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Corporate Offending: Are the harms caused so different as to justify the unequal levels of prosecution and scrutiny?

Amy Baker

Abstract

There exists a significant disparity between the harmful consequences of corporate crime and the level of scrutiny and attention it receives from both the media and the criminal justice system (CJS). Somewhat understandably, it is both logistically and evidentially harder to put a company on trial. However, it does not follow that this therefore justifies the paucity of sanction and penalty. This article will argue that corporate crime is being treated more favourably by the CJS when compared with other types of crimes despite causing comparable harms to individuals and communities. Part I outlines and explores the more lenient treatment, evidenced by low conviction rates and high number of settlement deals, that is borne partly from entrenched prejudicial narratives about what real crime is. Part II will argue that corporate crime should be treated with the same level of seriousness and urgency.

Key words – *criminal justice system, corporate crime, prosecution rates, fraud, mens rea, company liability.*

Introduction

Corporate offending covers many types of offences spanning from fraud, bribery, tax evasion to manslaughter. It is precisely its wide scope that means it simultaneously causes various types of harms such as, emotional, physical, financial, proprietary, or reputational harm. Whilst the harms caused by other types of crimes such as theft or assault are more direct in nature, corporate offending harms are no less deserving of focus and scrutiny. However, the criminal justice system (CJS) as it pertains today and for many years, has indirectly treated the harms caused by corporate offending as less consequential by the way it has consistently treated corporate crimes and its offenders as less deserving of punishment. This more lenient attitude towards corporate criminals and their crimes is a symptom of a larger problem within the CJS. Namely, there exists a very narrow idea of what constitutes a 'crime' and a 'criminal' which is associated heavily with race and socioeconomic status. It is unsurprising that this characterising of criminality has trickled into agents of the CJS and the public demand for persecution of these crimes. I will analyse thus the extent to which these harms are treated differently in the CJS before entering a normative discussion of whether they should be treated differently. I will contend that the harms created by corporate offending, though often indirect, are *not* different to the harms caused by other crimes and therefore such a lenient attitude and lack of scrutiny has allowed these crimes to receive disproportionate treatment.

Part I - Are they treated differently?

Identifying Corporate Crime

The question makes the presupposition that corporate offending is treated differently in the CJS. To analyse the extent to which this is accurate, it is first necessary to analyse the CJS to see whether there exists a different or arguably preferential treatment, predicated on their harms being different. Corporate offending has no statutory definition in England and Wales, though most would be able to differentiate between it and other stricter crimes. Edwin Sutherland, an American sociologist, famously defined white collar crime as "crime committed by a person of respectability and high social status in the course of his occupation"¹. Corporate crime has often been considered as existing in a subcategory of white-collar crime, the distinction being that the crime is committed for the benefit of the company. For clarity, I will take a broad approach when referencing corporate offending, referring generally to crimes

¹ Edwin H Sutherland, *White Collar Crime* (2 edn, New York 1949) 9.

committed by the company itself or by individuals on behalf of the company. This can include fraud, bribery, manslaughter, regulation non-compliance, tax evasions, insider trading or corporate manslaughter.

There exist inherent aspects of corporate offending that differentiate it to other crimes and subsequently make it harder to prosecute. It can be said that generally one of the aims of criminal law is to punish a perpetrator for the harm that they caused. In crimes such as arson or robbery, there is physical evidence of the crime, but criminal law makes the key distinction that there must also be evidence of the perpetrator's guilty mind. If the harm was committed purely by accident with no ill intent, it would be disproportionate to punish them severely. As a society we attach a level of moral blameworthiness to the intent of the defendant that justifies their punishment and separates their acts from those of mere accidents². Hence, in criminal law the *mens rea* (intention) is the fundamental component of a guilty verdict. Throughout course of a trial, lawyers will investigate and scrutinise the evidence for proof of a guilty mind. Consequently, one of the key problems in corporate offending occurs due to the fact there often is no 'mind' or 'body' to which blame can easily be attached.

