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Victim Impact Statements at Canadian Corporate Sentencing

ERIN SHELEY*

ABSTRACT

The recent SNC-Lavalin scandal and its political fallout have drawn public attention to an existing culture of impunity enjoyed by corporate criminal wrongdoers, despite the 2004 changes to the *Criminal Code of Canada* that intended to make corporate prosecutions easier. In this article, I argue that the conceptual problems with corporate criminal liability may lie in the criminal justice system's general misapprehension of the nature of corporate crime; especially of the distinct nature of the harm experienced by white collar victims. I further argue that, therefore, part of the solution to under-enforcement may be evidentiary: the Crown and courts should, where applicable, allow and particularly, encourage the victims of corporate crime to testify at sentencing hearings, on the occasions that corporations do go to trial. This will increase public awareness of the harms suffered by corporate victims and may thus increase support for greater enforcement generally, through both prosecutions and plea bargains. Finally, I consider the challenges to a victim-oriented understanding of corporate crime posed by the introduction of the remediation agreement in Canada. I compare the Canadian context to that of the United States – where deferred prosecutions agreements have long been in use and long caused such problems – to suggest how these problems may be avoided given the differences between the two countries' substantive law on corporate crime.

* Assistant Professor, California Western School of Law. Many thanks to the participants in the Robson Crim symposium for their comments on this paper, both before and after the symposium. Portions of Part III of this paper, on the evidentiary function of victim impact statements, will also appear in "Victim Impact Statements and Corporate Sex Crimes," forthcoming in a symposium volume of the *Oklahoma Law Review*. Thanks to the participants in that symposium as well for their comments, which have improved both papers.

Keywords: white collar crime; enforcement; mens rea; corporations; victims; sentencing; victimology; financial crime; environmental crime; *Criminal Code of Canada*

I. INTRODUCTION

In 2007, Hamilton couple Norman and Georgette Hawe, now in their 80s, placed \$450,000, the sum of both of their life savings, into an investment plan managed by an entity called Golden Gate Funds.¹ They were told that their money would be invested in a portfolio of mortgages, but Golden Gate diverted it for other purposes instead. The Hawes lost their savings and instead of retiring in comfort, they were forced to sell their home. “I started working when I was 21 years old,” Norman Hawe told the *Globe and Mail* in 2013, “I did a job for this guy from Hamilton here, and he owed me \$400. And he wouldn’t pay me. ... So, you know what I did? I went up and I stuck a knife in his four tires. And this, I lost \$450,000, and I haven’t done anything.”² The inaction Hawe refers to is actually the government’s. The Golden Gate case never came before a criminal court, but it did come before the Ontario Securities Commission (OSC), which can only impose monetary penalties. In 2009, Golden Gate’s owner, Ernest Anderson, settled with the OSC, acknowledged his misrepresentations to investors, and agreed to a \$4.7 million fine, which he never paid.

The Hawes’ story may not exactly echo down the corridors of power, but it does reveal a certain background lack of attention to white-collar misconduct that set the stage for what has become one of the greatest political scandals in Canadian history. A former federal Attorney General, Jody Wilson-Raybould, contends that she was pressured by Justin Trudeau’s Office of the Prime Minister to offer construction giant SNC-Lavalin a remediation agreement that would allow it to avoid criminal conviction under section 380 of the *Criminal Code*³ and the *Corruption of Foreign Public Officials Act* (CFPOA),⁴ in connection with its alleged payment of \$48

¹ Jeff Gray & Janet McFarland, “Crime Without Punishment: Canada’s Investment Fraud Problem”, *The Globe and Mail* (24 August 2013), online: <www.theglobeandmail.com/report-on-business> [perma.cc/SSZ2-WE7J].

² *Ibid.*

³ *Criminal Code*, RSC 1985, c C-46, s 380 [*Criminal Code*].

⁴ *Corruption of Foreign Public Officials Act*, SC 1998, c 34.

million in bribes to Libyan government officials.⁵ While SNC-Lavalin ended up unsuccessful in its attempt to secure an agreement, its extensive lobbying efforts have been cited as the impetus for Parliament adopting the remediation agreement mechanism in the first place,⁶ in the 2018 amendments to the *Criminal Code*.⁷

While the political aspects of the SNC-Lavalin affair have struck a particularly sharp note of outrage in the public at large, the company's misconduct arose in the same context that saw the Hawes' lost retirement savings go unpunished: the Crown's under-enforcement of white-collar crime and, in particular, its reluctance to bring criminal charges against corporations. Indeed, SNC-Lavalin is unique insofar as it was charged. Since the introduction, in 2004, of statutory corporate criminal liability under sections 22.1 and 22.2 of the *Criminal Code*, very few corporations have faced criminal charges.⁸ While this suggests that corporate giants like SNC-Lavalin have reason to believe they may engage in large-scale corruption with impunity, it also means that smaller victims of corporate crime receive little or no protection from the criminal justice system.⁹ And, there is at least some reason to believe that such victims exist: according to a 2012 survey by the British Columbia Securities Commission, 17% of Canadians over age 50 believe they have been the victim of investment fraud at some point in their lives and 29% of active investors so believe.¹⁰ Furthermore, the Crown has brought only a handful of charges against corporate employers (none of them major industry players) under the new *Criminal Code* provisions, specifically intended to address criminal negligence in workplace

⁵ See "What the SNC-Lavalin Scandal Reveals About Corporate Influence on Canadian Democracy", *CBC Radio* (15 February 2019), online: <www.cbc.ca/radio/day6/episode-429-snc-lavalin-s-lobbying> [perma.cc/7758-W6S5].

⁶ *Ibid.*

⁷ *Criminal Code*, *supra* note 3, Part XXII.1, "Remediation Agreements".

⁸ See Norm Keith, *Corporate Crime, Accountability, and Social Responsibility in Canada*, 2nd ed (Markham: LexisNexis Canada, 2016); Lincoln Caylor & Nathan Sheehan, "Canadian Corporate Criminal Liability" (18 March 2019), online: *Mondaq* <www.mondaq.com/canada/Criminal-Law> [perma.cc/J67G-QX9X].

⁹ White collar offenses are, of course, frequently prosecuted administratively – by the Securities Commissions as in the Golden Gate case and by other relevant bodies such as provincial Occupational Health and Safety agencies. For example, Alberta Occupational Health and Safety investigated 23 workplace fatalities in 2012 and 27 in 2011. See Wayne Renke, Book Review of *Still Dying for a Living: Corporate Criminal Liability after the Westray Mine Disaster* by Steven Bittle, (2014) 51:3 *Alta L Rev* 677.

¹⁰ See Gray & MacFarland, *supra* note 1.

conditions, despite the numerous workplace deaths that have occurred since their addition.¹¹ And, since the adoption of the *CFPOA* in 1999, only four companies have been convicted for corruption, compared to the nearly 200 convicted during the same time in the U.S. under the parallel *Foreign Corrupt Practices Act (FCPA)*.¹² Even scaling for the respective sizes of the jurisdictions, it is unlikely that this disparity reflects an underlying difference in actual levels of corruption. Given the global interconnectedness of the economy, Canadian corporations are competing in the same markets as their American counterparts and thus, they are subject to the same pressures that encourage corrupt business practices.

