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CORPORATE MANSLAUGHTER: AN EXAMINATION OF THE DETERMINANTS OF PROSECUTORIAL POLICY*

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Although the offence of corporate manslaughter has arguably been established in English law for over twenty five years, it has been prosecuted only twice and both indictments failed. There is, however, much prima facie evidence to implicate companies in reckless manslaughter.

The purpose of this paper is to present an explanation of why companies which appear to commit homicide have been treated with conspicuous indulgence by the state.

I begin by examining the evidence that incriminates companies in homicide. I look at how the state has responded to these deaths with marked leniency. A brief account is given of the historical development of corporate liability in this area. The state's prosecutorial policy is then considered from three perspectives, moving outwards from close focus to a wide historical angle: I examine (a) the mechanics of the criminal justice system, its procedures and the decisions of its personnel; (b) the role of public perception in influencing those decisions and (c) the aspects of the political economy which engender the public perception in question.

Introduction

There are over 7000 different criminal offences under current law (Seighart, 1980, p.15). In some cases it is perhaps not surprising to learn that the offences are only nominally so. It is, for example, still an offence of treason (and therefore punishable by death) under the Treason Act 1351 for someone to "violate the King's companion [wife] or the King's eldest

daughter unmarried..." although the Crown Prosecution Service is not, of course, overworked by this sort of offender. By contrast, however between 500 and 600 people are killed at work or through the operation of commerce each yearⁱ, more than twice the number who fall victim to personal reckless manslaughter.ⁱⁱ

A case at Glamorgan Assizes in 1965 demonstrated the validity of the indictment for corporate manslaughter. In the unreported case of **R v. Northern Strip Mining Construction Co. Ltd.** (*The Times*, 2,4,5 February, 1965) a welder-burner, Glanville Evans, was drowned when a railway bridge which the company was demolishing collapsed and threw men working on it into the Wye. Workmen had been instructed to burn down sections of the bridge, starting in its middle, which prosecuting counsel asserted was as ludicrous as telling a man sitting on the branch of a tree to saw that branch. The defendant company was acquitted on the facts of the case but neither eminent counsel appearing in the case (Mr. Philip Wien Q.C. for the Crown; Mr. W.L. Mars-Jones for the Defendant company) nor the very experienced presiding judge, Mr. Justice Streatfeild appeared to have any doubt about the validity of the indictment. Indeed, Mr. Mars-Jones for the defendant directly conceded the propriety of such an indictment when he said:

"it is the prosecution's task to show that the defendant company, in the person of Mr. Camm, managing director, was guilty of such a degree of negligence that amounted to a reckless disregard for the life and limb of his workmen."

February, 1965 therefore has some claim to be the first judicial recognition of the validity of the indictment for corporate manslaughter. Leigh, writing in 1969, accepted that the indictment had been established: "it now seems clear that corporations may be liable for manslaughter." (Leigh, 1969, p.59). Yet since that time 18,151 people have been killed at work without a single company having been convicted for homicide.

Prosecutions have followed against culpable employers in some of these cases but they have been for regulatory offences under legislation like the Health and Safety at Work Act, 1974, rather than for offences of homicide. The sanctions here are almost invariably low fines which carry no stigma and are, in the context of the wealth of many companies, the equivalent financial penalty of a parking fine for an individual (Carson, 1981, pp.269-289; Ermann, Lundman, 1982, p.148). The result of this is that neither social consciousness nor the annual Criminal Statistics register any serious homicide committed by companies although there is much *prima facie* evidence to suggest that many people are killed each year as the result of the criminal recklessness of corporations.

Apart from these deaths, companies have also been implicated in causing death in "disaster" scenarios like that of Zeebrugge where 193 people died in March 1987. A catalogue of some other recent incidents clarifies the scale of the problem and in all the following cases the relevant companies have been inculpated by the evidence (and with some an official enquiry report) in contributing in some significant way to the cause of death: the Kings Cross fire, 31 deaths in November 1987; the Piper Alpha oil rig fire, 167 deaths in July 1988; the Clapham train crash, 35 deaths in December 1988; the Purley train crash, 5 deaths March 1989 and the sinking of the Marchioness, 51 deaths in August 1989.

Why has there been only a single charge of corporate manslaughter (against P & O European Ferries (Dover) Ltd)ⁱⁱⁱ brought since the validity of such an indictment was clearly established in 1965? A number of explanations immediately present themselves but none are entirely convincing. The idea that companies have simply not come within the *actus reus* and *mens rea* of this crime during a 25 year period is implausible considering the very high number of deaths and the great diversity of situations from which they resulted. Alternatively it could be submitted that the reason for the absence of prosecutions for manslaughter is that the HSE has prosecuted for other regulatory crimes. This explanation, however, seems only to partly demystify the issue because it leaves unanswered the question as to why it was thought appropriate for these incidents to result in regulatory offences and for only one of them to involve police action and prosecution for manslaughter. Wells has characterised the causal problem (1990, 243):

"It is not always easy to say which comes first -the reluctance to use criminal law which leads to specific regulation, or the existence of specific regulation which diverts attention from the possibility of prosecution for offences such as manslaughter, murder or assault."

Some forceful argument has been advanced recently on the theme of the most effective response to corporate violation of safety law (Pearce and Tombs, 1990; 1991; Hawkins, 1990, 1991; Bergman, 1992,). Pearce and Tombs have argued that "a punitive policing strategy is necessary, desirable and practicable." (1990, 440), whereas Hawkins has argued that although "stricter enforcement and harsher penalties for regulatory violations are in many instances necessary" (1990, 444), punitive enforcement should be used discriminately. As Wells has argued, however, in much of her pioneering work in this area (1988, 1989, 1990), the significance of the omission to prosecute companies for serious crime is that it perpetuates to social perception that companies do not commit serious violent crime.

