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Paul Almond

Introduction

This chapter will explore the role of criminalisation in relation to workplace and, by extension, *public* health and safety. In broad terms, this includes not only *occupational* deaths and injuries suffered by employees while at work, but also those to non-employees that result from the activities of an employing organisation.[1] This latter category includes customers, passengers, patients, and service-users; agents, sub-contractors and other non-traditional employees; and members of the general public (such as passers-by, road users, or residents). At its core, though, the criminalisation of work-related health and safety has historically focused on the workplace. The Factories Acts of the 19th and early 20th centuries began the process of criminalizing injury at work,[2] and subsequent legislation (most notably the Health and Safety at Work Act 1974, or HSWA) has extended this coverage so that it now applies across all workplaces and other civil society settings. But these offences have been criticised for being limited by prosecutorial exceptionalism, lacking deterrent and communicative impact,[3] and failing to observe the inhibitory norms and safeguards of criminal law doctrine.[4]

This 'corporate manslaughter' offence introduced via the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) was designed to offer a more robust prosecutorial response to work-related deaths and to more convincingly fulfil the status of a 'mainstream' criminal law offence. This means that there are now two 'systems' of criminal offence governing work-related safety. This chapter argues that both of these systems are limited in practice because they are 'context-dependent',

[1] Details of the scope of the (narrower) category of *'workplace fatality'*, as used by the Health and Safety Executive, the UK's main safety regulator, can be found at pages 3 and 12-13 of their 2017 workplace fatality statistics bulletin: http://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf

[2] Paul Almond, Corporate Manslaughter and Regulatory Reform (Palgrave Macmillan 2013) (hereafter Almond, *Corporate Manslaughter*) 97-99; WG Carson, 'The Conventionalisation of Early Factory Crime' (1979) Intl J Sociology L 7/1, 37 (hereafter Carson, 'Conventionalisation'); BL Hutchins and Amy Harrison, *A History of Factory Legislation* (2nd ed, PS King & Son 1911).

[3] Almond, *Corporate Manslaughter* (n 2); Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) (hereafter Hawkins, *Law as Last Resort*); Bridget Hutter, *Compliance: Regulation and Environment* (Clarendon Press 1997) (hereafter Hutter, *Compliance*); Steve Tombs and David Whyte, *Safety Crimes* (Willan 2007) (hereafter Tombs and Whyte, *Safety Crimes*).

[4] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225 (hereafter Ashworth, 'Lost Cause?').

in that they derive their meaning from the institutional and social settings in which they are utilised. Both are *ends-oriented*, in that they aim to exert influence over particular social policy outcomes; but, as this chapter will illustrate, in practice, the prevailing logic of that policy arena exerts influence over these offences in equal measure. This has the effect of reinforcing, rather than challenging, these contextual tendencies, making the criminal law a less-than-effective means of delivering the social goods that justify criminalisation. The first two parts of this chapter explore the health and safety offences contained within the HSWA 1974, and the corporate manslaughter offence contained within the CMCHA 2007. In each case, the doctrinal, empirical, political, social and normative rationales which underpin these offences will be sketched. Having explored the social 'ends' that justify the criminalisation of health and safety violations, the difficulties encountered by these modes of criminalisation in practice will be set out. The chapter will then analyse the ways in which the context-dependency of these offences has shaped the criminalisation of work-related safety. It will argue that this context-dependency is both a necessary feature of these offences, but also a limiting factor in terms of their reach and impact.

Criminalising Safety I: Health and Safety Offences

The HSWA 1974 was introduced as a result of a broadly bipartisan political process, in order to consolidate and modernise the existing system of workplace safety regulation, bringing a diffuse and often archaic set of legal requirements together in a single, accessible form. Prior to this Act, health and safety was criminalised via a system of highly prescriptive offences which set out in exact terms what an employer must do in order to comply with the law.[5] The Robens Committee, on whose recommendations the HSWA was based, described this as a *"haphazard mass of law which is intricate in detail, unprogressive, often difficult to comprehend and difficult to amend and keep up to date"*.[6] Breaches of these requirements were framed as 'strict liability' offences, and prosecuted by the regulatory inspectorate with

[5] Paul Almond and Mike Esbester, *Health and Safety in Contemporary Britain: Society, Legitimacy, and Change since 1960* (Palgrave Macmillan 2019) (hereafter Almond and Esbester, *Health and Safety*) ch.4; Robert Baldwin, *Rules and Government* (Clarendon Press 1995) (hereafter Baldwin, *Rules and Government*); Sandra Dawson, Paul Willman, Alan Clinton, and Martin Bamford, *Safety at Work: The Limits of Self-Regulation* (CUP 1988) (hereafter Dawson *et al., Safety at Work*).
[6] Lord Robens, *Safety and Health at Work: Report of the Committee 1970-72* (HMSO 1972) para.458.

responsibility for the sector in which they occurred, however, this was fragmentary and often piecemeal. The law resultantly came to be seen as a matter of technical, *mala prohibita* offences, relating to narrowly-described breaches of technical requirement, precluding consideration of systemic issues of safety management and of overarching duties around health and safety. The lack of *mens rea* component within these offences *'conventionalised'* them as something less than crimes,[7] and their prescriptiveness meant that they quickly became obsolete in a rapidly-changing world of work, and needed constant revision, exacerbating perceptions of over-regulation. Enforcement came to be seen as having a limited practical impact, and so was deprioritised in favour of more informal regulatory approaches.[8]

The HSWA 1974 set out a system of wide-ranging 'portmanteau' duties on employers to ensure, *'so far as is reasonably practicable, the health safety and welfare'* of employees and of other people affected by their operations (HSWA 1974, ss.2-3), and on other individuals (premises owners, manufacturers of items, and employees) to ensure the safety of the activities they engage in (ss.4-7). More specific prohibitions are imposed via 'lower-order' rules, in the form of regulations and delegated legislation.[9] Section 33(1) of the HSWA makes it *'an offence for a person…to fail to discharge a duty to which he is subject by virtue of sections 2 to 7…[or] to contravene any health and safety regulations'*, thus converting the general duties into criminal offences without narrowing their scope or precluding further offences being created as new regulations are made. One effect of these duty-based offences was to extend the application of the law to many new workplaces and, crucially, to settings *beyond* the workplace. As an illustration, the s.3 offence has been used in a wide range of cases, from the deaths of passengers on the rail network,[10] to the shooting of innocent civilians during anti-terror police operations.[11]

The project of criminalisation that these offences represent has been criticised for departing from the normal doctrinal standards and underpinnings of the criminal

[7] Alan Norrie, *Crime, Reason, and History* (CUP 1993) (hereafter Norrie, *Crime, Reason and History*); also Carson, 'Conventionalisation' (n 2).
[8] Carson, 'Conventionalisation' (n 2); Hawkins, *Law as Last Resort* (n 3); Hutter, *Compliance* (n 3).
[9] Baldwin, *Rules and Government* (n 5) 131.
[10] Such as the 1997 Southall rail crash, in which 7 people were killed: *R v Great Western Trains* (1999) Unreported, Central Criminal Court, 30/06/1999 (hereafter *R v Great Western*).
[11] Such as the shooting of Jean Charles de Menezes, a Brazilian national, by an anti-terrorism Police unit in London in 2005: https://www.theguardian.com/uk/2007/nov/01/menezes.jamessturcke2 (last accessed 20 November 2018).

