was small, and the managing director was a major stockholder who basically controlled the corporation by himself. See LEIGH, *supra* note 48, at 43-73 (comprehensive discussion of the other cases in which, and other crimes for which, corporations have been held liable).

79. See LEIGH, *supra* note 48.

80. See *McCrane & Gault*, *supra* note 5, at 169.

81. *Id.*

82. *Id.*

held that the evidence was insufficient to show that the defendants should have perceived the risks of open-door sailing.⁸³ He stated that P & O should be acquitted because most of its agents could not be convicted.⁸⁴

In 1988, 35 people died when three rush hour trains collided after a signaling breakdown.⁸⁵ The Director of Public Prosecutions decided not to bring manslaughter charges against British Rail or its technicians due to insufficient evidence.⁸⁶ In 1989, 95 football fans died due to possible mishandling of the crowd by Yorkshire Police; however, the Director of Public Prosecutions again decided to forego bringing criminal charges.⁸⁷ More recently, the Crown Prosecution Service, after another train crash, stated it would not prosecute Railtrack or its managers for the Paddington crash in 1999, despite the company's history of corporate failings.⁸⁸

Prior to the Paddington crash, Lord Hoffman indicated that a more flexible approach was necessary to successfully convict the corporate entity, because the directing mind theory was apparently not useful for manslaughter cases.⁸⁹ Following Hoffman's suggestion, in 1996 the Law Commission proposed a new theory designed to create corporate criminal liability for management failure that results in harm.⁹⁰

Unlike the vicarious or directing mind theories, the management failure theory looks to corporate systems, practices, and policies, rather than individual actions.⁹¹ Management failure occurs when corporate conduct falls far below what is reasonably expected of the corporation in the circumstances,⁹² and when the way in which its activities are managed or organized fails to ensure the health and safety of persons employed in or affected by those activities.⁹³ The management failure theory has not changed since its inception in 1996;⁹⁴ the Blair adminis-

83. See generally *P & O European Ferries*, 93 Cr. Ap. R. 72.

84. *Id.* at 88.

85. See *McCrane & Gault*, *supra* note 5, at 170.

86. *Id.*

87. *Id.* at 170-71.

88. See *Webster*, *supra* note 5.

89. *Meridian Global Funds Management Asia Ltd. v. Securities Commission*, 3 All E.R. 918 (P.C. 1995).

90. *Wells*, *supra* note 30.

91. *Id.* at 548.

92. *Corporate Homicide Act*, *supra* note 6, at §§1(1)(b), 2(1)(b).

93. *Id.* at §§1(2)(a), 2(2)(a).

94. Compare *Wells*, *supra* note 30, at 549, with *Corporate Homicide Act*, *supra* note 6.

tration presented the management failure theory to the House of Commons as the Corporate Homicide Bill in April 2000.⁹⁵

Although §1 of the Corporate Homicide Bill applies to the corporate entity and permits courts to issue fines,⁹⁶ the Health and Safety at Work Act of 1974 ("HSWA") already has punishment mechanisms in place to fine the corporate entity for violating the HSWA.⁹⁷ Further, the Corporate Homicide Bill would preempt prosecution under the HSWA, rendering its appropriate provisions meaningless.⁹⁸

Corporate fines do not work to successfully deter corporate-related harm. First, since the enactment of the HSWA there has been a substantial number of deaths related to corporate management failure.⁹⁹ The fines provided for in the HSWA have not deterred corporate-related harms; in fact, corporate-related deaths have grown in number since corporate fining was codified.¹⁰⁰

95. See generally Corporate Homicide Act.

96. *Id.* at §1.

97. When Great Western Trains pled guilty to violating HSWA §3(1) for the Southhall train crash, it received a £1,500,000 fine. Attorney-General's Reference (No. 2 of 1999), 2000 Q.B. 796 (Eng. C.A.); Case Comment, *Causing Polluting Matter to Enter Controlled Waters – Offence of Strict Liability*, JOURNAL OF PLANNING & ENVIRONMENTAL LAW [J.P.L.] 943, 953 (Sept. 2000).

98. Corporate Homicide Act, *supra* note 6, at §§ 3(7),(8)(a). Section 3, in relevant part, reads as follows:

Remedial Orders Against Convicted Corporation or Officer

3. (1) A court before which a corporation or officer is convicted of corporate killing may, subject to subsection (2) below, order the corporation or officer to take such steps, within such time, as the order specifies for remedying the failure in question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death.