CRIME IN THE SUITES

The evidence of corporate manslaughter

There is much evidence to suggest that a very high number of the 18,151 deaths occurring within a commercial setting during the last 27 years were classifiable, at least *prima facie*, as instances of reckless manslaughter. It is also possible that some deaths could have entailed prosecutions for "unlawful act" or "constructive " manslaughter. This crime occurs where death results from the defendant's unlawful and dangerous act, dangerous in the sense that it is likely to cause direct personal injury, though not necessarily serious injury (Smith and Hogan, 1992, 366). For a conviction here, it is necessary that the unlawfulness of the act the defendant (D) does arises other than by negligent performance. So an act which has become criminally unlawful simply because it was negligently performed, for example, negligent driving, does not constitute an unlawful act for the purposes of "constructive" manslaughter, the name given to the crime in the first category. Because almost all of the corporate conduct which results in death is intrinsically lawful this charge is largely inappropriate. However, as Wells has argued (Lacey, Wells, Meure, 1990, 243) unlawful act manslaughter could be used in some cases "to combine the conduct-based regulatory offence [eg. under the Health and Safety at Work Act, 1974] with the result-based common law.

The crime of reckless manslaughter is committed where a defendant (D) does an act which creates an obvious and serious risk of causing physical injury to another -(a) not giving thought to the possibility of there being such a risk; or (b) having recognised that there was some risk involved, going on to take it (Smith and Hogan, 1992, pp.372-5). For a corporate defendant to be convicted it must be proven beyond a reasonable doubt that the *mens rea* for the offence existed in at least one "controlling mind" of the company.^{iv}

The *mens rea* for this offence is largely governed by a principle of *objective* culpability. So a defendant may be convicted for an offence requiring *Caldwell* recklessness (ie objective recklessness; Mr. Caldwell was the eponymous defendant in a case of 1981^v) even if s/he did not personally appreciate a risk that would have been recognised by an ordinarily prudent person. This departs from the principle normally applicable for serious offences - that the defendant must have been individually wicked or culpable eg. by consciously taking an unjustified risk. Against this, however, it may be recalled that *mens rea* as an element of crime is not quite as traditional as is sometimes assumed because it has only applied in today's subjective form since 1898 when an accused was permitted to give evidence in his/her own trial. The justification for the objectification of guilt in some areas of criminal law is the imposition of basic standards of care for life, limb and property (Smith & Hogan, 1992, p.60-9). This concept is not quite as severe as the imposition of guilt for criminal negligence. This is because for recklessness, D may not be liable if s/he *has* considered whether or not there is a risk and concluded wrongly and unreasonably that there was no risk, or so small a risk that it

would have been justifiable to take it.^{vi}

There are many cases where surgeons and anaesthetists have been prosecuted for reckless manslaughter in circumstances where they were engaged in trying to save or improve a patient's life.^{vii} However, whilst the prosecuting authorities have been so conscientious in the prosecution of individuals in what might be termed "ordinary" manslaughter cases and also many arising from some quite unusual circumstances, they have not been especially concerned to prosecute companies for the equivalent crime.

The Scale of the Problem

It is appropriate to consider the scale of the problem. If there is a fault or anomaly in the state's prosecutorial policy it is not one which affects only a small, peripheral group of cases. The evidence suggests that there are *hundreds* of cases appearing suitable to attract charges of corporate manslaughter each year which are not treated as such by the police, CPS and DPP. Over any twelve month period, the number of deaths at work is, on average, about three times the number of cases resulting in convictions for manslaughter (excluding "diminished responsibility" cases- those under S.2 of the Homicide Act, 1957). Over the decade, 1979-1989, the number of annual convictions for manslaughter, (excluding S.2 cases) fluctuated between 99 (1989) and 192 (1987). The number of people killed at work over a twelve month period is notably higher, for example: 558 during 1987/88, 730 during 1988/89 and 681 during 1989/90 (Health and Safety Executive, 1987/88; 1988/89; 1989/90)

Examining the same problem in the USA, Reiman has given the issue a particularly dramatic perspective. He estimates that in 1972 the number of people in the USA dying from occupational hazards (diseases and accidents) was 114,000, whereas only 20,600 died as victims of personal homicide. Represented on a time clock for murder there would be one personal killing every 26 minutes but:

" If a similar clock for industrial deaths were constructed...and recalling that this clock ticks only for that half of the population that is the labour force - this clock would show an industrial death about every four and a half minutes! In other words in the time it takes for one murder on the time clock, six workers have died just trying to make a living! " (Reiman, 1979 cited in Box, 1983, p.26)

The grisly figures of death at work represent the number of people who have been crushed, electrocuted, asphyxiated, burnt, drowned, impaled and so forth. What is the evidence that any significant number of them could be regarded, *prima facie*, as instances of corporate manslaughter? Reports of the Health and Safety Executive (HSE) have consistently demonstrated that most of these occupational deaths were avoidable and could have been

prevented by the management of the companies concerned. *Blackspot Construction* is an HSE report which analyses the circumstances of 739 deaths in the construction industry between 1981 and 1985. Referring to these deaths, J. D. Rimington

, the Director-General of the HSE said "They represent a very saddening loss of life, particularly *because most of the deaths could have been prevented*" (emphasis added) (Health and Safety Executive, 1988, p.1). The report shows that the immediate reasons for most deaths were lack of supervision, inadequate training and lack of attention to detail:

" The figures in this report clearly show that the basic causes of the deaths of 739 people from 1981-1985 have not changed over the last ten years. There were, on average, two deaths every week on construction sites. 90% of these could have been prevented. *In 70% of cases, positive action by management could have saved lives.*" (emphasis added) (Health and Safety Executive, 1988, p.4)