Finding Liability for Corporate Crime

So how is corporate liability established? There are three ways a corporation can be prosecuted according to the House of Commons report³. Firstly, Parliament creates a specific offence for the crime such as the Corporate Manslaughter and Corporate Homicide Act 2007, where punishment is in the form of a fine. Secondly, a corporation can be prosecuted as vicariously liable for the acts of its employees or agents, but this is strictly limited to regulatory offences where fault is not relevant⁴. The third way is the most relevant – the identification doctrine established in *Tesco Supermarkets Ltd. v Nattrass*⁵. Corporations and other 'non natural persons' have a distinct legal personality, so subsequently the court held that a corporation can only be liable for the conduct of a person who had the status and authority to constitute the company's 'directing mind and will'⁶. So, are they routinely prosecuted under

² John Hasnas, 'The Century of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 American Criminal Law Review 1329, 1330.

³ UK Parliament, 'Corporate Criminal Liability' (HC Library Research Paper 27/06/2022) 4 <<https://researchbriefings.files.parliament.uk/documents/CBP-9027/CBP-9027.pdf> > accessed 15 Apr 2023.

⁴ Ibid.

⁵ *Tesco Supermarkets v Nattrass* [1972] AC 153.

⁶ The Law Commission, Criminal Liability in Regulatory Contexts (Consultation Paper No. 195), para. 1.63 <http://www.lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf> accessed 14 Apr 2023.

this doctrine? The answer appears to be, no. It is unclear how senior an executive must be in order to be considered a 'directing mind'⁷ and this becomes a major problem when prosecuting larger companies whose internal structures seem exhaustive. This problem was highlighted by the CEO of the Serious Fraud office (SFO) who argued the law facilitates bad corporate culture where executives push away responsibility on to lower ranking employees to avoid guilt⁸. Although speaking from an inherently biased position, it does not negate the truth of the statistics— since the year 2000 only 11 companies have been convicted by the SFO⁹.

Additionally, there exist legal parameters that benefit corporations and allow them to negotiate and escape prosecution. Deferred Prosecution Agreements (DPAs) introduced under schedule 17 of the Crime and Courts Act, allows the prosecution of a company to be suspended if the defendant agrees to follow certain conditions – if not then charges may be brought. Moreover, in 2009 the Attorney General introduced a new procedure for plea bargaining in serious and complex fraud cases that were eventually incorporated into the Criminal Practice Directions, allowing these corporate defenders a further way to avoid meaningful punishment¹⁰. These processes allow corporate defendants to 'negotiate justice'¹¹, as Campbell argues, by providing them the ability to moderate the impact of criminal law, illustrated in cases such as *Innospec* where a multinational company involved in serious bribery was able to bargain for settlements.¹² It reinforces an idea that crimes of corporate offenders are more respectable and excusable, and do not require the same level of penalizing.

The Unequal Prosecution

The more lenient treatment for corporate offending can be further illustrated when compared with the harsher prosecution and treatment of other types of offenders. The parameters that exist to allow corporate offenders to negotiate the law are not replicated for

⁷ Ibid.

⁸ Camilla de Silva, 'Corporate Criminal Liability, AI and DPAs' (Speech at Herbert Smith Freehills Corporate Crime Conference, 21 June 2018) < <https://www.sfo.gov.uk/2018/06/21/corporate-criminal-liability-ai-and-dpas/> > accessed 27 Mar 2023.

⁹ Jonathan grimes, Rebecca Niblock and Lorna Madden, 'Corporate Criminal Liability in the UK: The introduction of DPAs, proposals for further change and the consequences for officers and senior managers' (Thomson Reuters Practical Law 2013/4) < [https://uk.practicallaw.thomsonreuters.com/4-5479466?_lrTS=20230424225334841&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-5479466?_lrTS=20230424225334841&transitionType=Default&contextData=(sc.Default)&firstPage=true) accessed 20 Apr 2023.

¹⁰ Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edn, OUP 2019) 331.

¹¹ Ibid.

