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Crime Prevention and Security Management
Series Standing Order ISBN 978-0-230-01355-1 hardback
978-0-230-01356-8 paperback
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Corporate Manslaughter and Regulatory Reform

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Softcover reprint of the hardcover 1st edition 2013 978-0-230-27452-5
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First published 2013 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

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ISBN 978-1-349-32446-0 ISBN 978-1-137-29627-6 (eBook)
DOI 10.1057/9781137296276

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Almond, Paul, 1979–

Corporate manslaughter and regulatory reform / Paul Almond.
p. cm.

Includes bibliographical references and index.

1. Manslaughter—Great Britain. 2. Criminal liability of juristic persons—Great Britain. 3. Employers' liability—Great Britain.
4. Industrial safety—Law and legislation—Great Britain—Criminal provisions. 5. Law reform—Great Britain. I. Title.

KD7965.A96 2013

344.4104'65—dc23

2012036832

10 9 8 7 6 5 4 3 2 1
22 21 20 19 18 17 16 15 14 13

*For my parents
and
Ellen Doreen Bates (1922–2011)*

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Preface

It was while conducting interviews with HSE inspectors in 2003 that the idea for the research question at the heart of this book first began to formulate. I was a PhD student, undertaking fieldwork for my study of health and safety inspectors' attitudes in relation to work-related fatality cases, and I was speaking with a very experienced inspector about his 30-year career and the changes he had witnessed during that time. He identified what he saw as a paradox underpinning this area of regulation:

When I joined HSE 27 years ago it wasn't a very important job to be honest, but it just seems to have grown and grown in importance... I remember investigating fatalities when nobody was interested in what was going on, it was just one of those things, people go to work and get killed, but it's a big event now. I wonder why, when actually we're safer, the importance of the subject seems to keep rising? In the time I've been an inspector, employee fatalities have fallen from about six or seven hundred a year down to about two hundred a year. You'd expect people to have said 'right, we can pack in now', but they don't, the importance keeps growing. It's a conundrum. I know you're not being interviewed, but what are your thoughts?

(2003: 17)

The inspector's frankness, and the reversal of the interviewer-interviewee dynamic, had thrown me, and I was not well-prepared enough to give him any more than a very general answer. But afterwards I was struck by this seeming contradiction and the way that it seemed to map across onto the whole topic of health and safety regulation. Why was there a movement towards criminalisation, and a greater sense of public concern over death and disaster, at a time when the quantitative scale of the problem of work-related death and injury was ostensibly in decline? Why were criminalisation and a 'toughening' of the law being pursued at the same time as rates of inspection, enforcement, and

prosecution were falling? And how had this issue managed to retain such a high level of perceived significance at a time when health and safety regulation faced a climate of sustained public and political hostility, mistrust, and opposition arguably far greater than at any other time during the last 100 years?

Having started out with a doctoral study that tried to understand the corporate manslaughter reforms in practice, I subsequently focused on trying to make sense of that process in more sociological terms. One potential explanation for this phenomenon can be found via reference to the work of scholars within a 'risk society' paradigm, who identify a climate of widespread public insecurity over risk as leading to the formation of policies that reflect a new 'risk management' role for government, such as those involving the punitive, expressive use of the law to reassure the public about the dangers inherent in modern society. But this line of argument alone did not seem able to explain the reality of public attitudes in this area that I had subsequently uncovered via empirical investigation or to reflect the contested political realities that continue to shape this area of law. Increasingly I came to see that the political legitimacy of health and safety regulation as a whole, as reflective of its contested normative status, was central to understanding this issue, and that viewing the new offence as communicative of symbolic messages about legitimacy could assist in clarifying its role and purpose. Regulation is as much about the promotion of a particular set of values and securing commitment to a particular conception of the good society as it is about changing behaviour to conform to prescribed standards and expectations.

