

# CRIMINALIZING CORPORATE KILLING: THE IRISH APPROACH

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## I. INTRODUCTION

The debate on criminal corporate liability in the United States might benefit from a comparative perspective: How have other countries treated the criminal liability of corporate entities? This benefit might be enhanced by focusing on a country with a similar legal heritage to the United States—a country with a common law legal system inherited from the British. And, it would help if that country were concurrently examining the issue of criminal corporate liability. Interesting questions might include: What issues dominate the debate? How are issues of punishment, reparations, and rehabilitation handled? Is a legislative approach contemplated? The purpose of this Article is to offer one such alternate perspective, the Irish perspective.

At the end of 2010, the Irish Minister for Justice and Law Reform Dermot Ahern announced plans for the government to adopt legislation placing the crime of corporate manslaughter on a statutory foundation, relying in part on previous research by the Irish Law Reform Commission (LRC).<sup>1</sup> This paper synthesizes an important research document by the LRC on the elements of a legislative approach to corporate manslaughter.<sup>2</sup> By reviewing the

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1. See *Irishtimes.com*, *Corporate Manslaughter Bill Planned*, <http://www.irishtimes.com/newspaper/breaking/2010/1229/breaking12.html> (accessed Apr. 20, 2011) (explaining that “new regulations . . . would make companies and senior managers criminally liable for the death of employees in the workplace”).

2. L. Reform Comm’n, *Report on Corporate Killing (LRC 77-2005)* (available at [http://www.lawreform.ie/\\_fileupload/Reports/Report%20Corporate%20Killing.pdf](http://www.lawreform.ie/_fileupload/Reports/Report%20Corporate%20Killing.pdf)) (accessed Oct. 1, 2011).

Irish suggestions, my hope is to prompt discussion and debate on issues facing the United States on the question of corporate criminal liability.

The comparative perspective suggests, preliminarily, that the American debate could widen and deepen if the focus included more consideration of the remedies available under a criminal scheme to address corporate criminal wrongdoing. Much of the debate in the United States and in the symposium from which this paper arises focuses on ethical issues of accountability—in particular, whether it is ethically sound to impose penalties on “innocent” parties for wrongdoing committed by a large, corporate entity.<sup>3</sup> There also is debate over the efficacy of criminal penalties for corporate wrongdoing, with a notable absence of incarceration as a viable penalty.<sup>4</sup> The Irish discussion, however, has not centered on the dual issues of accountability and financial penalties. Instead, the Irish debate includes the possibility of a range of remedies as criminal penalties for corporate wrongdoing.<sup>5</sup> Discussing the possible remedies in some sense sidesteps the issues of individual accountability and efficacy of punitive measures to address corporate wrongdoing. These issues should be raised and discussed in more detail in the United States debate.

## II. VARYING APPROACHES TO LIABILITY FOR CORPORATE WRONGDOING

### A. The Irish Situation

Ireland has been reviewing its approach to criminalizing corporate killing for a number of years.<sup>6</sup> In Ireland, a corporation may be held criminally liable for wrongdoing, even when intent is an element of the crime.<sup>7</sup> Irish law has not, however, adopted a

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3. S.E. Ass'n of L. Schs., *Annual Meeting 2010 Update* 16 (available at <http://sealslawschools.org/wp-content/uploads/2010/08/SEALSProgramMay24Draft2010.pdf>) (accessed Oct. 1, 2011).

4. *Id.*

5. See [Irishtimes.com](http://www.irishtimes.com), *supra* n. 1 (discussing several options for penalties and remedies for corporate manslaughter).

6. L. Reform Comm'n, *Criminal Law (Completed Projects)* § 3.10, <http://www.lawreform.ie/welcome/criminal-law-completed-projects.251.html> (accessed July 30, 2011).