law.[12] Many of these objections are reflective of a conception of health and safety law as part of a distinct 'culture' of regulatory criminal law, separate from the 'mainstream' of 'authentic' individual criminal offences; Jeremy Horder critiques the tendency among such writers to see this as a perversion of 'true' criminal law, rather than as an expression of the plurality of values, contexts, and rationales that might underpin criminalisation.[13] Horder instead positions offences like those around health and safety as part of a distinct (and equally valid) project of 'regulatory criminalisation', which pursues instrumental outcomes via the prosecution of largely non-moral entities, and which is distinct from civil liability because of the seriousness of the wrongdoing involved, rather than the crossing of any distinctive conceptual threshold. A similar conceptualisation is provided by Dubber's account of the 'police power', the expression of the sovereign authority of the state to maximise welfare by managing the activity of its citizens.[14] The exercise of this power of 'administration' is held in contrast to the role of 'law' as a mode of civil society governance. While the latter seeks to manifest and protect the rights and autonomy of citizens, the use of 'police' power is unencumbered by any need for legitimation via reference to the procedural and substantive safeguards (such as *mens rea* requirements and presumptions of innocence) that are central to the law as a mode of governance.[15] While health and safety regulation might be understood as an example of this police power (though Dubber does not explicitly conceptualise it as such), it remains an example of 'people policing' that affect the autonomy of persons directly and so requires justification; this also creates tensions when 'legal' safeguards are not observed.[16]

Three features of the HSWA offences are worth highlighting in this regard. First, liability under these offences is subject to the 'so far as is reasonably practicable' (SFAIRP) test, which requires that the prosecution prove that the defendants failed to exercise due diligence in relation to the risk in question. If the defendant can show

[12] For example, Ashworth, 'Lost Cause?' (n 4).
[13] Jeremy Horder, '"Bureaucratic" Criminal Law: Too Much of a Bad Thing?' in RA Duff, Lindsay Farmer, Sandra Marshall, Matteo Renzo and Victor Tadros (eds) Criminalization: The Political Morality of the Criminal Law (OUP 2014) 101 (hereafter Horder, '"Bureaucratic" Criminal Law'), 130.
[14] Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia UP 2005) (hereafter Dubber, *Police Power*).
[15] Ibid, ch.6; the procedural elements of this distinction are also reflected in Packer's distinction between 'due process' and 'crime control' models of criminal justice: Herbert Packer, *The Limits of the Criminal Sanction* (Stanford UP 1968) ch.8.
[16] Dubber, *Police Power* (n14) 160.

that *"the time, trouble and expense"* of the precautions needed to prevent it arising *"are disproportionate to the risks involved"*,[17] then they will lack the necessary fault. As a qualified standard, the test allows for the balancing of a quantum of risk against cost when determining what constitutes a breach of the law,[18] and has been criticised for essentially tolerating a degree of non-compliance on the basis of cost, and so undermining the absolute health and safety duties enshrined in European law.[19] While the SFAIRP test helps mitigate the *'burning sense of grievance'* associated with strict liability,[20] it has arguably downplayed the criminality of the offending involved, and left these offences open to criticism as extensions of the criminal law into areas of social policy where its use is not merited.[21] Perhaps most controversially, the SFAIRP test imposes a reverse burden of proof; a defendant must adduce evidence to demonstrate that they have taken reasonable steps to meet the standards required under the Act.[22] Such reverse onus provisions arguably impinge upon a defendant's autonomy, a particular concern in relation to individual, rather than corporate, defendants.[23]

A second doctrinally problematic feature of these offences is their *'deliberate vagueness'*.[24] The offences were deliberately created to be open-textured and flexible, and so are not specific in terms of the actions, consequences, and causal links they require. First, they do not require that any specific consequence should result from the breach of duty specified; they are inchoate, in that there need only be a prospective relationship between a breach and any consequences and indeed, those consequences need never materialise at all. While the preventive criminalisation of prospective and inchoate harms is a not unusual part of the general criminal law, when combined with other open-ended offence elements it does arguably contribute to a minimisation of perceived seriousness, which is commonly

[17] *per* Lord Oaksey in *Marshall v Gotham* [1954] AC 360 [370]; also *Austin Rover v H.M. Inspector of Factories* [1989] 3 WLR 520.
[18] Dawson *et al., Safety at Work* (n 5) 15; Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 OJLS 97.
[19] This obligation is contained within articles 4(1) and 5(1) of Council Directive 89/391/EEC of 12 June 1989, and was examined in *Commission v United Kingdom*, C-127/05, 14 June 2007.
[20] Norrie, *Crime, Reason and History* (n 7) 86.
[21] Ashworth, 'Lost Cause?' (n 4).
[22] *Davies v Health and Safety Executive* [2002] EWCA Crim 2949; also Victoria Howes, 'Duties and Liabilities under the Health and Safety at Work Act 1974: A Step Forward?' (2009) 38 ILJ 306.
[23] Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12 L and Financial Markets R 57, 62 (hereafter Campbell, 'Corporate Liability'); Horder, '"Bureaucratic" Criminal Law' (n 13), 124.
[24] Almond and Esbester, *Health and Safety* (n 5): ch.4.

assessed in criminal offences by reference to harm.[25] This has led to calls for the creation of offences which do acknowledge resulting harms.[26] Relatedly, the offences do not require that there be any established causal link between a breach and an outcome (although the latter may be indicative of the former). So in *R v Chargot*,[27] it was held that, even in the absence of any evidence as to acts or omissions which breached s.2, the fact of death could *"itself demonstrate…that the employer failed to ensure [the victim's] health and safety at work"*.[28] While such an approach was held to be necessary to the fulfilment of the law's social policy functions,[29] it does demonstrate the potential for procedural unfairness associated with imprecise regulatory standards.[30]

Finally, this 'deliberate vagueness' also extends to the substantive acts that can constitute an offence; the statute does not specify any forms of conduct that constitute breaches of the duties. Liability for these offences relates to the underlying factors that allowed the risk in question to manifest, rather than to the incident itself.[31] This reflected a shift from *specification* standards, relating to defined hazards, to *performance* standards, relating to obligations to reach acceptable levels of provision, but its effect was to frame the offences as *mala prohibita*, lawful conduct done in unlawful ways, rather than *mala in se* crimes.[32] The status of these offences is at once clear, but also contested. On the one hand, like many measures that form part of Dubber's 'police power', they are formally classed as criminal offences, involving punitive sanctions[33] such as significant fines and imprisonment.[34] But they

[25] Ashworth, 'Lost Cause?' (n 4) 242.
[26] James Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007 - Thirteen Years in the Making but was it Worth the Wait?' (2008) 71 MLR 413, 419.
[27] *R v Chargot Limited (t/a Contract Services) and others* [2008] UKHL 72 (hereafter *R v Chargot*).
[28] Ibid*, per* Lord Hope of Craighead [para. 30].
[29] Ibid [paras. 21, 29-31].
[30] John Spencer, 'Criminal Liability for Accidental Death: Back to the Middle Ages?' (2009) 68 CLJ 263.
[31] *R v Tangerine Confectionery Ltd.* [2011] EWCA Crim 2015.
[32] Chris Clarkson, 'Corporate Manslaughter: Yet more Government Proposals' [2005] Crim LR 677, 681; Jeremy Horder, 'Homicide Reform and the Changing Character of Legal Thought' in Chris Clarkson and Sally Cunningham (eds) *Criminal Liability for Non-Aggressive Death* (Ashgate 2008) 11 (hereafter Horder, 'Homicide Reform').
[33] *Benham v United Kingdom* (1996) 22 EHRR 293.
[34] Sentencing guidelines for these offences envisage fines of up to £20m being levied in the most serious cases: Sentencing Council, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guidelines* (2015) <https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web1.pdf> accessed 27 November 2018 (hereafter Sentencing Council, *Definitive Guidelines*).

are not generally perceived as *criminal* offences, either officially,[35] or by the wider public, who regard them as *"only a health and safety thing"*.[36] While empirical analysis of public attitudes in this area indicates that the purposes of these offences (accountability for harm and protecting a 'right to safety') are widely supported,[37] these attitudes reflect the *"characteristic flexibility and moral alegitimacy"* of police power,[38] and so these offences are positioned as regulatory in nature, and distinct from criminal 'law'.