In another report, *Agricultural Blackspot*, a study of 296 deaths between 1981-4 the HSE concluded that in 62% of cases "responsibility rested with management" (HSE, 1986, p.12). Again, in *Deadly Maintenance*, a study into deaths at work in a range of industries, the HSE concluded that "management were primarily responsible in 54% of cases." (1985, p.8) According to the law stated in **R v Northern Strip Mining Construction Co. Ltd.** (1965) and the preliminary ruling of Mr. Justice Turner in **R v P & O European Ferries (Dover) Ltd.** (1990)^{viii} it is possible for a company to be convicted of manslaughter if it can be proven beyond reasonable doubt that : (1) a victim who died had been subjected to an "obvious and serious risk" of some physical injury prior to death and (2) that a senior manager or director of the company who was a "controlling mind" of the company was responsible for an act or omission which lead to the death and (3) that when the relevant director(s) committed the *actus reus* s/he had the appropriate *mens rea* ie that they behaved as they did having (a) given no thought to the possibility that a worker would be put in danger of physical injury , or, (b) having recognised there was such a risk, to have allowed it to continue. It is also necessary to prove (4) that the relevant conduct of the company directors was at least a "substantial cause" of the death, ie that they "contributed significantly" to the death.^{ix}

In English criminal law there are important doctrinal barriers to convictions for corporate manslaughter, in particular there is the courts' rejection of the principle of "aggregated fault" by which the partial fault of several company directors might be combined to incriminate the corporation. This issue is addressed below (p.17), but here it is relevant to note that such a principle does operate in some systems like the Dutch Criminal Code and could be introduced to English criminal law without significant repercussions in other parts of the law (Field and Jorg, 1991, 163).

The principle of "identification", by which a conviction is only possible where someone sufficiently senior in the company as to be identified *as* the company acted with the necessary *mens rea* (blameworthy mind), is difficult to apply, especially in large companies (see below, p.). Again, however, there are legal systems, like that of the Netherlands, which work without such a rule (Field and Jorg, 1991, 167) and the rules could be adopted in other countries.

These principles, whilst quite established, are not lapidary. They are arguably no more resistant to change than the ancient rules of law that a 'husband cannot commit rape against his wife' and that '*Hansard* cannot be referred to in a law court to ascertain the meaning of legislation', both of which rules have recently been abolished by the House of Lords^x. If the law were to be changed to facilitate prosecutions for corporate manslaughter a notable consequence of would be the high number of incidents which could be processed as serious crimes; the necessary proofs in respect of legal "recklessness" and causation would not be significantly more challenging than in normal cases of personal manslaughter.

From the evidence available from transcripts of proceedings in Coroners' Courts and from HSE reports it seems clear that there would be a reasonable probability of proving these matters to the required standard in many cases. It is important to recall that many of the deaths in particular industries result from distinctly repetitive causes. The crux of the Crown's failure to prove its case in the Herald of Free Enterprise prosecution was that similar ships in the past had worked without any mishap for seven years during which time there had been more than 60,000 sailings of this class of vessel. It was argued that there was nothing to alert the defendants to the danger presented by their system of ensuring the bow doors were closed before the vessel left port. To people in the position of the defendants, it was argued, the risk was not "obvious". This, however could not be said about the risk of physical injury or death in other corporate undertakings which have resulted in major disasters or workplace fatalities. As Bergman has commented:

" Last year alone there were 147 fatalities and 4010 serious injuries on construction sites - 3 deaths and 80 injuries a week- many resulting from identical causes for example dangerous scaffolds or collapsing trenches. It would be much easier to prove that the risk of injury to the person(s) who subsequently died was, in many cases, "perfectly evident" [Mr. Justice Turner's preferred phrase in the P & O case] and "immediately apparent" to any reasonable director of a construction company" (Bergman, 1990B, p.1501)

The HSE's case reports and allocation of responsibility in studies like *Blackspot Construction* further demonstrate that the criteria for reckless manslaughter appear, *prima facie* , to be

present in many of the cases which, if they are prosecuted, are only charged as regulatory offences under the Health and Safety at Work Act 1974. For example, in the HSE's study of Roofwork deaths we learn that "In the vast majority of fatal accidents on roofs, management and those in charge of the work did not exercise sufficient control to ensure that relatively simple precautions were taken." (HSE, 1988, p.27) Looking at 'Demolition and Dismantling' the HSE note that 95 people died doing this type of work during the period under review and says "of the 95 accidents, 67 were caused by management allowing unsafe systems of work to be used." (HSE, 1988, p.31). It is worthy of note that in both of these HSE statements the word "accidents" is used to describe deaths for which there are, on the HSE's own admission, identifiable persons who have played a substantial part in causing the deaths. In other contexts it would seem quite improper to refer to such cases as "accidents". Even if the word "accidents" is used to convey the meaning of "unintentional killing" this is unhelpful. On 30th April, 1981 Edward Seymour knocked down Iris Burrows with his lorry and killed her. In one sense this was an "accident" because it was not an intentional killing. However, Mr. Seymour was convicted of the serious crime of reckless manslaughter for this incident and was sentenced to five years imprisonment^{xi}. This use of the term "accident" (and its grammatical variants) proliferates through the HSE literature and is very misleading. The point is of more than linguistic significance. The use of such terminology reflects a tacit assumption about the nature of these deaths (even when HSE evidence in the same sentence contradicts the suitability of such a word) and helps promote such an image in the public perception.

Most prosecutions arising from commercially caused deaths are brought in the Magistrates' Court where the maximum fine is £2000 (rising to £5000 in October, 1992). Imprisonment is an available sentence but a custodial sentence has only been given once since the Act's commencement on January 1st 1975, and that was a 12 month suspended sentence imposed on the director of a small construction company in 1987 for failing to have an asbestos licence and ignoring a prohibition notice. In 1988/9 of those cases of fatalities at work which resulted in prosecutions, only 3% resulted in prosecutions in the Crown Court where the average fine was £2,145. The remaining 97% were taken to the Magistrates' Court where fines averaged £505 (Labour Research, 1990, p.13). Nevertheless, even where the prosecution goes to the Crown Court where the fine is unlimited, the fines, which sometimes appear high compared to personal penalties, are still quite meagre when measured against the net income of the relevant companies. For example the HSE Annual Report 1987/8 boasts:

" The fine of £750,000 imposed in March on British Petroleum Ltd in the Scottish Courts for the failure of safety precautions at Grangemouth resulting in the loss of three lives represents a landmark in the application of safety law, and marks the seriousness with which the judiciary are prepared to regard serious breaches by

firms with the heaviest responsibilities and where there is the potential for disaster." (HSE, 1987/8, p.30)

But this fine should be evaluated in its proper context. When we turn from the HSE's Annual Report for 1987 to that of BP for the same year, we see that the £750,000 fine should be judged against BP's profit (after taxation but before extraordinary items) which was £1,391,000,000 (British Petroleum, 1987, p.53). The fine therefore amounts to 0.05% of the company's profit after taxation. This is the equivalent of an £7.50 fine for a person whose net earnings are £15,000, an unlikely disposal for someone whose culpable conduct has resulted in three deaths.