7. See Criminal Justice (Theft and Fraud Offences) Act 2001 pt. 9 s. 58 (available at <http://www.irishstatutebook.ie/pdf/2001/en.act.2001.0050.pdf>) (accessed Oct. 1, 2011) (providing for criminal liability for a corporate body, under the Act, in cases involving the

single, stable approach to the crime of corporate manslaughter.<sup>8</sup> To date, as noted by the LRC, “[T]here has never been a prosecution of a corporate entity for manslaughter in Ireland.”<sup>9</sup> But, prosecution for corporate manslaughter is possible in Ireland, and, in the absence of a statutory definition, liability would be determined by Irish courts applying the Irish common law.<sup>10</sup> Irish common law, in turn, relies heavily on British common law.<sup>11</sup> Even though the United Kingdom has adopted legislation dealing with corporate manslaughter,<sup>12</sup> the Irish courts would turn to pre-existing British common law in defining the crime of corporate manslaughter in an Irish context.<sup>13</sup>

Therein lies the rub. British courts apply several different approaches to the question of attributing wrongdoing to a corporate entity.<sup>14</sup> An Irish court could thus adopt one of several approaches on the issue of corporate manslaughter.

This instability in corporate criminal liability is problematic. The LRC has set out to resolve the problem.<sup>15</sup> In two major reports, the LRC has suggested a legislative solution to the problem.<sup>16</sup> While Ireland has not yet adopted legislation incorporating the LRC’s recommendations, Minister Ahern has recommended that it do so.<sup>17</sup> To more fully appreciate the ap-

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“consent or connivance . . . [or] neglect” of a corporate officer); Competition Act, 2002 pt. 1 s. 3 (available at <http://www.irishstatutebook.ie/pdf/2002/en.act.2002.0014.pdf>) (accessed Oct. 1, 2011) (defining an “undertaking” capable of prosecution under the Act to include a “body corporate”); Prevention of Corruption (Amendment) Act, 2001 pt. 9 (available at <http://www.irishstatutebook.ie/pdf/2001/en.act.2001.0027.pdf>) (accessed Oct. 1, 2011) (utilizing language similar to that of the Criminal Justice (Theft and Fraud Offences) Act of 2001 in imposing corporate liability in instances of public corruption); *see also* L. Reform Comm’n, *Consultation Paper on Corporate Killing (LRC CP 26-2003)* 19–26 (available at [http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpCorporate%20Killing.pdf](http://www.lawreform.ie/_fileupload/consultation%20papers/cpCorporate%20Killing.pdf)) (accessed Oct. 1, 2011) (offering an overview on the state of the law regarding corporate criminal liability in Ireland).

8. *See generally* L. Reform Comm’n, *supra* n. 2.

9. *Id.* at 4.

10. *Id.* at 4–5.

11. *Id.*; L. Reform Comm’n, *supra* n. 7, at 24–25.

12. Corporate Manslaughter and Corporate Homicide Act 2007 (available at [http://webarchive.nationalarchives.gov.uk/20110201125714/http://legislation.gov.uk/ukpga/2007/19/pdfs/ukpga\\_20070019\\_en.pdf](http://webarchive.nationalarchives.gov.uk/20110201125714/http://legislation.gov.uk/ukpga/2007/19/pdfs/ukpga_20070019_en.pdf)) (accessed Oct. 1, 2011).

13. L. Reform Comm’n, *supra* n. 2 at 4–5.

14. *Id.*

15. *Id.* at 3–7.

16. *Id.* at 42–43; L. Reform Comm’n, *supra* n. 7, at 166.

17. *Irishtimes.com*, *supra* n. 1. A bill on corporate manslaughter had previously been introduced as a private members bill, based on the LRC recommendations, but did not

proach suggested by the LRC, it is useful to review the current, likely common law approach to an Irish prosecution for corporate manslaughter. As noted above, this requires consideration of the British approach to criminal liability for corporate wrongdoing, particularly as the British law applied before the 2007 adoption of the United Kingdom's Corporate Manslaughter Act.<sup>18</sup>

### B. The British Approach to Corporate Manslaughter

In the United Kingdom, before the Corporate Manslaughter Act's 2007 adoption, the courts used various tests to assign criminal liability for corporate wrongdoing.<sup>19</sup> Perhaps the leading approach is the "Identification Doctrine," which was established in *Tesco Supermarkets Limited v. Nattrass*,<sup>20</sup> a prosecution brought against Tesco Supermarkets for a criminal violation of the British Trade Description Act.<sup>21</sup> The supermarket had advertised a sales price for a certain cleaning liquid.<sup>22</sup> A poster in the store advertised the sale.<sup>23</sup> When supplies ran out, a manager restocked the empty shelves with a higher-priced item but failed to remove the poster advertising the lower price.<sup>24</sup> A customer was overcharged, and a criminal prosecution was brought.<sup>25</sup>

The company defended with the argument that the act of "another person"—the branch manager—was responsible for the wrongdoing.<sup>26</sup> The House of Lords, in a number of opinions (each of which might produce a different result if applied), echoed an earlier opinion by Lord Denning, in which he analogized a corporate entity to a human body:

A company may in many ways be likened to a human body.  
It has a brain and nerve centre which controls what it does.