Criminalising Safety II: Corporate Manslaughter

The 'corporate manslaughter' offence introduced by the CMCHA 2007 was intended to allow complex organisational entities that cause death to be held responsible under the law of homicide. Section 1(1) of the Act states that *'An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.'* This offence can be committed by a wide range of organisational actors, including corporations, Government bodies, Police forces, partnerships, trade unions, and employers' associations. Liability is established if it is proved that a *'management failure'* on the part of the organisation played a substantial role in a breach of a duty of care owed to the victim. This is intended to have both a facilitating and limiting effect; causal responsibility may be diffused among an organisation's decision-making hierarchy, but a very serious degree of culpability must be shown on the part of that organisation, as reflected in both the requirements of *'grossness'*[39] and the requirement of management seniority. Relevant duties include those owed as an employer (as under health and safety law), an occupier of premises, or a provider of goods or services, but not those owed as a matter of public policy, including those

[35] Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform* (HMSO 2005) (hereafter Home Office, *Corporate Manslaughter*) referred to them as "regulatory" rather than "serious" offences: 58.
[36] Paul Almond and Sarah Colover, 'Mediating Punitiveness: Understanding Public Attitudes towards Work-Related Fatality Cases' (2010) 7 Eur J Criminology 323, 333.
[37] Ibid; Paul Almond and Sarah Colover, 'Communication and Social Regulation: The Criminalization of Work-Related Death' (2012) 52 British J Criminology 997.
[38] Dubber, *Police Power* (n14) 181.
[39] Which has the same meaning here as in *R v Adomako* [1995] 1 AC 171.

arising from decisions as to the allocation of public resources or the weighing of competing interests.[40]

The drivers behind the introduction of this offence included *internal* legal considerations, as well as *external* social ones. First, a *doctrinal need* for reform was identified by policymakers and commentators,[41] prompted by the limitations of the law of manslaughter when applied to corporate bodies. Previous cases demonstrated that the rules for the attribution of responsibility to corporate bodies (the 'identification doctrine') were unable to deal with acts that departed from criminal law norms of individual agency. An individual senior manager was required to supply the *actus reus* and *mens rea* 'on behalf of' the organisation, which could not commit a wrong in its own right.[42] This constituted both a falsely narrow conception of the agency of organisational bodies, which have long been able to act on their own account in relation to, for example, the performance of statutory duties,[43] and an artificial way of conceiving of criminal responsibility, in that the liability of one legal entity (the company) is contingent on the state of mind of another (the individual).

This 'borrowed' *mens rea* also fitted unconvincingly with the gross negligence manslaughter offence itself, which does not require proof of a subjective state of mind on the part of the defendant; it was thus anomalous that an individual 'controlling mind' was needed to provide evidence of a notionally 'mindless' state.[44] As a result of these limitations, the old law was deemed incapable of responding to deaths arising as a result of systemic faults and collective decisions, rather than the discrete acts of identifiable individuals,[45] and so failed to reflect the causes of most organisational failures.[46] Additionally, the corporate manslaughter offence was a

[40] The relevant duties are set out at s.2(1) and the 'public policy' exclusion is set out at s.3(1).
[41] Law Commission, *Report 237: Legislating the Criminal Code: Involuntary Manslaughter* (HMSO 1996) (hereafter Law Commission, *Report 237*); Chris Clarkson, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59 MLR 557; Bob Sullivan 'The Attribution of Culpability to Limited Companies' (1996) 55 CLJ 515 (hereafter Sullivan, 'The Attribution of Culpability'); Celia Wells, *Corporations and Criminal Responsibility* (2nd ed, OUP 2001) (hereafter Wells, *Corporations*).
[42] *Attorney-General's Reference (No. 2 of 1999)* [2000] 3 All ER 183.
[43] *R v Great North of England Railway Co.* (1846) 9 QB 315.
[44] Law Commission, *Consultation Paper 135: Involuntary Manslaughter* (HMSO 1994), para. 5.77; Wells, *Corporations* (n 40) 111.
[45] *"[T]he only way in which a corporation can be liable for manslaughter is under the directing mind principle…the consequence is that it is virtually impossible to bring a successful prosecution against a large corporation particularly where…the allegation is essentially based on a system failure." per* Scott-Baker J in *R v Great Western* (n 10) [15].
[46] Paul Almond and Garry Gray, 'Frontline Safety: Understanding the Workplace as a Site of Regulatory Engagement' (2017) 39 L & Policy 5 (hereafter Almond and Gray, 'Frontline Safety'); Charles Perrow, *Normal Accidents: Living with High-Risk Technologies* (Princeton: Princeton UP

response to the previously identified doctrinal limitations of the existing health and safety offences. It was intended to be ends-oriented, delivering moral judgements on defendants because they had culpably killed,[47] and as such, to treat these cases as concerning issues of rights and justice rather than police power, in Dubber's terms.

Secondly, these doctrinal issues gave rise to a more fundamental *empirical challenge*; that the law had failed in practice to secure any convictions against complex organisational defendants. High-profile prosecutions following major disasters invariably failed, usually due to the inability of prosecutors to demonstrate a connection between senior managers and the operational failures which caused the outcomes in question.[48] For instance, the prosecution brought against P&O Ferries following the sinking of the Herald of Free Enterprise in 1987 failed, as the immediate (shipboard) causes of the disaster fell between, and not within, the responsibilities of individual (office-based) company managers.[49] This was despite the finding of the official inquiry into the disaster that *"[a]ll concerned in management, from the members of the board of Directors down…shar[e] responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness"*.[50] There were seven successful prosecutions under the old law, but each involved a non-complex organisation where there was no real distinction between 'management' and day-to-day operations.[51] In most cases, the consequences of the convictions were also limited, resulting in a *de facto* non-criminalization of work-related deaths.

Three socio-political drivers of reform can also be identified. There was a *political desire* for reform, reflecting the need of the New Labour government of the day to appease its trade union backers, who had otherwise found themselves marginalised within that business-friendly governmental project. The corporate manslaughter reforms were one such concession, a high-profile piece of law intended to signal a

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1984); Gene Rochlin (1999) 'Safe Operation as a Social Construct' (1999) 42 Ergonomics 1549; Wells, *Corporations* (n 41).

[47] Bob Sullivan, 'Corporate Killing - Some Government Proposals' [2001] Crim LR 31, 33.

[48] Wells, *Corporations* (n 41).

[49] *R v HM Coroner for East Kent ex p Spooner* [1989] 88 Cr App R 10; *R v Stanley and Others,* (1990), unreported, Central Criminal Court, 19/10/1990.

[50] Department of Transport, *MV Herald of Free Enterprise: Report of the Court No. 8047* (HMSO 1987), para.14.1.