This article does not attempt to solve the entire problem of white-collar criminal under-enforcement or even to debate the merits of Parliament's decision to introduce remediation agreements into this legal landscape. Instead, it argues that victim testimony at sentencing has an important role to play against the conceptual hurdles that may deter corporate prosecution. Because a corporation cannot go to jail, it may not seem, from a retributive standpoint, to be an attractive target for scarce prosecutorial resources. I argue that the conceptual problems with corporate criminal liability lie in the criminal justice system's general misapprehension of the nature of corporate crime; especially of the distinct nature of the harm experienced by corporate victims. Prosecutors should, in making charging decisions, attend to this harm through interaction with corporate victims. And, both prosecutors and courts should, where applicable, encourage the victims of corporate crime to testify at sentencing hearings on the rare occasions when corporations do go to trial. To the extent that the media circulates these victim stories, they will raise public awareness of the human costs of white-collar crime which will create a stronger public mandate for white collar enforcement generally.

¹¹ See Canadian Centre for Occupational Health and Safety, "Westray Bill (Bill C45)- Overview" (last modified 5 May 2020), online: <www.ccohs.ca/oshanswers/legisl/billc45.html> [perma.cc/6Q8R-Z8ER]; Steven Bittle, *Still Dying for a Living: Corporate Criminal Liability after the Westray Mine Disaster* (Vancouver: UBC Press, 2012) at 31-34, citing *R v Metron Construction Corporation*, 2012 ONCJ 506; *R v Scrocca*, 2010 QCCQ 8218. See also *R v Transpavé Inc*, 2008 QCCQ 1598; *R v Pétroles Global Inc*, 2012 QCCQ 5749.

¹² See Joanna Harrington, "SNC-Lavalin Case Shows Why We Should Review Canada's Corruption Laws" (26 February 2019), online: *The Conversation* <theconversation.com/snc-lavalin-case> [perma.cc/3358-DQJ5]; US, Securities and Exchange Commission, *SEC Enforcement Actions: FCPA Cases* (Washington, DC: SEC, last modified 9 January 2020), online: <www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> [perma.cc/338G-JF6L].

I proceed in four parts. In Part II, I give an overview of the common law and statutory basis for corporate criminal liability in Canada – including its historical origins in public outcry over harm to victims – and the major scholarly questions it raises. In Part III, I collect evidence suggesting that some of the harm suffered by victims of corporate crime is psychological and it arises directly from the corporate nature of the criminal – above and beyond the direct physical and economic harms that may also be properly attributed to individual human employees. In Part IV, I describe the evidentiary and constitutional bases on which the Crown may lead victim impact evidence during sentencing and argue that such evidence is highly probative of the nature of corporate criminal harm. I suggest that such evidence enhances the expressive function of the criminal law by resolving its conceptual disconnect around the idea of corporate criminal liability that contributes to under-enforcement. Specifically, victim impact statements given in one trial, if disseminated by the media, may serve to increase public understanding of corporate harm as criminal and contribute to a mandate for future enforcement. Finally, in Part V, I consider the problems for a victim-oriented understanding of corporate crime posed by the introduction of the remediation agreement to Canada. I compare the Canadian context to that of the United States – where deferred prosecution agreements (DPAs) have long been in use and long caused such problems – to make suggestions for how best to avoid them, given the differences between the two countries’ substantive law on corporate crime.

II. CORPORATE CRIMINAL LIABILITY IN CANADA: AN OVERVIEW

Corporate criminal liability has common law origins in Canada¹³ and was formally recognized by the Supreme Court of Canada (SCC) in 1985 in *R v Canadian Dredge and Dock Co.*¹⁴ In that case, the Court adopted the English “identification theory” of corporate criminal *mens rea*, which allows

¹³ See *R v Fane Robinson Ltd*, [1941] 3 DLR 409, 76 CCC 196 (Alta SC (AD)), Ford JA for the majority; *R v JJ Beamish Construction Co Ltd et al*, [1966] 2 OR 867, 59 DLR (2d) 6 (Ont SC), Jessup J, as he then was; *R v St Lawrence Corp Ltd*, [1969] 2 OR 305, 5 DLR (3d) 263 (Ont CA), Schroeder J for the Court; *R v Parker Car Wash Systems Ltd* (1977), 35 CCC (2d) 37, 1 BLR 213 (Ont SC), Hughes J; *R v PG Marketplace Ltd* (1979), 51 CCC (2d) 185, 4 WCB 98 (BCCA), Nemetz CJ for the majority.

¹⁴ [1985] 1 SCR 662, 19 DLR (4th) 314.

a corporation to be criminally liable only where the government can identify a so-called “directing mind” of the company – an individual “officer or managerial-level employee” – who possesses the requisite degree of *mens rea* required for the given criminal offence.¹⁵ The identification theory “produces the element of *mens rea* in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind” and therefore “establishes the ‘identity’ between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person, the employee.”¹⁶ This rule differs sharply from the principle of *respondeat superior* which the United States Supreme Court imported from tort law to define the due process limits to corporate criminal liability in the controversial 1909 *New York Central & Hudson River Railroad v United States* case.¹⁷ Under *respondeat superior*, the crime of any employee exposes the corporate employer to criminal liability and poses the risk of criminalizing corporations for the actions of rogue, low-level employees, even when they act against corporate policy.

Respondeat superior has been widely criticized, in the U.S. and abroad for running afoul of the principle that criminal punishment should track with actual culpability; its potential for punishing non-guilty entities – even non-negligent entities – is clear.¹⁸ Canada has, therefore, rejected the doctrine, as summarized in the Government Response to the Fifteenth Report on the Standing Committee on Justice and Human Rights, Corporate Liability:

The Government [of Canada] shares the concerns expressed by many witnesses that vicarious liability as applied in the United States is contrary to the principles that underlie Canada’s criminal law. While its rigours are somewhat attenuated by the United States Sentencing Guidelines which allow for reductions in the prescribed fine in accordance with the corporation’s culpability score, many would argue that under Canadian law it would be wrong in principle to impose the stigma of a criminal conviction on a corporation when its actions are not morally blameworthy.¹⁹

If *respondeat superior* runs the risk of over-criminalization, however, the identification theory carries the opposite risk. Under the rule of *Canadian*

¹⁵ *Ibid* at 682.

¹⁶ *Ibid*.

¹⁷ 212 US 481 at 493–95 (1909).

¹⁸ See e.g. John Hasnas, “The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability” (2009) 46:4 Am Crim L Rev 1329 at 1339.

¹⁹ Canada, Department of Justice, *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights* (Ottawa: DOJ, November 2002), online: <www.justice.gc.ca/eng/rp-pr/other-autre/jhr-jdp/hear-aud.html> [perma.cc/PE3D-NTKD].

Dredge and Dock, a corporation may be prosecuted only on proof that a member of the board of directors, an officer, or a senior manager has the *mens rea* to commit a particular offence. This would necessarily make it very difficult for the Crown to bring charges in cases where (a) a generally lax corporate culture emboldens lower level employees to commit crimes in the course of employment or (b) systemic breakdowns in internal controls lead to grossly negligent conduct that jeopardizes the public.