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progress. *Id.*

18. L. Reform Comm'n, *supra* n. 7, at 4–5.

19. *Id.*

20. [1972] A.C. 153 (HL).

21. *Id.*

22. *Id.* at 156.

23. *Id.*

24. *Id.*

25. *Id.* at 168.

26. *Id.* The term "another person" is used to mean any individual outside the brain or "nerve centre" of the corporation. *Id.* at 171, 177–178. It is an idea used as a defense to the imposition of corporate liability. *Id.* at 177–178.

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.<sup>27</sup>

Using *H.L. Bolton*, the Lords in *Tesco* generally agreed that the branch manager responsible for the misadvertising was too low in the corporate hierarchy (i.e., was the “hands” rather than the “brain or nerve centre”) for the company to be held liable for the violation.<sup>28</sup> The branch manager’s acts were not the result of controlling action by the company’s nerve centre.<sup>29</sup> The manager was not the company, but “another person” who broke the chain necessary for corporate liability.<sup>30</sup>

There was considerable dispute among the Lords about who might cause the corporation to be liable.<sup>31</sup> Was it limited to the board of directors, managing director, and other superior officers? Was it the chief operating officer or other person in actual control of the company’s day-to-day operation? Was it those identified in the controlling documents as having high-level responsibilities? Whatever the differences, there was clear agreement that corporate liability only resulted, if at all, from the acts of those at the highest levels of corporate governance.<sup>32</sup>

Other British judicial opinions adopt a different approach to assigning liability to a company based on the actions of individual employees.<sup>33</sup> Thus, there is not one definitive approach to criminal

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27. *Id.* at 171 (quoting *H.L. Bolton (Eng’g) Co. Ltd. v. T.J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159, 172).

28. *Id.* at 171, 180–181.

29. *Id.*

30. *Id.* at 181.

31. *Id.* at 187.

32. *Id.*

33. *E.g. Meridian Global Funds Mgt. Asia Ltd. v. Sec. Comm’n*, [1995] 2 A.C. 500, 502 (holding that the question of whether an individual director’s acts will be attributed to the company is determined by looking first to the company’s constitution and laws and then to general rules of agency); *Regina v. British Steel Plc.*, [1995] ICR 586 (holding that an employer cannot escape liability for exposing independent contractors to risk caused by employees simply by showing that the company’s “directing mind” took all reasonable care

liability for corporate wrongdoing under British common law. Accordingly, for all practical purposes, Ireland—with its reliance on the British common law in determining criminal liability for corporate manslaughter—shares the same uncertainty of approach.

### C. The Irish Problem

There is no definitive common law approach to corporate manslaughter in Ireland. In a case alleging corporate manslaughter, an Irish court would look to decisions of the British courts in the absence of Irish legislation.<sup>34</sup> But, as noted above, British cases are themselves uncertain as to the proper standards for liability for corporate wrongdoing.<sup>35</sup> Each case's outcome would depend upon the particular factual context.<sup>36</sup> There is an unreported Irish decision, in which the owner and operator of an unsafe fairground ride was convicted of gross negligence manslaughter,<sup>37</sup> but it is unlikely that this decision would provide much guidance in deciding the criminal liability of a large corporation. An Irish court would be free to cite to and rely on any of the foregoing British cases as persuasive authority in deciding corporate criminal liability for manslaughter.<sup>38</sup> This presents an unstable environment in which to operate business, and also threatens unequal results for society in prosecutions for criminal liability for corporate killing.

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to discharge its duty); *Dir. Gen. of Fair Trading v. Pioneer Concrete*, [1995] ICR 25, 25–26 (holding the company in contempt of court because employees ignored prohibition against making agreements, even though prohibition was followed at senior level).

34. L. Reform Comm'n, *supra* n. 2, at 4–5.

35. *See supra* n. 33 (listing various British cases).