[51] Almond, *Corporate Manslaughter* (n 2) 27.

commitment to worker's right.[52] They were also a response to *social concerns* about the harms caused by business activity, the long-term effects of global capitalism, and the more general risks inherent in late-modern society. The idea of 'corporate manslaughter' came to prominence in response to a string of disasters during 1987-1989,[53] and resurfaced following the rail accidents at Ladbroke Grove, Hatfield, and Potter's Bar between 1999 and 2002. The public concern this prompted was cited as a rationale for reform by both the Law Commission and the Home Office.[54]

Finally, we can identify a broader *normative undertaking* behind the corporate manslaughter reforms. On the one hand, it is possible to view these offences as a product of class struggle, a means of reasserting labour rights in the face of the destructive power of the corporate capitalist system[55] (a view dismissed by critics as reflecting either a *"Marxist moral-political rut"*, [56] or an unprincipled regulatory populism[57]). Alternatively, this normative role involves securing the citizenship rights of those affected by an act of endangerment by one who *"does not care as she should for their interests"* and in doing so, ignores the good reasons against acting thus. [58] Culpably negligent work-related fatality cases involve a neglect of the citizenship rights of others *'to live the life of a civilised being according to the standards prevailing in the society'*. [59] Regulatory offences exist to ensure that employers treat employees as ends in their own right, and to ensure that risks are

[52] James Gobert, 'The Politics of Corporate Manslaughter - The British Experience' (2005) 8 Flinders J L Reform, 1 (hereafter Gobert, 'Politics of Corporate Manslaughter'); Almond, *Corporate Manslaughter* (n 2) 162; Steve Tombs and David Whyte, 'A Deadly Consensus: Worker Safety and Regulatory Degradation under New Labour' (2010) 50 British J Criminology 46 (hereafter Tombs and Whyte, 'Deadly Consensus').

[53] Including the Clapham Junction rail crash (1988, 35 dead), the sinking of the *Herald of Free Enterprise* (1987, 193 dead) and the *Marchioness* (1989, 51 dead), the fires at King's Cross station (1987, 31 dead) and on Piper Alpha (1988, 167 dead), the Kegworth air crash (1989, 47 dead), and the Hillsborough stadium disaster (1989, 96 dead). These disasters also came against the backdrop of the Chernobyl nuclear disaster in 1986: Wells, *Corporations* (n 41).

[54] Law Commission, Report 237 (n 41), 1.10; Home Office, *Corporate Manslaughter* (n 35): 6

[55] Tombs and Whyte, *Safety Crimes* (n 3).

[56] Jeremy Horder, *Homicide and the Politics of Law Reform* (OUP 2012), 116 (hereafter Horder, *Homicide*).

[57] Robert Baldwin, 'The New Punitive Regulation' (2004) 67 MLR 351 (hereafter Baldwin, 'New Punitive Regulation').

[58] RA Duff, 'Criminalizing Endangerment' (2004) 65 Louisiana LR 941, 943 (hereafter Duff, 'Endangerment'); also HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1968) 157; Andrew Simester, 'Can Negligence be Culpable?' in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (4th Series, OUP 2000) 85. Critical scholars (such as Tombs and Whyte, *Safety Crimes*) argue that many corporate manslaughter defendants display a socio-political, economic, or institutional *"practical hostility toward the interests or people they attack"*, in Duff's terms, and so may fit into his paradigm of 'attack' rather than 'endangerment' offences.

[59] TH Marshall, *Citizenship and Social Class* (Pluto 1992) 8 (hereafter Marshall, *Citizenship*).

not borne disproportionately by any particular social class or group.[60] Individuals bear rights relating to the nature and quality of their citizenship; the manslaughter offence symbolically reasserts the culpability of breaching those rights by failing to fulfil the obligations they place onto one's own conduct.

The CMCHA sought to respond to this need by bringing harmful corporate conduct within the scope of the 'real' criminal law, and so validating them as offences against the value of human life. Conformity to doctrinal and due process standards of *legality*, which respect individual autonomy, is a necessary prerequisite for the legitimation of criminal 'law',[61] and regimes of corporate criminal liability have historically struggled to fulfil these standards.[62] In part, this reflects the legitimacy problems attaching to legal intervention in areas of social and economic policy like the workplace, but also that, while the sphere of justice focuses on individuals and their rights, corporate regulation has tended to involve the instrumental ordering of 'things' and commerce, more properly matters of police power.[63] At the same time, however, there is a residual desire for the offence to remain responsive to the underlying labour law issues commonly reflected in workplace safety failures,[64] something that necessitates the preventive, ends-focused approach inherent in the police power. The pursuit of *particular* outcomes, and a desire to respond to certain *types* of incident, is inherent in the political and social settlements that underpin these laws; their usage is *consequentialist* and tied to substantive understandings about what is, or ought to be, a matter of criminal law.[65] The corporate manslaughter offence thus struggles to fulfil both its primary intended purpose of morally adjudicating on questions of wrongdoing via the application of legal norms, as well as the latent regulatory function (found in the HSWA offences) of effectively ensuring social welfare via the application of police power. This perhaps reflects a problem affecting criminal law in general, namely, that it is not necessarily able to be both normatively meaningful and instrumentally effective at the same time, and so offers a

[60] Almond, *Corporate Manslaughter* (n 2); Tony Prosser, *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (OUP 2011) (hereafter Prosser, *Regulatory Enterprise*); Peter Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69 MLR 29 (hereafter Ramsay, 'Responsible Subject').
[61] Dubber, *Police Power* (n14) 180.
[62] Almond and Esbester, *Health and Safety* (n 5) ch.4; Baldwin, *Rules and Government* (n 5); Campbell, 'Corporate Liability'(n 23) 5-7.
[63] Dubber, *Police Power* (n14) chs.6-7.
[64] Gobert, 'Politics of Corporate Manslaughter' (n 52); Tombs and Whyte, *Safety Crimes* (n 3).
[65] Sullivan, 'The Attribution of Culpability' (n 41) 516.

choice between, rather than a reconciliation of, the 'two cultures' of penal and regulatory criminal law.[66]

The Corporate Manslaughter Offence in Practice

In the ten years that the corporate manslaughter offence has been in force, its impact has been more modest than forecast. The number of prosecutions brought has fallen well short of the 10-13 per year anticipated by the Home Office,[67] and the Act has not yet been utilised in relation to any high-profile disasters. Efforts to collate these outcomes[68] indicate that there have been, to date, 30 prosecutions brought under the 2007 Act, resulting in 26 convictions. 17 of these convictions (65%) resulted from guilty pleas entered at trial, with many leveraged via the levelling of multiple charges (manslaughter and HSWA 1974 offences, against both individual directors and organisations) in a single case.[69]

Crucially, none of these convictions have involved large organisations. One unsuccessful prosecution involved an NHS Hospital Trust,[70] a large organisation, but failed as prosecutors were unable to establish that the clinical failures involved in the treatment of the victim (a patient who died during a caesarean section) *grossly* breached a duty of care. As a result, few cases have tested the concept of 'management failure' as a means of attributing organisational responsibility. In the case of *Lion Steel*,[71] where a worker fell to his death while performing maintenance work on a factory roof, it was recognised that while the director in charge of the

[66] Horder, '"Bureaucratic" Criminal Law' (n 13) 150; also Almond, *Corporate Manslaughter* (n 2); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008) (hereafter Husak, *Overcriminalization*); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007) (hereafter Simon, *Governing through Crime*).

[67] Home Office, *Corporate Manslaughter and Corporate Homicide: A Regulatory Impact Assessment of the Government's Bill* (2006) <http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/ria-corporate-manslaughter.pdf?view=Binary> accessed 27/11/2018 13

[68] Building on Steve Tombs, 'The UK's Corporate Killing Law: Un/fit for Purpose?' (2018) 18 Criminology and Crim Justice 488 (hereafter Tombs, 'Corporate Killing'); Celia Wells, 'Corporate Criminal Liability: A Ten Year Review' [2014] Crim LR 849 (hereafter Wells, 'Corporate Criminal Liability'). No published data are provided by the UK Government on the use of the CMCHA 2007; they are subsumed within broader homicide categories within general crime statistics.