It did not take long for both to occur spectacularly enough to raise public awareness of the shortcomings of identification theory. On May 9, 1992, during the last hours of their four-day shift, 26 miners perished in a methane explosion at the Westray Mine in Plymouth, Nova Scotia.²⁰ The mine had opened only eight months previously, after Toronto company, Curraugh Resources, Inc. won both federal and provincial money for the project, which was touted as destined to revitalize the economically-depressed Pictou County. Political pressure from both Ottawa and Halifax may explain why the mine was permitted to operate despite a letter from the MLA, Bernie Boudreau, to Nova Scotia Labour Minister Leroy Legere, alerting him to the fact that the mine was using potentially dangerous methods unapproved for coal mining.²¹ Curraugh had obtained a special permit to use such methods to tunnel prior to reaching the coal seam but not actually to mine coal, and Legere was unaware that Curraugh continued to use them three months into the mine's operations.²² Furthermore, mine workers complained of cutbacks in safety training and equipment and management's negligent attitude toward safety inspections. When miner Carl Guptill complained about these conditions to Labour Ministry inspectors they did not investigate, and Guptill was fired.²³

After the disaster, the Nova Scotia government mounted an inquiry conducted by Justice K Peter Richard, who concluded that the explosion resulted from "incompetence... mismanagement... bureaucratic bungling...

²⁰ Martin O'Malley, "Westray Remembered: Explosion Killed 26 N.S. Coal Miners in 1992", *CBC News* (8 May 2012), online: <www.cbc.ca/news/canada/nova-scotia/westray-remembered-explosion-killed-26-n-s-coal-miners-in-1992-1.1240122> [perma.cc/4H7E-XG8Z].

²¹ *Ibid.*

²² *Ibid.*

²³ Caroline O'Connell & Albert J Mills, "The Westray Mine Explosion" in Emmanuel Raufflet & Alfred J Mills, eds, *The Dark Side: Critical Cases on the Downside of Business* (London, UK: Routledge, 2017) 162.

deceit... ruthlessness... and... cynical indifference.”²⁴ Specifically, Justice Richard found that:

[T]he Westray operation defied the fundamental rules and principles of safe mining practice... it clearly rejected industry standards, provincial regulations, codes of safe practice, and common sense... Management failed to adopt and effectively promote a safety ethic underground. Instead, management, through its actions and attitudes, sent a different message – Westray was to produce coal at the expense of worker safety.²⁵

Despite its misconduct, Curraugh Resources (which went bankrupt in 1993) was never criminally charged.²⁶ The Crown did attempt to prosecute mine managers Gerald Phillips and Roger Parry for criminal negligence and manslaughter, but the charges were eventually dropped due to insufficiency of evidence.²⁷ The identification theory effectively blocked criminal justice for the victims of a large-scale, systemic breakdown that resulted in mass loss of life. Whatever evidence might have existed that “directing minds” at Curraugh were inappropriately pressuring the operators of Westray Mine to begin production, it could not, apparently, be proven that any such person had all of the requisite mental elements to state a case for homicide.

One way of stating the problem in the language of causation is that the company was, collectively, guilty of gross negligence: no one in the company took the requisite steps to mitigate the risks to its miners, created by its operations. These omissions caused the deaths. Had an individual’s culpable omissions caused human death, they would have been on the hook for negligent homicide. But, because Curraugh was a corporation, there was no way to charge it for the collective omissions of all of its employees taken together.

The Westray explosion prompted widespread public outrage. After 12 years of lobbying, Parliament finally passed Bill C-45 (known as the “Westray Bill”) in 2003.²⁸ The Bill amended the Canadian *Criminal Code* in two ways.

²⁴ Justice K Peter Richard, “Executive Summary: Report of the Westray Mine Public Inquiry” (November 1997) at 3, online (pdf): <ece.uwaterloo.ca/~dwharder/epel/Lecture_materials/Westray.Mine.Public.Inquiry.pdf > [perma.cc/G5J2-VSHB].

²⁵ *Ibid* at 23.

²⁶ Michael McDonald, “Ceremony Marks the 25th Anniversary of Westray Mine Disaster in Nova Scotia”, *The Toronto Star* (9 May 2017), online: <www.thestar.com/news/canada/2017/05/09/ceremony-marks-25th-anniversary-of-westray-mine-disaster-in-nova-scotia.html> [perma.cc/94ZT-QN6S].

²⁷ *Ibid*.

²⁸ Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, 2nd Sess, 37th Parl, 2003 (as passed by the House of Commons 7 November 2003).

First, it added section 217.1, creating a duty for workplace supervisors to take reasonable steps to prevent bodily harm to their subordinates, the omission to perform which would trigger liability in criminal negligence.²⁹ More dramatically, it statutorily superseded the identification theory of *Canadian Dredge*, expanding the circumstances under which entities may be criminally liable for the crimes of their employees.³⁰ Section 22.1 applies to crimes premised on criminal negligence and section 22.2 applies to crimes premised on subjective *mens rea*/fault.³¹ Under Section 22.1 an entity is liable for criminal negligence if:

- (a) acting within the scope of their authority
 - (i) one of its representatives is a party to the offence, or
 - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.³²

Under section 22.2 an entity is liable for a fault-based offence when:

- 22.2 ... with the intent at least in part to benefit the organization, one of its senior officers
- (a) acting within the scope of their authority, is a party to the offence;
 - (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
 - (c) knowing that a representative of the organization is or is about to be a party to offence, does not take all reasonable measures to stop them from being a party to the offence.³³

These new *Criminal Code* provisions expand liability beyond that allowed by the identification theory, as they allow the criminal conduct or negligence of any level of employee to create corporate liability under certain

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Criminal Code*, *supra* note 3, ss 22.1, 22.2.

³² *Ibid.*, s 22.1.

³³ *Ibid.*, s 22.2.

circumstances, so long as there is also some sort of failure of oversight at the senior-officer level. Nonetheless, these provisions are somewhat complicated in the number of moving evidentiary parts that a prosecutor must juggle to prove them.

In the first place, it took some time for courts to sort out who, exactly, counts as a senior officer; recent cases have held that the category includes both regional managers and independent agents who manage an important aspect of a corporation's activities.³⁴ These rulings have confirmed the fact that the new provisions do indeed expand the scope of corporate criminal liability beyond the actions of the board and the *c-suite*; a senior officer need not have policy-making authority, merely operational authority.³⁵ However, compared to the rigors of the *respondeat superior* standard, the *Criminal Code* provisions appear to allow an affirmative defence based on "reasonable measures taken by senior officers" with respect to the business units under their supervision.³⁶ At the time of Bill C-45's passage, some scholars were optimistic that it improved upon the common law by allowing a court to "view corporate decision-making on a collective, rather than an individual basis," when "because of the fragmentation in decision-making in modern corporations" it is "hard to point to a single individual and say that his or her decisions show a marked departure from the standard of care."³⁷

Despite the promise of these new *Criminal Code* provisions on paper, critics of corporate criminal under-enforcement note that they have failed to change what is, in essence, a problem of prosecutorial culture. Steven Bittle argues that prosecutors continue to treat corporations differently from street offenders.³⁸ While the government pursues street crime using a punitive, deterrence-based approach, it prefers a "compliance" model for corporate criminals, focusing on education and voluntary remediation first, with prosecution as a last resort.³⁹ Bittle argues that, given their profit incentives to do so, corporations will attempt to circumvent compliance-

³⁴ See *R v Pétroles Global Inc*, 2013 QCCS 4262; *R v Metron Construction Corp*, 2013 ONCA 541.

