

Rethinking Corporate Crime

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Rethinking Corporate Crime

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Preface

In *The Devil's Dictionary* (1911), Ambrose Bierce defined a corporation as 'an ingenious device for obtaining individual profit without individual responsibility'. Never has Bierce's wit had more bite, or seemed more apt, than it does today. In transport, technology, pharmaceuticals, financial services and other sectors of the economy, one can find examples of transgressions by companies that have resulted in considerable loss and harm. Bhopal, BCCI, *Herald of Free Enterprise*, Thalidomide and the Ford Pinto have virtually entered the lexicon as synonyms for corporate malfeasance. In the United Kingdom, in the past several years, there have been major train crashes at Southall, Ladbroke Grove, Hatfield and Potters Bar. Despite the damage, the injuries and the loss of life in each of these tragedies, and despite evidence of arguably gross negligence on the part of the relevant company, obtaining a criminal conviction has proved highly elusive. In the financial sector, the City of London has been shaken by an embarrassing number of scandals over the past few decades, including Guinness and Barings; and, more recently, revelations of major corporate fraud in the United States have shown that the deviant practices can extend to the highest levels of the corporation. These new cases have drawn intense media attention and have prompted a spate of legal actions against such well-known companies as Enron, Tyco, Arthur Andersen and Xerox. Combined with previous studies documented in the standard literature, these cases have revived interest in the nature of corporate crime and what can be done to prevent its occurrence.

Ever since Edwin Sutherland coined the phrase 'white-collar crime' over a half century ago, by which term he clearly meant to include corporate crimes, there has been research, public inquiries, lawsuits and media attention on deviance and law-breaking in the corporate world. An ever-mounting body of evidence indicates that companies often deliberately and, sometimes repeatedly, flout the law; that the consequences can be extremely grave (both financially and in terms of loss of life and limb); and that, if caught, the likelihood of a prosecution is remote, the prospects for a conviction, if there is a prosecution, are not promising and the sanctions following the infrequent conviction can be derisory. Nor does the public seem overly bothered. The public's views on most forms of corporate crime stand in stark contrast to their views on 'street' crime, the type of ordinary crimes that tend to form the grist for political debates and media scare stories. Yet, on almost every measure, the effects of corporate crimes are more harmful, more costly, more extensive and more debilitating than those which follow from street crime.

Are crimes that occur in a business context attributable to individuals or organisations? We believe that where a company's goals, systems, ethos or culture contribute to, tolerate or encourage law-breaking, the company should be subject to legal accountability. Corporate criminality inheres in the culpable failure to prevent crimes that could have been averted had the company paid proper attention to, and better managed, risk. But why are successful prosecutions of companies so rare? Does the problem lie at the investigatory stage of the proceedings, or at the trial stage? Does it lie in flawed criminal doctrines, or in procedural and evidentiary rules that are ill-suited to corporate defendants? Is it our understanding of the dynamics and pressures of business and the market place that is deficient? If corporate crime is as widespread – or even endemic – as some critics would have us believe, if the government is less than fully committed to combating it, if the law is not up to the task, and if the public is not much exercised (save for the occasional high-profile disaster), does it follow that large and powerful companies are effectively beyond legal control?

In this study, we, a lawyer and a sociologist-criminologist, have combined our background, experiences and perspectives to take a fresh, inter-disciplinary look at corporate crime. While the landscape for our study is potentially vast (and would include commercial crimes, antitrust and cartel-formation, fraud, environmental offences, occupational health and safety violations, and those activities of 'organised crime' that interlock with corporate crime), we have chosen to give particular emphasis to crimes involving 'corporate violence'. This is both because they reveal the critical role of improper risk management and its potentially disastrous effects, and because these cases have proved peculiarly resistant to legal control. One might well ask why the legal mind has so much trouble perceiving that a company can be guilty of causing death? Why has it proved so difficult in the United Kingdom to convict a company of manslaughter?