It can therefore be argued that many thousands of one of the most serious crimes on the criminal calendar are not being prosecuted as such. Some are left as "accidents" whilst others are dealt with as administrative offences. The fact that there is no intention to kill in these cases should not lessen the aversion with which they are treated. In orthodox morality intention to do wrong is regarded with greater abhorrence than recklessness as to whether or not harm occurs, but as Reiman has argued, (Reiman, 1979, p.60) a reverse formula can be just as cogent: if a person intends doing *someone* harm there is no reason to assume that s/he poses a wider social threat or will manifest a contempt for the community at large, whereas if indifference or recklessness characterises the attitude a person has towards the consequences of his or her actions then s/he can be seen as having a serious contempt for society at large.

CORPORATE LIABILITY

For the early part of its history, the corporation lay outside the criminal law. "It had a soul to damn and no body to kick" (Leigh, 1969, p.4) If a crime were committed by the orders of a corporation, criminal proceedings for having thus instigated an offence could only be taken against the separate members in their personal capacities and not against the corporation itself (Stephen, 1883, II, p.61) In 1701 Lord Holt C.J. is reported as having said that "A corporation is not indictable but the particular members are".^{xii} This was a consequence of the technical rule that criminal courts expected the prisoner to "stand at the bar" and did not permit "appearance by attorney".^{xiii} This idea was supported by Roman Law. It was argued that as it did not have an actual existence, a corporation could not be guilty of a crime because it could not have a guilty will. Further it was said that even if the legal fiction which gives to a corporation an imaginary existence could be stretched so as to give it an imaginary

will, yet the only activities that could be consistently ascribed to the fictions thus created, must be such as are connected with the purposes which the corporation was created to accomplish. A corporation, the argument ran, could not, therefore, commit a crime because any crime would necessarily be *ultra vires* the corporation. Moreover a corporation is devoid not only of mind but also of body and therefore incapable of receiving the usual punishments: "What? Must they hang up the common seal?" asked an advocate in 1682.^{xiv}

The proliferation of companies in modern times and the extent of their influence in social life has necessitated accountability within the criminal law. The legal question arose as to how a company's guilt could be determined. The doctrine of "identification", by which a corporation can be found criminally liable through the conduct and mental state of certain of its personnel was recognised by Mr. Justice Streatfeild in **R v. Northern Strip Mining Construction Company** (1965). It was later given express approval by Mr. Justice Turner in his preliminary ruling, in 1990, on whether a corporation could be properly indicted for manslaughter (arising from the charges brought against P & O European Ferries for the sinking of the Herald of Free Enterprise), Mr. Justice Turner said:

"...where a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime of manslaughter...it as well as its controlling mind or minds, is properly indictable for the crime of manslaughter."

Who are the people representing the "controlling minds" of the corporation? Denning L.J., as he then was, has answered in an anthropomorphic metaphor by saying that it was not those who represented the "hands which hold the tools" but those "who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and it is treated by the law as such."^{xv} A variety of criteria and phrases for determining who in a company thinks and acts *as* that company have been suggested in the leading case of **Tesco Supermarkets Ltd. v. Nattrass** (1972). Viscount Dilhorne, for example, thought that it would have to be someone:

"...who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders." ([1972], AC 153)

In any event, it is a question of *law* whether a person, in doing particular things, is to be regarded as the company or merely as the company's servant or agent.

A CRIME WITHOUT CONVICTION

In seeking to explain prosecutorial policy in respect of commercially caused deaths it is helpful to examine the matter from three points of vision. First we can examine the operation of the *mechanics* of the criminal justice system in this area, looking at what part the procedures of the police, the HSE inspectors, the Coroners' Courts and the Crown Prosecution Service (CPS) play in precluding the prosecution of companies for manslaughter. Second, the role of *public perception* in influencing the judgements of the actors in the criminal justice system is evaluated. What tacit assumptions, if any, inform the personnel whose decisions have resulted in the current prosecutorial policy? Finally, we can examine the broader context of the *political economy* to discover what factors may help to explain the development of the axioms which produces the public perception which in turn influences the way that decision-makers in the criminal justice system choose to act.

1. THE MECHANICS OF THE SYSTEM

In brief, the main procedural reason why there are no prosecutions for corporate manslaughter is that after a workplace death the police arrive and take usually only short statements from a company spokesperson as responsibility for investigating these deaths lies with the HSE. These deaths are alone in being regarded by the legal system as properly investigated by a body other than the police. Even other areas of non-conventional crime, for example Road Traffic Act offences, are regarded as sufficiently serious to be dealt with by the police. Yet the HSE is only concerned with violations of the Health and Safety at Work etc. Act 1974, *not* with serious crimes like manslaughter. In these circumstances, therefore, consideration of manslaughter is systematically excluded. As Wells has explained (1990, 243), regulatory schemes are seen as quasi-criminal and

"...tend to be couched in terms of failure to follow a prescribed process rather than being directed towards results. So that whereas conventional crime prohibits causing grievous bodily harm, safety regulations are concerned with failure to fence dangerous machinery."

There is, therefore, behind the annual figures for Health and Safety at Work Act convictions, a catalogue of injuries and deaths which do not feature as part of any official crime statistics.