³⁵ See Todd Archibald, Ken Jull & Kent Roach, "Corporate Criminal Liability: Myriad Complexity in the Scope of Senior Officer" (2014) 60:3 *Crim LQ* 386 at 390.

³⁶ *Ibid* at 388.

³⁷ Darcy L MacPherson, "Extending Corporate Criminal Liability: Some Thoughts on Bill C-45" (2003) 30:3 *Man LJ* 253 at 283.

³⁸ See Bittle, *supra* note 11 at 46, 51.

³⁹ *Ibid*.

based enforcement through falsification and deceit.⁴⁰ While Bittle's critique of corporate motives may prove a bit too much — assuming, as it does, universally bad motivations on the part of business entities — his description of the under-enforcement problem rings true. If the democratically enacted *Criminal Code* provides for corporate criminal liability, it is undemocratic for the Crown to largely ignore it relative to the crimes of individuals.

III. THE PERCEPTUAL HARMS OF CORPORATE CRIME

Part of my argument in this paper is that the lack of corporate criminal enforcement flows from a fundamental, theoretical incoherence in the justification for corporate criminal liability. It has been well documented, particularly in the context of sexual assault, that prosecutors charge more frequently when they understand the nature of the harm at issue in a particular class of offence.⁴¹ Furthermore, while the criminal law does not, itself, appear to create new moral norms among the public at large, it appears to strengthen existing norms and, thus, contributes to an increased public mandate for enforcement.⁴² The combined effect of these two phenomena means that optimal enforcement depends on a clear understanding, among prosecutors and the public at large, of what the nature of a particular criminal harm is.

The existence of corporate criminal liability faces a number of conceptual attacks, as a corporation can feel neither remorse nor the shame of criminal stigma, nor can it be incarcerated.⁴³ Utilitarian scholars have further suggested that criminally punishing corporations results in a net loss to society by over-deterring beyond the existing disincentives created by civil

⁴⁰ *Ibid* at 51, 152.

⁴¹ See e.g. Jeffrey W Spears & Cassia C Spohn, "The Genuine Victim and Prosecutors' Charging Decisions in Sexual Assault Cases" (1996) 20:2 *American J Crim Justice* 183 at 192-96; Darryl K Brown, "Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute" (2018) 103:2 *Minn L Rev* 843 at 857-59.

⁴² Michael C Harper, "Comment on the Tort/Crime Distinction: A Generation Later" (1996) 76:1/2 *BUL Rev* 23 at 25.

⁴³ See e.g. Hasnas, *supra* note 18 at 1339; William S Laufer, "Corporate Bodies and Guilty Minds" (1994) 43:2 *Emory LJ* 647 at 655; Gerhard OW Mueller, "Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability" (1957) 19:1 *U Pitt L Rev* 21 at 41-46.

and regulatory liability.⁴⁴ In the Canadian context, with Westray looming so large as a backdrop, Norm Keith warns that “the history of accountability of corporations has often been directed by crisis and ‘moral panic’ more than by reasoned, logical application of legal responsibility.”⁴⁵ Keith further contends that the impersonal, “faceless” attributes of a corporation make it particularly susceptible to moral panic through manipulations by the media and public officials searching for scapegoats.⁴⁶

On the other side, proponents of corporate criminal liability argue, essentially, that corporations do really bad things: they engage in harmful conduct with ill effects on health, environment, worker safety, and so forth.⁴⁷ Yet, this does not adequately address the critics’ arguments. After all, if such bad things can be causally attributed to individual human employees, then those employees can be prosecuted alone; if not, perhaps such bad things cannot, consistent with principles of justice, be criminally punished because they cannot be attributed to a particular offender. I argue, instead, for a different justification, premised on the fact that when a corporation commits a crime, it imposes a distinct set of harms on its victims and, by proxy, on society – above and beyond the substantive harms caused by the offence – that flow from the nature of the corporate entity itself.⁴⁸ A focus on victims can help prosecutors better understand these harms and victim impact statements can transmit them to the public.

The *Criminal Code* has long recognized harm to victims as a sentencing factor in both individual and corporate prosecutions. Section 718.1 of the *Criminal Code* states that a criminal sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; a factor in this proportionality calculus is the harm caused to a victim arising from the commission of the offence.⁴⁹ Scholars note some of the unique

⁴⁴ See e.g. Daniel R Fischel & Alan O Sykes, “Corporate Crime” (1996) 25:2 J Leg Stud 319; VS Khanna, “Corporate Criminal Liability: What Purpose Does It Serve?” (1996) 109:7 Harv L Rev 1477.

⁴⁵ Norm Keith, “Evolution of Corporate Accountability: From Moral Panic to Corporate Social Responsibility” (2010) 11:3 Bus L Intl 247 at 247.

⁴⁶ *Ibid* at 260.

⁴⁷ See e.g. Pamela H Bucy, “Corporate Criminal Liability: When Does it Make Sense?” (2009) 46:4 Am Crim L Rev 1437.

⁴⁸ See Erin Sheley, “Perceptual Harm and the Corporate Criminal” (2012) 81:1 U Cin L Rev 225 at 228.

⁴⁹ *Criminal Code*, *supra* note 3, s 718.1; Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 84–92.

aspects to the relationship between a victim and a corporate offender. As a point in favor of Bill C-45, Archibald, Jull, and Roach note that:

From the victim's perspective (or in a case such as Westray, the families of victims), if it can be shown that criminal activity occurred, it matters not which level of management authorized it... [t]his dichotomy [between policy-makers and operators] is viewed as a way of isolating the board of directors and the corporation.⁵⁰

On the other hand, Norm Keith points out the potential difficulties in identifying the victims of a particular corporate offence, which might be obvious in cases of fraud against a particular group of shareholders, but harder to determine in cases of mass bacterial infections resulting from corporate action assisted by a provincial government's failure to meet clean water regulatory requirements.⁵¹

Just as sentencing courts focus on the degree of harm caused by particular corporations, prosecutors should charge more corporations in the first place due to the kinds of harms corporations cause their victims. In addition to the obvious material harms – which may vary as between economic, environmental, physical, etc. depending on the offence – there is a separate class of harms common to those types of corporate crime with discernible victims. I call these “perceptual harms”.⁵² Perceptual harms amount to the empirically demonstrated sense of helplessness a victim feels when faced with a perpetrator that is temporally enduring, powerful, and materially complex.⁵³ When a corporate offender continues to exist after it commits a crime, it can shatter a victim's “belief in a just world”:⁵⁴ a psychological heuristic crucial to a person's wellbeing. This is a unique sort

⁵⁰ Todd Archibald, Kenneth Jull & Kent Roach, “The Changed Face of Corporate Criminal Liability” (2004) 48:3 Crim LQ 367 at 393.

⁵¹ Norm Keith, “Sentencing the Corporate Offender: From Deterrence to Corporate Social Responsibility” (2010) 56:3 Crim LQ 294 at 315 [Keith, “Sentencing the Corporate Offender”].

⁵² See Sheley, *supra* note 48.

⁵³ *Ibid* at 259–63.

