EXPLORING THE RE-CRIMINALISING OF OHS BREACHES IN THE CONTEXT OF INDUSTRIAL DEATH

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I INTRODUCTION

Since the 1980s the calls for further criminalisation of organisational conduct causing harm to workers, the public and the environment have intensified in Australia, Canada and England and Wales. One focal point of this movement has been the criminal law’s response to organisations (and their personnel) failing to comply with occupational health and safety (‘OHS’) standards, particularly when physical harm (death and serious injury) has resulted from those breaches. Some governments have responded with proposals to enable manslaughter prosecutions to be initiated ‘more effectively’ against organisations causing the deaths of workers or, in some cases, members of the public (Archibald et al, 2004; Haines and Hall, 2004; Hall et al, 2004; Tombs and Whyte, 2003). In Australia governments have also increased monetary penalties for regulatory OHS offences, a few have introduced other contemporary organisational sanctions, and some have initiated OHS prosecutions more vigorously and with larger fines. In Canada...
and England and Wales, however, there appears to be a decrease in the use of criminal law in OHS regulation overall, albeit alongside more punitive potential penalties (Baldwin, 2004; Brown, 2001; Gunningham and Johnstone, 1999). One obvious question to ask is why such reform has occurred given there is little evidence that the risk of injury or death from industrial activities has increased during the same period.

Possible explanations for these recent reforms include heightened perceptions of the risk of adverse consequences resulting from industrial activity, in what Beck and Giddens describe as an increasingly technologically advanced and threatening 'reflexive modernity' (Beck, 1992; Giddens, 1991 and 1999; see also Douglas, 1992); a greater sense of injustice and lack of organisational accountability for industrial deaths (and, indeed, for all industrial harm), particularly where there are higher levels of awareness about systemic organisational failings that contribute to or cause such harm; reduced societal tolerance of industrial death; a greater need to assign blame for industrial deaths; greater media interest in industrial death; and, finally, the increased legitimation deficits in relation to organisational actors whose activities result in industrial deaths (see in particular discussion by Glasbeek, 1998 and 2003; Haines and Hall, 2004; Haines and Sutton, 2003; Hartley, 2002; Lacey, 2000: 33; Snider, 1987 and 1991; Tombs, 1995; and Wells, 2001). The explanations for the emergence of such themes are too complex to be explored in great depth in this article, but we shall argue here that it is these phenomena rather than other more instrumental motives that explain why interest in these issues has recently emerged in its present form.

Academic criticism of current approaches to the use of the criminal law in OHS regulation has focused on two elements: first, the failure of existing regulatory OHS offences to hold adequately to account those (both organisations and individuals) who disregard their purposes and aims to prevent industrial harm (Gobert and Punch, 2003; Gunningham and Johnstone, 1999; Johnstone 2003a; Johnstone, 2004b; Pearce and Tombs, 1990; Slapper and Tombs, 1999; Tombs, 1995; Wells, 2001); and second, the failure of existing individualistic traditional criminal offences (for instance manslaughter) to adequately respond to the greater role of organisations in causing industrial death or injury, or to ensure accountability for, denunciation and punishment of, and prevention of harm (Clarkson, 1996; Field and Jorg, 1991; Fisse, 1983, 1991 and 1994; Fisse and Braithwaite, 1988 and 1993; Gobert, 1994; Gobert and Punch, 2003; Hall et al, 2004; and Wells, 1988 and 2001). Of course, the reform movement has not been

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2 'Industrial deaths' refer here to sudden work-related deaths or deaths stemming from public disasters.
3 Although whether this is cause or effect of the other reasons we highlight remains unclear.
4 The distinction between what we here call 'traditional' and 'regulatory' criminal law is intended to refer to the difference between 'traditional' criminal law, taken here to refer to crimes such as murder, manslaughter and causing serious injury that are outcome or result based, as opposed to what some call 'regulatory' criminal offences as contained in OHS statutes. The former can be viewed as the law's truly criminal response, given the punitive and expressive motives often associated with such laws (Brown, 2001; Haines and Hall, 2004; Wells, 2001: ch 2). One
without its critics, and there is no academic or social consensus that greater use of criminal law (either regulatory or traditional) in the regulation of OHS is either necessary and/or worthwhile (Baldwin, 2004; Bardach and Kagan, 1982; Brown, 2001; CBI, 2001; Hawkins, 2002; note also the discussion of Haines and Hall, 2004). While there is little dispute in the academic literature that there is a role for some criminal law in the regulation of OHS (Ayres and Braithwaite, 1992; Gunningham and Johnstone, 1999; Haines, 1997; Johnstone, 2004b), there is considerable debate about the extent, and in what situations, criminal prosecutions should be used as part of a regulatory enforcement strategy and what types of criminal offences should be prosecuted when prosecutions are deemed appropriate (Hawkins, 2002).

In this article we take up the theme of the reform of criminal laws that can be utilised against organisations following industrial deaths. For various reasons our focus is thus on organisational and not individual (officer or employee) criminal liability. First, in the past decade there has been a greater emphasis on reforming the legal rules used to attach traditional criminal liability to organisational entities for industrial deaths in Australia, Canada and England and Wales, than at any time since organisational criminal law initially developed in the 1940s (Haines and Hall, 2004; Hall et al, 2004). Second, an identifiable trend in the development of organisational criminal law towards holistic notions of criminal responsibility is evidenced in such reforms. Traditional criminal law has always been firmly rooted in individualistic notions of criminal responsibility and fault (Wells, 2001; Ashworth, 2003: 114), even in the organisational context. Yet the move towards wider use of traditional criminal responsibility based on negligent organisational culture or negligent management systems has loosened the necessity for individual fault in areas of organisational criminal responsibility. Third, industrial deaths are perhaps the quintessential form of organisational ‘violence’ (Wells, 2001: 12), and the relatively recent calls for a traditional criminal legal response to these deaths in, for example, the form of manslaughter prosecutions, whatever its merits, is worthy of attention. It is important to explore further societal or cultural dynamics and link the at times sterile legal academic debate on organisational criminal accountability to a greater understanding of the underlying social motives for law reform.

We shall stress throughout this article a fundamental and important distinction between instrumental aims or purposes of law reform and expressive or symbolic ones (Haines and Hall, 2004). The former focuses on deterring poor health and safety standards; the latter supports notions of ‘truth’ or ‘justice,’ dealing with

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5 The legal foundations of organisational accountability for traditional criminal offences in common law countries can be traced back to a trio of cases in the 1940s that developed the way mens rea was attributed to corporations in criminal law, as shall be discussed below (Slapper and Tombs, 1999: 28; Wells, 2001: 93). These cases were DPP v Kent and Sussex Contractors [1944] KB 146; Moore v Bresler [1944] 2 All ER 515; R v ICR Haulage (1944) 30 Cr App R 31.
emotions like grief and pain, and is inextricably tied up with government’s need to ensure (perhaps superficially so we shall suggest) that neither workers and the general public nor owners of the means of production seem structurally disadvantaged in the context of an OHS regulatory system.

To contextualise our arguments, we first explore the existing legal framework of OHS regulation in order to contrast both the use of regulatory criminal offences and traditional criminal offences (in particular manslaughter), focusing on the means by which the criminal law has responded to industrial death. We then briefly outline the salient features of recent reforms of organisational criminal liability principles, in particular as they relate to manslaughter prosecutions following industrial deaths. The article then places such manslaughter prosecutions in the broader context of OHS regulatory enforcement, and considers the weaknesses in the existing system of regulatory OHS prosecutions and the implications of this for future reformed manslaughter prosecutions. We then consider what we view as the dangers of emphasising manslaughter prosecutions at the expense of the prosecution of regulatory criminal offences, and return to this in the final section of the article. The various motives for law reform are then outlined, with a clear distinction placed on instrumental, symbolic and structural benefits. The article concludes with a discussion of other potential strategies for enhancing the role of OHS law in bringing organisations to account for, and preventing, industrial deaths, whilst by no means seeking to underestimate the difficulties faced by such a task.

Our underlying argument is that both policy makers and academics need to understand why the two forms of criminal OHS offences have developed in the way they have, in particular considering both the historical and modern societal restraints on any other viable system of regulatory enforcement. We argue there is a need to acknowledge and to confront these structural reasons head on to avoid undermining the importance of OHS standards, which we suggest is exactly what current traditional criminal law reform increasingly seems to be doing. Our discussion leads us to conclude that what is needed is the re-criminalisation of OHS breaches through existing and reformed regulatory criminal offences, with prosecutions effectively utilised and resourced, but crucially without resorting necessarily to reformed traditional criminal law. What is needed is a greater appreciation of the criminality of regulatory criminal law, casting aside the pervasive yet ungrounded belief that ‘it’s not really criminal.’ Once this is done, regulators will be able to use both forms of OHS criminal law strategically, in tandem, to achieve a range of objectives.

II A COMPARISON OF OHS AND MANSLAUGHTER OFFENCES

From a legal perspective, manslaughter offences differ significantly in a number of ways from regulatory OHS offences. First, the elements of offences embodied in
OHS statutes and in the crime of manslaughter differ markedly. Traditionally OHS statutes set out specification standards, which mandated specific safeguarding methods, the procedures to be adopted, or practices to be refrained from, in specific situations (McAvoy, 1977; Brooks, 1993: 934-35; Gunningham and Johnstone, 1999: 24–25). To overcome the well-documented weaknesses of this model (including uneven coverage, the overly detailed and technical nature of the standards, and their tendency to preclude employer initiative and worker involvement), from the mid-1970s, OHS legislation was built around general duties supplemented by regulations and codes of practice (see Johnstone, 2004a: 63–64).