¹² *R v Innospec Ltd* [2010] Crim LR 665.

offenders of different socioeconomic or racial backgrounds. DPAs are only available for organisations and the Lammy report found that defendants of BAME backgrounds were far less likely to enter plea agreements than their white counterparts¹³. This was attributed due to a lack of distrust in the CJS as a whole, a sentiment understandable given the recent Casey Report which found the MET to be institutional racist¹⁴. Despite black people accounting for just 4% of the population, they make up 13% of the prison population, and get consistently harsher sentences than white counterparts.¹⁵ Additionally, a Ministry of Justice report found that the vast majority of prisoners share socioeconomic factors such as lack of education, foster home background and young parenthood that are not indicative of the wealthy corporate offender¹⁶. So, what causes this imbalance? Tim Newburn argues that it is due to the issue that it is now an 'established fact that criminal courts deal with crimes of people of 'impoverished means'¹⁷. Hillyard and Tombs outlined how crime has no 'ontological reality'; we essentially have created the concept of a crime and with that, very narrow and specific ideas of a criminal¹⁸. These ideas and assumptions of crime trickle throughout the system so acts that are serious crimes are often neglected in favour of the more consistently and visible ones – what Reiman calls a 'pyrrhic defeat theory'¹⁹. In the UK there is a deep history of associating crime with the minority groups of society²⁰. The way to successfully separate these groups and protect the rest of society was through symbolic punishment²¹ and consequently, as Hudson argues, an 'insatiable demand for security' was borne²². Welsh outlines that the UK's punitive model ensures that the least educated and most economically marginalised are

¹³ David Lammy, 'An Independent review into the treatment of, and outcomes for Black, Asian and Minority Ethnic Individuals in the Criminal Justice System' (GOV.UK, 8 September 2017) 26 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf > accessed 18 Apr 2023.

¹⁴ Vikram Dodd, 'Louise Casey's report on the Met Police: the fall of a British institution' The Guardian (London 21 Mar 2023) < <https://www.theguardian.com/uk-news/2023/mar/21/louise-caseys-report-on-the-met-police-the-fall-of-a-british-institution> > accessed 15 Apr 2023

¹⁵ Ministry of Justice, 'Ethnicity and the Criminal Justice System 2020' (GOV.UK, 2 December 2021) < <https://www.gov.uk/government/statistics/ethnicity-and-the-criminal-justice-system-statistics-2020/ethnicity-and-the-criminal-justice-system-2020> > accessed 18 Apr 2023.

¹⁶ Ministry of justice, 'Prisoner's Childhood and Family backgrounds' (Ministry of Justice Research Series, ISBN: 978-1-84099-544-2 March 2012) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/278837/prisoners-childhood-family-backgrounds.pdf > accessed 14 Apr 2023.

¹⁷ Tim Newburn, 'Social Disadvantage and Crime' in Hartley Dean and Lucinda Platt (eds) *Social Advantage and Disadvantage* (1st edn, OUP 2016) 328.

¹⁸ Paddy Hillyard and Steve Tombs, 'From Crime to social harm?' (2007) 48 *Crime Law Soc Change* 9, 12.

¹⁹ Jeffrey Reiman, *The rich get richer and the poor get prison. Ideology, class and criminal justice* (5th edn, Boston 1998) 61.

²⁰ Welsh Lucy, Skins Layla, and Andrew Sanders, *Sanders and Young's Criminal Justice* (5th edn, OUP 2021) 484.

²¹ Barbara Hudson, *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity* (1st edn, London 2003) 70.

²² Welsh (n 20) 487.

always the most scrutinised and receiving of the CJS attention²³. There exists a domino effect where the pyrrhic defeat theory, the idea that the typical criminal is a lower class uneducated BAME individual, is re-enforced to the public through CJS statistics and media narratives; subsequently, the public demand a crackdown on these criminals²⁴: Consequently, neither the police nor the CJS focus on corporate offending and instead focus on the 'low hanging fruit'²⁵. For example, despite fraud being one of the most common crimes in England and Wales in 2021, costing the economy £137 billion a year, just 0.8% of the police were tasked with focusing on fraud and economic crime²⁶. There is a significant difference between the treatment of corporate offending and other of offences, not just in the process of the CJS but also inherent to the wider public's understanding, or more accurately, their assumptions of crimes and criminals.

Part II - Should they be treated differently?