⁵⁴ See e.g. Jozef Dzuka & Claudia Dalbert, “The Belief in a Just World and Subjective Well-Being in Old Age” (2006) 10:5 Aging & Mental Health 439 at 442. See Melvin J Lerner & Carolyn H Simmons, “Observer's Reaction to the ‘Innocent Victim’: Compassion or Rejection?” (1966) 4:2 J Personality & Soc Psychology 203; Melvin J Lerner, “The Justice Motive: Some Hypotheses as to its Origins and Forms” (1977) 45:1 J Personality 1; Melvin J Lerner, Dale T Miller & John G Holmes, “Deserving and the Emergence of Forms of Justice” (1976) 9 Advances in Experimental Soc Psychology 133.

of harm flowing from the corporate structure itself.⁵⁵

As an example, consider the long-term sociological and psychological costs of a corporate environmental crime.⁵⁶ The psychological literature has documented a particular sort of harm in victims of the major oil spills of the last several decades: evidence suggests the psychological harm experienced by victims to be exacerbated by the corporate nature of the responsible entities and issues related to assignment of blame. In addition to the immediate physical losses suffered by the victims of technological disaster, the victims' communities also suffer a long-term social deterioration described as "the corrosive community".⁵⁷ The literature attributes part of this corrosive effect to the members of a community struggling over where to place blame, authorities being evasive and unresponsive, and victims becoming suspicious and cynical.⁵⁸

Psychologist Deborah du Nann Winter, whose expertise centers on the psychological effects of environmental damage, has observed from her studies of victims of the Deepwater Horizon oil spill that the primary emotional reaction among these victims is "anger... around the oil companies' failure to abide by regulations" as well as "helplessness" (which she explains by noting the phenomenon of "learned helplessness," which is the tendency of organisms to become non-responsive in the face of situations over which they have no control).⁵⁹ Again, the structural relationship between the corporation and the background legal authority that supports it can be directly linked to the psychological damage experienced by victims. I now turn to the evidentiary mechanism by which prosecutors who understand the nature of the perceptual harm experienced

⁵⁵ See Sheley, *supra* note 48.

⁵⁶ See William R Freudenburg, "Contamination, Corrosion, and the Social Order: An Overview" (1997) 45:3 *Current Sociology* 19; William R Freudenburg & Timothy R Jones, "Attitudes and Stress in the Presence of Technological Risks: A Test of the Supreme Court Hypothesis" (1991) 69:4 *Soc Forces* 1143; Krzysztof Kaniasty & Fran H Norris, "A Test of the Support Deterioration Model in the Context of Natural Disaster" (1993) 64:3 *J Personality & Soc Psychology* 395; J Stephen Kroll-Smith & Stephen Couch, "Symbols, Ecology, and Contamination: Case Studies in the Ecological-Symbolic Approach to Disaster" (1993) 5 *Research in Soc Problems & Public Policy* 47.

⁵⁷ See Freudenburg, *supra*, at 56.

⁵⁸ See Freudenburg & Jones, *supra* note 56.

⁵⁹ Susan Koger, "Coping with the Deepwater Horizon Disaster: An Ecopsychology Interview with Deborah Du Nann Winter" (2010) 2:4 *Ecopsychology* 205 at 205.

by corporate victims may use that knowledge to increase and mobilize existing public support for white-collar prosecutions.

IV. THE EVIDENTIARY ROLE OF VICTIM IMPACT STATEMENTS

The crime victim's rights as a stakeholder in the Canadian criminal justice system have long been recognized⁶⁰ and, as mentioned previously, sentencing courts must consider the degree of harm to victims in applying the proportionality principle expressed in section 718.1 of the Criminal Code.⁶¹ In 1988, the federal and provincial ministers responsible for criminal justice endorsed the *Canadian Statement of Basic Principles of Justice for Victims of Crime*, "in recognition that all persons have the full protection of rights guaranteed by the [Charter]" and "the rights of victims and offenders need to be balanced."⁶² They have recently been the focus of greater attention with the passage of the *Canadian Victims Bill of Rights* in 2015.⁶³ The Bill provides the victim with a range of rights, including to be apprised of the status of the investigation of and proceedings against their offender and certain rights of privacy and security. It also provides that "[e]very victim has the right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered."⁶⁴ The right to present a victim impact statement had existed long before the Bill of Rights; it became statutory with earlier amendments to the *Criminal Code* in 1988⁶⁵ and enhanced with additional amendments in 1999. Currently, subsection 722(1) of the *Criminal Code* provides:

When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional

⁶⁰ See Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999); Leslie Sebba, *Third Parties, Victims and the Criminal Justice System* (Columbus, Ohio: Ohio State University Press, 1996); Alan N Young, *Justice for All: The Past, Present and Future of Victims in Canada* (Toronto: Osgoode Hall Law School, 1997).

⁶¹ *Criminal Code*, *supra* note 3, s 718.1.

⁶² Canada, Department of Justice, *Canadian Statement of Basic Principles of Justice for Victims of Crime*, 2003 (Ottawa: DOJ, last modified 7 January 2015), online: <www.justice.gc.ca/eng/rp-pr/cj-jp/victim/03/princ.html> [perma.cc/XH7Y-9MA6].

⁶³ *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

⁶⁴ *Ibid*, s 15.

⁶⁵ *Criminal Code*, *supra* note 3.

harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.⁶⁶

Prosecutors should pay closer attention to the particular impacts of corporate crime on its victims and use that understanding to promote the role of the victim in corporate prosecutions. Specifically, where prosecutors can identify victims, they should encourage them to read victim impact statements (VIS) during corporate sentencing proceedings as frequently as they do in cases of violent crime. This would begin to break down the conceptual barrier between corporate and individual crime, which may obscure the criminal nature of corporate conduct and also better link the project of criminalizing corporations to some version of the harm principle,⁶⁷ as opposed to goals of prosecutorial economy.

This argument raises initial questions, based on what we know so far about how VIS operate in the criminal justice system. While there does not appear to be recent empirical data on this question, it seems that only a distinct minority of victims avail themselves of the opportunity to make such statements.⁶⁸ A 1990 study found that victims' rate of refusal to give a statement was twice as high in cases of property crime as opposed to other sorts of crime.⁶⁹ Furthermore, a study of the effect of victim impact statements on actual sentencing outcomes in Calgary found no discernible impact on actual sentence.⁷⁰ Reviewing this rather inconclusive data, Julian Roberts concluded that “[w]e cannot exclude the possibility that VIS have had limited impact on victims' satisfaction in large measure because of the way in which they have been conceptualized, operationalized and administered” and on that basis called for “a clearer and consensual vision of the nature and function of a VIS.”⁷¹

⁶⁶ *Ibid*, s 722(1).

⁶⁷ See *R v Labaye*, 2005 SCC 80.

⁶⁸ Canada, Research Development Directorate, *Victim Impact Statements in Canada*, vol 7, by Carolina Giliberti (Ottawa: DOJ, 1990) (reporting that victims completed statements in 23% of trials) at 12.

⁶⁹ *Ibid* at table 1.

⁷⁰ Canada, Research Development Directorate, *Victim Impact Statements in Canada, Evaluation of the Calgary Project (Background Paper)*, vol 2, by Judith Muir (Ottawa: DOJ, 1990) at 95.