In Australia, as in Canada and England and Wales, the general duty provisions essentially reproduce the common law negligence duty and standard of care — although the wording of these provisions differs from jurisdiction to jurisdiction (see Johnstone 2004a: 65, and ch 4 and 5). The duties are usually imposed upon employers, the self-employed, persons in control of workplaces (occupiers), manufacturers, suppliers, and designers of plant and substances, employees and, in Queensland, principal contractors in the construction industry. They impose on duty holders duties to take care for various aspects of worker health and safety. For example, 'employees' are typically required to provide and maintain for employees a working environment that is safe and without risks to health. In all of the Australian state-based OHS statutes apart from the Workplace Health and Safety Act 1995 (Qld), these duties are qualified by the 'reasonable practicability' of taking the measures required to ensure worker health and safety. Determining whether a measure is reasonably practicable requires the duty holder to weigh up, on the one hand, the likelihood of the hazard causing harm to a worker, and the gravity of that harm, against the technological feasibility and cost of removing or reducing the risk (see further Johnstone 2004: 207–29).

These skeleton statutory general duties are 'fleshed out' with standards in regulations and codes of practice. Beginning in the late 1980s Australian regulations and codes of practice have tended to steer clear of specification standards, and instead rely on performance standards, process requirements and documentation requirements (see Bluff and Gunningham: 2004: 20–27; and Johnstone, 2004a: 156–58). Instead of telling duty holders exactly how they are to achieve compliance, performance standards define duties in terms of goals that must be achieved, or problems that must be solved, and leave it to the initiative of the duty holder to work out the best and most efficient method for achieving the specified standard. Process requirements prescribe a process, or series of steps, that must be followed by a duty holder in managing specific hazards, or OHS

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6 The Workplace Health and Safety Act 1995 (Qld) establishes strict duties, and provides that it is a defence to a prosecution for a contravention of a general duty for the duty holder to prove (on the balance of probabilities) that he or she followed the relevant regulation or code of practice, or, where there is no regulation or code of practice about exposure to a risk, that she or he chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention. This latter expression is a recasting of the reasonably practicable expression.
generally. For example, OHS regulations often require the identification of hazards and assessment and control of identified risks. Process-based standards have spawned greater reliance on documentation requirements, which require duty holders to document measures they have taken to comply with process-based standards, performance standards and general duty standards.

Modern OHS standards are therefore ‘constitutive’, in that they attempt to use legal norms to constitute structures, procedures and routines which are required to be adopted and internalised by regulated firms, so that these structures, procedures and routines become part of the normal operating activities of the firm (Hutter, 2001: ch 1). For example, the general duties require:

a structured, systematic approach to safety in everything which is touched by the operations of the defendants. It is not enough to endeavour to comply with these obligations on an ad hoc basis looking at particular matters from time to time ...

Employers are required to actively assess and take account of all risks that might foreseeably arise. Systems need to be created to deal with these risks and, to the extent possible, eliminate them. Employees need to be instructed and trained to apply these systems. The employer needs to assess from time to time whether those systems are working and whether employees are following them. This involves supervision.7

If OHS duties are breached, they can be enforced ultimately by criminal prosecution. For a regulatory OHS offence to be prosecuted following an industrial death (and indeed in all other case as well), criminal law requires only the proof of failure to provide a safe system of work, to conduct adequate hazard identification, risk assessment and control, or to guard a machine (Appleby, 2003).8 Hence such offences are not defined in terms of result, and in the case of criminal prosecutions following an industrial death, the occurrence of the death would be irrelevant to establishing criminal liability.9 Regulatory OHS offences are also strict liability offences, by which it is meant they require no evidence of criminal fault on behalf of the personality prosecuted. In essence strict liability requires only criminal conduct (Herren, 2003: ch 4), in this context the breach of a duty by an employer through acts or omissions. As has been noted, however, offences resulting from breach of strict liability duties under OHS statutes are qualified by the ‘reasonable practicability’ of measures which might be taken to minimise OHS risks and prevent any breach of the OHS standard.10

In contrast to the regulatory system of criminal punishment, the traditional criminal legal system also provides a crime of gross negligence manslaughter that can be prosecuted following an industrial death,11 and is concerned with outcome

7 Marks J in Inspector Ching v Bros Bins Systems Pty Ltd, Inspector Ching v Expo Pty Ltd trading as Tthy Rose Auto [2004] NSWIR Comm 197, para [32].
8 See also R v Australian Char Pty Ltd (1996) 64 IR 387, 400 and Haynes v C I and D Manufacturing Pty Ltd (1995) 60 IR 149, 158.
9 Even if not irrelevant in actually contributing to the bringing of the prosecution and when sentencing the offender.
11 Another possibility is unlawful act manslaughter: see Wells (2001: 117).
or result (ie the death) rather than *per se* the mode of behaviour leading to the death. This type of criminal offence (like most other criminal offences) also requires proof of specific criminal fault — in this case, as its name suggests, gross negligence — on behalf of the personality prosecuted for the offence.\(^2\) Hampel J in *R v A C Hatrick Chemicals Pty Ltd\(^3\)* described the fault element as follows:

The essence [of the offence of gross negligence manslaughter] ... is 'a great falling short of the standard of care' which a reasonable person would have exercised, involving 'such high risk' that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.\(^4\)

Manslaughter by gross negligence therefore is a crime quite different in nature from the regulatory OHS offences outlined above. To summarise: first, it is a response to a fatality — it is defined in relation to a result, and its requirements are not expressed in a way that marks it as 'constitutive' in form, although, clearly a failure to manage OHS systematically provides some evidence of the kind of negligence that must be 'gross' enough to support a successful manslaughter prosecution. A second significant difference between regulatory OHS offences and manslaughter by gross negligence is that, in contrast to the strict liability provisions in regulatory OHS offences, traditional criminal offences generally require criminal fault. The degree of criminal fault required in manslaughter is 'gross negligence.'

The third significant difference between OHS offences and gross negligence manslaughter lies in the manner in which the courts attribute criminal liability when it is organisations which are prosecuted for the two types of offences. Criminal law has evolved around the central theme of individual liability (Wells,

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12 Criminal fault is often referred to as the mens rea requirements of traditional criminal law, and apart from strict and absolute liability offences, is a prerequisite in order to establish a criminal conviction. Other kinds of traditional criminal offences require different levels of fault before a conviction can result. The most culpable is an intention to do an act that is deemed criminal, followed by recklessness in doing such an act, and finally negligence (Herring, 2004: 140). Less demanding than a 'gross negligence' standard of fault is that of ordinary criminal negligence. This requires judging a defendant by the actions of a 'reasonable person', and is an adequate fault element where offences can be committed by negligence in all cases other than those resulting in death. Note, however, negligence and gross negligence are in fact confusingly not what we would call a mens rea at all. The British Court of Appeal has authoritatively stated that evidence of a state of mind is not required for a conviction for gross negligence manslaughter. Such a standard of fault is therefore often referred to as a more 'objective' standard of criminal liability, and the subjective fault of a defendant is just one relevant factor in pointing to their negligence being gross (See *Attorney-General's Reference (no 2 of 1999)* [2000] 3 All ER 182). Hence, in this article we have referred to gross negligence as a fault element as opposed to a mens rea for the crime of manslaughter. The important point here though is that whatever we call this standard, it has the nature of describing criminal fault.

13 Unreported, Supreme Court of Victoria, 29 November 1995, 8–9.

14 See *Nydam v R* [1977] VR 430, 445. For statutory provisions touching upon responsibility for workplace deaths, see also *Crimes Act 1900* (NSW) ss 18 and 24; *Crimes Act 1938* (Vic) s 5; the Queensland Criminal Code 1899, ss 288, 289, 297, 303, 310, 320 and 328; the *Criminal Law Consolidation Act 1935–1986* (SA) s 13; the Western Australian Criminal Code 1913, ss 266, 268 and 270; *Criminal Code 1924* (Tas), s 159; the Criminal Code of the NT of Australia, ss 157, 161, 163 and 167; and the *Crimes Act 1900* (ACT) s 15.
2001: 1; Ashworth, 2003: 114), which makes the question of attributing criminal liability to organisations (in particular corporations) a complex one. 'A corporation is an abstraction. It has no mind of its own any more than it has a body of its own.'\textsuperscript{15} Corporations can only act through their human employees and agents; yet they are also legal 'fictions' created by company law to be distinct from their directors, workers and shareholders.\textsuperscript{16}

In relation to strict liability OHS regulatory offences, the courts have held that liability is placed on organisations using a doctrine of legal personality, so that specific duties are owed by the organisation itself, and are personal and non-delegable.\textsuperscript{17} Crucially there is no need to try and attribute to the organisation another's criminal conduct, including that of its agents. In the words of Tipping J in the New Zealand Court of Appeal:

This analysis does not depend ... upon concepts of agency or vicarious liability. It relies simply upon the proposition that once there has been a failure to take a practicable step to ensure the employee's safety [hence breaching the duty], the employer is responsible for that failure.\textsuperscript{18}