[69] Alexandra Dobson, 'Shifting Sands: Multiple Counts in Prosecutions for Corporate Manslaughter' [2012] Crim LR 200.

[70] *R v Maidstone and Tunbridge Wells NHS Trust* (2016) Unreported, Inner London Crown Court, 28/01/2016 (hereafter *R v Maidstone NHS*).

[71] *R v Lion Steel Equipment Ltd.* (2012) Unreported, Manchester Crown Court, 20/7/2012.

worksite might bear responsibility for that failure, this fault did not have to be shared with other directors in order to constitute a *management* failure.[72] And in the case of *CAV Aerospace*, [73] where purchasing practices at a parent company led to dangerous overstocking at a subsidiary company's warehouse, liability was established on the basis of the control exercised by the level of the parent company. [74] The test proved flexible enough to handle this type of corporate arrangement, but it remains to be seen whether it can do so in relation to the information flows and power relationships involved in the prosecution of a major corporate entity.

The average fine following a conviction currently stands at £315,580, with the highest to date being £1.2m; these outcomes are at the bottom of the range of possibility envisaged by the Sentencing Guidelines,[75] and are not noticeably different from the fines that might be imposed in comparable HSWA prosecutions. Very few of the cases (5) have sought to make use of any of the more innovative sentencing options (such as publicity orders) that the 2007 Act introduced. And there are some clear trends in the sectors, regions, and types of case where manslaughter prosecutions have been brought. The most heavily represented industry in terms of manslaughter prosecutions is construction (ten cases), followed by manufacturing (5), agriculture (3), and waste management (3). Nine of the prosecutions have occurred in Lancashire and the North-West, and four in Northern Ireland, perhaps reflecting the prevalence of the aforementioned industries in these regions, but also suggesting the influence of local institutional factors like those identified within the CPS by Quick in relation to medical manslaughter cases. [76] These include the presence of pockets of localised expertise among CPS/PSNI decision-makers, particularly in relation to complex threshold decisions like determining 'grossness', and the tendency for success (or *'getting home'*, in Quick's terms[77]) in one case to inculcate confidence in pursuing others. Gaining a better understanding of the role of

[72] Simon Antrobus, 'The Criminal Liability of Directors for Health and Safety Breaches and Manslaughter' [2013] Crim LR 309.
[73] *R v CAV Aerospace Ltd.* (2015) Unreported, Central Criminal Court, 24/7/2015.
[74] Tombs, 'Corporate Killing' (n 68) 15.
[75] Sentencing Council, *Definitive Guidelines* (n 34) 21.
[76] Oliver Quick, 'Prosecuting 'Gross' Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service', J Law Soc 421.
[77] Ibid., 438.

expertise and local pressures and variables within prosecutorial agencies would no doubt cast an important new light on the outcomes secured to date.

Finally, certain fact patterns recur within the prosecuted cases; twelve have involved falls from height, five have involved becoming trapped in machinery, and four have involved being crushed by falling material. One reason for this might be that these activities are more commonly undertaken by SMEs, which have tended to be targeted for prosecution.[78] But there are perhaps more significant reasons, which link back to the doctrinal features of the offence. First, these circumstances tend to involve physical 'boundary violations', or people moving from 'safe' spaces to 'unsafe' ones – proximate to machinery, onto rooftops, or into restricted spaces. Such a boundary violation itself manifestly breaches health and safety standards; a categorical (in/out), rather than an incremental (degrees of reasonableness) form of failure. As such, they are easier to prove than other health and safety breaches, and so lend themselves to forming the basis of a prosecution. Second, violations of this sort (circumventing or disregarding rules) tend to indicate a form of 'chosen' conduct in the way that errors and mistakes do not; these choices implicate the organisational settings which shape and constrain them.[79] This then brings the character of the offending organisation into question, as the attitudes of culpable neglect and a 'get the job done' motivation, which often underpin the decisions to violate physical boundaries, all act as indicators of wrongfulness, to some degree. In this way, a form of quasi-*mens rea* is injected into the prosecution decision-making process, adding a layer of moral judgement onto offences that might otherwise be reflective of more technical, and less obviously normative, issues.[80]

Overall, then, the corporate manslaughter offence has been less effective in practice than many would have hoped. The principal barriers to its application have stemmed from the efforts made to pursue the criminal law norms that HSWA offences arguably circumvent, and which a homicide offence is expected to fulfil. The fault element requires attention be paid to decision-making among a specified range of post-holders, which must fall below a particular threshold of grossness and give rise to a

[78] Tombs, 'Corporate Killing' (n 68) 13.
[79] Rebecca Lawton, 'Not Working to Rule: Understanding Procedural Violations at Work' (1998) 28 Safety Science 77; James Reason, *Human Error* (CUP 1990); LR Zeitlin, 'Failure to Follow Safety Instructions: Faulty Communication or Risky Decisions?' (1994) 36 Human Factors 172.
[80] Hawkins, *Law as Last Resort* (n 3).

specific consequence.[81] Finally, the offence must 'look' like a manifest breach of a duty of care which implies some form of moral culpability. Each of these factors limits the application of the offence to the 'worst' cases only, but has also inhibited prosecution decision-making. 'Harder' cases which might test these doctrinal barriers have not been pursued; the desire to adhere to the norms of 'real' criminal offences has an important normative function but has also narrowed the instrumental reach of the offence, in part placing an appropriate brake on the use of a serious criminal offence, but also in part curtailing its capacity to address meaningful social needs.

Criminalisation and context-dependency

The criminalisation of this area of labour law has thus encountered a paradox: that doctrinally 'criminal' offences are not necessarily instrumentally effective, and that useful 'quasi-criminal' offences are not necessarily imbued with enough normative weight. In part, this reflects the weaknesses of the criminal law as a social policy tool.[82] But it also reflects the influence of the institutional and socio-political contexts within which criminalisation occurs. The criminal offences that govern this area of labour law have resulted from complex processes of bargaining, negotiation, and debate, which have involved trading-off concerns about the restrictive effects of criminalisation against the social-welfarist ambitions of reformers.[83] As a result, and like other regulatory undertakings, these offences are *political*, in that they are tools for the pursuit of particular substantive ends or public interest goals.[84] This focus on prevention and welfare is consistent with accounts of the police power, not least in its emphasis upon the differentiation and targeting of cases which constitute threats to the social order.[85]

The two bodies of criminal law discussed in this paper each derive their meaning and purpose from the institutional and social settings in which they are applied, and so might be described as *context-dependent* in form. 'Context-dependency' here is used to connote offences which only apply to certain situations and types of

[81] Wells, 'Corporate Criminal Liability' (n 68) 855.
[82] Husak, *Overcriminalization* (n 66); Simon, *Governing through Crime* (n 66).
[83] Almond, *Corporate Manslaughter* (n 2); Gobert, 'Politics of Corporate Manslaughter' (n 52); Horder, *Homicide* (n 55); Wells, *Corporations* (n 41).
[84] Brian Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (CUP 2006) 6; Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper Colophon 1978).
[85] Dubber, *Police Power* (n14) ch.7.

offender, and which relate to conduct that only becomes criminal by virtue of the circumstances in which it arises. Horder identifies a *"bureaucratic-administrative model"* of criminal offences which are context-dependent, being targeted at particular classes of individuals and 'flexibilised' in their form so as to allow for substantive outcomes to be pursued in certain circumstances.[86] These relevant contexts may be either proscribed in the form of the offence, as is the fact of 'driving' in Horder's example of causing death by dangerous driving, or otherwise interpolated via the decision-making of enforcers. In that example, cases of falling asleep at the wheel might be categorised as 'dangerous' driving, while cases of 'momentary inattention', or where a victim contributed to an accident, might be classed as 'careless' driving.[87] Whether it is dangerous or careless to pull out at a junction in front of an unnoticed motorcycle is not specified in the offence and is not an inherent distinction; it is a product of a contextually-informed understanding of the risks and dynamics associated with driving, as well as a choice about the types of driving that ought to be punished. Throughout the criminal law, offence terms are thus defined in order to capture *"wrongs committed within…an institutional setting—a setting that partly determines their meaning and their implications"*.[88]