36. L. Reform Comm'n, *supra* n. 2, at 5.

37. *See* L. Reform Comm'n, *Homicide: Murder and Involuntary Manslaughter* 85–86 (LRC 87-2008) [http://www.lawreform.ie/\\_fileupload/Reports/rMurderandInvoluntaryMS.pdf](http://www.lawreform.ie/_fileupload/Reports/rMurderandInvoluntaryMS.pdf) (accessed July 30, 2011) (reporting on the decision in *The People (DPP) v. Cullagh* (1998) in which the owner of a chairplane ride at a funfair that malfunctioned and killed a rider was found guilty of gross negligence manslaughter for failing to inspect and make repairs to the twenty-year-old ride).

38. *See supra* n. 33 (citing British cases).

### III. THE IRISH SOLUTION

#### A. Corporate Liability

The LRC recommends that “as the current [common] law of corporate liability for manslaughter does not provide a clear basis for constructing liability, a new basis, contained in legislative form, is necessary.”<sup>39</sup> The LRC sets out to address the various complexities that arise when using legislation to stabilize criminal liability for corporate killing.<sup>40</sup>

The LRC notes certain issues that must be addressed in any legislative solution. The first issue is the “paradox of size.”<sup>41</sup> This means, the smaller the corporate entity, the more likely it is that an individual’s acts can be ascribed to the company.<sup>42</sup> This makes it more likely that a larger company will escape liability due to a large, complex chain of command. For example, in the English case of *R. v. Kite and OLL Limited*,<sup>43</sup> the acts of the managing director of a one-man firm led directly to the company’s conviction for manslaughter.<sup>44</sup> On the other hand, in *R. v. P & O European Ferries (Dover) Limited*,<sup>45</sup> an official inquiry into the deaths surrounding the sinking of a passenger ferry found deficiencies throughout the company’s operation, yet the company escaped liability for corporate manslaughter because no individual could be found liable for manslaughter.<sup>46</sup>

Thus, the LRC believes that “a statutory formulation for corporate killing should take account of different sizes of corporate entities to which the offence would apply.”<sup>47</sup> This issue could be given added prominence in the United States debate, to better inform the accountability issue in corporate criminal liability.

The LRC notes that an approach to corporate killing that focuses on the criminal law runs the risk of not being as sufficiently

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39. L. Reform Comm’n, *supra* n. 2, at 5.

40. *Id.*

41. *Id.* at 5–6.

42. *Id.* at 6.

43. Winchester Crown Court, 8 December 1994; *The Independent* 9 December 1994 (cited by L. Reform Comm’n, *supra* n. 2, at 6).

44. L. Reform Comm’n, *supra* n. 2, at 6 (citing *Kite*, Winchester Crown Court, 8 December 1994; *The Independent* 9 December 1994).

45. [1991] 93 Cr App R 72 (cited by L. Reform Comm’n, *supra* n. 2, at 6).

46. *Id.*

47. L. Reform Comm’n, *supra* n. 2, at 7.

proactive as other, civil approaches.<sup>48</sup> For example, an agency charged with inspecting, reporting, and possibly fining companies for unsafe conditions might be more effective than the after-the-fact approach of punishing corporate killing through the criminal law.<sup>49</sup> Nevertheless, on the basis of deterrence, public censure, and consistency, the LRC is of the view that “criminal liability for manslaughter is an appropriate means of dealing with death caused by corporate wrongdoing.”<sup>50</sup> As will become apparent, by providing greater flexibility in the penalties available to punish this corporate crime, the proposed approach addresses some of the concerns over the effectiveness of criminally prosecuting corporations.

The LRC also recognizes the difficulty of establishing the mental element of a crime when a corporation is the defendant, even though intent is recognized as something a corporation can possess.<sup>51</sup> For example, it is highly doubtful that a corporation can be guilty of murder in Ireland.<sup>52</sup> The LRC identifies this difficulty of proving intent as an issue to be addressed in formulating proposed legislation.<sup>53</sup> Still, this does not bar prosecution of a corporation for manslaughter, because there are two categories of manslaughter recognized in Irish law: voluntary and involuntary.<sup>54</sup> Voluntary manslaughter requires intent, as it amounts to an intentional killing with extenuating circumstances.<sup>55</sup>

Involuntary manslaughter is divided into two categories: “manslaughter by a criminal and dangerous act and manslaughter by gross negligence.”<sup>56</sup> The LRC recommends that the most appropriate category for criminal liability for corporate killing is involuntary manslaughter by gross negligence,<sup>57</sup> and then identifies four elements of gross-negligence manslaughter: (1) the accused was, by ordinary objective standards, negligent; (2) the

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48. *Id.* at 10.