If the employer is an organisation, therefore, it will not be absolved from liability for breaching an OHS duty simply because at a top management level the organisation had taken all reasonable steps to ensure safety, if at an operational level it was the court's opinion that such steps as were 'reasonably practicable' had not been taken to implement effectively OHS policies and procedures.\textsuperscript{19}

In relation to manslaughter by gross negligence, however, a narrower 'identification doctrine' has been used to attribute to a 'corporation' the requisite criminal fault. In order for criminal fault to be attributed to a corporation, the courts from the 1940s onwards developed a principle whereby the individual knowledge, intention or actions of particular employees was that of the corporation itself (Wells, 2001: 93; and Slapper and Tombs, 1999: 28). Particular officers of the corporation are the corporation. The law therefore developed to directly attach criminal liability to the corporation through requiring evidence of criminal fault in a senior officer of a corporation acting as a 'directing mind and will' of that corporation (Gobert and Punch, 2003: 59–69). This 'identification' doctrine was authoritatively laid down in Tesco Supermarkets v Nattrass ('Tesco')\textsuperscript{20} although Lord Denning’s judgement in H L Bolton ('Engineering') Co Ltd v T J Graham & Son Ltd outlines the principle most clearly:

\begin{itemize}
  \item \textsuperscript{15} Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705.
  \item \textsuperscript{16} See Salomon v Salomon [1897] AC 22.
  \item \textsuperscript{18} Linework Limited v Department of Labour [2001] 2 NZLR 639, para [45].
  \item \textsuperscript{19} See R v Gateway Foodmarkets Ltd [1997] 3 All ER 78. See also R v Associated Octel Co Ltd [1996] 4 All ER 846.
  \item \textsuperscript{20} [1972] 2 WLR 1166.
\end{itemize}
A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. 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 it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such [our emphasis] ... in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty.  

The most obvious question to ask in relation to the identification doctrine is how far it extends? Who exactly can be defined as the ‘directing mind and will’ of a corporation to establish corporate criminal liability? It is here that the limitations to the doctrine can be found (Forlin, 2004). Courts in Australia and the England and Wales have generally taken a very narrow, and arguably unrealistic, approach in answering this question. They have laid down that it is generally only the board of directors, the managing director(s), senior and highly placed managers or anyone to whom a function of the board had been fully delegated that can be seen in law as the ‘directing mind and will’ of the corporation.

However, the Canadian courts defined the ‘directing mind and will’ concept more broadly than their Australian and British counterparts (Ferguson, 1999). In Canadian Dredge and Dock, Estey J outlined the principle as follows:

The essence of [the directing mind and will test] is that the identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of corporate operations assigned to him by the corporation [our emphasis]. The sector may be functional, or geographic, or may embrace the entire undertaking of the corporation. The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation.

[The] identification doctrine only operates where the crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.

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This test was defined further in *The Rhone v The Peter A B Widener*, where Iacobucci J stated that:

One must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such a policy ... the court must consider who has been left with the decision-making power in a relevant sphere of corporate activity.\(^2\)

Nevertheless the narrower view of the identification doctrine has been the relevant legal test in deciding whether a corporation should be prosecuted for the crime of manslaughter in Australia and England and Wales. Was there evidence of criminal fault for gross negligent manslaughter evidenced in the conduct of an individual who could be identified as the 'directing mind and will' of the corporation? The problems resulting from the narrow 'identification' test (and indeed the wider Canadian interpretation) in terms of failing to achieve 'adequate' organisational criminal accountability are obvious (see further Fisse, 1994). In larger and more complex corporations, those seemingly more culpable when an industrial death takes place are those working on the front line: for instance, train drivers passing signals at speed or individuals working on the ground with dangerous equipment and in dangerous situations. Although these individuals can be criminally liable in their own right, they cannot be described as the 'directing mind and will' of a corporation so as to establish corporate criminal liability, because usually they do not work at a policy level or deal with implementing policy (in particular OHS policy). For this reason it has often proved impossible to convict all but the smallest and structurally and organisationally simplest industrial actors for corporate manslaughter.\(^2\)

In accepting the identification doctrine, the courts\(^2\) have rejected the 'aggregation' principle for attributing traditional criminal liability for offences such as manslaughter to corporations (Gobert and Punch, 2003: 82–86; Wells, 2001: 109). According to this principle, the fault of a number of different and perhaps unrelated individuals (workers, contractors, senior officers and managers, or directors) could be aggregated to form the criminal fault of the corporation. As long as agents of the corporation 'as a whole' are morally culpable for a criminal offence, the aggregation principle could be used to establish its criminal liability.

Another approach to circumvent the narrowness of the 'identification doctrine' was taken in *Meridian Global Funds Management Asia Ltd v Securities*

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26 An additional difficulty has often related to legal causation, a crucial element of the conduct (or *actus reus*) part of criminal offences. The evidential requirements to prove that a particular policy at management or director level, if implemented solely by one officer, caused the death or injury of a worker can often be impossible to overcome (Appleby, 2003; Forlin and Appleby, 2004; and Forlin, 2004).
Commission, which concerned a breach of the Securities Amendment Act 1988 (NZ). Lord Hoffmann sought to distinguish the principle to be applied in this case from the stricter identification principle as applied in Tesco. Rather than considering who it is that should be considered as the ‘directing mind’ of the company, Lord Hoffmann argued it was more important to look at whose behaviour and actions Parliament intended to be attributable to the company.

There will be many cases … in which the court considers that [a criminal offence] was intended to apply to companies and that, although it [the law] excludes ordinary vicarious liability, insistence on the primary rules of attribution [as in Tesco v Nattrass] would in practice defeat the intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation; given that it was intended to apply to the company, how should it apply? Whose acts (or knowledge, or state of mind) was ‘for this purpose’ intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

Wells (2001: 104; citing Gray, 1996: 299) observes that it seemed clear that Meridian, in acknowledging the need for a more sensitive test of corporate attribution, was stretching the identification model, rather than taking the offence into the vicarious liability category … ‘In the age of flatter corporate hierarchies, “empowered” front-line employees and devolved decision-making, Lord Hoffmann’s decision has considerable resonance in the real commercial world’.

The courts, however, have held that this approach cannot be taken with manslaughter prosecutions.

III REFLECTION ON REFORMS

In recent years proposals have been put forward in Australia and Canada to reform in general the methods for attributing traditional criminal liability to organisations, and here we briefly outline their salient features. For existing criminal offences whose fault element is based on gross negligence, the proposals show a shift away from wholly individualistic notions of organisational criminal liability. Proposals have also been put forward in Australia and England and Wales to deal specifically with the existing law of manslaughter as it is applies to organisations, and to develop specific crimes relating to industrial death. These reforms, where criminal fault is also gross negligence–based, similarly provide evidence of the shift away
from wholly individualistic notions of organisational criminal liability. This article focuses only on criminal offences where the fault element is gross negligence, because this is the fault element almost always prosecuted following an industrial death (note, however, Wells, 2001: 117). Gross negligence as a fault element encompasses failures to act (to protect the health and safety of workers and members of the public). Reforms in relation to criminal offences whose fault elements are intention and recklessness are, however, equally innovative (see Hall et al, 2004).

In Australia, new principles for attributing criminal responsibility to the ‘corporate’ entity for all federal criminal offences were proposed by the Criminal Law Officers Committee of the Standing Committee of Attorneys-General in 1992, and were enacted in the Criminal Code Act 1995 (Cth). With offences where the criminal fault element is gross negligence, the narrowly defined identification doctrine is no longer a prerequisite for a conviction, and the proposals in effect allow aggregation of the acts of various individuals (not only senior officers) as a basis for the criminal liability of the corporation. The Canadian federal Parliament also recently passed reforms for attributing criminal responsibility to organisations, inserting passages into the Canadian Criminal Code. The Code extends the meaning of ‘organisation’, which is more expansive than that of the ‘corporation’, as are extended definitions of the terms ‘a senior officer’ and a ‘representative.’ The reformed Canadian Criminal Code similarly introduces the principle of aggregation for offences that can be committed gross negligently. The Australian Commonwealth law (adopted also in the Criminal Code 2002 (ACT)) and the Canadian law change the legal principles for attributing criminal liability to corporations (or more widely organisations in Canada), whilst utilising existing criminal offences such as gross negligent manslaughter.

For commentary on the provisions, see Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992: pt 5), Hall et al (2004), and Woolf (1997: 257). The Criminal Code Act 1995 (Cth) came into effect in the Commonwealth jurisdiction on 15th March 2000. It was envisaged that the Criminal Code would be adopted by all Australian states and territories and would in due course form the basis of all Australian criminal law (which is presently state based). However, identical provisions to those in the Commonwealth Code have been incorporated only in the smallest Australian jurisdiction, the Australian Capital Territory (ACT) (see below). As states lay down criminal law in Australia the Commonwealth provisions therefore only apply to a very limited range of Commonwealth offences that do not for instance relate to traditional criminal offences (like manslaughter) or OHS offences until such time as states or territories (like the ACT) legislate otherwise.

Bill C-45 (CAN) was passed on 7th November, 2003 and is awaiting implementation. For more expensive commentary see Hall et al (2004) and Archibald et al (2004).

The Queensland Government also proposed an offence related to dangerous industrial conduct resulting in death and injury, essentially proposing that Queensland incorporate the attribution principles (in particular aggregation) contained in the Criminal Code Act 1995 (Cth) and covering harm to workers or members of the public. The present status of this proposal is unclear, but again see Hall et al (2004) for more detailed commentary.