⁷¹ Julian V Roberts, “Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings” (2003) 47:3 *Crim LQ* 365 at 395–96. See also Ashley Smith, “Victim Impact Statements: Redefining Victim” (2011) 57:2/3 *Crim LQ* 346 (arguing for a redefinition of the term “victim” in the CCC to limit the number of

Perhaps the biggest challenge to making good use of VIS is that prior research suggests courts are uncertain as to precisely what end they are supposed to “consider” them when making sentencing determinations.⁷² More recently, Marie Manikis has conducted a review of appellate court decisions to attempt to answer this question.⁷³ She finds that some courts recognize that VIS provide information about the harm which serves as either an aggravating or mitigating factor in sentencing.⁷⁴ Other courts, however, suggest that VIS are supposed to serve a purely expressive purpose and should not affect sentencing outcomes at all.⁷⁵

Other scholars fear that VIS increase the systemic injustice of criminal law. Susan Bandes fears that they mobilize negative emotions against the defendant: they “evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger.”⁷⁶ She argues that they shift the focus away from the defendant’s moral culpability and toward “a thirst for undifferentiated vengeance.”⁷⁷ She also believes that the narratives developed during the guilt phase of the trial are already stacked against the defendant by the time that sentencing takes place.⁷⁸ Martha Minow opposes victim evidence for fear that it will encourage dueling victim narratives between the victim and defendant; she urges that the system adopt normative standards for evaluating “historical” harm experienced by oppressed groups, as opposed to individuals.⁷⁹ Jennifer Culbert sees VIS as inappropriately establishing the suffering of the victim as an

people qualifying to give VIS and thereby impose greater order on the sentencing proceeding).

⁷² Roberts, *supra* note 71 at 370–71.

⁷³ Manikis, “Victim Impact Statements at Sentencing: Towards a Clearer Understanding of Their Aims” (2015) 65:2 UTLJ 85.

⁷⁴ *Ibid* at 95, citing *R v Cook*, 2009 QCCA 2423; *R v G(K)*, 2010 ONCA 177; *Steeves v R*, 2010 NBCA 57; *R v Revet*, 2010 SKCA 71.

⁷⁵ *Ibid* at 97, citing *R v M(W)*, 2010 BCCA 370; *Doucet v R*, 2013 QCCA 1778; *R v Karim*, 2014 ABCA 88; *R v Alexander*, 2014 ONCA 22.

⁷⁶ Susan Bandes, “Empathy, Narrative, and Victim Impact Statements” (1996) 63:2 U Chicago L Rev 361 at 395.

⁷⁷ *Ibid* at 398. See also Steven G Gey, “Justice Scalia’s Death Penalty” (1992) 20:1 Fla St UL Rev 67 at 123; Martha C Nussbaum, “Equity and Mercy” (1993) 22:2 Philosophy & Public Affairs 83 at 89–90.

⁷⁸ Bandes, *supra* note 76 at 400.

⁷⁹ Martha Minow, “Surviving Victim Talk” (1992) 40:6 UCLA L Rev 1411 at 1438.

incontrovertible basis for deciding punishment in an otherwise pluralistic and morally relativistic society.⁸⁰

While these are all valid and important concerns, such arguments rely heavily on a bi-lateral view of sentencing in which the victim's only function is to oppose the interests of the defendant. Indeed, many popular arguments in favour of VIS rely on similar, but symmetrically opposite, grounds: we should prioritize the victim's individual needs over the defendant's by allowing VIS.⁸¹ Manikis proposes that we create a balance between presumably victim-focused expressive goals (which she characterizes primarily as allowing for the release of emotion) and the instrumental goal of informing the sentencing court about actual harm.⁸² She would allow the victim to speak broadly, even to make "emotional outbursts" for expressive purposes, but would require the court to "discard the part unrelated to harm when crafting and deciding the severity of a sentence."⁸³

I have argued elsewhere that the current debate on the victim's participation in the criminal sentencing process ignores how the complexity of a victim narrative effectively conveys to the sentencing body the community's experience of harm, without which the criminal justice system loses its legitimacy as a penal authority.⁸⁴ This full account of public harm is crucial to the retributive function of sentencing and if it is excluded, the system risks perceptions of illegitimacy.⁸⁵ The narrative features of VIS work to make a victim's harm accessible to a listener and, because these victim stories also circulate through society outside of the courtroom, they shape

⁸⁰ Jennifer Culbert, "The Sacred Name of Pain: The Role of Victim Impact Statements in Death Penalty Sentencing Decisions" in Austin Sarat, ed, *Pain, Death and the Law* (Ann Arbor, Mich: University of Michigan Press, 2004) 103.

⁸¹ See e.g. Jonathan Simon, "Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech" (2004) 82:4 NCL Rev 1377 at 1383 (arguing that the state's tendency, in recent years, to fetishize the "crime victim" has been a justification for conservative criminal legislation); Kenji Yoshino, "The City and the Poet" (2005) 114:8 Yale LJ 1835 at 1884 (arguing that VIS do not serve the ends of "fairness," which he defines explicitly as allowing the defendant to assume the "narrative posture... of a Scheherazade, telling stories to the state so she may live... untrammled by other voices").

⁸² Manikis, *supra* note 73 at 109-13.

⁸³ *Ibid* at 113.

⁸⁴ Erin Sheley, "Reverberations of the Victim's Voice: Victim Impact Statements and the Cultural Project of Punishment" (2012) 87:3 Ind LJ 1247 at 1277.

⁸⁵ *Ibid*.

social norms about culpability.⁸⁶ If the sentencing process cannot accommodate victim stories it risks illegitimacy in the eyes of a society guided by these norms.⁸⁷ It also risks allowing undifferentiated stereotypes, developed by political and media actors, to take the place of individuated victim accounts in the mind of a fact-finder.⁸⁸ This argument, of course, relates to the retributive function of VIS within a criminal trial and the importance of what such statements convey to the sentencing body itself – what Manikis would refer to as their “instrumental” function.

But VIS also have an external or expressive function, which the rise of social media has compounded by transmitting unmediated trial narratives through public spaces that they have not penetrated in the past.⁸⁹ This “expressive” function is more complex than simply serving, as Manikis conceives of it, as a therapeutic opportunity for victims to release emotion. There is also a public expressive function to the criminal justice system. The traditional media has long distorted public perceptions about crime and punishment, thereby undermining the expressive function of criminal justice.⁹⁰ The traditional Marxist critique of the media asserts that those in power manipulate the press to harness support for policies that criminalize those with the least power in society.⁹¹ However, the “left realist” school of criminology points out that the whole of public concern about crime is hardly the product of false consciousness. There are quite rational reasons to fear crime and many people, in fact, fear it due to direct interaction with actual victims.⁹² Unmediated victim narratives have, therefore, always been an important source of information about actual criminal harm, particularly harm to victims ignored by the prevailing media account.

⁸⁶ *Ibid* at 1277–84.

⁸⁷ *Ibid* at 1285.

⁸⁸ *Ibid*.

⁸⁹ See Erin Sheley, “Victim Impact Statements and Expressive Punishment in the Age of Social Media” (2017) 52 *Wake Forest L Rev* 157 at 158 [Sheley, “Expressive Punishment”].

⁹⁰ *Ibid* at 159.

⁹¹ Yvonne Jewkes, *Media and Crime*, 3rd ed (London, UK: Sage Publications, 2015) at 24.