On this reading, then, regulation can simultaneously work (in terms of behaviour change) and not work (in terms of promoting particular values) and so can have instrumental effects while it also struggles to communicate the moral messages that underpin its political status and validate its existence. Declining rates of death and injury suggest that compliance-oriented regulation is working on some level. But political opposition, declining enforcement, and the persistence of significant areas of resistance to regulation all signify the failures of regulation and its politically constrained nature. Understanding that regulation can succeed and fail at the same time allows for insights derived from the regulatory studies literature and from critical perspectives on regulation to be reconciled to some degree. This book seeks to understand the successes and failures of regulation and argues that corporate manslaughter reforms can be understood as a means of restating the reasons for

regulating that underpin health and safety as a social and legal project. It is hoped that this book will contribute to understandings both of the corporate manslaughter reforms as a solution to the problems that health and safety regulation faces and of the nature and origins of those problems.

Acknowledgements

My thanks go to my colleagues at the School of Law, University of Reading, UK, for providing a collegiate and supportive working environment. Particular thanks go to Thom Koller for research assistance during the project, Dave Hallam for performing numerous IT rescues, and all of the admin team. The thoughts that have been fed into this book have benefited from the input of many people over the last few years, in many different ways, including Sarah Colover, Garry Gray, Fiona Haines, Gavin Leigh, Sally Lloyd-Bostock, Neal Stone, David Whyte, participants of the 2011 Socio-Legal Studies Association (SLSA) 'Criminalising Commerce' stream, and the numerous students and colleagues at Reading with whom I have discussed these issues. Of course, all errors and shortcomings remain my own. Finally, love and thanks are due to my family (especially Sarah, Randy, Lynn, and Derek), who have supported me through life, study, and work. Special gratitude is reserved for my parents, Janice and Peter, whose love and support has always been a great help and is hugely appreciated. Lastly, and most importantly, thanks to my wife Natalie, without whose love, care, encouragement, and friendship this book would not have been written and for which I am eternally grateful.

Series Preface

Paul Almond's book is likely to be of interest to a range of scholars because it examines the law governing organisations that are in some way responsible for people losing their lives (and specifically the Corporate Manslaughter and Corporate Homicide Act 2007) from a range of perspectives. For example, he provides a historical account of regulatory law and health and safety practices. From this we learn that some of the central themes of this book that govern the way the laws on corporate killing were constructed and implemented have their roots in the past. This includes, for example, the competing demands of worker protection and market-driven regulatory approaches; the restrictions of safety rights at work for individuals because of the greater need to support economic and political systems; and the rationale for the low priority given to protecting workers from unsafe practices (including a lack of commitment to taking enforcement action) despite Health and Safety being a reflection of a 'good society'.

Moreover, this book provides an insight into a form of sanctioning that is perceived to sit outside the criminal justice system. Paul Almond discusses the distinction between what is classified as criminal and what is regulatory, looking critically at issues of seriousness, harm, and social impact. He assesses the role of big organisations both in influencing and in some cases controlling the agenda for different types of responses. He discusses the lower priority of regulatory law and how some are 'not universally condemned' and perceived as 'not matters of real crime' despite having extremely serious consequences.

Indeed, the role of law in holding businesses to account is an important one, and Paul tracks the shift towards corporate criminal liability which, he argues, is likely to spread further. A major issue that underpins his analysis is the limited and sometimes arbitrary approach taken to enforcement. In the regulatory environment he critically assesses the dangers inherent in systems of law which seek to appease public demands for 'justice' because of fears that such approaches will lead to mistrust and non-cooperation. He also critically evaluates the different status of criminal and regulatory law in relation to community norms that underpin both legitimacy and effectiveness.

In bringing these themes together he examines a range of issues around work-related death and indeed the death of non-workers, which, he shows, constitute a far greater problem than has traditionally been thought. This is partly because much work is invisible, at least to authorities and those who count the incidents of deaths at work, as well as those who respond to them. He draws upon the theoretical writings of Jürgen Habermas; incorporates international comparative work; discusses the inherent dangers of treating corporate manslaughter as a special case of Health and Safety; and includes a critique of regulation per se, not least as it applies to Health and Safety generally and corporate manslaughter specifically.

Many supporters of the Act and those who seek to criminalise corporations that kill workers will find Paul Almond's critique of its provisions enlightening. For him, while it may be a form of 'penal populism' and the result of 'political expediency', it is also a necessary measure, and one that has the potential to bring very positive benefits. Even then, it must be acknowledged that the new offence is unlikely to be effective in practice and may not constitute the optimal means of responding to work-related deaths.

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