But note the enactment of new substantive provisions for manslaughter in the Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT), discussed below.
In addition to these general attribution developments, specific new offences have also been passed or proposed which apply only when individuals are killed at work and/or in public industrial incidents. The ACT became the first Australian jurisdiction to enact specific legislation related to industrial manslaughter in November 2003, with the Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT) creating specific criminal offences relating to recklessly or negligently caused industrial death. A new offence of industrial manslaughter was created, applicable only to 'employers of workers', and not therefore relevant to criminal prosecutions following public disasters or when members of the public are otherwise killed through industrial activity.35 Similarly, in Victoria, the Crimes (Workplace Deaths and Serious Injury) Bill36 sought to introduce a new offence of corporate manslaughter into the Crimes Act 1958 (Vic), again in relation only to the death of 'workers.' The key features of the Victorian Bill were the use made of the aggregation principle, and the specific use of a company's existing duties under OHS law as the basis of traditional criminal prosecutions for offences such as manslaughter.37 Finally, the Law Commission for England and Wales (1996) proposed to apply the elements of an individual human offence of killing by gross carelessness, but 'in a form adapted to the corporate context and, in particular, in a form that does not involve the principle of identification' (Law Commission, 1996: 7.36). The question of criminal liability for an offence of 'corporate killing' focuses not on individual conduct, but on 'management failure' (Law Commission, 1996: 8.19), and requires an examination of things done in the management and organisation of the company, rather than on a purely operational level.38

In summary, the proposals discussed in this section seek to replace the narrowly defined identification doctrine as the principle governing organisational

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35 For further commentary see Hall et al (2004).
37 The Bill was introduced into State Parliament in November 2001, passed through the lower house of Parliament, the Legislative Assembly, but failed to get through the upper house, the Legislative Council, in May 2002, and was eventually withdrawn. Again, for more detailed commentary see Hall et al (2004).
38 In response to the Law Commission, a Government consultation document in May 2000 stated 'The Government considers that while there may prove to be difficulties in proving a "management failure" there is a need to restore public confidence that companies responsible for loss of life can properly be held accountable in law...' (Home Office, 2000: 15). And so despite noting that there may be difficulty in applying the concept of management failure, and despite very little discussion of what the term actually meant in practice, the Government generally supported the findings of the Law Commission and proposed to adopt these findings subject to the suggestion that the offence potentially apply not just to body corporates but to a wider category of 'undertakings.' An 'undertaking' was defined as 'any trade or business or other activity providing employment' (Home Office, 2000: 15–16). See Gobert's discussion of the current status of these reforms in this edition. For further exploration and comment on the proposals, see Hall et al (2004), Ridley and Dunford (1997) and Wells (2000: 122).
criminal accountability for traditional gross negligence–based criminal offences, by enabling the criminal fault of a number of individuals be aggregated. In some instances they introduce specific offences relating to industrial death. Prosecutors have not yet tested any of the laws implemented, and so the effectiveness of the legally complex provisions is still in question. We suggest that the reforms reflect a response to the awareness of the role played in society by larger and more powerful organisations (and in particular corporations) and, in moving from individualistic to holistic notions of criminal responsibility (previously only applicable to regulatory OHS law), adopt criminal fault elements that have resonance with modern organisational ways of acting and organising (Gobert and Punch, 2003; Wells, 2001). We suggest, however, that this type of criminal law reform is not necessarily to be unreservedly welcomed and is perhaps unlikely to achieve any positive purpose, as shall be discussed below.

IV GIVING MANSLAUGHTER A CONTEXT: PROSECUTION UNDER THE OHS STATUTES

In this part of the article we broaden the context of the industrial manslaughter debate, by placing manslaughter within various contexts of OHS enforcement. First, we examine the historical approach to the use of formal criminal prosecution in OHS regulation, which has resulted in OHS prosecution being widely labelled as 'not really criminal' in nature. Second, we discuss the implications for manslaughter prosecutions of the findings of a major study of the use of regulatory OHS prosecution in Australia, which shows how OHS issues are decontextualised and individualised in OHS prosecutions, so that the overall criminality of organisations contravening the duties in the OHS statutes appears systematically to be reduced. Finally, we suggest that careful thought is required to ensure that the greater use of manslaughter prosecutions does not further undermine the existing criminality of regulatory OHS offences.

There is an ongoing debate (see Hutter, 1989 and 1997, and Black, 2001) regarding the role of inspectorates in maximising compliance with OHS legislation: is the best way to maximise compliance with OHS standards to advise and persuade employers to comply with standards or to punish them for not doing so? The dominant position, at least in relation to OHS, was established in the mid-19th century in Britain, before the enactment of the first Australian OHS statutes (see Johnstone, 2000; Gunningham, 1984: ch 4). Soon after the establishment of the first Factories Inspectorate in 1833 in the United Kingdom, there emerged an enforcement culture which eschewed prosecution as the major enforcement strategy, and instead focused on securing compliance through advice, persuasion and negotiation (see Bartrip and Fenn, 1980a, especially 205–06, and 1980b and Bartrip and Burman, 1983: 60). A remarkable aspect of this enforcement culture has been its ideological longevity (see Carson, 1979 and 1980 and Johnstone,
Carson (1979 and 1980) has argued that this hegemonic approach to OHS enforcement is the result of a clash, in the United Kingdom in the 1830s, between, on the one hand, a social movement seeking compulsory and effective regulation of working conditions, and the prevailing structure, organisation and ideology of production, in which contravention of the Factories Acts was deeply embedded and practiced even by 'respectable' employers. Widespread use of prosecution would have entailed 'collective criminalisation' of employers 'of considerable status, social respectability and growing political influence' (Carson, 1979: 167). The partial resolution of these contradictions, and the low penalties imposed by magistrates for contraventions, led the inspectorate to prosecute only 'willful and obstinate' offenders, and to develop informal and conciliatory approaches to enforcement, based on informal advice, persuasion and warnings, and with prosecution as the last resort. Further, the removal of the requirement of mens rea from the formal elements of factory offences in the 1844 Factories Act, making the offences strict liability offences, facilitated this drift towards setting such crimes apart from the ordinary crimes involving criminal fault. Carson (1980: 169) concludes that by the late 1840's the 'pattern of factory law enforcement had been set, and the ambiguity [and conventionalisation] of factory crime established.' (See further Prior, 1985; and Johnstone, 2000). This approach to OHS enforcement is clearly also apparent in the policies and practices of Australian OHS regulatory agencies (see Johnstone, 2000 and 2004a: 44-5 and 456-7). Our point is that this approach is historically contingent, the result of particularly historical forces and processes, and that there is still scope for governments to reclaim a greater criminality for what are now called regulatory OHS offences.

But this reclaiming of criminality of regulatory OHS offences also needs to recognise and counter the processes at work when prosecutions for contraventions of the OHS statutes are initiated. This prompts two questions: What happens when regulatory OHS prosecutions are initiated? From the perspective of potential manslaughter prosecutions, is there anything to be learned from the experience of OHS regulators with prosecutions under the OHS statutes?

Johnstone's (2003a and b) study of OHS prosecutions in Victoria from 1983–1999 shows that current approaches to OHS prosecution decontextualise and individualise OHS issues. Consistent with the historical pattern outlined above, the study found that prosecutions were relatively rare, with inspectors using informal measures (advice and education) in most visits, and occasionally issuing improvement and prohibition notices. Where prosecutions were initiated, in 87 per cent of cases this was in response to a fatality or serious injury, usually on an inadequately guarded machine, so that most prosecutions, from the outset, were 'event-focused'. The study also found that most prosecutions were prosecuted
summarily, and most defendants entered guilty pleas, so that the most important part of the trial was the sentencing process.

Consistent with studies in other areas of corporate crime (see De Prez, 2000 and Croall, 1988), in OHS prosecutions defence counsel ‘controlled’ the sentencing proceedings to choose ‘the style of mitigation ... designed to refute and neutralize the criminalisation of the defendant’s activities’ (De Prez, 2000: 66). Defence counsel used a series of ‘isolation’ techniques (see Mathiesen 1980, 1981 and 1985) to decontextualise, transform and individualise the facts of each OHS prosecution, so that, in the courts’ eyes, the level of culpability of defendants was reduced. The most important isolation technique was for the event (the incident leading to injury or death) to be ‘splintered’ from its context, so that the context fades and recedes into the background, leaving unrelated questions of detail in focus (see further Johnstone 2003a: 207–11).

The focus on the details of the event enabled defence counsel to use a series of blame-shifting techniques, such as arguing that the worker’s actions caused the incident; that the inspectorate had failed to warn the defendant of the hazard on earlier visits; or that the supplier of equipment was to blame for supplying the defendant with an unsafe machine. The focus on the details of the event also enabled the event to be individualised, by portraying it as ‘something unique, something incomparable, and something quite special, individual, a-typical’ (Mathiesen, 1981: 58) — for example, by suggesting that it was a ‘freak accident’. Such a presentation ensured that far reaching conclusions or generalisations could not be drawn from the event, because it was far too exceptional, unique or abnormal. This plea was usually built onto a ‘good corporate citizen’ plea (claiming an excellent reputation and OHS attitude and record for the defendant), to emphasise the unusual nature of the incident giving rise to prosecution.