⁹² See e.g. Jock Young, “The Tasks Facing a Realist Criminology” (1987) 11:4 *Contemporary Crises* 337 at 337 (arguing that perceptions of crime are largely “constructed out of the material experiences of people rather than fantasies impressed upon them by the media or agencies of the State”); Adam Crawford et al, *Second Islington Crime Survey* (London, UK: Middlesex Polytechnic Centre for Criminology, 1990) (arguing that “in inner city areas, mass media coverage of crime tends to reinforce what people already know”).

So-called “viral” victim narratives about police violence attendant to the Black Lives Matter movement, as well as the uniquely impactful victim impact statement delivered by Jane Doe in the Stanford rape case, illustrate how the expressive function of punishment has become even more critical in light of “new” media.⁹³ One could argue, of course, that victim narratives can be disseminated without being first expressed during a formal sentencing hearing – the police violence videos are a good example of this. Yet, to the extent that institutions of justice support these narratives by providing a forum for their expression and dissemination, the institutions themselves are participating in what Anthony Duff describes as the “communicative” purpose of punishment.⁹⁴ Punishment sends a message to the offender about their conduct, to the victim about their worth in the eyes of the community, and to the community about what we morally require from one another.⁹⁵ The system serves this purpose better if it incorporates unmediated victim narratives into this process.

The recent Calgary case of Carey and Cody Manyshots demonstrates the interaction between VIS, social media, and the perceived legitimacy of the justice system on the part of the general public. The Manyshots brothers kidnapped a 17-year-old girl from a bus stop, kept her prisoner, and sexually assaulted her repeatedly.⁹⁶ Because the victim did not feel emotionally able to read her statement aloud to the trial court, the Crown prosecutor asked the court to exercise its discretion to allow the prosecutor to read the statement on behalf of the victim.⁹⁷ The Court refused and a local social media firestorm followed.⁹⁸ (A Facebook page linking to one article on the topic had, two weeks after the decision, received 370 “reactions” and 133 comments.)

One representative commenter underscored the communal importance of the VIS:

Ridiculous, the reason its [sic] called a victim impact statement is clear, so the victim gets to share the pain and suffering that resulted from the crime. Judges

⁹³ Sheley, “Expressive Punishment”, *supra* note 89.

⁹⁴ RA Duff, “Guidance and Guidelines” (2005) 105:4 Colum L Rev 1162 at 1182.

⁹⁵ *Ibid.*

⁹⁶ Nancy Hixt, “Judge’s decision on victim impact statement in Manyshots brothers’ case sparks public outrage”, *Global News* (27 July 2016), online: <globalnews.ca/news/2852304/judges-decision-on-victim-impact-statement-in-manyshots-brothers-case-sparks-public-outrage/> [perma.cc/5ZQF-6USF].

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

should uphold that civic right as a part of our legal system no matter what. Taking away the victims [sic] voice is as disgusting as taking away our freedom. I am reinforced in my belief that judges, cops and prosecutors are totally indifferent to the rights of the individual. They hold the balance of power and we are lead around like cattle in a broken system.

By linking the idea of a silenced victim to a general loss of civic freedom, this commenter emphasizes the expressive importance of such statements. As Duff theorizes, they implicate not only the system's obligation to communicate to the victim its condemnation of his or her victimizer, but to relay this message to the rest of the polity. The victim's account of her harm is not only an account of her individual harm but of how her community itself has been harmed through the crime against her. While fairness may require courts to exclude certain statements under certain circumstances, it does so at the risk of negatively impacting public faith in systemic legitimacy.

In sum, particularly in the era of "viral" social media content, VIS can be used to vindicate the rights of the powerless against the powerful as easily as they can be used to increase the punitiveness of the justice system against certain defendants. And, in our *status quo* universe, in which VIS will continue to be used in the latter capacity, there is arguably a greater moral imperative to use them in the former as well. Corporate criminal punishment provides an ideal setting for this endeavor. It is hard to think of a greater power asymmetry than that existing between a corporate defendant, on the one hand, and an individual human victim, on the other.

We do not have examples of many victim impact statements at corporate criminal trials, but it is helpful to consider a couple of victim narratives about corporate harm occurring in other formal settings. Consider, for example, the victims of the 1972 Buffalo Creek disaster, in which a coal slurry dam owned by the Pittston Corporation burst and caused 125 citizens of Logan County, West Virginia to drown in black sludge⁹⁹ (additionally, the property destruction left 4,000 people homeless).¹⁰⁰ Despite the fact that the investigation determined that the dam had violated numerous federal and state safety regulations, no criminal charges were ever filed against the Pittston Corporation, its subsidiary Buffalo Mining Co, or any of their officers. The citizens of the

⁹⁹ Gerald M Stern, *The Buffalo Creek Disaster* (New York, NY: Vintage Books, 1977) at 11.

¹⁰⁰ *Ibid.*

Buffalo Creek area formed a Citizens Commission to investigate the disaster, which concluded:

We think that this coal company, Pittston, has murdered the people, and we call upon the prosecuting attorney and the judge...to prosecute and bring to trial this coal company...the fact of the matter is that these are all laws on the books which the company felt completely free to ignore, which says something about the relationship between coal companies and state governments...just this complete freedom to ignore these laws with no fear of any kind of prosecution.¹⁰¹

These words make explicit the perceptual harms that corporate crime imposes on its victims. The Buffalo Creek victims' commission identified, as part of the trauma the community had suffered, their comparative helplessness relative to a company with (a) continued temporal existence and (b) some sort of interrelationship with structures of state power.

Very similar themes appear in the congressional testimony of Keith Jones, whose son Gordon died on the *Deepwater Horizon*: "TransOcean, Halliburton, and any other company will be back because they have the infrastructure and economic might to make more money. But Gordon will never be back. Never. And neither will the 10 good men who died with him."¹⁰²

Again, it is not only the loss of Gordon that Jones identifies here but the asymmetry between that loss and the impossibility of an equivalent loss on the side of an enduring entity like Halliburton. The disruption to the belief-in-a-just-world heuristic, as discussed above, resulting from perceived unfairness, appears in both of these accounts of suffering due to unpunished or inadequately punished corporate crime.

These victim narratives draw attention to the *sine qua non* of a corporate criminal act – to that which justifies punishing the institution itself above and beyond the culpable individual actors that can and should also be charged where possible. It is not just that the harm imposed by corporations is severe. That can be true and yet, it can still be the case that punishing both individual employees and the corporation is redundant if the latter is

¹⁰¹ Appalshop's Buffalo Creek Film Preservation & Digital Outreach Project, "The Buffalo Creek Flood: An Act of Man Transcript" (1975) at 5, online (pdf): <buffalocreekflood.org/media/BCF-transcript.pdf> [perma.cc/M3CM-7KCW].

¹⁰² US, *Legal Liability Issues Surrounding the Gulf Coast Oil Disaster: Hearing Before the House Committee on the Judiciary*, 111th Cong (2010) at 25 (Keith Jones), online: <www.govinfo.gov/content/pkg/CHRG-111hhrg56642/pdf/CHRG-111hhrg56642.pdf> [perma.cc/9MT8-FLKB].

punished for the same harm as the former. The issue is that the psychic harm posed by corporate crime is distinct in kind.