49. *Id.*

50. *Id.* at 11.

51. *Id.* at 16 (describing an English case in which a corporation was found guilty of conspiring to defraud because “the intent of the managing director could be attributed to the defendant company”).

52. *Id.* at 15.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*



negligence caused the death of the victim; (3) the negligence was of a very high degree; and (4) the negligence involved a high degree of risk or likelihood of substantial personal injury to others.<sup>58</sup>

## B. Individual Liability

The issues of individual liability and corporate liability are intertwined.<sup>59</sup> Apart from the previous discussion of the “paradox of size,” the issue of corporate liability depends upon the view of the company as the sum of its parts (atomized view) or as an entity in itself (organic view).<sup>60</sup> A completely atomized view of the company might remove all likelihood of corporate liability for manslaughter, as the acts of individuals might not be ascribed to the company.<sup>61</sup>

The LRC “considers that a well[-]formulated scheme of corporate culpability would look separately at the liability of the corporate entity and the individuals within it.”<sup>62</sup> The LRC then concludes:

[C]orporate liability for manslaughter [should] be based on a test of gross negligence, formulated around a breach of duty. While the test will be applied to the entity as a whole, regard should be had to the wrongdoing of individuals within the entity when assessing whether the corporate entity has breached its duty.<sup>63</sup>

## IV. CONSTRUCTION OF CORPORATE LIABILITY

### A. Introduction

Using gross negligence manslaughter as the applicable culpability standard largely removes the issue of subjective intent, which would be problematic with a corporate defendant, and replaces it with a more objective standard.<sup>64</sup> To define this

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58. *Id.* (citing *The People (Att’y Gen.) v. Dunleavy* [1948] IR 95).

59. *Id.* at 65.

60. *Id.* at 27.

61. *Id.* at 28.

62. *Id.* at 39.

63. *Id.* at 40.

64. *Id.* at 47.

standard, the LRC has referred to the United States Model Penal Code Section 2.02(2)(d), which provides the following elements for criminal negligence:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>65</sup>

Employing these criteria and those derived from the Irish law, the LRC, as a preliminary matter, "recommends that these elements should form the basis of the test of corporate liability for manslaughter: (a) [t]he undertaking was negligent; (b) [t]he negligence was of a sufficiently high degree to be characteri[z]ed as 'gross' and so warrant criminal sanction; and (c) [t]he negligence caused the death."<sup>66</sup>

The remainder of this Article will more closely consider aspects of these elements and the recommended sanctions for corporate manslaughter.

### B. Standard of Culpability

The proposed Irish legislative standard of liability for corporate manslaughter is gross negligence.<sup>67</sup> The LRC describes gross negligence as a crime of capacity rather than of autonomy.<sup>68</sup> That is, a person is guilty of gross negligence if he or she had the capacity to avoid the harm caused.<sup>69</sup> This standard is objective, and it avoids an inquiry into the corporation's mental intent for the crime because no autonomous act is needed to prove gross negligence.<sup>70</sup> The LRC explains that "[w]hat is at issue is that [a

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65. *Id.* at 49 (quoting Model Penal Code § 2.02(2)(d) (ALI 1985)).

66. L. Reform Comm'n, *supra* n. 2, at 47.

67. *Id.*

68. *Id.* (citing Andrew Ashworth, *Principles of Criminal Law* 193–194 (4th ed., Oxford U. Press 2003)).