It might be argued that this leniency is attributable to the fact that the harms caused by corporate offending are different to that of other offences, and different treatment is thus appropriate, but this is not accurate. The harms created are not truly that different. What distinguishes corporate offending is the complexing nature of the perpetrator that might serve to justify or explain the alternative approach to prosecution— however this does not warrant less severe punishment or treatment.

The Identical Harms

A criminal law system works by punishing those that society deems morally culpable for the crime committed. This is often done through a jury. It is the nature of the crimes and the intention that is inherent within them that distinguishes them from other areas of law such as tort or public law. The crime committed has caused a level of harm to either the individual or society as whole that is morally worthy of liability. It is thus why the level of harm caused by a crime arguably impacts and dictates the punishment. For example, the scale of sentencing

²³ *Ibid.*

²⁴ Steve Tombs, 'Corporate Crime' in Chris Hale, Keith Hayward, Azrini Wahidin and Emma Wincup (eds) *Criminology* (3rd edn ,OUP 2013) 49.

²⁵ Welsh (n 20).

²⁶ Richard Hyde, Scott Corfe, Bill Anderson-Samways, , 'Fraud is no Britain's dominant crime but policing has failed to keep up' (SMF, 4 March 2022)<
https://www.smf.co.uk/commentary_podcasts/fraud-is-britains-dominant-crime/> accessed 20 Apr 2023.

connected to grievous bodily harm or sexual assault/rape. The law forms clear correlations between the severity of punishment and the degree of harm caused – such as the different categories of touching inflicted under the Sexual Offences Act 2003. Therefore, harm does exist on a scale. However, the extent to which therefore that the harms caused by corporate offending are different to other types of offences is contestable. In sexual assault or rape offences the harm includes the direct physical injury to the victim but also extends to their emotional stress caused by the harassment. In drug offences, it might be argued that it is the harm caused to the individual's body, but arguably it is the wider destructive harm that drugs cause to society that has necessitated it as a criminal offence. In theft offences it is the harm caused by robbing a person of their property and autonomy.

In corporate offending the different scales of harm are similarly replicated. In 2007, the biggest financial crash since the depression of the 1920s hit both the UK and the world. This was largely due to the deliberate mismanagement of mortgage packages by senior bank executives and employees²⁷. However, despite some individual employees being prosecuted, no bank in the UK has ever been successfully prosecuted²⁸. The harm caused by the financial crash cannot be mitigated as corporate failure worthy of leniency. The ONS bulletin in its 10-year review found that almost 2.7 million people were made unemployed – the highest rate since the early nineties²⁹. It had a lasting impact on wages, keeping them in pay freeze until 2013 and caused productivity to halt completely, severely affecting the UK economy for years to come³⁰. Research has found that there were detrimental impacts on mental health, particularly in young men where the trend for suicide was found to have drastically increased³¹.

Furthermore, in 2017, a deadly fire in Grenfell tower was caused by the exploitation of deficient building regulations by subcontractors and developers. They used cost effective cladding in their refurbishments which led to the fire. It killed 72 people, destroyed 151 homes, and greatly affected the mental health of an entire community³². The harm to people and the wider community from these corporate crimes cannot be underestimated and yet these companies have largely evaded meaningful prosecution. Although a handful of individuals

²⁷ Brian Duignan, 'Financial Crisis of 2007-8' (Encyclopaedia Britannica, 30 Mar 2023) < <https://www.britannica.com/event/financial-crisis-of-2007-2008>> Accessed 17 Apr 2023.

²⁸ (n 3).

²⁹ Office for National Statistics (ONS), 'The 2008 Recession 10 years on' (ONS, 1 April 2008) < <https://www.ons.gov.uk/economy/grossdomesticproductgdp/articles/the2008recession10yearson/2018-04-30> > accessed 23 Apr 2023.