The HSE has severely restricted resources (Foley, 1980, p.8) and is mainly concerned, according to its Director-General, John Rimington, to "negotiate compliance" with employers, the "primary effort" of the Executive is "of assisting and advising the generality of well-conducted companies" Bergman, 1990A, p.1108). For these reasons the HSE is not as tenacious in pressing for a manslaughter charge as it might be. There is no legal reason why the police should not investigate a company and its directors after a workplace death. The HSE and CPS have responded to criticism by arguing that it is unnecessary for the police to be

involved in the full investigation since the HSE will itself refer suitable cases to the CPS for its consideration. John Rimington has said " Discussions between the HSE inspector and the police will take place if the most appropriate charge is one not available to an HSE inspector." (Bergman, 1991, p.27). There is, however, no evidence of such a procedure having been put into effect. Since 1974 when the HSE was established, there have been 9,050 deaths at work yet the HSE has evidently not referred any case to the CPS. The one prosecution for manslaughter for a workplace death which was taken against a director in the last 16 years was referred to the CPS by the police not the HSE^{xvi}.

There are other procedural obstacles and caveats which lie on the path to a prosecution for corporate manslaughter. The almost invariable pattern of events at the inquest following a workplace death is for the coroner to direct the jury to a verdict of "accidental death". Only if a verdict of "unlawful killing" is returned would the case be referred to the DPP for his consideration as a possible case of manslaughter. In order, though, for a jury to be able to decide that there had been an "unlawful killing" by a company, it would be necessary to initially recognise the *mens rea* in at least one director or someone who was a "controlling mind " of the company. Yet directors and senior managers are almost never called to give evidence at these inquests. The coroner has the sole right to summon witnesses to an inquest so s/he must bear the main responsibility for their absence from these proceedings but it should be noted that in deciding who should be called to give evidence, the coroner relies on the statements collected by the police and the HSE inspector who visited the scene of the death. However, neither the police nor the HSE inspectors are disposed to take statements from such senior people.

It is also important to appreciate the role of lawyers at the inquests. Because of the difficulties, outlined above, in relying on coroners to call directors as witnesses so that the jury may properly consider a verdict of "unlawful killing", the availability at the inquests of lawyers who have the aim of guiding the court in that direction, becomes imperative if there is to be a proper hearing of all matters. There are, however, very few attempts by lawyers to intervene at inquests with the aim of encouraging an "unlawful killing" verdict. There is no legal aid awardable for proceedings in a coroner's court^{xvii} so bereaved families either have to pay for these services themselves or rely on the support of the victim's Trade Union if s/he belonged to one. In fact, many families are not in a position to pay for representation at the inquest. Even many of those who could pay must fail to see any point in taking such action. They may wish to try and pursue civil litigation to receive compensation but often the solicitor they consult about that matter will not wish to tackle the "controlling minds" of the employing company at the inquest because to do so would be seen as hostile and adversarial (part of the

criminal law process) and not conducive to a negotiated settlement (the civil law process).^{xviii}

Trade Unions can pay for legal representation at an inquest but, by the nature of the work in which many of the victims have been engaged, there is low union membership and relatively few such sponsorships are made. Between 31 March, 1989 and 1 April, 1990, 427 people were killed at work of whom 139 (over one third) were working in the construction industry. Most of these victims were not trade union members but were working "on the lump".

According to Foley:

" By 1990, over 1.5 million people were employed in the building industry; six per cent of the country's total work force...In London and the South East...lump workers accounted for 80 per cent of the labour force on many sites." (Foley, 1990, p.6)

The discretion of the coroner himself cannot generally be relied upon to facilitate the discussion of an "unlawful killing" verdict in cases involving corporations. For example, the coroner for East Kent, Mr. Richard Sturt, had ruled at the Zeebrugge inquest on 19 September, 1987 that as a matter of law a corporate body could not be guilty of manslaughter. On an application for judicial review by members of the victims' families, a Divisional Court held that a corporate body could be liable for manslaughter. Even so, the coroner had guarded himself by stating that if he was wrong about the capacity of a corporation, nevertheless there was insufficient evidence to support a conclusion that those who represented the directing mind and will of the company had been guilty of conduct amounting to manslaughter. The jurors did not accept the advice of Mr. Sturt and returned a verdict of "unlawful killing". Because of the publicity surrounding the sinking of the Herald of Free Enterprise, the very high number of deaths (192) and the particularly damning Judicial Inquiry Report, (Sheen, 1988) the jury would have felt emboldened to defy the advice of the coroner in a way which may well not apply in most cases.

Mr. Sturt, by virtue of being H.M. Coroner for East Kent has also presided over all the inquests (seven) into the deaths arising from work on the Channel Tunnel. In each case he has withdrawn the option of an unlawful killing verdict from the jury leaving them with no alternative but to return a verdict of "accidental death". In the last three inquests he told the jury that they did not even need to leave the courtroom to discuss the case amongst themselves.

Prosecutions for manslaughter are made especially difficult by the legal refusal to adopt a principle of "aggregated fault". The point was argued in the judicial review brought by members of the Herald Families Association. They sought to establish that the instances of fault amongst several people acting for P & O could be combined so as to show that the

company itself had been reckless. John Alcindor was deputy chief superintendent of P & O's marine department. He had received a suggestion that indicator lights showing the state of the loading doors be fitted to the bridge. He did nothing to implement that suggestion. Jeffrey Develin, chief superintendent of the marine department and a director of the company bore a major responsibility for the safety of the fleet and the systems in operation on board vessels. It was Mr. Develin's department which failed to install the indicator lights and instead passed the matter on to the technical department. Wallace Ayres, a director and head of the technical department failed to respond to two requests for indicator lights to be fitted to the bridges of vessels.