Determinations about what falls within the ambit of an offence reflect institutional decision-making at the level of the political community, rather than pre-legal reasoning about particular moral wrongs, and so are reflective of the aforementioned conceptual tensions between the 'two cultures' of criminal law[89] and two governance models of law and police.[90] On the one hand, they allow for consideration of the 'good reasons' for criminalising which exist at the level of the political community, such as those relating to social citizenship rights,[91] and the protection of individuals from exploitation and domination.[92] These are legitimate goals for criminalisation to

[86] Horder, *Homicide* (n 56) 75-77.
[87] Sally Kyd Cunningham, 'Has Law Reform Policy been Driven in the Right Direction? How the New Causing Death by Driving Offences are Operating in Practice' [2013] Crim LR 712.
[88] RA Duff, Lindsay Farmer, Sandra Marshall, Matteo Renzo and Victor Tadros (2014) 'Introduction: Towards a Theory of Criminalization' in RA. Duff, Lindsay Farmer, Sandra Marshall, Matteo Renzo and Victor Tadros (eds) *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) 1, 21 (herafter Duff et al, *Criminalization*).
[89] Horder, '"Bureaucratic" Criminal Law' (n 13) 150.
[90] Dubber, *Police Power* (n14).
[91] Marshall, *Citizenship* (n 59) 8; Prosser, *Regulatory Enterprise* (n 60) 103; Ramsay, 'Responsible Subject' (n 60) 40-41.
[92] John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for making it Work Better* (Edward Elgar 2008); Almond, *Corporate Manslaughter* (n 2) 168.

pursue, consistent with the key concerns of labour law. But they are also at odds with accounts of criminalisation which privilege offences based on moral wrongfulness as the only legitimate criminal form, and which consequently disregard the value of these offences.[93] Rather than criminalising conduct on the basis of universal moral standards, these offences do so in the pursuit of public goals which are articulated as rules via the institutional context of the state, the constitution, and the mechanisms of law through which they are embodied.[94] This institutional setting is further expressed via variables such as organisational policy, routine, habit, and style, which constitute the enforcer's decision-making frame and so *"institutionalize"* and shape the ways in which offences are used.[95] Certain types of conduct and defendant are thus criminalised according to the contextual value of doing so, something which appears at odds with criminal law norms of equal treatment and non-differentiation.[96]

Context-dependency in practice

This contextual quality is displayed to a startling degree in the case of the HSWA 1974 offences, which are open-ended in nature and base liability upon broad assessments of a defendant's conduct, rather than any specified action or failure. As discussed, the general offences under the HSWA are intended to apply broadly, establishing safe work as a universal right or value, and embedding it within a principles-based, goal-setting regime,[97] and are particularised only in terms of who they apply to (employers, employees, and so on). In practice, however, they are heavily delimited; as Hutter observes, *"[g]iving meaning and substance"* to these offences requires attending to *"broad considerations across a range of issues"*,[98] not least the requirements contained within secondary legislation and Approved Codes of Practice (ACoPs),[99] as well as normal industry standards. It is non-compliance with these requirements that forms the evidentiary basis of an actionable 'failure to

[93] Duff et al, *Criminalization* (n 88) 21 make this point in relation to Ashworth, 'Lost Cause?' (n 4).
[94] Neil MacCormick, *Institutions of Law* (OUP 2007) ch.3 (hereafter MacCormick, *Institutions of Law*).
[95] Hawkins, *Law as Last Resort* (n 3); MacCormick, *Institutions of Law* (n 94) ch.4.
[96] Ashworth, 'Lost Cause?' (n 4) 249-250; Dubber, *Police Power* (n 14).
[97] Almond and Esbester, *Health and Safety* (n 5) ch.4; Almond, *Corporate Manslaughter* (n 2) ch.6; Prosser, *Regulatory Enterprise* (n 60) 103.
[98] Hutter, *Compliance* (n 3) 102.
[99] The Health and Safety Executive (HSE) currently lists 101 pieces of secondary legislation that it enforces (http://www.hse.gov.uk/legislation/statinstruments.htm), along with 55 currently-available ACoPS (http://www.hse.gov.uk/pubns/books/index-legal-ref.htm).

ensure' health and safety.[100] In determining the scope of the general duties, the courts have paid attention to their social and economic purposes,[101] introducing another degree of contextual assessment. By themselves, the offences are almost content-neutral in terms of the limits and conditions of liability – almost all of which are constructed by reference to external institutional and policy factors.

For example, the test of 'reasonable practicability' contained within these offences involves assessment of context; a breach of a duty will only be a crime if it is something which, in the circumstances, the duty-holder could reasonably be expected to have mitigated against. The management of risk is framed as a matter of 'organized uncertainty',[102] in that duty-holders are required to exercise judgement about the gravity, likelihood, and tolerability of risks, and face criminal liability if they do not do so appropriately. These open-ended judgements are institutionalized via the guidance of safety professionals and regulators to reflect accepted contextual norms, interests, and priorities.[103] Conversely, cases involving similar harms, but which do not meet these or other criteria for investigation (seriousness, perceived culpability, instrumental impact) are unlikely to be pursued, as the extra-legal context does not demand it (there may be a breach of a duty and an injury, but no 'reason' to prosecute). In fact, only a small percentage of known violations are investigated or prosecuted, giving rise to concerns about equality of treatment in relation to both the cases singled out for enforcement and those overlooked.[104]

Another example of this context-dependency is provided by s.7 of the Act, which creates an offence relating to employees, who are required to *'take reasonable care for the health and safety of himself [sic] and of other persons who may be affected by his acts or omissions at work'*. This offence is similar to those applying to employers, but is narrower in that it relates to one's own conduct, rather than a failure to ensure the safety of others. It is also used rarely, with only around 10

[100] Campbell, 'Corporate Liability' (n 23) discusses this form of liability.
[101] *R v Chargot* (n 27) [paras. 21, 29-31].
[102] Michael Power, *Organizational Uncertainty* (OUP 2007).
[103] Baldwin, *Rules and Government* (n 5); Hutter, *Compliance* (n 3). For instance, if a case falls within the scope of a 'hobby-horse' issue or strategic initiative, it is more likely to be prosecuted: Hawkins, *Law as Last Resort* (n 3); Bridget Hutter and Sally Lloyd-Bostock, 'The Power of Accidents: The Social and Psychological Impact of Accidents and the Enforcement of Safety Regulations' (1990) 30 British J Criminology 409.
[104] Ashworth, 'Lost Cause?' (n 4).

prosecutions per year,[105] due to the contextual limits of the offence; individual prosecutions are more at risk of failing unless they are clearly wilful in nature, as juries or magistrates may sympathise with an individual defendant in a way they would not with a company.[106] Crucially, prosecuting workers for health and safety breaches runs counter to the welfarist philosophy and 'worker-protective' industrial relations ethos underpinning HSWA liability, which frames risk as a matter of organisational process.[107] The offence is effectively redefined via its social, political, and institutional contexts so as to preclude this type of '*responsibilization'*.[108]

The corporate manslaughter offence is also contextually-defined in several important regards. In particular, there is a need to establish that the causes of a death lay in a 'management failure', a breakdown in the way in which an organisation conducts its activities and controls the risks it poses to others. Hence, an omission will only become a 'management failure' when it occurs within the context of an *organisational* structure, and at the level of *management*. 'Organisational' failures that occur outside the scope of 'management' will not give rise to liability. The pre-2007 law was undermined by the difficulty of attributing responsibility to a corporate body for operational-level actions,[109] and the corporate manslaughter offence is likely to suffer the same fate, not least because it is notoriously difficult to establish the 'managerial' quality of an organisational failure, as the underlying norms of criminalisation in this area are resistant to the attribution of fault to the corporate body, as opposed to individuals.[110] In each case, distinctions are drawn between factually similar actions according to the nature of the persons who commit them.