³⁰ *ibid.*

³¹ David Gunnell et al, 'The 2008 Global Financial Crisis: effects on mental health and suicide' (Policy Bristol Report, 03:2015)

³² BBC News, 'Grenfell Tower: What Happened?' (BBC News, 29 October 2019) < <https://www.bbc.co.uk/news/uk-40301289> > accessed 20 Apr 2023.

have been held accountable, the main companies that were involved have not³³. This is due to the lack of criminal charges brought against any of the corporations responsible for the Grenfell disaster. The harms are not different to the harms caused by the offences laid out previously, so why does this imbalance continue? It is mainly, as Tombs argues, due to the fact that they remain invisible in political and cultural spheres³⁴. Although Grenfell might have arguably raised the profile of these acts, there does not seem to be the same level of 'war' or crackdown against corporate crime that exists for other types of offences³⁵. It corresponds with previously established narratives around pictures of crime, which treat the 'moral culpability of the mine executive who cut corners knowingly' and the murderer very differently despite having the same level of intention, as Reiman theorises³⁶. The fact that there is minimal research and literature available into the harms caused by corporate offending is illustrative of the incongruent treatment.

Making Companies responsible

The main difference between corporate offending and other types of crimes are borne from the complexing nature of the corporate offender. As stated, the CJS relies on the identification doctrine to attribute liability to a company. There is no individual or mind that can be deemed culpable. It is this aspect which differentiates from other crimes such as sexual assault, robbery, or drug offences where the defendant can be easily identified – they can both be figuratively and literally be put on the stand for trial. Therefore, the question becomes is it appropriate to treat these companies as morally culpable agents in the remit of criminal law? Academic John Hasnas argues strongly that corporations cannot be considered moral agents worthy of criminal culpability³⁷. He agrees with Velasquez that it is 'logically incoherent' to attach moral responsibility as they are not causally responsible for their employees and cannot act intentionally³⁸. To punish what Hasnas sees as 'innocent' shareholders or board members in charge of the company is contradictory to the principles of criminal justice that seek to punish the guilty, not the innocent. However, this too lightly belittles the role of the corporation in society and negates the fact that often the innocent shareholder or senior executives' deliberate omission is sufficient to justify liability. Cavanagh makes the point that

³³ HC Research Paper (n 3) 8.

³⁴ Tombs (n 24).

³⁵ Steve Tombs and David Whyte, 'Introduction to the Special issues on Crimes of the Powerful' (2015) 54 *The Howard Journal* 1, 3-4.

³⁶ Reinman (n 19) 67-70.

³⁷ Hasnas (n 3) 1331.

³⁸ *ibid*, 1341.

even companies themselves are keen to be seen as 'distinct identifiable— almost human entities' who aim to be treated as a member of society, as argued by the companies in *McDonald Restaurants v Morris & Steel*³⁹⁴⁰. The harm these corporations cause should not be mitigated or ignored simply because it is difficult to identify a single person as culpable – the wider harm they cause to society necessitates a wider scope of culpability that justifies a finding of liability by the companies as a whole.

Conclusion

It is evident that defined narratives exist on what constitutes a criminal or a crime worthy of punishment which permeates throughout the CJS. The statistics show that there is a very different level of scrutiny and attention on punishing the crimes of the lower socioeconomic class and BAME individuals. A cycle occurs where the public use these narratives to demand persecution of these groups, subsequently meaning agents of the CJS, most notably the police, ignore crimes like corporate offending and economic crime and instead focus on the 'low hanging fruit'⁴¹. Yet, there is no tangible evidence to suggest that the harms caused by corporate offending are any substantially different to that of other crimes to justify this inequality. Harms exist on a scale and corporate crimes replicate that very scale ranging from financial loss, property damage, to even injury and death. What makes them different is the fact they are caused indirectly by series of decisions and omissions on the behalf of companies by their senior executives and employees. However, that does not justify the lenient and dismissive treatment that they have received. It is appropriate to find liability for corporate crime differently through avenues such as the identification doctrine, but the current treatment is disproportionate to the level of harm caused. As Reiman articulates: "there is no moral basis for treating on-one-one harm as criminal and indirect harm as merely regulatory"⁴².

³⁹ Neil Cavanagh , 'Corporate Criminal Liability: an Assessment of the modes of fault' (2011) 75 *Journal of Criminal Law* 414, 430.

⁴⁰ *McDonald's Restaurant v Morris & Steel* [1999] EWCA Civ 144.

⁴¹ Welsh (n 20).

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