...

- (7) Where an order is made against a corporation under this section it shall not be liable under any of the provisions mentioned in subsection (8) below by reason of anything which the order requires it to remedy in so far as it continues during the time specified by the order or any further time allowed under subsection (4) above.

- (8) The provisions referred to in subsection (7) are-

...

- (b) the provisions of Part I of the Health and Safety at Work etc. Act 1974 . . .

99. See Eaglesham, *supra* note 5.

100. See generally Fisse & Braithwaite, *supra* note 29.

Second, corporations have built-in mechanisms that allow them to treat fines, in reasonable amounts, as a cost of doing business.¹⁰¹ A corporation may simply withhold shareholder dividend payments and use the money it would have distributed to pay its fines.¹⁰² Furthermore, the Corporate Homicide Bill states that a court may issue additional fines if a corporation is a repeat offender who does not comply with a court order to remedy the management failure.¹⁰³ Excessive fining, however, merely redirects pain and suffering back onto the public. Large fines, while likely to trigger internal disciplinary measures within the corporation, are also likely to reduce corporate solvency, lead to layoffs, plant closings, or bankruptcy, and injure stockholders or creditors.¹⁰⁴ Such adverse consequences can often be more harmful than the corporate crime itself, particularly when the consequences affect a narrow class of people and the injury the corporation caused is widely diffused.¹⁰⁵

Third, stigmatizing a corporate entity is likely to further harm the community in which the corporation operates.¹⁰⁶ A criminal reputation will reduce a corporation's popularity within its community.¹⁰⁷ Thus, any benefit it produces for its community would likely be in jeopardy, because a criminal reputation can adversely affect business to deprive the community of that benefit.¹⁰⁸ This, as a matter of public policy, could decrease shareholder incentive to discipline managers, because shareholders would fear that such discipline could prompt a corporate conviction, that would cause stigmatization and decrease the

101. *Id.* at 41-2; Davis J. Reilly, *Murder Inc.: The Criminal Liability of Corporations for Homicide*, 18 S.H. L. REV. 378, 401 (1988) (citing Maakestad, *State v. Ford Motor Co.: Constitutional, Utilitarian, and Moral Perspectives*, 27 ST. LOUIS UNIV. L.J. 857, 879-80 (1983)).

102. See generally EISENBERG, *supra* note 2.

103. Corporate Homicide Act 2000, §3(5)(Eng.). Section 3, in relevant part, reads as follows:

(5) A corporation which fails to comply with an order under this section is guilty of an offense and liable-

(a) on conviction on indictment, to a fine . . .

104. John C. Coffee Jr., "No Soul to Damn, No Body to Kick:" *An Unscandalized Look into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 408 (1981).

105. *Id.*

106. Arkin, *supra* note 3, at 28; Reilly, *supra* note 101, at 403.

107. *Id.*

108. *Id.*

value of the entire corporation due to the misconduct of one or a few individuals.¹⁰⁹

Additionally, by spreading the punishment across a wide body, the Corporate Homicide Bill does not advance society toward its goal to decrease homicide, because doing so diminishes the punishment's deterrent effect. Deterrence only works when individual punishment is involved; specific deterrence is premised on an individual's incarceration and his or her reflection upon it, and general deterrence is premised on potential criminals reflecting on a convict's incarceration.¹¹⁰ Thus, the House of Commons should reform the Corporate Homicide Bill to more adequately deter corporate-related homicide and prevent the harmful consequences which would follow if it were enacted as it is written.

IV. INDIVIDUAL PUNISHMENT OF CORPORATE FUNCTIONARIES ASSOCIATED WITH THE HOMICIDE

A more effective way to deter corporate-related homicide without incurring the adverse externalities that accompany corporate fining is to imprison corporate functionaries associated with the homicide.¹¹¹ Individual punishment satisfies the aspirations of criminal justice more effectively than corporate fines because it instills a more concrete fear in employees to work responsibly:¹¹² The fear of going to jail is much more substantial than the fear of taking a pay cut or losing a job. Thus, individual punishment is more likely to deter the actions, omissions, or management failures that result in death.