Another strand of context-dependency within the CMCHA offence is the need to determine whether there has been a relevant, culpable breach of a duty. Section 2 of the Act requires that there must be a relevant duty of care owed under the law of

[105] Based on data from http://www.hse.gov.uk/enforce/prosecutions.htm, covering the period from 19/6/2017 to 18/6/2018.
[106] Hawkins, *Law as Last Resort* (n 3) 96-7; Hutter, *Compliance* (n 3) 225.
[107] Hawkins, *Law as Last Resort* (n 3) 94-5.
[108] Garry Gray, 'The Responsibilization Strategy of Health and Safety: Neo-liberalism and the Reconfiguration of Individual Responsibility for Risk' (2009) 49 British J Criminology 326 (hereafter Gray, 'Responsibilization').
[109] David Ormerod and Richard Taylor, 'The Corporate Manslaughter and Corporate Homicide Act 2007' [2007] Crim LR 589 (hereafter Ormerod and Taylor, 'Corporate Manslaughter'), 592
[110] Almond and Gray, 'Frontline Safety' (n 46); Gray, 'Responsibilization' (n 108); Eric Tucker, 'Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom' in Theo Nichols and David Walters (eds) *Safety or Profit?: International Studies in Governance, Change, and the Work Environment* (Baywood 2013) 71 (hereafter Tucker, 'Old Lessons').

negligence (as an employer, occupier or premises, supplier, or similar); this is a question of law for the judge to determine.[111] As these duties must precede the commission of the offence, they bring into consideration the contextual structuring of obligations owed between actors. The formation of '*Uberised'* quasi-employment relationships between employing/contracting firms and employees/contractors[112] may preclude legal duties being owed. Similarly, the potential retrenchment of employment rights post-Brexit[113] may also shape the substantive reach of the offence. This is further underlined by the inherently context-dependent nature of 'grossness' in relation to a breach of the law, which is assessed by the jury, taking account of ulterior legal requirements and health and safety guidance, as well as organisational attitudes, practices, and past performance.[114] These standards and expectations are, in many regards, elastic, in that they can change over time; inadequate performance, if assessed by reference to the standard of 'reasonable practicability' under the HSWA, is a cost-benefit judgement, and when costs and benefits are recalculated, those thresholds are liable to be reset.

One last contextual limitation is the exclusion of duties relating to questions of public policy under s.3 of the Act, which places questions of resource allocation and political choice beyond the scope of the offence. It may be argued that this is a necessary safeguard for those who make hard decisions in an imperfect world, but this wide-ranging exclusion places an entire class of *strategic* decision-makers outside the law, while leaving *operational* decision-makers exposed to liability.[115] It also means that deaths resulting from callousness or indifference towards the citizenship rights of classes of people at the level of policy will fall outside the scope of liability, despite seemingly reflecting a blameworthy disposition.[116] This is likely to mean that the policies of privatisation, profit-maximisation, and neglect implicated in past disasters such as Hillsborough, Piper Alpha, or Ladbroke Grove, and current

[111] Ormerod and Taylor, 'Corporate Manslaughter' (n 109) 599.
[112] Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit, and Co.: Platforms as Employers-Rethinking the Legal Analysis of Crowdwork' (2015) 37 Comparative Labor L & Policy J 619.
[113] Steve Coulter and Bob Hancké, 'A Bonfire of the Regulations, or Business as Usual? The UK Labour Market and the Political Economy of Brexit' (2016) 87 *Political Quarterly* 148.
[114] Ormerod and Taylor, 'Corporate Manslaughter' (n 109) 603.
[115] Horder, *Homicide* (n 56) 130-1. For example, the rationing of treatment by NHS decision-makers may be excluded, but the decisions of individual doctors may not be: Chris Newdick, W*ho Should we Treat?: Rights, Rationing, and Resources in the NHS* (2nd Ed, OUP 2005).
[116] RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 115-120.

cases such as that at Grenfell Tower,[117] are liable to remain unchallenged under the corporate manslaughter offence.

In terms of practice, Horder critiques the contextual targeting of the CMCHA on the basis that, although the offence is inclusive in terms of the types of organisation it applies to (including public bodies, partnerships, and other forms of organisation), the policy narrative around the offence has focused on corporations to the exclusion of these other bodies.[118] He attributes this to an ideological preoccupation with Marxian political economy on the part of supporters of the offence, echoing critiques of a modern culture of *'regulatory punitiveness'*.[119] For Horder, this precludes consideration of failures within public service settings such as the NHS, and undercuts the law's claims in relation to principles of procedural fairness and equal treatment. In fact, there is a healthy literature exploring the potential application of corporate manslaughter to public bodies, both prospectively[120] and in relation to the disasters that prompted law reform in the first place,[121] and public-sector cases have already been pursued under the 2007 Act.[122] Any slant towards the criminalisation of corporate defendants may simply reflect the offence's context-dependent nature. The rolling-back of the state in the era of the 'New Public Management'[123] has placed what were once public-sector functions within the private sphere, rendering cases in industries such as social care[124] and mining[125] *de facto* private-sector matters. Indeed, the overlaps between public and private captured by the concept of

[117] Where 72 people died in a fire, the circumstances of which seemingly implicate the decisions of the local Council, the Tenant Management Organisation, the emergency services, and central Government.
[118] Horder, *Homicide* (n 56) ch.4.
[119] Baldwin, 'New Punitive Regulation' (n 57).
[120] Including prisons (David Doyle and Suzanne Scott, 'Criminal Liability for Deaths in Prison Custody: The Corporate Manslaughter and Corporate Homicide Act 2007' (2016) 55 Howard J Crime and Justice 295), police forces (Stephen Griffin and Jon Moran, 'Accountability for Deaths Attributable to the Gross Negligent Act or Omission of a Police Force: The Impact of the Corporate Manslaughter and Corporate Homicide Act 2007' (2010) 74 J Crim L 358; Raymond Arthur and Victoria Roper, 'Criminal Liability for Child Deaths in Custody and the Corporate Manslaughter and Corporate Homicide Act 2007' (2018) 30 Ch Fam L Q, 3. 121), and hospitals (Mary Childs, 'Medical Manslaughter and Corporate Liability' (1999) 19 LS 316).
[121] Wells, *Corporations* (n 41); Gobert, 'Politics of Corporate Manslaughter' (n 52); Almond, *Corporate Manslaughter* (n 2).
[122] *R v Maidstone NHS* (n 70).
[123] Christopher Hood, 'A Public Management for All Seasons?' (1991) 69 Public Administration 3.
[124] *R v Sherwood Rise Ltd.* (2016) Unreported, Nottingham Crown Court, 09/02/2016.
[125] *R v MNS Mining Ltd.* (2014) Unreported, Swansea Crown Court,19/6/2014.

