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You're a Criminologist? What can you offer us? Interrogating Criminological Expertise in the context of white collar crime

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The term white collar crime is a stroke of genius. By one term, Sutherland established a strong criminological presence in calling attention to the crimes and harms of business. It makes a criminological analysis unique hence it is not surprising the call for heavier sanctions and criminal penalties remains strong in the field. This chapter critically analyses this call and highlights the dilemmas involved. Firstly, criminalisation can be a conservative not a progressive strategy in responding to white collar crime and secondly, when criminologists venture beyond this sphere, they have to content with multiple strands of expertise and the relevance of our analysis can be challenged. In resolving these dilemmas, I argue that understanding criminalisation, and the call to criminalise, within a field of struggle can help unravel when, and under what conditions a call to criminalise may have transformative potential.

Criminologists working in white collar crime and regulation often face several inter-related dilemmas in our attempts to influence and inform pubic and political debate on the damage posed by business. The touchstone of criminological analyses, demands for greater criminalisation and enforcement of criminal penalties remains prominent. Yet for some this demand appears as a distraction from understanding the systemic reasons why law and law enforcement more often supports the activities of business rather than controlling it. Many have turned to pay attention to broader regulatory controls: some legal, some relational, some physical. This can be effective, but a

regulatory focus also can blunt efforts to draw attention to fundamental structural problems that generate ongoing problems, even as small gains might be made. Further, in the world of regulation, criminological knowledge competes with law, economics and political science for relevance. We are then confronted with questions about the nature of our expertise and the rigour of our analysis. In the process, our world becomes more complex even as our public message on what to do require clarity and parsimony. In the chapter below I analyse this demand to criminalise and how to understand when, and under what conditions, it might simply a critical strategy to change the rules of the game around business conduct and when simply a way of deflecting attention from more systemic problems.

Criminalisation and the call to arms

Criminological foray into the crimes and harms of the powerful began with throwing down the gauntlet – we had been looking the wrong way – to the crimes of the powerless rather than the powerful! Perhaps one of the enduring legacies of criminology is Sutherland's (1940) term itself, white collar crime. It captured a sentiment and a reality that significant and damaging crimes can be committed by those in positions of influence – and without sanction beyond what might appear a slap on the wrist. Sutherland's 1939 address announcing this insight to the American Sociological Association made the newspaper headlines of the day (Odum, 1951). Since 1939 its use has grown and the names applied to white collar crime have proliferated – from corporate crime (Clinard & Yeager, 1980), to occupational crime to state corporate crime (Kramer, Michalowski, & Kauzlarich, 2002) or simply crimes of the powerful (Pearce, 1976; Rothe & Kauzlarich, 2016). Terminology has generated a significant criminological legacy for looking at the powerful if you wish to understand crime.

Terminology aside, why does a criminological *analysis* matter? Does its primary strength lie in its capacity to act as a rallying cry – a way of giving voice to the idea of crime as a social and political – not simply a legal property (Higgins, Short, & South, 2013; White & Kramer, 2015)? That w*e*

determine what is criminal and what should be done about it? The chapter below explores the complexity of the call to criminalise as a means to critically evaluate criminology's contribution to understanding what is colloquially known as white collar crime. For the purposes of this chapter – and for reasons I have explained elsewhere (Haines & Sutton, 2012) the term white collar crime is used here to encompass the crimes and harms perpetrated by business actors and business people.

There is an individual and a systemic aspect of the call to criminalise. For my colleague Adam Sutton this was a profoundly conservative and ultimately misguided effort. It simply deflected attention from the deep structural imbalances that lay at the heart of white collar harm. Taking his cue from Aubert (1952), the problem to be uncovered was one of unravelling ambiguity – why was the law structured, and enforced, in the way it was? What was it about the nature of the activity that meant that even if successful a prosecution against a single white collar criminal (or several) would hardly spell the death knell of white collar crime? An alternative view was put by Kit Carson in his inaugural lecture as Professor of Criminology at La Trobe University in 1983 (K. Carson, 1993). For him, the call for criminalisation and for use of the criminal law was political, a strategy to enable greater social change. For the purposes of political expediency, ambiguity needed to be dispensed with. There is considerable value in careful thought about what the call for criminalisation can and cannot do in ensuring business acts in the public interest.

This task of ensuring business acts in the public interest is now more complex than ever. It is no longer sufficient to castigate businesses and business executives for their role in financial collapse, miserable wages and conditions and countless deaths and injuries. The human toll of business practice, including a rise in new forms of slavery, is now met by alarming environmental damage, not only from climate change, but critical biodiversity loss, nitrogen depletion in soils, ocean acidification, plastic pollution and much more. Industries and their constituent businesses are part and parcel of this damage (Haines & Parker, 2018). Is there any progressive possibilities that remain

in a call to criminalise individual business practices as a way to tackle the deeply intertwined social and environmental damage wrought by current business practices?