The event focus also enabled defence counsel to isolate the event in the present, a present reconstructed to make it appear benign, even heroic — for example, by asserting that the employer has looked after the injured worker, or that after the incident and before the prosecution proceedings the employer had rectified the situation. Finally, the event was often isolated from its context by relegating it more or less to an outmoded past (Mathiesen 1981: 68) — for example, by asserting that the company had replaced the offending machine, had engaged a new management team, or an OHS consultant, since the ‘accident’, or had introduced a new OHS program, thereby rendering the event nontransferable to other parts of the work process (see Johnstone 2003a: 233–36).

Over time Victorian OHS prosecutors developed techniques to try to counter these isolation techniques (see Johnstone, 2003a, ch 8), but it is clear that there were limits to the extent that prosecutors could prevent such techniques from being used to reduce defendants’ culpability for OHS offences. Johnstone (2003a, ch 9) argues that these limitations on OHS offences arise from the ‘form’ of the criminal law used in OHS prosecutions. OHS offences have traditionally been grafted onto the mainstream, traditional, criminal law, without rethinking the event-focused bias of the criminal law, so that in OHS prosecutions, despite (as
discussed earlier) OHS offences addressing OHS systems, the focus of proceedings is on the event rather than on organisation of work at the workplace, or on the capitalist work relations that provided the context for the injury or death. The strict liability nature of OHS offences has meant that such offences are perceived as 'not really criminal,' and that the prosecutor is not required to prove fault greater than negligence, while defence counsel has relatively free rein to show absence of culpability. These problems are exacerbated by the venue of most OHS prosecutions — the magistrates' courts, geared for fast summary justice, and, in McBarnet's (1981: 138-40) analysis, promoting an 'ideology of triviality'.

Johnstone (2003a: 288–94) suggests that this analysis explains why regulatory OHS offences traditionally have resulted in low penalties when prosecutions have been conducted. More importantly, the process defuses OHS as an issue (Johnstone, 2003a: 294):

The court is seen to be dealing with the issue, and convicting offenders, but at the same time sanitising the issues so that the underlying activity, the production of goods and services, is not threatened. In other words, the court plays a major legitimating role in OHS, but the underlying issues are largely untouched. Of course, to maintain legitimacy, the law must appear to be just and effective.

Johnstone (2003a: 294) argues that other factors are drawn in to bolster this quest for legitimacy, including calls for higher penalties, and law reform to enable prosecutions for industrial manslaughter. While manslaughter prosecutions will most likely be taken in intermediate or superior courts, thus reducing the likelihood of the offences being 'trivialised', because of the event-focus of manslaughter prosecutions, it can be anticipated that the isolation techniques outlined above will feature heavily in sentencing pleas. Even where prosecutions are successful, there is no guarantee that the process will lead to the improvement of OHS systems at work (as discussed below). Thus, not only are calls for industrial manslaughter reform part of a legitimation process, but the same processes that undermine any instrumental effectiveness of OHS prosecutions might also inhibit the impact of manslaughter prosecutions.

A further complexity lies in the relationship between regulatory OHS offences and manslaughter. We argued earlier in this section that historically regulatory OHS offences have assumed an ambiguous form, and have been regarded ideologically as 'quasi-criminal' offences, despite the fact that, to the legal mind, they are clearly criminal in nature (Smith, 2002: 125). Carson and Johnstone (1990: 140) argue that the prosecution of those causing workplace fatalities under the general criminal law may be counter-productive, in that by focusing on a few particularly serious cases and singling them out for 'special treatment' in the form of manslaughter prosecutions, an OHS enforcement agency risks undermining the criminality of regulatory OHS offence under OHS legislation. 'By prising out a few cases for treatment under separate, criminal auspices, the criminal status of

39 Apart from the OHS statutes in New South Wales and Queensland, and in England and Wales (which place an onus on a defendant), the Australian OHS statutes place the onus of proving that there were reasonably practicable OHS measures on the prosecutor.
what is left is rendered even more ambiguous than it is already becoming under the impact of the continuing historical and structural processes' outlined above. This is not an all encompassing argument against the use of industrial manslaughter, but a reminder of the complexities involved in policies aimed at using industrial manslaughter in the context of bolstering the 'criminality' of regulatory OHS offences, and the culpability of OHS offenders. We shall return to this problem below.

V THE POSSIBLE MOTIVES FOR LAW REFORM

Faced with these complexities, we turn now to consider reasons for the emergence of the increased criminalisation of OHS breaches, in particular relating to more fervent calls for an increased number of manslaughter prosecutions following industrial deaths. First, reforms enabling greater use of manslaughter prosecutions could 'extend the armoury of [OHS] enforcement ... and so provide a sanction to be reserved for the most egregious breaches ... an appropriate type of criminal punishment for organisational gross negligence that results in industrial death.' (Haines and Hall, 2004: 266). Yet it is important to evaluate the arguments that manslaughter prosecutions would have a deterrent effect resulting in improved compliance by organisations with regulatory law. A review of the empirical literature suggests that '... evidence relating to the effectiveness of manslaughter prosecutions with a more punitive regulatory regime is mixed' (Haines and Hall, 2004: 268; see crucially Simpson, 2002 cited therein). Hence it seems doubtful whether such reform represents 'evidence-led policy,' whatever entrenched ideological proponents may suggest.

Secondly, policy makers looking for justification for using the traditional criminal law in response to industrial deaths might consider issues of 'justice,' an 'expressive and emotional' base of calls for law reform, 'symbolic of a moral concern about the nature of society' (Haines and Hall, 2004: 268). Hence law reform is required not necessarily because it would work in an instrumental sense, but because it is 'a reaffirmation of the sacredness of human life.' Whether reforms could be 'symbolically rich' would depend upon whether reform had the capacity to say something fundamentally important about the value of human life and health. Their transformative potential would be to herald a more egalitarian age, where the rich and powerful and their corporate creations were subject to the same laws as everyone else ... [O]rganisational responsibility reforms (as symbolically rich reforms) act to increase social solidarity; critically, it reassures workers and their families about their intrinsic value' (Haines and Hall, 2004: 269; see also Wells, 2001: 167 and Tombs and Whyte, 2003).
Two possible scenarios lead theoretically from this discussion however. The first is that prosecutions using the reformed laws could be both symbolically rich and instrumentally rich, or, second, symbolically rich but instrumentally neutral or even negative in their effect, in that they can give a false sense that ‘something has been done’ to improve OHS, produce defiant organisations which refuse to co-operate with regulators, deter conscientious middle managers from working as OHS managers (Haines and Hall, 2004: 269), or, as discussed earlier, further undermine the criminality of regulatory OHS offences.

Finally, we can move towards more sociological ideas to make sense of the reforms. Cohen’s conclusion that ‘crime is a response to social conflict that simplifies and reduces conflict’ can be read alongside Galbraith’s argument that ‘the criminal law allows the problem to be seen as bad people and not bad situations, poor morals and not incompatible incentives ... the criminal law satisfies our visceral need to find a scapegoat, to morally denunciate and to feel superior — while allowing the underlying incentive structure to remain intact’ (both summarised by Haines and Hall, 2004: 270). To this extent, as we began to consider in relation to the history of the enforcement of OHS laws in the previous section, any reform of criminal law might simply paper over structural problems, providing legitimation, whilst leaving underlying structural pathologies untouched (see also Haines, 1997). Recognition of the political nature of reform processes therefore allows for further insight into the nature of the debate as to what law reform seeks to achieve and indeed why it is occurring.

One can apply a neo-Marxist model as one way of explaining the reforms. Governments through law reform can be seen as playing ‘complex and multi-dimensional’ roles, seeking to address contradictions in modern capitalism that essentially pit workers against capitalists (Curran, 1993; Snider, 1987 and 1991). Government’s long term goal can be seen not in the direct repression of workers at the behest of capitalists (an instrumentalist Marxist approach), nor in the continual desire to seek to achieve equality in decision making by reflecting all interests within society (a pluralist approach), but in ensuring the long term survival of capitalism (a neo-Marxist or class–dialectical approach), upon which it depends for its sources of funding and legitimation (Snider, 1991: 211; see also O’Connor, 1974; Panitch, 1977; and Tombs, 1995). This survival of capitalism can be promoted in the short term by the ‘authentic attempt (of governments) to resolve a crisis or a conflict between the interests of different groups, although perhaps not equally and not completely. The state plays a variety of roles in the process, simultaneously serving the working class and the capitalist class’ (Curran, 1993: 8). Law reform can and does potentially lead to improvements in OHS standards for workers through a process of struggle by groups with conflicting interests where the main goal of governments is the long-term survival of capitalism (see also Chambliss, 1979; Stearns, 1979; and Whitt, 1979).

Public industrial disasters that stimulate public condemnation and attract attention, especially when a perceived lack of suitable criminal accountability accompanies them, seem crucial in bringing around OHS law reform. Yet also the
power of capitalists over workers clearly influences the extent of reform processes (Braithwaite, 1995; Curran, 1993: 3–5; Glasbeek, 2003: 25; Lewis-Beck and Alford, 1990: 746; Slapper, 1993; Snider, 1987: 40; Snider, 1991; Tombs, 1995; Tombs and Whyte, 2003: 6–8; Wells, 2001: 12). Hence the actual process of law reform from conflict (for example, a disaster) or crisis (public dissatisfaction) differs from the traditionally simplistic and reductionist Marxist or more complex pluralist notions of the state and society. The only way accurately to understand law reform is in the context in which it has occurred (Curran, 1993: 8; citing Mills, 1959: 146).