At one point, there appeared to be a groundswell for reforming the law in this area. In 1996, the Law Commission recommended a new offence of 'corporate killing', and, in 2000, the Labour government embraced this recommendation in a consultation paper on 'involuntary manslaughter' (Home Office: 2000). Hopes for reform ran high; but in the Queen's speech at the opening of Parliament in November 2002, it soon became clear that, more than six years after the Law Commission had first proposed changing the law, there would be no new legislation in this session of Parliament. Were the legal issues that complex? Was the problem simply the legal profession's traditional resistance to change? Or was the road to reform sabotaged by the political clout of 'big business'? Perhaps the government was led to see the potentially adverse repercussions for the nation's economy – and its own political future – if multinational enterprises were to move their headquarters to a more corporate-friendly environment. Whatever the explanation, the effect is that the difficulties of prosecuting a company in England and Wales for causing death are not going to disappear in the foreseeable future.

In this book we will examine not only issues raised by cases of corporate violence, but also by other forms of corporate misconduct. We plan to draw on law, social science, criminology and management studies, to the extent that they shed light on our analysis. We will also look to the laws and practices of other jurisdictions when that would be helpful, and will try to illustrate our points with real-life examples from well-documented cases. Our goal is to make the topic of corporate crime

accessible and comprehensible, not just to lawyers and academicians, but to all persons who find the subject intriguing and who recognise its relevance in contemporary society. We would hope that our efforts will prove of value to legal practitioners, to judges, to legislative and other policymakers, to enforcers and regulators, to professionals in compliance and legal departments of companies, and, of course, to the senior managers of corporate United Kingdom.

Given the rapidly unfolding developments in this field, it might seem that any analysis of corporate crime will be hostage to the next scandal or disaster. We would not disagree, but have tried to surmount the problem by concentrating on developing a *framework* for understanding and analysing corporate wrongdoing. We have entitled our book 'Rethinking Corporate Crime' because we plan to take a fresh look at the topic and offer some, hopefully, innovative solutions to long-standing problems. We begin by examining the causes of corporate crime, looking beyond the conventional view that attributes corporate offences primarily to a desire to enhance profits. This entails looking closely at the organisational and managerial context in which corporate misconduct takes place, and the range of variables that may contribute to decisions, or the failure to take decisions, which lead to criminal offences. We will examine the role of 'criminogenic' environments, systemic failures and ineffective supervision; and shall see how a corporate 'culture' or ethos can contribute to, support and even encourage illegality. In respect to the law, we will critically assess traditional tests which impute liability to companies based on crimes committed by individuals, but will also try to develop a theory of 'organisational fault' that, in our opinion, better captures the essence of corporate criminality. More controversially, we will explore the case for defining corporate crimes without regard to results. We intend also to re-examine evidentiary and procedural rules that seem somehow inappropriate when a company rather than a natural person is in the dock; and we will propose a range of more meaningful sanctions that might be imposed when corporations are convicted of serious offences. Finally, we will scrutinise the problem of 'policing' companies, and explore the feasibility of collective and individual self-regulation, which we believe may offer a more effective approach to corporate crime-prevention than that pursued by traditional regulatory agencies.

The list of individuals who have commented on all or parts of this manuscript is extensive, but would include David Bergman, Michael Clarke, Neil Cohen, Janet Dine, Geoff Gilbert, Carolyn Hamilton, Sheldon Leader, Michael Levi, Vittorio Manes, Sabine Michalowski, Peter Muchlinski and Sir Nigel Rodley. Several of these individuals were also kind enough to provide us with unpublished articles and works in progress, as well as suggestions for further lines of inquiry. To all of these persons, and to others whom we may have inadvertently overlooked, we are indebted. We, of course, bear full responsibility for whatever defects, mistakes and errors remain. Maurice Punch would like to thank Corry, Julio, Maria and George for their support during the writing of this work; and he would like to express his appreciation to his colleagues in RBC Network (Nic van Dijk, Veronique van der Heijden, Tineke Melis, Johan Heilbron and Geert de Vries) for their valuable insights arising from researching issues of 'corporate governance' within the financial services industry. Similarly, James Gobert benefited greatly from discussion with his colleagues in the 'Starship Enterprise' project (Steve Anderman, Janet Dine, Sheldon Leader, David Ong and Bob Watt) on the topic of 'corporate governance' and would also wish to acknowledge their unstinting support. The invaluable research assistance of Emilia

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February 2003

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