Criminalisation or Crime Prevention? Entering the regulatory debate

Many argue that there is a need to look beyond the criminal law to a suite of strategies of control of business conduct. Prevention – crime prevention if you will – for many has the primary role to play in the control of white collar crime (Laufer, 2006). This takes analysis into the world of regulation where the focus is as much on stopping the harm from arising in first place rather than enforcing for a breach after the damage is done. There has been a proliferation of writing in the area of regulation (for a recent extensive collection of writing see Drahos, 2017). Delving into the multiple ways of control of business is important (Larsson, 2012) yet there is a criminological ambivalence towards this scholarship arguing it underplays the nature of power that leads to an undermining of the need for strong enforcement of the criminal law (Tombs, 2002). Yet, key components of law – beyond criminal law have always had an important role to play. Car safety, design of roads, freedom of association laws and so on form some of the basic conditions under which business compete (Freiberg, 2010). They can be understood as part and parcel of the conditions of trade or the rules of the market. The struggle over the content of these laws, and innovating ways of ensuring compliance, is as important to the control of white collar crime as the use of criminal statutes or the infliction of criminal penalties. There is a complementarity here, where breach of the underlying regulations might well be met with stronger criminal penalties – but attention needs to be across the spectrum from law enforcement, including criminalisation, to the actual content of the legal and regulatory regime and its consequences for how businesses ply their trade.

Details and Actuarial Risks

An assessment of the law's content though brings with it significant challenges. The first is in understanding what legal provisions and regulatory approaches might assist in reducing harm. This requires both knowledge of the law and knowledge of the technical area involved in the harm itself

(major hazards, occupational health and safety, corporate collapse and so on). That is, to venture into the territory of the lawyer, and of the engineer, the actuary, the accountant and so on. Hence, any criminologist who ventures into this terrain have to become a bit of a Jill of all trades or a Jack of multiple professions. In my own work, an early challenge was in understanding engineering – at least to a passable extent of ensuring that I understood enough of the technical challenges of major hazard facilities (at least as a knowledgeable observer) to ensure that my writing could at least garner some respect from technical audiences.

In each area of business harm one challenge is to understand what might be considered technical knowledge and to try to distinguish this from the very human and social dynamics that pertain to the social construction of that knowledge. To be sure, there is value in a primary focus on interrogation of the economic, political and social dynamics around a particular form of harm (see for example Douglas, 1992). For me, though, a sole focus on this dimension ultimately proved unsatisfactory. A main concern I developed in my work was around what I labelled actuarial risk – that is the impact and probability that a particular hazard will be realised (Haines, 2011). My paradigmatic case was the industrial disaster. Irrespective of the social construction of the risk, the political influences and so on was the reality that, if the assessment was wrong and the right controls not in place the industrial plant would at some point explode. Without at least some understanding of the industrial processes in place, it was almost impossible to make any sensible comment on the degree to which a particular governance regimes will, or will not, be sufficient to prevent the next disaster. But it was equally misguided to ignore the economic, social and political influences that shape not only the nature of the risk assessment, but also the development of the laws and regulations, and the nature of compliance and enforcement in any particular place and time.

A key lesson from this work was that the actuarial risks that constitute white collar crime and harm are not all the same. In particular, the most material of elements, money, provided the most elusive when it came to subjecting to a set of accounts and the value of money embedded within them a

risk assessment in the same manner as subjecting a major hazard plant to a risk assessment of the possibility of catastrophic explosion. In both there was complexity, to be sure. But accounts and money are themselves a social, economic and political construct in a manner that an explosion that emerges from an ignition source and a flammable gas is not. Engineering is not accounting. The figures on a balance sheet and the number on the coin or note are meaningless – if there is not the confidence that the figures do indeed have meaning. The circulation of money, replete with numerical denomination of worth, itself rests on a confidence trick. The (im)materiality of money is socially constructed, it simply a means of distributing value across space and over time (Haines, 2011, 2014).

The conclusion from *the Paradox of Regulation* was, not surprisingly, that the content of the harm matters and the economic and political context within which the regulatory regime emerges matters. Returning to the criminal enforcement, then, it matters greatly whether you have a law that is worth enforcing. To know that, you need to dig deeper. In ignorance, call for greater criminal enforcement and accountability (even against white collar criminals) may simply fail to reduce the carnage, since compliance may not reduce harm if the specific rules embedded within law and regulation mean that compliance and harm reduction are not compatible.