69. *Id.*

70. *Id.*

corporation] can be said to have the capacity to take the requisite level of care to avoid the commission of manslaughter.”<sup>71</sup>

While citing *The People (Attorney General) v. Dunleavy*, the LRC describes the elements of gross negligence manslaughter as comprising that:

- the accused was, by ordinary objective standards, negligent;
- the negligence caused the death of the victim;
- the negligence was of a very high degree; and
- the negligence involved a high degree of risk or likelihood of substantial personal injury to others.<sup>72</sup>

### C. First Element: Negligence

The first element, negligence, requires a finding that the defendant owed the deceased a duty of care.<sup>73</sup> Rather than comprehensively defining the issue by legislation, the LRC recommends that “whether [a corporation] owed a deceased a duty of care should be established based on existing common law rules and statutory duties.”<sup>74</sup> The LRC, however, goes on to recommend that a “non-exhaustive, indicative list” of duties—such as the duty of a landowner, employer, or producer of goods to relevant parties—be included in any statutory scheme.<sup>75</sup> Once a *duty* of care is established, it is necessary when determining negligence to consider what *standard* of care is required.<sup>76</sup> For a human person, the standard of care is one of the reasonable person.<sup>77</sup> This standard does not easily translate to a corporate defendant.<sup>78</sup> The LRC “recommends that the standard of care should require the [corporation] to take all reasonable measures to anticipate and prevent

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71. *Id.* (citing L. Comm’n of Eng. & Wales, *Consultation Paper on Involuntary Manslaughter* ¶ 5.77 (LAWCOM No. 135 1994)).

72. *Id.* at 48.

73. *Id.* at 50.

74. *Id.*

75. *Id.* at 51.

76. *Id.* at 52.

77. *Id.* (citing *Dunleavy*, [1948] IR at 102).

78. *Id.*

risks of death or serious personal harm, having due regard to the [corporation's] size and circumstances."<sup>79</sup>

With regard to the standard of care, the LRC deems it relevant to consider "the way in which the organi[z]ation's activities are managed or organi[z]ed by its high managerial agents,"<sup>80</sup> to "the regulatory environment in which the undertaking operates,"<sup>81</sup> as well as to "any corporate assurance systems that the undertaking subscribes to."<sup>82</sup> It is also important, in the LRC's view, to consider "whether the senior management sought to profit from the breach of duty."<sup>83</sup> The LRC also recommends that a court should, when deciding the issue of gross negligence, "drill down" into the organization's management structure, and consider "[t]he allocation of responsibility within the undertaking; [t]he procedural decision making rules of the undertaking; [and] [t]he policies of the undertaking."<sup>84</sup> The LRC refers to this as the "corporate culture,"<sup>85</sup> and also recommends considering "[t]he training and supervision of employees by the undertaking [and] [t]he response of the undertaking to previous incidents involving a risk of death or serious personal harm."<sup>86</sup>

#### D. Second Element: "Gross" Nature of Negligence

The second element of the proposed crime of corporate manslaughter is gross negligence.<sup>87</sup> This must be distinguished from ordinary negligence.<sup>88</sup> But, it is difficult to define with precision when negligence is sufficiently gross to warrant a criminal conviction for corporate manslaughter. The LRC notes the risk of circularity in the definition: "[i]f members of the jury ask how negligent [a defendant] must have been if they are to convict of

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79. *Id.* at 53.

80. *Id.* at 55.

81. *Id.* at 56.

82. *Id.*

83. *Id.* The report also states that the profit motive is not a factor in determining guilt or liability, but it may become an issue for sentencing. *Id.*

84. *Id.* at 57.

85. *Id.* at 56.

86. *Id.* at 57–58.

87. *Id.* at 59.

88. *Id.* at 17.

manslaughter, the answer is ‘so negligent as to deserve conviction for manslaughter.’”<sup>89</sup>

The LRC recommends the approach adopted in *Dunleavy*<sup>90</sup> to define gross negligence.<sup>91</sup> According to the LRC, “[t]he negligence will be characteri[z]ed as ‘gross’ if it: (a) was of a very high degree; and (b) involved a significant risk of death or serious personal harm.”<sup>92</sup>

### E. Third Element: Causation

The third element of corporate manslaughter is causation.<sup>93</sup> The issue posed with respect to causation is the likelihood that a corporate defendant may successfully interpose the defense of *novus actus interveniens*.<sup>94</sup> That is, a corporation might argue that an act of an employee broke the chain of causation for the corporate offense.<sup>95</sup>

For that reason, the LRC suggests “that the corporate acts should be ‘a cause’ as opposed to ‘the immediate cause’ of death.”<sup>96</sup> Therefore, the LRC “recommends that the normal rules of causation should apply to corporate manslaughter.”<sup>97</sup>

## V. SANCTIONS FOR CORPORATIONS

### A. Introduction

It is in the areas of sanctions for corporate manslaughter that the Irish approach may have the most valuable insights to offer for the American debate. The common-sense observations about the nature of the corporate defendant and the range of options available in imposing sanctions on a corporate defendant deserve

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89. *Id.* at 59 (quoting Andrew Ashworth, *Principles of Criminal Law* 299 (4th ed., Oxford U. Press 2003)).