On this matter, Bingham L.J. ruled that:

" Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary *mens rea* and *actus reus* against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such."^{xix}

This principle here has been endorsed elsewhere. It is adopted, for example, in Clause 30(2) of the Law Commission's Draft Criminal Code Bill (Law Com., 1989, p.76) and David Willcox, a solicitor with Partner, Beaumont & Son, who act for a range of airline companies has argued^{xx} that this position is necessary to prevent a company being convicted on too low a threshold of evidence. Wells has eloquently shown (1988, 1989, 1990) how notions of personal responsibility in criminal law are unsuitable when applied to corporations. She has noted (1989, 932) that

"The concept of atomistic actors deviating from the "norm" of conformity is commonly invoked in the language of the criminal justice system and in the media and other areas of social control such as schools. This image is particularly inappropriate for a large corporation. How would this help in a company which devolved its centres of power to semi-autonomous regional managers? How would this help us to a legal response to a car manufacturer which, by a series of cost cutting policies, allowed its robots to be programmed to observe a lower degree of safety on the installation of brakes."

The Bingham L.J. ruling appears to make it virtually impossible for a company to be convicted for manslaughter because the way that responsibilities are distributed through a corporate body makes it extremely unlikely that the necessary fault will ever reside entirely in a single identifiable individual. The analogy with a personal defendant used by Bingham L.J. seems inappropriate. Companies gain many benefits from the principle of aggregation. Indeed, the

very notion of a separate legal personality being accorded to a group of people *qua* a company is founded upon the principle of aggregation. With benefit comes responsibility. *Qui sensit commodum debet sentire et onus* (he who has obtained an advantage ought to bear the disadvantage as well). It is perverse to dispense with the principle of aggregation just at the point when its application would implicate the company in a serious crime. This apparent perversity, however, becomes more intelligible in the context of a political economy which accords priority to the commercial goal of profit and which is thus loathe to render seriously criminal conduct which can be seen as simply as commercial impetuosity.

We have looked at how, through the *mechanics* of the criminal justice system there are intrinsic obstacles to a conviction for corporate manslaughter. The cursory investigations by the police and HSE inspectors; company directors being left uninvestigated; the unwillingness of coroners to facilitate proper consideration of unlawful killing verdicts; the CPS's misguided reliance on the HSE to refer suitable cases of suspected manslaughter and the HSE's self-image of an advisory adjunct to industry. The operation of much of this system is perpetuated because of the social perceptions of the people who operate it. It is appropriate to look at this in some detail.

2. SOCIAL PERCEPTIONS

Owing to various factors of social and historical development it is very common for deaths at work to be perceived as "accidents" or, in any event, if they are wrongs, they are seen as wrongs which are suitably dealt with as infringements of regulatory legislation.

So popular ideas and implicit assumptions play a part in determining how the criminal justice system operates. In discussing the law which prevents sleeping in public transport facilities in many states of the USA, Chambliss and Seidman point out (1971, p.82) that the conduct at which the law is aimed is clearly defined but in practice certain types of people sleeping in the stations will be treated differently from others. A homeless, unwashed vagrant will be treated differently from a neat executive who has nodded off whilst waiting for a commuter train even though both people are asleep at a station. The reason why the HSE inspectors do not investigate directors after someone has been killed at work is partly because of limited time and resources but also because of commonly held notions about the nature of serious crime. As Quinney has observed:

" Crime is not inherent in behaviour but it is a judgement made by someone about the actions and characteristics of others." (1970, p.16)

Coroners may be seen to share the same sort of assumptions as police officers and HSE inspectors. Such an outlook is the product of the axioms arising from the society we inhabit.

Swigert and Farrell have stated:

" Culturally implicit parameters of law are also evident in the case of homicide. A fatal argument between friends following a Saturday evening of drinking, for example, would leave little doubt as to the applicability of the criminal statutes. Fatal bodily harm , however, may just as easily be the product of dangerous factory conditions, polluted air or unsafe motor vehicles as it is of bullet wounds, knifings or beatings. The latter clearly fall within the meaning of homicide; the former do not. The distinction is an implicit one." (1980-1, p.163)

In the same vein, Wells has argued that:

"Sandwiched between the Zeebrugge tragedy and the Kings Cross disaster came the Hungerford shootings. Nearly 200 people drowned off Zeebrugge in March, 31 died at the Kings Cross fire in November and 16 were fatally shot by a gunman who ran amok in Hungerford in August, 1987. The deaths there were immediately seen as *criminal*. The Prime Minister in a widely reported remark, said that it was so much more shocking than other tragedies *because* it was not an accident but a crime." (1988, p. 791)

So the social perceptions of the actors in the criminal justice system (police officers, HSE inspectors, coroners, lawyers and CPS officers) can help to explain why the system works in the way that it does.

The mechanics of the criminal justice system have worked to preclude prosecutions for corporate manslaughter. Nonetheless, there are ways in which the system could have been made to work so as to allow for such indictments to have been made. It is largely due to the interpretations of circumstances made by the *dramatis personae* that the system is not made to operate in a way which would indict companies for manslaughter. It thus becomes necessary to ask why and how these people come to acquire these precepts. To do so it is helpful to consider the historical and economic factors which have engendered certain ideas.

3. HISTORICAL AND ECONOMIC INFLUENCES

The regularity of such a high number of occupational deaths each year (often more than the annual number of reported personal homicides)^{xxi} suggests that the propensity for companies to conduct their affairs in ways that result in death is not attributable to erratic influences like the occasional enterprise of a few extraordinarily careless or unscrupulous firms.

In looking at the operation of the 1833 Factory Act, which set out to "regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom", Carson sought to explain why factory inspection, despite its operation under the criminal law, came "to accept violation of the law as a conventional feature of industrial production, only meriting

prosecution under the most unusual circumstances." (1979, p.51) Thus Alexander Redgrave, a Factory Inspector, could openly state in 1876 that:

" In the inspection of factories it has been my view always that we are not acting as policemen,...that in enforcing this Factory Act, we do not enforce it as policemen would check an offence which he is told to detect."

Carson concluded that the operation of the law developed in this way in order not to constrain the economic development taking place in the nineteenth century.