Finding a way back to understanding systemic problems: riffs on State-Corporate Crime

However, there is an essential truth to maintaining the unity in the call for criminalisation. It is a call for justice for an equal share, an equal opportunity and equal chance to be protected from the harms that businesses perpetrate. There is, in delving into the complexity of individual regulatory arenas and devouring different forms of technical knowledge, a trap. Namely, in subjecting each specific harm in the detail and rigour it deserves and needs it is possible to overlook the connections between particular areas.

Hence there is a need to go beyond detail to understand the *commonalities* that lie behind why business is regulated the way it is. The first step here is to recognise a key social and legal assumption that is made – namely that business is beneficial to society. Businesses are seen as the fundamental way our lives are ordered. They bring significant benefits, through goods and services, jobs and a sense of meaning value and worth. It follows then, that business activity should be supported and it is, though laws (such as corporate law, licensing, planning, employment laws and so on). This aspect of law has recently been usefully developed by Dave Whyte (2014) in his concept of 'regimes of permission' to capture the extensive legal infrastructure that provides the basis for businesses to ply their trade.

Regulation and the control of business harm is measured against the benefits businesses are argued to bring (Carroll, 2008). Each area, each actuarial risk replete with its specific governance regime (occupational health and safety, major hazards, pollution control, unsafe products, fraud of various kinds) acts as a check, an attempt at discipline on business behaviour and the behaviour of those who control the business. So, understanding the specific nature of the controls remains important, but so too is understanding the general nature of support for business together with this specific legal infrastructure. Regulation, then, can be understood as 'instrumental law' (Teubner, 1998).

What then should we make of the call to criminalise? In addition to the problem of demanding compliance with and enforcement of laws when breached being ineffective in stemming the harm, is the problem that criminalisation in one specific area of concern might deflect attention from the way that regimes of permission, in of themselves, order and facilitate harm. Whyte (2014 p.241) argues 'even the most punitive and invasive regulatory agencies do little more than marginally re-distribute the burdens of cost and responsibility for corporate harms'. From this lens, the call to criminalise seems even less likely to engender progressive change.

Yet, perhaps this is too sweeping a claim. There are two separate considerations here. Firstly, is to interrogate the nature of business benefit and secondly to ask the key political science question

regarding the conditions under which more, or less, harmful business practices emerge. In terms of business benefit, clearly much of the criminological literature focuses on the harms. The benefits are not subject to the same level of discussion. Sutherland, when asked about the definition of white collar crime and what all the different offences had in common responded that their commonality lay in their breach of American values – of the value of competition, and essentially good clean business practice. There was no sense in his work of a systemic problem of the nature of the capitalist enterprise. Many criminologists would disagree and would point to the fundamental problems associated with, in particular, private for profit corporations embedded within a capitalist economy (Glasbeek, 2002; Tombs & Whyte, 2015).

However, perhaps it is helpful to think at a less lofty level at the embedded nature of harm within benefit. Many (but certainly not all) of the daily necessities, those of us in the industrialised north consume, come to us through capitalist industrial processes. To that extent, they provide benefit. They also provide employment for a significant proportion of many people (again, though not all). They also provide revenue to government through taxes (not only corporate taxes but also payroll taxes of various kinds, income tax from workers, royalties and so on). To an extent, then, it is helpful to understand the harms of white collar crime as embedded within these benefits (or if you prefer the benefits embedded in the harms). Critically, these benefits provide significant political purchase – implicit or explicit threats to governments that if controls are too onerous, benefits will not flow.

A focus on the relationship between business and the state is central to criminological writing on state-corporate crime and the debates on the use of the term (Kramer et al., 2002; Whyte, 2014). In essence, through the lens of state-corporate crime the relationship between the state and business is brought centre stage to allow us to understand how harm emerges from this relationship – for example how lax enforcement and poor resourcing of regulatory agencies lies behind an incapacity to enforce business laws and regulation properly. But categorising and classifying different harms that emerge from the relationship between business and state is one thing, understanding why is

another. This is where understanding benefits can come in – in teasing out the pull of business on the state to ensure the benefits keep flowing. Tombs and Whyte draw on Gramsci to provide some theoretical heft here pointing to the interventionist state as a way to understand the reasons for the perversity in the relationship (Tombs, 2012; Whyte, 2014). A fundamental role of the state is in managing an 'ethical' relationship between business and government to maintain social order. To do this, the state engages in a 'complex disciplinary process' (Whyte, 2014, p.240) to manage social relations, which also requires maintaining the legitimacy of the state so that exerting some control over business harm arises. My own framing of a similar dynamic draws from a Habermassian base, where regulation is understood to emerge from a state concern with maintaining the conditions for capital accumulation (and its own revenue) whilst also reassuring the population of its security (Haines, 2011). These different theoretical traditions help explain both why regulatory regimes emerge (to reassure the citizenry of their security) whilst they are also subject to complaints by business of 'red tape' and the need to deregulate and reduce the 'regulatory burden' as a drag on business.