90. [1948] I.R. 95, 100 (Ir.).

91. See L. Reform Comm’n, *supra* n. 2, at 60 (recommending that the two factors defined in *Dunleavy* be adopted to provide guidance to a court in distinguishing gross negligence from civil negligence).

92. *Id.*

93. *Id.*

94. *Id.* at 61.

95. *Id.*

96. *Id.* at 60 (citing Charleton, McDermott & Bolger, *Criminal Law* ¶ 7.23 (Butterworths 1999)).

97. *Id.* at 62.

to be highlighted in consideration of corporate criminal liability under United States law.

The LRC believes that rehabilitation of a corporate offender may be more likely than rehabilitation of a human criminal defendant.<sup>98</sup> In the case of a corporate defendant, changes to the “corporate culture,” or replacement of personnel who are responsible for creating the unsafe conditions that resulted in death, may greatly reduce the likelihood of the defendant reoffending. In the case of the convicted human, the causes of the offense may be hidden deep within the human psyche and impervious to change—and therefore conviction and sanction may be unlikely to prevent reoffense. These observations shape the LRC’s recommendations regarding sanctions for a corporate defendant.<sup>99</sup>

Nevertheless, there should be some similarities to the sanctions process for both human and corporate defendants. Perhaps most importantly, the LRC recommends a pre-sentence report in both cases.<sup>100</sup> This will help the judge in sentencing and, in the case of an appeal, provide a transparent basis for assessing such matters as the amount of the fine.

## B. Sanctions

### 1. Fines

The LRC recommends that unlimited fines be available to punish corporate defendants convicted of manslaughter.<sup>101</sup> It notes several criticisms regarding the use of fines.<sup>102</sup> First, fines can create the public impression that corporations can “buy their way out” of corporate manslaughter offenses.<sup>103</sup> Attempts to avoid this problem, however, can lead to another problem known as a “deterrence trap,” in which the only fine sufficient to impose sufficient deterrence may be so large that a corporate defendant cannot pay it.<sup>104</sup> On the other hand, a number of corporate de-

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98. *Id.* at 79.

99. *Id.* at 79–80.

100. *Id.* at 80.

101. *Id.* at 82.

102. *Id.* at 81.

103. L. Reform Comm’n, *supra* n. 7, at 18.

104. L. Reform Comm’n, *supra* n. 2, at 81 (citing Paul C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79

fendants are non-commercial bodies.<sup>105</sup> Imposing a large fine on a public-sector body will have a far different effect than a similar fine on a for-profit organization.<sup>106</sup>

There is also the question of properly calibrating the amount of the fine. The LRC recommends against aligning the amount of the fine with turnover (as is the case with certain antitrust fines) because this might underpenalize corporations that are asset-rich but have comparatively low turnovers.<sup>107</sup>

Nevertheless, the LRC “recommends that a court sentencing [a corporation] convicted of corporate manslaughter should have the power to impose an unlimited fine.”<sup>108</sup>

## 2. Remedial Orders

In addition to the use of fines as a means of disciplining corporations found guilty of corporate manslaughter, the LRC also explains the potential value in the use of remedial orders:

Remedial orders can potentially be excellent rehabilitative tools; by examining where the corporation went wrong, a remedial order can require the [corporation] to take the necessary steps to remedy the problem . . . [T]he conditions imposed could require the undertaking to conduct an internal investigation into the circumstances of the occurrence of the corporate killing offen[s]e, followed by appropriate internal disciplinary proceedings, and the filing of a satisfactory compliance report with the court.<sup>109</sup>

For these reasons, the LRC “recommends that a court sentencing an undertaking for corporate manslaughter should have the option of imposing a remedial order.”<sup>110</sup>

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Mich. L. Rev. 386, 390 (1981).

105. *Id.* at 82.

106. *Id.*

107. *Id.* at 81.

108. *Id.* at 82.

109. *Id.* at 83.

110. *Id.* at 84.