In his later study of the high death rate in the North Sea oil fields, Carson notes that by the middle of the 1970's the rate of "accidental" death in the oil industry was 11 times higher than that for construction, 9 times higher than that for mining and 6 times higher than that for quarrying. His evidence indicates that the accidents were not simply what is only to be expected when an industry undertakes hazardous operations at the very frontiers of technology but rather the result of factors like poor communication, failure of equipment, poor working practices and lack of safety precautions". Throughout the 1970's the British government was under considerable pressure to extract North Sea oil as rapidly as possible for economic reasons including a pressing balance of payments problem. The government was heavily dependent on the expertise and resources of the major transnational oil companies who would only act quickly if they were left relatively unhampered by any requirement for costly and time-consuming safety precautions. The government eventually acceded to their demands about the legislative framework in which the companies were to operate. Carson concludes that most of the 106 deaths which had occurred up to December, 1980 (which deaths he analyses in great detail) could have been avoided if the "political economy of speed had not been allowed to prevail over the "political economy of employee's lives". Carson cites the words of an American oil man calling the square dance moves from a ceilidh play by John McGrath (Carson, 1981, p.46),

Pipe that oil in from the sea
Pipe those profits - home to me
I'll bring work that's hard and good-
A little oil costs a lot of blood.

Concluding this study, Carson notes that he was struck by the parallels between the history of North Sea oil safety and that of the earliest efforts to impose statutory controls upon the operations of the 'dark satanic mills' of the nineteenth century. In both periods:

" there were immutable laws of capital which rendered it 'imperative' that regulation should be minimized. Then, as now, it was constantly threatened that capital

would flee if subjected to any more constraints." (1981,p.302)

The paramount economic priority of companies in capitalism is to be profitable concerns. It is their essential purpose. Scruples, moral considerations and legal restraint, in different measure for different people, restrict injurious conduct in the quest for profit. During a recent drought when water supplies were simply exhausted in some parts of England, at least two groups of young men were discovered trying to *sell* buckets of water to old, housebound people. Their conduct may be regarded as morally repugnant but it was not illegal and it was, in a strict sense, within the province of what has been described as "enterprise culture".

The economic environment exerts a strong pressure on companies to take risks. This was directly conceded by Dr. John Cullen, the Chairman of the Health and Safety Executive, when he stated:

"The enterprise culture, the opening up of markets, and the need to survive competition place businesses under unprecedented pressure...the scale and pace of technological change means that increasing numbers of people -the public as well as employees- are potentially at risk." (*The Guardian*, March 4, 1989)

Indeed, as many business people often claim, from the launching of a company onwards the process of running a company is constantly beset with a variety of risks. Companies are relentlessly having to remain "competitive" by keeping their expenditure as low as possible. Clearly, most companies will not knowingly jeopardise the lives of their customers or the general public but there are enough documented instances of such risks apparently being taken to demonstrate the compelling pressure of commercial competition.

On 13 September, 1978, Ford Motor Company was indicted in Indiana, USA for reckless homicide. A Grand Jury decided after three days of deliberation that Ford was to be tried as a responsible party for the deaths of three teenagers, who were burnt to death when their Ford Pinto burst into flames following a low-speed, rear-end collision. Many people had died in similar incidents all over the USA. Dowie has stated that "by conservative estimates Pinto crashes have caused more than 500 deaths" (1987, p.14). Wells has argued (1990, 245) that the significance of the case is not its result (the company was acquitted) but that a company was considered to be triable for homicide and that "a grand jury were prepared to apply the vocabulary of criminal liability to corporate harm". She has cautioned, however, that an important part of this process of extending the "cultural parameters" of homicide in the *Ford Pinto* case was the extent to which the harm resulting from the defective fuel tank design could be personalised and characterised in the same way as an incident of conventional crime (1990, 246).

The actual trial resulted in the company being acquitted but evidence was led in the case which demonstrated that Ford was aware of the danger posed by the Pinto but had used a cost-benefit calculation to decide that the cars should be left, unaltered with their owners. It would have cost less than \$11 per car to remedy the defect but calculations had shown that subsequent insurance claims resulting from the number of people predicted to be killed and maimed would be \$47.5 million whereas it would cost \$137 million to recall and alter all the Pintos it had sold. This sort of cost-benefit analysis, which relegates human life below the considerations of profit, is not peculiar to Ford Motor Company or to recent developments. It is a feature endemic to the system of commerce.

Max Weber commented on this issue in relation to its implications for capitalism in American cities. In 1904 he observed that:

" After their work,...[Chicago] workers often have to travel for hours in order to reach their homes. The tramway company has been bankrupt for years. As usual, a receiver who has no interest in speeding up the liquidation, manages its affairs; therefore, new tramcars are not purchased. The old cars constantly break down, and about four hundred people a year are thus killed or crippled. According to the law, each death costs the company about \$5,000 which is paid to the widow or heirs, and each cripple costs \$10,000, paid to the casualty himself. These compensations are due so long as the company does not introduce certain precautionary measures. But they have calculated that the four hundred casualties a year cost less than would the necessary precautions. The company therefore does not introduce them." (Swigert and Farrell, 1980, p.166)

A society in which the social production of goods and services is dominated by commercial considerations will necessarily generate a certain human sacrifice. These are portrayed as people who die for the greater good of the majority. What originates as a necessary consequence of the economic structure is translated into a social axiom. This accords with the view expressed by Marx in 1859 when he wrote:

"In the social production of their existence, men inevitably enter into definite relations that are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence determines their consciousness." (1970, p.20-1)

To properly examine why there has not been a single successful prosecution for corporate

manslaughter we need to examine (a) the *modus operandi* and perceptions of the police, HSE inspectors, lawyers, coroners and CPS officers and (b) the historical and economic environment which develops and influences those perceptions. The illumination afforded by such a combination of interpretative, phenomenological and structural analyses has been demonstrated by Nelken in his detailed study of the restricted effects of the 1965 Rent Act. Examining why the legislation, which had been hailed as a great reform, was in fact of very little use, Nelken argued

"..[the] necessity to draw on both structural and interpretative approaches in order to provide a convincing account of the emergence and implementation of law. Proponents of structural approaches now readily admit that any examination of the structural constellation of forces cannot be used to read out the emergence or content of a given piece of legislation...whilst those who adopt an interpretative perspective are obliged to concede that the negotiation of meaning is biased in favour of structurally powerful groups." (1983, p.211)

If this approach, which allows us to see a "coherence without conspiracy" (1983, p.212) is taken to the issue of corporate manslaughter we can see how a combination of "negotiated meaning" and the "structural constellation of forces" produce a systematic reluctance to convict companies of manslaughter.