One can understand the notion of advanced capitalist democracy as one where state policies will not always serve interests of capital, but where policies are the product of struggle. Struggles in a capitalist context occur where employers and those representing employers would usually secure advantage (McCammon, 1990: 207; cited by Curran, 1993). A ‘complex dialectical process’ exists in which governments develop mechanisms dealing with industrial harm that result from uneasy compromises between demands of capitalism for production and for disciplined and productive labour and related issues of pressure groups which can ‘force the state’s agenda, threaten legitimacy, and arouse and channel dissent,’ particularly following crises or disasters (Snider, 1991: 211–12). Governments desire the continued existence of capitalist means of production that goes awkwardly hand in hand with requirements to ensure the labour that fuels production is kept satisfied. If the state imposes too many constraints on capital, this could frighten companies away with potential detrimental effects on the jurisdiction’s economy and potential threat to political leaders (Snider, 1991: 213–16), what Habermas (1973) calls ‘legitimation’ problems, when they fail to deliver on their political promises to further societies perceived ‘common’ interests (see also Haines and Sutton, 2003).

As Johnstone (2003a) suggested (see above), OHS prosecutions decontextualise the event from the system from which it has resulted. Applying similar logic, law reform changing the attribution rules and/or clarifying the elements of industrial manslaughter, can be seen as addressing symptom and not cause focused on attention grabbing incidents rather than structural defects underlying contemporary society that contribute to such harmful industrial incidents (Haines and Hall, 2004; see also Haines, 1997). A neo-Marxist lens suggests structural contradictions within society are bound to result in pressure for law reform to alleviate tension in relations both between workers and capital (or owners of the means of production), but more importantly given the simplicity of this worker and capitalist dichotomy in contemporary society, between governments and a public sceptical of its intentions to act for the ‘public good’, and not simply in the interests of capital. It is here that reform in the criminal law’s response to industrial death could act as an emollient on such tensions, a legitimating device for political authority, whatever the scientific or instrumental benefits of such reform (see in particular Haines and Hall, 2004: 271; citing Habermas, 1976 and 1989; Haines and Sutton, 2003; and Brown, 2001).
Victims (and their families) harmed in OHS incidents (or ‘accidents’) also become ‘political fodder’ in a broader canvass, as policies that capture emotional needs of societies (including the need to blame) historically have been subject to political distortion and abuse ... such [industrial manslaughter] reforms may temporarily satisfy the need to blame, but in doing so will deflect attention away from measures that may be more fruitful and instrumentally beneficial. (Haines and Hall, 2004: 271).

A neo-Marxist theoretical approach suggests, therefore, that the public and workers have to be placated by law reform that proposes ‘solutions’: solutions to crises resulting from contradictions that fail to address the extant contradictions in existing means of production in advanced capitalist society. Symbolic criminal law with weak instrumental capabilities is quintessentially what results. The potential for effective law reform can and often is then undermined in its enforcement. Reasons to be pessimistic about the ability of law reform to be successfully implemented include key issues of regulatory agencies resource deficiencies and regulatory methods, as highlighted by Johnstone’s (2003a) research above, but also investigative problems, legal ambiguity, and lack of meaningful organisational criminal remedies (Hall et al, 2004, and see discussion below on sanctions). All these themes are taken up by general commentators as providing evidence of inbuilt structural biases of the state to protect the long term interests of capitalism, at the same time as pacifying its critics (Curran, 1993; Hopkins and Parnell, 1984; Perrone, 1995 and 2000; Simpson, 2002; Slapper and Tombs, 1999; Slapper, 1999; Snider, 1987/91; Sutton and Haines, 2003; Tombs, 1995; Tombs and Whyte, 2003; Wells, 2001).

One can outline a law reform process by which pressure groups and unions slowly change OHS working conditions through continual pressure on governments that increase the amount of regulation and laws affecting capital, mostly at times of chaos, crisis or public disquiet with existing levels of criminal accountability. Industrial deaths in particular provide significant public pressure on states to regulate capital, as there is a clearly defined victim and clearly defined harm (Snider, 1991: 220). Governments purport to signal the importance attached by the state to the safety of workers and the public through law reform that demonises those organisations which do not stick to this apparent societal consensus as to the sanctity of human life, whatever the reforms’ actual instrumental as apposed to symbolic affect. The next stage of battle becomes the enforcement of the reformed law (Snider, 1991).

Further, pressures on governments to reform law also come about as a result of those themes highlighted briefly in our introduction. One cannot simply focus on contradictions managed by governments based on class, or between workers and capital, or the public and capital. Disasters, deficient fault attribution principles, and lack of criminal accountability per se are also not the only considerations increasing legitimation stakes for government and leading to law reform. These factors primarily come about because we now live in a ‘reflexive modernity’ where societal perception of acceptable levels of risk has radically altered (Beck, 1992; Douglas, 1992; Giddens, 1999; Wells, 2001: 42). Even if
there are fewer sudden industrial deaths now than in the past, even fewer disasters with such large losses of life (focusing of course on the developed world only however), what is now crucial is that loss of life as a result of industrial activity, whether as a worker or member of the public, is to a greater extent no longer perceived to be acceptable in industrialised and developed nations, than was hitherto the case. The paradox seems to arise whereby the healthier we are, for example, the more we worry about illness.

As industrial fatalities are rarer than in the past, this leads to the situation where they get more media attention, leading to greater societal outrage, and increased pressure on governments to act to legitimate their own existence and role in furthering the general ‘public good.’ A greater understanding that such deaths result from negligent OHS systems and negligent management, and are not, as was once considered to be the case, ‘accidents’ or acts of God, is also crucial, leading also to reflections as to the need for more adequate and holistically based organisational responsibility (Giddens, 1991 and 1999; Hartley, 2001; Perrow, 1999; Turner and Pigeon, 1997; Wells, 2001). The changed role of the media in contemporary society becomes crucial, alongside the need to secure compensation from negligent organisations in an increasingly compensation-orientated culture (Wells, 1995 and 2001). These pressures exist alongside increased and more focused campaigning on issues of organisational criminal accountability by well-organised victims groups, specially created pressure and advocacy groups, and the trade union movement, all eagerly reported in the contemporary mainstream media. All this increases pressure on governments to enact symbolic reforms of criminal law to address types of negligent organisational behaviour not in the past subject to traditional criminal law, primarily as a result of changed societal perceptions and pressures.

So perhaps explanations relating to law reform overplay the role of the state. Although governments are instigators of law reform, the origins of the pressure placed upon them more often comes from outside. Closer attention must therefore be paid to change on a cultural level and to ideological bases that provide the foundations for the means of production under capitalism (Snider, 1987: 56). Change occurring on an ideological level has in turn produced marked shifts in relations of production. Hence Snider (1987: 57) views this change as having been motivated by:

decades of struggle undertaken by unions, consumer groups, public interest law lobbies, environmental activists, socialist parties, and all other groups involved in rights struggles (Sumner, 1981) over these issues in last 100 years ... these struggles and debate and publicity they generated through media, churches, schools and other institutions in society have produced a gradual shift in dominant ideology and a redefinition of reasonable business behaviour.

40 Note also Habermas’ discussion on the need for, methodologically speaking, a critical social science that must ‘integrate an interpretative or hermeneutic and a causal or empirical-analytic approach’ (Seidman, 1987: 6).
This process results in an increase in the ‘price of legitimacy’ for the corporate sector and leads to a prevailing public opinion that raising standards of corporate behaviour is necessary, whilst imposing new standards of what risk, profit or treatment of workers is acceptable and where the power balance between workers and capital (or also the public and capital) should stand. A new minimum standard of corporate morality emerges, and only if the corporate sector and the state respond to such cultural and ideological change would the long-term survival of contemporary capitalism (upon which the state relies) be assured (Snider, 1987: 57). One can argue therefore that law reform stems from the threat posed by this change in opinion upon the continued long-term existence of capitalism.\(^4\)

This can be illustrated in the context of OHS reform since the 1980s in Australia, Canada and England and Wales by the formation of victims groups, with some demanding law reform and greater use of ‘traditional’ as opposed to ‘regulatory’ criminal law;\(^4\) advocacy centres providing services to relatives of those killed through industrial deaths;\(^4\) unions more widely utilising their power and voice to condemn acts of ‘corporate killing’ and demanding that health and safety is taken more seriously;\(^4\) academics condemning the inadequate response of the criminal justice system;\(^4\) and lawyers and barristers arguing in court for a wider interpretation of established criminal doctrines so as to extend the use of criminal law following industrial deaths.\(^4\) This action combined has finally compelled politicians to promise law reform. Governments have responded to changed societal and cultural perceptions resulting from increased campaigning for law reform and seemingly increased attention paid to notions such as corporate social responsibility and worker safety. For if governments were not to react to these cultural, ideological and structural changes, the consensus model of the state acting in the public interest to safeguard the citizens rights (as members of the public and workers) on par with those of capital could be brought into question and its legitimation could be threatened.

Governments are forced into law reform through processes outlined by class–dialectical or neo-Marxist theorists. Governments are forced to face the crises

\(^4\) Snider (1987) also attributes a key role to the work of social scientists who she suggests carry the aura of objective knowledge to outsiders which is important ‘in [the] struggle for hearts, minds and legitimacy’ (see also Tombs, 1995; where he cites Hadden, 1994).