Further, individual punishment, unlike the corporate fine, would not adversely affect the public in any way.¹¹³ There is much less stigma placed on the corporation because only those individuals responsible for the homicide are labeled "criminals."¹¹⁴ The corporation can continue to supply the benefit it produces for the community unfettered by a criminal reputation or dislike within the community.¹¹⁵ Additionally, the corporation would not harm innocent people by withholding dividend payments, making financial cutbacks, or laying

109. *Id.*

110. *See* Blecker, *supra* note 16.

111. Fisse & Braithwaite, *supra* note 29, at 17.

112. Reilly, *supra* note 101, at 404.

113. *Id.*; *see also* Fisse & Braithwaite, *supra* note 29; Coffee, *supra* note 104.

114. Coffee, *supra* note 104.

115. Reilly, *supra* note 101, at 402-04.

off employees to satisfy the punishment, as it would do to satisfy a fine.¹¹⁶

Corporations and the public would benefit from individual punishment because the corporations would shed their irresponsible employees (as they would be incarcerated) and collectively act more responsibly with respect to public safety.¹¹⁷ Thus, the House of Commons should remove §1 of the Corporate Homicide Bill, which aims to deter corporate-related homicide by punishing the corporate entity with fines.

The Corporate Homicide Bill contains a well-intentioned provision designed to punish individuals for corporate-related homicide;¹¹⁸ however, it is not without faults. The Corporate Homicide Bill limits individual liability for homicide to an officer,¹¹⁹ which it defines very narrowly as "the chairman, managing director, chief executive, or secretary of a corporation."¹²⁰

The Corporate Homicide Bill, while realistically foreseeing that most important business decisions are made by high executive officers,¹²¹ does not hold liable for homicide other corporate functionaries who may be closely associated with a death.¹²² Plant supervisors and shop foremen, often without first checking with the CEO or informing a corporate officer, make important decisions regarding the safety of their workers on a daily basis: The Corporate Homicide Bill ignores the fact that a plant foreman or supervisor may have more control over the safety of others than do corporate officers.¹²³ Thus, the House of Commons should reform the Bill so that it does not limit liability to officers; it should expand the scope of liability to also include board members, plant supervisors, foremen, and any other corporate functionaries who, in the scope of their employment, are associated with the homicide.

Although the Corporate Homicide Bill does not prevent prosecution for manslaughter or murder in a traditional sense,¹²⁴ a court may

116. Coffee, *supra* note 104, at 408.

117. See generally Fisse & Braithwaite, *supra* note 29.

118. Corporate Homicide Act, *supra* note 6, at §2.

119. *Id.*

120. *Id.* at §5.

121. See generally EISENBERG, *supra* note 2 (referring to the principles embodied by the American Law Institute on corporate law).

122. See generally Corporate Homicide Act, *supra* note 6.

123. *Id.*

124. *Id.*

be more likely to convict for corporate homicide with respect to corporate related deaths because there is a lesser degree of punishment to coincide with an arguably lesser degree of culpability. Since the acts that caused these deaths have generally gone unpunished for the past decade,¹²⁵ it is important that the Corporate Homicide Bill becomes a part of the United Kingdom's criminal laws.

From a public policy perspective, however, the Corporate Homicide Bill's enactment may cause a further decrease in the number of charges brought against individuals for traditional murder or manslaughter. The Director of Public Prosecutions may rely on the management failure theory to punish the corporate entity instead of prosecuting individuals for murder and manslaughter. In other words, individuals responsible for the death may "get away with murder" because prosecutors would focus more on the corporate crime, thereby abandoning any attempt to prosecute the individual.

V. CONCLUSION

While society may desire to avenge the deaths of many people and deter future deaths, it must not do so in a manner that continues to harm it further. A corporate fine has this effect, but individual punishment does not.¹²⁶ Additionally, a collective corporate fine does not adequately serve the aspirations of deterrence as a justification for punishment; deterrence is only effective when people are punished individually.

Further, the House of Commons should reform the Corporate Homicide Bill to apply to individuals only. While all crimes, except those of strict liability, involve an act and a culpable mental state,¹²⁷ "[a] corporation is an abstraction. It is incapable itself of doing any physical act or being in any state of mind."¹²⁸

Vincent Todarello

125. See generally Eaglesham, *supra* note 5.

126. Fisse & Braithwaite, *supra* note 29, at 17.

127. See generally Dresser, *supra* note 10.

128. *P & O European Ferries*, 93 Cr. App. R. 72.