'state-corporate crime' arguably make discussion of such a binary distinction obsolete.[126]

Crucially, the fact of the corporate setting may, in many cases, reflect a meaningful difference in the normative evaluations the law makes, as it raises questions of character, motivation, and 'practical attitudes' towards risk.[127] The business sphere, particularly that of relatively marginal, low-investment industries such as waste processing, agriculture, and construction (which account for a majority of cases), provides a setting within which an ends-oriented, instrumental rationality might prevail. This type of motivation (a *'profit-first'* or *'just get the job done'* attitude) is identifiable in many of the cases prosecuted to date,[128] and has long functioned as a shorthand 'fault indicator' in regulatory prosecution decision-making.[129] Of course, such an outlook is not unique to the corporate setting, and it is notable that areas of the public sector where a 'business ethos' has been inculcated (such as the NHS) have also attracted attention from prosecutors. Context-dependency here allows for the criminalisation of conduct that offends against valued social ends. It is only an indirect outcome that this results in a pattern of usage against corporate bodies and public entities that model themselves on this way of organising one's conduct.

Conclusion: Criminalisation and the regulatory project

This chapter has explored the two main ways in which safety violations are criminalised, and has identified a trend towards context-dependency in the offences created. This allows for the alignment of the law with the expectations and standards embedded within the social, organisational, and economic surround, satisfying rule of law considerations. It also means that the outcomes it produces are ostensibly directed at fulfilling labour law-oriented policy goals. Specific requirements of the HSWA and CMCHA offences, such as the fault elements and the circumstances that give rise to liability, are interpreted in accordance with external understandings about the context that they relate to. These offences are used to restate social citizenship

[126] Raymond Michalowski and Ronald Kramer, 'State-Corporate Crime and Criminological Inquiry', in Henry Pontell and Gilbert Geis (eds) International Handbook of White-Collar and Corporate Crime (Springer 2007) 200.
[127] Duff, 'Endangerment', (n 58) 948.
[128] Informal observation suggests that 23 of the 29 convictions brought to date feature some form of motivational component of this sort.
[129] Hawkins, *Law as Last Resort* (n 3) ch.11.

norms and reinforce the health and safety regime. But there is also a problem with this context-dependency, namely, that it allows those same offences to be contextually shaped in less constructive ways, because this context includes a political, social, and institutional agenda which is directly hostile to those same labour law goals. A deregulatory agenda has held sway in the UK for many years, and in the context of workplace safety, it has led to a reframing of the law so as to be more individualized in scope, non-universal in application, and business-oriented.[130] In particular, the offences outlined here have been interpreted so as to reinforce certain core assumptions about responsibility in relation to health and safety. First, there is an assumption that 'risk incidents' are caused by individual 'faulty components' (human errors and breakdowns), particularly at the level of autonomous frontline actors. This places a significant emphasis upon individual actors to exercise voice and make decisions, and locates causal problems beyond the scope of organisational responsibility.[131]

Second, the regulatory context views regulation as best pursued via 'polycentric' governance-based systems of risk management, within which individual employees are one group of participants among many, and bear equal responsibility for the exercise of safety.[132] Within such a view, non-organisational actors are blamed when things go wrong, and functional distinctions are drawn between 'autonomous' individuals who make choices about risk, and the organisations that notionally bear responsibility for them.[133] On this view, questions of responsibility are increasingly individualised, so that organisational hierarchies insulate managerial actors from blame, both in relation to regulatory offences, but especially 'criminal' forms of liability. Finally, the rights and protections granted to individuals with regard to their health and safety delimit the extent to which those individual actors can rely on the law for protection. As mobilized, rights-holding agents, individuals should pursue safety through the internalisation of 'safety cultures' and the invocation of personal

[130] Paul Almond, 'Revolution Blues: The Reconstruction of Health and Safety Law as 'Common-Sense' Regulation' (2015) 42 J L Society 202: 221 (hereafter Almond, 'Revolution Blues'); Anneliese Dodds, 'The Core Executive's Approach to Regulation: From 'Better Regulation' to 'Risk-Tolerant Deregulation'' 40 Social Policy & Administration 526; Tombs and Whyte, 'Deadly Consensus' (n 52).
[131] Almond and Gray, 'Frontline Safety' (n 45) 12.
[132] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation & Governance 137.
[133] Almond and Gray, 'Frontline Safety' (n 46) 14; Gray, 'Responsibilization' (n 108); Tucker, 'Old Lessons' (n 110).

rights;[134] if they do not, they are at fault. Together, these contextual assumptions underline that responsibility, like water, is a commodity which flows downwards within an organisation much more easily than it flows upwards.

An example of reframing in line with these contextual assumptions is provided by the issue of mental health and workplace stress which, despite being a regulatory priority, almost never leads to prosecutions, as it is arguably incompatible with criminal law norms of causation, harm, and foreseeability, and is harder to control than most physical hazards.[135] Psychosocial risks are prone to being framed primarily as matters of personal resilience and wellbeing, in line with this individualising narrative, and so apt to be tackled via 'soft law' methods.[136] As such, the context-dependency of these offences excludes this issue from the scope of the law. Similarly, prosecuting organisations for manslaughter only when an unequivocal physical 'boundary violation' has occurred illustrates the efforts required to challenge voluntaristic assumptions about individual contributory obligations. Only when it is manifestly clear that organisational controls have broken down will the locus of responsibility be shifted onto the corporate form. Similar dynamics can be observed in relation to the emphasis placed onto 'motive' in relation to HSWA and CMCHA prosecutions; the need to prove a *de facto* source of *mens rea* frames liability as connected to 'individual' rather than systemic causes. And the exclusion of particular 'lower risk' industries, and groups of employees (such as the self-employed) from the reach of enforcement[137] again demonstrates that contextual presumptions about voluntarism, responsibility, and risk shape the parameters of the law.

Context-dependency thus means that the laws used to respond to workplace health and safety incidents reinforce, rather than challenge, these tendencies, and distance the legal organisation of health and safety, on the one hand, from the experiences of workers on the other. An individualised paradigm of responsibility and fault endures even in these notionally organisational settings; the upwards arrow of accountability, focusing on corporate responsibility, is weakened by the common contextual

[134] Susan Silbey, 'Taming Prometheus: Talk About Safety Culture' (2009) 35 Annual Rev Sociology 341.
[135] Almond and Esbester, *Health and Safety* (n 5) ch.5.
[136] Sergio Iavicoli, Stavroula Leka, Aditya Jain, Bernedetta Persechino, Bruna Rondinone, Matteo Ronchetti, and Antonio Valenti, 'Hard and Soft Law Approaches to Addressing Psychosocial Risks in Europe: Lessons Learned in the Development of the Italian Approach' (2014) 17 J Risk Research 855.
[137] Almond, 'Revolution Blues' (n 130).

assumptions that are made about the antecedents of, responsibility for, and nature of the rights affected by, workplace health and safety breaches. It might be argued that the inherently anthropomorphic nature of some of the conceptual foundations of criminal liability, such as character, choice, and motive, mean that it is always likely to constitute a less-than-ideal means of responding to collective or systemic forms of conduct. At the same time, however, the causes of this phenomenon are more deep-seated, originating in the cultural assumptions that underlie the application of organisational concepts within the criminal law. Because the locus of understandings of responsibility within contemporary neoliberal formations tend to reside in individual agency, the decisions and assessments made about fault, even in fields of ostensibly 'worker-protective' criminalisation, tend to circle back to the actions of specified individuals. This renders the criminal law a less-than-effective, and often repressive, means of delivering the social goods that underpin criminalisation in this particular area. It is only by challenging these broader social and political assumptions about discipline, hierarchy, and control within the workplace that the paradigm of individual agency can be transcended and truly worker-protective criminalisation can occur.