\(^4\) In particular: in the United Kingdom, Disaster Action, the Herald Families Association, Safety on Trains Action Group, Marchioness Action and Marchioness Contact Groups, and the Simon Jones Memorial Campaign; and in Victoria, Australia, Industrial Death Support and Advocacy Group (IDSA) and the Uniting Church Partnership In Grieving Programme.

\(^4\) In particular the expanding Centre for Corporate Accountability in the United Kingdom.

\(^4\) In particular the Trades Union Congress, Transport and General Workers Union, and the Hazards Campaign in the United Kingdom (and in particular the Construction Safety Campaign of the 1980s) and the Australian Council of Trade Unions, the Construction, Forestry, Mining and Energy Union, and Victorian Trades Hall Congress in Australia.

\(^4\) The field has certainly expanded rapidly since the 1980s, but in particular consider the influence of the work of Field and Jorg (1991), Fisse and Braithwaite (1993), Gobert and Punch (2003), Slapper (1999) and Wells (2001).

\(^4\) See for instance Lissack QC (2000).
stemming from public reaction to high-profile industrial deaths in particular that are merely symbolic of changed cultural values and societal perceptions relating to the acceptability that lives can be lost at work and the changing levels of risk that society now considers legitimate. In trying to address the crisis in public confidence that politicians are acting in everyone’s interests, most notably those of workers and the general public, governments through law reform are merely seeking to satisfy (or more appropriately ‘pacify’) in the short-term the negative symptoms of the contradictions between worker and capital, between the increased demand for safety at work and in public life, and a capitalist competitive system which at times can be seen to pay little regard for human life lost in its claws. It is merely seeking to confront the crisis and not the contradiction, leading to a dialectical process of law reform that is potentially unstable but in the long-term interests of capitalism. Governments maintain the existing unequal status quo, where the risks of the capitalist productive process are unequally distributed between on the one hand the owners of the means of production and on the other hand workers and members of the public, and where the criminal justice system takes an unequal approach to the instigators of street crime harm when compared to that caused as a result of the capitalist means of production and its leaders (Ashworth, 2000; Ashworth, 2003: 115; Nelken, 2002: 844). With both street crime and corporate crime, however, this method of governing leads to governments failing to address adequately the causes of either kind of crime. While governments espouse the value of all life, often unconditionally so, alongside the benefits of advanced industrial systems, they realise the capitalist system can at times show no such regard for workers lives. Behind its benefits stem the physical costs for those least powerful, now more so hidden in the developing world.

VI LAW REFORM AS RIGHT END BUT WRONG MEANS: REFORMS TO EXISTING OHS STATUTES AS THE FORGOTTEN POSSIBILITY?

Faced with our understanding of the historical origins of OHS regulatory enforcement, and our critical interpretation of the reform processes in relation to industrial manslaughter, we now consider the alternatives to the reform of manslaughter law, whilst remaining realistic about the hurdles ahead in ensuring adequate OHS standards and the effective prosecution of their breach, given structural constraints. If doubts remain about the benefits of reforming manslaughter law, what other options could achieve the same ends (instrumentally and symbolically) that governments argue they want to achieve through such reform. We have argued that there is little evidence of the general deterrent effect of manslaughter prosecutions, and that while such prosecutions might achieve
symbolic or expressive and emotive aims, they may do little to improve OHS standards. This leads us to suggest that the reform of existing regulatory OHS offences might be more instrumentally beneficial in contributing to proactive prevention of industrial deaths, whilst retaining or even strengthening the symbolic effects of regulation. Having concluded in the previous sections that the industrial manslaughter reforms in their current form are intrinsically symbolic, we attempt to bring together instrumental and symbolic goals of the two strands of the reform of OHS criminal law. To this extent, we suggest the re-criminalising of OHS breaches, but not limited to manslaughter reform.

OHS criminalisation reforms have not been confined to the rules for attributing traditional criminal responsibility to organisations, or the creation of new manslaughter offences. In Australia and in England and Wales OHS reviews have also attempted to revitalise existing regulatory OHS offences. These reviews have been premised on perceiving the systems of both traditional and regulatory criminal law as complementary. Some commentators suggest that a focus on developing traditional criminal law rather than on strengthening sanctions under existing OHS statutes is a worrying trend, and that it might even undermine worker health and safety. Appleby (2003) suggests in England and Wales it would be better for OHS to ‘rehabilitate the status’ of the Health and Safety at Work Act 1974 for many industrial deaths by emphasising its breach is truly ‘criminal’ (as OHS law is in fact criminal law (Smith, 2002: 125)) rather then proposing new manslaughter laws.47 We are sympathetic to this view. We support those arguing that the regulatory sanctioning framework for OHS contraventions should be strengthened, by ratcheting up penalties for breach of existing duties by organisations and individuals, including a wider use of imprisonment as a sanctioning option against organisational personnel and increased fine levels for organisations, and new corporate sanctions such as corporate probation, court-ordered publicity and, in the most egregious cases, the dissolution of offending corporations (Appleby, 2003; Carson and Johnstone, 1990; Gunningham and Johnstone, 1999; Hall et al, 2004). The main focus of OHS reviews has been just this: on increasing levels of fines, more innovative sanctions, increased used of imprisonment for individual breaches, alongside possible reform of the provisions dealing with individual criminal liability (Hall et al, 2004).

As we argued above, relying on individual traditional criminal offences such as manslaughter only where death occurs is to devalue and differentiate regulatory OHS law from other more traditional criminal law when it could be perceived as equally criminal (Carson and Johnstone, 1990). We argue that OHS policy makers should try to arrest the tendency for regulatory OHS offences to be seen as ‘quasi-

47 In discussions relating to the merits of strict liability offences, being in form as they are without requiring mens rea or criminal fault, the argument put forward is that as such offences are ‘not really’ criminal or quasi-criminal, the criminal law should not be used. Indeed, the British Court of Appeal recently stated that OHS offences were ‘not really criminal’ (Davies v HSE (EWCA Crim 2949)). However, as we make clear, this is a perceptual issue and not a legal one, to which our argument is that such perceptions should change.
criminal’, and should reassert that such offences are truly criminal and the harm caused by breaching and derogating from OHS standards is as serious (and at times more serious) as that caused by breaching traditional criminal law. Measures are required to ensure that such statutory offences are re-criminalised, to enhance their capacity to focus attention on proactive as opposed to reactive measures, punishing risk whether or not harm has occurred. Harm that has not occurred but could occur is surely as culpable as harm that has occurred. OHS statute-based offences importantly allow organisations creating such risks to be criminally prosecuted, even if under present regulatory enforcement techniques such prosecutions are generally reliant on deaths or injury (Hall et al, 2004; and Johnstone, 2003a). Gobert and Punch (2003: 115) develop this idea with their innovative offences of endangerment applied in the organisational OHS context, although they appear to envisage that the offence would not be part of regulatory OHS law, placing it unquestioningly within traditional criminal law.

As a means to achieve this increased criminalisation, or what we prefer to term re-criminalisation, of OHS law, Glazebrook (2002) suggests creating imprisonable offences under existing OHS statutes by extending directors’ duties with a new offence of causing death or serious injury by breaching OHS regulations. Another option (see Carson and Johnstone, 1990) is to introduce new discrete offences (such as industrial manslaughter or causing death through violation of an OHS Act and its attendant regulations) into regulatory OHS law, as opposed to separate criminal offences that fall within a separate criminal system. A further possibility is that regulatory OHS offences could be enacted in traditional criminal statutes like the Crimes Acts or Criminal Codes (Hall et al, 2004) to re-emphasise their breach is truly criminal, although along with such non-regulatory status could come extra procedural safeguards and stricter burdens of proof.

Even critical commentators accept the functional role of regulatory OHS offences in punishing some corporate harm, although they often view OHS regulatory offences as ‘not really being criminal’ (Glasbeek, 1998; Wells, 2001; Tombs and Whyte, 2003). What results is support in calls for more punitive regulatory OHS offences and its more effective investigation and enforcement but only in addition to increased use of ‘traditional’ criminal law, which has its own special (symbolic) value (Wells 2001: 21–31; Tombs and Whyte, 2003: 17–18). We suggest that this approach appears to assume that regulatory OHS offences cannot be equal in symbolic value to traditional criminal law.

Earlier we argued that historically regulatory OHS offences have assumed an ambiguous form, and have been regarded ideologically as ‘quasi-criminal’ offences, despite the fact that, to the legal mind, they are clearly criminal in nature, and that prosecuting organisations causing workplace fatalities under the general criminal law may be counter-productive, because it renders regulatory OHS
offences even more ambiguous than they already are. An alternative approach, which we find persuasive, is to accept that the bringing of manslaughter charges does raise a dilemma, and that manslaughter offences should be prosecuted in addition to regulatory OHS offences, ensuring that manslaughter prosecutions are used to bolster the deterrent and symbolic value of all OHS enforcement activities (see further Gunningham and Johnstone, 1999: 210-15).