### 3. Community Service Orders

The LRC, on balance, recommends that community service orders be available to the sentencing court imposing a sanction against a company convicted of corporate manslaughter.<sup>111</sup> The LRC, however, does recognize several drawbacks to this sentencing approach, and suggests certain methods of mitigating these drawbacks. First, because the community service will be performed by employees paid by the corporation, it may again appear that the company is buying its way out of a conviction—and with the use of forced labor.<sup>112</sup> Second, there is the possibility that the community service will be directed to the court's pet charity, or used as an alternative to the expenditure of government resources on matters for which the government should rightly pay.<sup>113</sup>

The LRC would get around these difficulties by adopting an approach recommended by the LRC of Australia:

- (i) Community service orders should be available at the discretion of the court;
- (ii) If, after finding that a corporation has contravened the Act, the court decides that a community service order would be the appropriate penalty option . . . it should indicate this to the corporation and ask it to prepare a report on a community service project it could perform *in lieu* of, or in addition to, a monetary penalty;
- (iii) If the contravener does not propose a project, or the court rejects its proposal, the court should specify the project to be undertaken or impose a different type of penalty;
- (iv) Community service projects should be required to bear a reasonable relationship to the contravention. This requirement is necessary to prevent community service orders being used to promote 'pet charities.' In determining the nature of a community service the court should be required to consider what, if any, damage was suffered by the community as a whole as

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111. *Id.* at 91.

112. *Id.* at 89.

113. *Id.*



a result of the contravention, and to require a reasonable relationship between the community service project and the nature of the damage;

- (v) If more supervision is required than could be performed by the court, the court should appoint a person to be an independent representative of the court. This representative could, for example, be a lawyer, accountant, auditor, receiver or other appropriately qualified person. He or she would supervise compliance with the project and, if necessary, prepare reports on a proposed project. The fees of such a person would be payable by the contravener.<sup>114</sup>

#### 4. Adverse Publicity Orders

An adverse publicity order would serve several useful functions according to the LRC.<sup>115</sup> Such a response would not only counteract the perception that a company was buying its way out of an offense by paying a fine, but also would express public disapproval of the offense in a way that a simple fine or remedial order might not.<sup>116</sup> An adverse publicity order:

[W]ould require the convicted undertaking to publici[z]e the fact of a conviction for corporate manslaughter at its own expense; the undertaking might be required to write to shareholders and/or customers or it might be required to place an advertisement in a local or national newspaper. The precise content of such publicity would be set by the court.<sup>117</sup>

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114. *Id.* at 90–91 (quoting L. Reform Comm’n, *supra* n. 7, at 199–200 (2003) (available at [http://www.lawreform.ie/\\_fileupload/consultation%20papers/cpCorporate%20Killing.pdf](http://www.lawreform.ie/_fileupload/consultation%20papers/cpCorporate%20Killing.pdf))).

115. *Id.* at 91–93.

116. *Id.* at 91–92

117. *Id.* at 91.

### 5. Restraining Orders/Injunctions

The LRC believes that the existing Irish law regarding restraining orders and injunctions is adequate for the range of sanctions it is imposing and does not recommend a change.<sup>118</sup>

## VI. CONCLUSION

The LRC has recommended various changes in the law to reduce or eliminate uncertainties in Irish law regarding corporate manslaughter.<sup>119</sup> These recommendations contain valuable insights for the American legal debate on corporate criminal liability. First, there is the issue of whether a more legislatively based approach would be suitable in the United States, particularly given the debate over the initial legitimacy of the common law basis for corporate criminal liability. A legislative approach might address some of the uncertainties arising due to the common law origins of the doctrine in the United States.

The proposed approach by the LRC also highlights the issue of the proper sanctions to be imposed upon a corporate defendant. The focus on sanctions “de-centers” two of the principal issues in the American debate: (1) the ethical soundness of imposing criminal liability on a corporation due to spillover effects on arguably “innocent” parties; and (2) the effectiveness of criminal sanctions—particularly fines—that may be passed on to the customers of the corporation.

By following the Irish debate and the subsequent introduction of legislation criminalizing corporate killing, American legal observers may gain fresh insights to inform the ongoing debate within the United States.

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118. *Id.* at 94.

119. *See generally id.* (listing a multitude of findings and recommendations for the treatment of corporations found guilty of committing corporate manslaughter in Ireland).