From these premises it becomes clear that victim narratives have the potential to give coherence to a conceptually unstable area of the criminal law. In the first place, the use of VIS at corporate sentencing provides evidence of the distinctly corporate aspects of victim harm for a sentencing body, whose job it is to dispense appropriate punishment. In the second, where the Crown's under-enforcement of the *Criminal Code* against corporations may be a substantially cultural, rather than doctrinal, problem, the expressive function of VIS may serve to reflect and enhance social norms about corporate criminality and thereby bring popular demand for corporate prosecutions more in line with that for individual criminals.

V. REMEDIATION AGREEMENTS AND CORPORATE VICTIMS: A COMPARATIVE PERSPECTIVE

The timing of this article renders it impossible to leave the topic of VIS as evidence of corporate criminal harm in Canada without at least considering the recent sea change in white-collar enforcement. In September 2018, after many years of discussion and recent months of lobbying, Parliament adopted amendments to the *Criminal Code* allowing the Crown to use remediation agreements to resolve cases of organizational misconduct. Modeled after the deferred prosecution agreement (DPA) pioneered by the United States Department of Justice, remediation agreements provide a mechanism for a corporation to settle a criminal investigation without having to resort to a guilty plea.

According to section 715.31 of the *Criminal Code*, the agreements have the following objectives:

- (a) to denounce an organization's wrongdoing and the harm that the wrongdoing has caused to victims or to the community;
- (b) to hold the organization accountable for its wrongdoing through effective, proportionate and dissuasive penalties;
- (c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;
- (d) to encourage voluntary disclosure of the wrongdoing;
- (e) to provide reparations for harm done to victims or to the community; and

(f) to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.¹⁰³

Subsection 715.32(2) instructs that prosecutors, in determining whether to offer a remediation agreement, should consider the following factors:

- (a) the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
- (b) the nature and gravity of the act or omission and its impact on any victim;
- (c) the degree of involvement of senior officers of the organization in the act or omission;
- (d) whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
- (e) whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
- (f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
- (g) whether the organization – or any of its representatives – was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;
- (h) whether the organization – or any of its representatives – is alleged to have committed any other offences, including those not listed in the schedule to this Part; and
- (i) any other factor that the prosecutor considers relevant.¹⁰⁴

Judging by the American experience with DPAs, this new addition has the potential to exacerbate the under-enforcement problems discussed above. In the U.S., the rise of the era of deferred and non-prosecution agreements has meant that greater numbers of criminal corporations escape formal criminal charges entirely, in exchange for paying fines and making stipulated changes to internal governance.¹⁰⁵ These agreements are “mutually beneficial” to the extent that they make life easier for prosecutors, who can avoid the massive discovery process involved in taking a

¹⁰³ *Criminal Code*, *supra* note 3, s 715.31.

¹⁰⁴ *Ibid*, s 715.32(2).

¹⁰⁵ David M Uhlmann, “Deferred and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability” (2013) 72:4 Md L Rev 1295 at 1298.

corporation to trial, and for corporations, who can avoid the sting of criminal conviction and its collateral effects (especially the risk of being barred from business with the government), which was the major concern of SNC-Lavalin.

While the U.S. Department of Justice's official factors for determining whether a corporation should be criminally charged include "the risk of harm to the public" posed by the crime committed (and the reciprocal costs of a prosecution to both the public and innocent third parties such as employees), they also include such factors as "remedial efforts" and "willingness to cooperate."¹⁰⁶ The prevalence of DPAs thus ties much of federal criminal enforcement against corporations to the relative ease with which the two sides can strike a bargain, as opposed to the degree of actual harm to human victims. The use of DPAs and NPAs is not even consistent across the DOJ: the Environment and Natural Resources Division and the Antitrust Division rarely use them, while the Criminal Division and some United States Attorney's offices resort to them more often than not.¹⁰⁷

The gap between the primary American substantive culpability standard and the DOJ's extremely nuanced factors to guide prosecutorial decision-making has created, what some scholars have referred to as, problems of incongruence. As William Laufer and Alan Strudler put it:

First, forward problems emerge where changes in the general part of the law—liability rules and culpability standards—are conceived without concern for how punishment is crafted or justified. And reverse problems arise where standards for punishment impose liability or culpability that conflict with extant law in theory or practice.¹⁰⁸

As Laufer and Strudler argue, the federal charging guidelines wholly abandon the rule of *respondere superior* and instead measure "features of the corporate person," particularly as measured by post-offence behaviour which "may bear little correspondence to the underlying offence."¹⁰⁹ Other scholars note that the massive increase in corporate cooperation with criminal investigations has unintentionally blurred the line between the

¹⁰⁶ US, Department of Justice, *Principles of Federal Prosecution of Business Organizations* (Washington, DC: Department of Justice, 2019) at s 9-28.300, online: <www.justice.gov/principles-federal-prosecution-business-organizations> [perma.cc/UJ8J-WZFJ].

¹⁰⁷ Uhlmann, *supra* note 105 at 1301.

¹⁰⁸ William S Laufer & Alan Strudler, "Corporate Crime and Making Amends" (2007) 44:4 Am Crim L Rev 1307 at 1311.

¹⁰⁹ *Ibid.*

prosecuting government and the private entity being prosecuted.¹¹⁰ This results in doctrinal problems such as as: the risk of corporations qualifying as agents of the state for the purposes of Constitutional exclusionary rules; the risk of undermining employees' Fifth Amendment protections against self-incrimination; the possibility of the government being deemed "in control" of corporate documents for the purposes of discovery requests by individual employees; and prosecutors acting "beyond their institutional competence" by adopting corporate oversight roles.¹¹¹

How all of these concerns shake out in Canadian doctrine remains, of course, to be seen. It is encouraging that subsection 715.32(2)(b) specifically mentions harm to victims as a relevant factor, which is not considered in the U.S. Department of Justice's charging guidelines related to DPAs. To the extent that DPAs have allowed American prosecutors *carte blanche* to threaten over-enforcement without the need for a complicated criminal trial, they are less likely to have that effect in Canada, simply due to the more nuanced liability standard for corporate criminal *mens rea* required by sections 22.1 and 22.2. Corporations that feel like they could beat criminal charges under those provisions are less likely to agree to remediation agreements where the evidence suggests that the Crown would not be able to prove the necessary elements at trial. The availability of such agreements is, however, far more likely to exacerbate the more pressing problem of under-enforcement. If prosecutors are already reluctant to bring charges against corporations due to the complicated discovery process such trials entail, it stands to reason that they will be even less likely to do so with an easier option at hand. Attention to victim harm – not only by prosecutors and courts, but by the public in general – may prove an important buffer against such a risk.

At the end of the day, Canadian criminal enforcement against corporations remains in a state of ferment. The 2004 amendments to the *Criminal Code* came from a sudden public awareness of the nature of corporate negligence and the material harms to victims it causes. The SNC-Lavalin affair has again thrown the specter of corporate lawlessness into the public sphere. While not all cases of corporate crime have easy-to-identify victims, where they exist, their narratives provide important evidence of the

¹¹⁰ See generally Barry A Bohrer & Barbara L Trencher, "Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation" (2007) 44:4 Am Crim L Rev 1481.

¹¹¹ *Ibid.*

nature of corporate criminal harm. The expressive value of victim impact statements in providing coherence to the project of corporate criminal liability is particularly high in this ever-changing environment.