The first step in re-criminalising regulatory OHS offences is to increase the potential and actual levels of penalties. The Health and Safety at Work Act 1974 (UK), in particular, provides already for unlimited fines when cases are tried in the higher Crown Court, and courts have insisted that fines under the Health and Safety at Work Act 1974 should increase, with evidence they have substantially increased (HSE, 2002). In Australia, there have been significant increases in maximum monetary penalties in New South Wales, Queensland and Western Australian OHS statutes in recent years (see Johnstone, 2004a: 445-47 and the Occupational Health and Safety Amendment and Repeal Act 2004 (WA)), with proposals for significant increases in Victoria (Maxwell, 2004: 14 and ch 35; and Occupational Health and Safety Act 2004). The recent New South Wales Occupational Health and Safety Legislation Amendment Bill 2004 proposes to double the current maximum fines in the Occupational Health and Safety Act 2000 (NSW) where a contravention of a general duty provision results in the death of a person.

Another possible approach to reform would be to introduce a wider range of sanctions, going beyond the monetary fine. These might include community service orders requiring corporate offenders to undertake OHS projects; formal court-ordered sanctions of adverse publicity of the offence to the whole community; the dissolution of the company, where all other measures proved unsuccessful and the company’s OHS performance was a danger to worker health and safety; and corporate probation orders where a court has the power to make a

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48 The Industry Commission in Australia (1995, vol 1: 121) concurred with this view, and accepted that there were strong policy arguments against using industrial manslaughter prosecutions for workplace deaths.

49 This is not of course to say that the increases in fine levels are adequate (see also Wells, 2001: 17-18). A turning point in England and Wales was the Court of Appeal’s judgement in R v Howe and Son (Engineers) Ltd [1999] 2 All ER 249. The court stated that fines imposed for OHS offences were too low to act as a suitable deterrent in achieving the instrumental aim of OHS law to decrease the amount of industry related injury and death. Specific sentencing guidelines were also laid down in this case (HSE, 2002: 6; Wells, 2001: 33). The sharp increase in fine levels during the past century is reflected in recent statistics that show that the average fine imposed on companies in particular following death of a ‘worker’ in England and Wales was £28,908 in 1996/7, £42,813 in 1997/8, and increasing to £66,911 in 1998/99 (CCA and Unison 2002: 15). The past few years have also seen record fines of up to £2m and Aus $2m for large corporations following public disasters and workplace deaths both in Australia and the United Kingdom. However one must also consider the British HSE statistics for the years 2002/03 that report the average fine in cases following a death (that is work-related) as being only £29,564 compared to £38,055 the previous year, which was a drop of 22 per cent. The HSE expressed disappointment to see the overall level of fine following a work-related death fall given the expectation that fine levels would continue to rise (HSE, 2003: 7).
variety of orders, ranging from the court ordering and monitoring the reform by an OHS offender of its OHS systems for a limited period of time, to an order that requires internal disciplinary measures within the company (see Australian Law Reform Commission, 1987: 165–78; Fisse, 1983; Gunningham and Johnstone, 1999: 259–77; Hall et al, 2004; and New South Wales Law Reform Commission, 2001).

An important issue also to consider is whether sanctions for regulatory OHS offences should differ from those available for manslaughter offences. Some commentators (for example, Christian, 2001) have argued that, if the available penalties are the same, the distinction between new manslaughter provisions and regulatory OHS offences ‘could be purely semantic’. On one level, this reflects the historical pattern of initiating regulatory OHS prosecutions in response to injuries and fatalities, so that the proactive, preventive, purposes of the OHS statutes are underutilised, and regulatory OHS prosecutions are commenced in the same circumstances as manslaughter (and related traditional criminal law prosecutions) would be. Our preferred view is that both types of OHS criminal offences should have a wide range of sanctions for contraventions, and that regulators should make greater efforts to use OHS regulatory provisions where an injury or fatality has not yet occurred, but duty holders have failed systematically to manage OHS and have put others at significant risk of injury, ill health or death.

In conclusion, we suggest that any approach considering how to increase organisational criminal accountability for industrial death and to reduce the incidence of such deaths should not just focus on reforming the rules attributing the crime of gross negligence manslaughter to corporations, or to modify the elements of the crime of manslaughter, but should also focus equally on the existing OHS regulatory system and on enhancing the punitiveness of existing regulatory OHS offences. Any attempts to utilise only traditional criminal law in the event of industrial death could otherwise lead to the downgrading of the status of regulatory OHS offences when in fact reform should focus on ensuring that such offences are perceived as truly criminal, and that their deterrent effect is maximised by increasing the level of the maximum fine, and by introducing effective new corporate sanctions.

VI CONCLUSION

The central argument we have sought to develop throughout this article is that the focus of reforms of OHS regulatory enforcement regimes should be on prevention — on reducing the incidence of industrial death, disease and injury arising from organisational failure to develop and implement adequate OHS measures to ensure injuries, illness and fatalities do not occur in the first place. In our view, strengthening regulatory OHS offences and ensuring that OHS statutes are effectively enforced best achieves this aim. This means that policy makers must
resist the historical trend for regulatory OHS offences to be seen as quasi-criminal, falling within a nebulous ‘public welfare’ category, and second in force and power and distinct in meaning from traditional criminal law. Perceptions of the violation of OHS statutes, whether or not they result in harm, can and should be changed, to ensure that they are seen as being truly criminal.

The sidelining of regulatory OHS law in the context of the reform of manslaughter law is a troubling prospect, and although we agree that the traditional criminal law (gross negligence manslaughter and new industrial manslaughter offences) may well be appropriate in certain circumstances, we argue that such offences are only a reaction to industrial deaths that have already occurred. The literature suggests that there are considerable doubts about any substantial deterrent function to be served by manslaughter prosecutions. Unbridled attention to traditional criminal law in particular, even in its symbolic effects, could deflect attention away from proactive models to reduce industrial deaths and injuries and away from the important contribution the existing OHS statutes and their related regulatory offences make to preventing workplace injury, disease and death. Properly enforced and sanctioned regulatory OHS offences can be both proactively and reactively punitive.

Having said this, we understand the arguments often recited by academic commentators that manslaughter prosecutions have an important symbolic, denunciatory and retributive role to play, and that notions of equality and fairness require that the traditional criminal law provisions for manslaughter apply just as forcefully to industrial deaths as they do to deaths outside the industrial arena. We are concerned within this context, however, with the potential use of manslaughter reforms to legitimate existing relations of production and the way in which risks of injury and death are unequally distributed between workers or the public and the owners of capital. As critical criminologists and sociologists suggest, solving symptoms of social pathologies with the headline grabbing criminal law, in all areas of criminal activity, does not address contradictions inherent in social systems, but instead simply shifts attention elsewhere for the moment. The criminal law can often mask deeply embedded inequality. To solve contradictions involves much more thought. Nevertheless, we have concluded that a sensible approach to this dilemma is to bring manslaughter and outcome based offences within the existing OHS regulatory regimes alongside a ratcheting up of punishment for breach of OHS standards, having the overall effect of re-criminalising regulatory OHS breaches. This could at least begin to reduce the divide between OHS regulatory regimes and the ‘traditional’ criminal law, and place regulatory OHS offences where they should be in terms of the seriousness of that which it seeks to confront. This could well lead to increased levels of reflection on the seriousness of OHS violations, the harms caused, and the benefits against which this harm can be weighed.

The strength of our argument hinges on whether the bad publicity associated with increased use of more punitive regulatory OHS prosecutions, in tandem with careful and strategic prosecutions under reformed traditional manslaughter provisions contained within regulatory statutes, and the threat of significant
sanctions (including imprisonment), increase the levels of attention paid to OHS policies, procedures and practices within organisations, and result in reduced levels of industrial deaths, illness and injury. Would a well-coordinated approach to responsive enforcement (see Johnstone, 2004b), including manslaughter prosecutions for egregious cases resulting in workplace fatalities and large and varied sanctions for non-compliance with OHS statutory provisions, increase voluntary compliance (Gunningham and Johnstone, 1999) with OHS law and lead to positive gains? Or will these changes simply motivate organisations to take a 'blinker' approach (Haines, 1997: 78–79) to compliance, by confining themselves to obvious changes, to limiting legal liability, and leaving broader issues unexamined (see also Baldwin, 2004; and CBI, 2001)? These are the important questions to ask, and the answers are not simple. The rush for law reform that we have described earlier does not appear to have been based on well-developed responses to these issues.

What is clear, however, is that reforms to the use of criminal law, in the guise of regulatory OHS and manslaughter prosecutions, must look to contextualise, rather than decontextualise, the harm caused by industrial activity. Historically, OHS prosecutions have been criticised on the grounds that the prosecution process decontextualises and trivialises non-compliance with OHS standards. We argue that reform initiatives should be judged on whether they ensure that the harm caused by industrial activity is considered to be as serious as harm caused by gun violence or drink driving, and that the social production systems that lead to such harm come in for more detailed scrutiny.

We conclude by reiterating a central point in this article, which is that we are mindful that legal change alone can never confront the carnage of industrial harm in all its forms. This point can often be forgotten in the rush for law reform as 'solution.' On a collective level we need to reflect on our existing social and economic system and its relations of production; public funding priorities relating in particular to OHS regulatory agencies (which need to be better resourced to play a more effective proactive role in regulating OHS); our presently constructed needs as citizens of the developed world; and in particular our willingness (however passive) to cause injury, illness and death to domestic and overseas workers in pursuit of economic progress. As Wells (2001: 168) also appropriately suggests:

There is no magic answer to corporate power, to issues of personal safety and their interrelationship with criminal law and justice. For, in truth, this debate tells us more about ourselves as human beings and citizens, with our fears and insecurities, than it does about criminal law.
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