CONCLUSIONS

"In a grotesque footnote to a story on the report, one newspaper noted that 30 corpses have still not been recovered from the wreckage of Piper Alpha under the North Sea because the oil company thinks it would be too expensive to retrieve them."
(Foley, 1990, p.25)

The factors which emerge from this study as most clearly instrumental in shaping the operation of policy are the economic pressures and imperatives of the commercial world.

If law is regarded as a phenomenon separate from its social object and detachable from its historical development, then an optimistic view may be taken as to how instrumental the criminal law can be in dealing with corporate manslaughter. Conversely, if law is seen as a *product* of social relations, not something *extrinsic* to them, then it is less likely that any significant change to the extent of corporate manslaughter can be wrought by the criminal law whilst the social relations and pressures from which the crime arises remain in place. Warrington has observed that:

" Law merely attempts to make what is legitimate (i.e. socially accepted relationships)

operate smoothly. Its legitimacy cannot depend upon itself (the law) but on what makes law what it is (society)." (1977, p.29)

The state's prosecutorial policy in respect of corporate manslaughter can be thus regarded as originating in the economic structure and operating precepts of the commercial system. However the matter is not presented as such but assumes the image of either an independently arrived at legal stance or an accidental cluster of mechanisms and rules. As Engels wrote in 1886:

"But once the state has become an independent power *vis-a-vis* society, it produces forthwith a further ideology. It is indeed among professional politicians, theorists of public law and jurists of private law that the connection with economic fact gets lost for fair. Since in each particular case the economic facts must assume the form of juristic motives in order to receive legal sanctioning and since in so doing, consideration of course has to be given to the whole legal system already in operation, the juristic form is, in consequence, made everything, and the economic fact nothing." (1973, p.5)

In seeking to explain the development of legal phenomena like prosecutorial policy in *prima facie* cases of corporate, materialist analysis, in contradistinction to idealistic or autopoietic theory, is relatively compelling. A view of society as "a recursively *closed system* which can neither derive its operations from its environment nor pass them on to that environment" (Luhmann, 1988, 18) is one which leaves odd but clearly patterned legal phenomena (like the corporate manslaughter problem) in the realm of the inexplicable. A serious problem for those postulating material analyses, however, is the need to be able to clearly expose the precise mechanisms by which "the economic facts...assume the form of juristic motives". There is a great deal of research still to be done into the role of the "economic fact" in the emergence and operation of law.

NOTES

i. Health and Safety Executive Annual Reports 1977-1992. This is a problematic category as the figures exclude the thousands of people who die at home or in hospitals from work-related conditions (asbestosis, mesothelioma etc.) and from other long-term factors with an arguably commercial impetus like smoking-related diseases. Deaths of people in the course of their work, like police officers, are within the scope of this inquiry although I recognise the existence of factors in such cases which might not be present in most work-related deaths.

ii. Over the decade 1979-1989, for example, the number of annual convictions for manslaughter, excluding cases of "diminished responsibility" fluctuated between 99 (1989) and 192 (1987). Even these figures are higher than the real figures for "reckless manslaughter" because they include S.3 killings as the result of provocation and constructive manslaughter killings i.e. where the defendant has killed unintentionally in the course of committing an unlawful act which a reasonable person would foresee as liable to cause some injury (a category which can be regarded as necessarily involving a form of recklessness).

The Home Office does not publish statistics which differentiate "reckless manslaughter" homicides but see E. Gibson, Homicide in England and Wales, 1967 HORS No.31 (1975)

iii. DPP v. P & O European Ferries (Dover) Ltd. (1991) 93 Cr. App. R. 72

iv. Turner J., DPP v P & O European Ferries (Dover) Ltd, *supra*, p.84

v. R v. Caldwell [1981] 1 All ER 961

vi. Chief Constable of Avon and Somerset Constabulary v. Shimmen (1986) 84 Cr. App. R. 7

vii. See eg. *The Guardian*, 13 March, 1991; *The Guardian*, 2 November, 1991, *The Times*, 11 September, 1990

viii. (1991) 93 Cr. App. R. 72 at pp. 84, 88-89

ix. "In cases of homicide it is rarely necessary to give the jury any direction on causation as such... Even when it is necessary to direct the jury's minds to the question it is usually enough to direct them that in law the accused's act need not be the sole cause or even the main cause of the victim's death, it being enough that his act contributed significantly to that result" *per* Goff L.J. in **R v Pagett** (1983) 76 Cr. App. R. 279

x. R v. R [1991] 4 All ER, 481; Pepper (HMI Taxes) v. Hart [1993] 1 All ER, 42

xi. R v. Seymour [1983] 2 All ER 1058

xii. Holt L.C.J., 12 Mod, p.559

xiii. This problem was eventually overcome by S.33 of the Criminal Justice Act, 1925 which allowed for a company to appear by its representative.

xiv. R v. City of London (1882) St. Tr. 1039 at 1138

xv. Denning L.J., H.L. Bolton (Engineering) Co. Ltd., v. T.J. Graham & Sons Ltd., [1957] 1QB 159 at 172

xvi. R v. Holt, HSE *Information Bulletin*, January, 1990

xvii. Legal Aid Act, 1988, Part 1, Schedule 2 (by omission)

xviii. I am obliged to the following solicitors who gave me the benefit of their experience in these matters: Patrick Whight of Winckworth & Pemberton, Kenneth Shaw of Kenneth Shaw & Co., and Peter Jordan in private practice but formerly with the Legal Aid Board.

xix. R v. HM Coroner for East Kent ex parte Spooner (1989) 88 Cr. App. R. 10 at 17

xx. This argument was given in a Law Society Lecture on "Corporate Manslaughter", London, 20 March, 1991