There is an important and critical insight from this focus on the relationship between business and the state namely why a call to criminalise (either in statute or through enforcement) is so often rebuffed – but why it is occasionally acceded to. Criminalisation of corporate harm and white collar crime requires a particular set of political circumstances for it to emerge. Analysis of industrial manslaughter over many decades points to the challenges in developing laws that can actually target those with the greatest responsibility in generating harm (Gobert, 2008). Literature on the conventionalisation of white collar crime have shown how criminal laws, when focussed on business practice, are transformed into something less than criminal, they are tamed, made palatable to those who hold the reins of power (W. G. Carson, 1980; Johnstone, 2007). When reforms to criminalise are successful, they are often criticised for their over emphasis and relevance to small business whilst leaving the large end of town untouched (Parker, 2012). The letter of the law, the

resources for enforcement and the resources of the accused all conspire to defeat many attempts to hold white collar offenders to account.

Criminalisation remains publicly powerful, though. It reassures the public that they have been heard. When criminal penalties have not been applied there is strong condemnation – as in the condemnation of the lack of prosecutions of senior financial executives in the US following the financial crisis (Calathes & Yeager, 2016; Pontell, Black, & Geis, 2014). The significant penalties that followed the savings and loans crisis in the US are recalled with fondness. The jailing of Enron and WorldComm executives are also noted. Bernie Maddoff is sentenced to 150 years. What has been the success of these? Detailed research in the US context needs to be done, not so much on the criminality and complicity of particular executives that are involved in such scandals, nor on the success or otherwise of the trials, but rather on the impact of particular criminal sentences on subsequent corporate and political action and the impact of vociferous calls to criminalise. Anecdotally, the levels of imprisonment following the Savings and Loans crisis did not appear to ameliorate the impact of the Global Financial Crisis. This would suggest that criminalisation as a simple head count of who is behind bars and for how long is a poor indicator of success.

Recent scholarship on the Madoff case is particularly illuminating. Colleen Eren (2017) in her book *Bernie Madoff and the Crisis: the Public Trial of Capitalism* outlines in careful detail how this significant sentence came about. Her thesis is convincing, namely that the complexity of financial dealings that led to the crisis formed a lightning rod for the identification of a single villain. This is despite this particular crime not being instrumental in the crisis itself. Rather, the enormity of the harm, the complexity of the collapse (and indeed the crisis) combined with a human drama where a clear villain was identified. Eren (2017) carefully teases out why this sentence cannot be seen as part of a broader strategy of challenging and changing the dominant nature of US capitalism.

An alternative outcome from the call to criminalise is possible. In my own work on the Longford Gas Disaster in 1998 in Victoria, Australia I traced the aftermath of that disaster in terms of legislative

change and practice on the ground (Haines, 2011). Here, I found strong pressure to introduce Industrial Manslaughter Laws in the wake of the disaster. It was taken up by the then Labor party as policy, but dropped in the final stages of an election campaign in order for the Labor government to secure the preferences they needed to retain control of the Senate and win a further term in government. This might be seen as a failure – and to an extent it was. However, intense scrutiny of the Labor government remained from the Longford Disaster to ensure there was no repeat. Industrial manslaughter as the way to ensure this was no longer viable, so they opted instead for radical changes to Major Hazards legislation and were able to gain the support they needed as well as increasing the capacity of the regulator to enable it to manage and enforce these changes. These changes that had a significant impact on major hazard facilities (chemical plants and oil refineries) improving their practices. In this way the *call* to criminalise can be seen as part of a series of events that led to successful and effective reform.

These two examples suggest there may be a different way to tease out more carefully across different contexts whether the call to criminalise, as well as actual criminal prosecutions do or do not lead to helpful reform. That is to place prosecution as well as the call to criminalise as part of a *field of struggle*. In this way, it is possible to analyse methodically in particular places whether the demand for criminalisation, criminal prosecution and all the activism and activity that revolves around it represents only isolated pockets of accountability or can be understood as a way to engender systemic change.

At its most straight forward, a field of struggle is defined by actors in relation to one another acting intentionally and strategically to gain greater influence by shaping the rules that govern the field (Fligstein & McAdam, 2011). When seen as part of a field of struggle, criminalisation can be understood in part as a set of rules within a field, but also the call itself a strategy to reshape relationships within the field itself. The purpose of criminalisation is to change the relative influence

that actors have within the field – and with that to change 'the rules of the game' under which businesses act.

One of the first lessons from the fields of struggle literature is that effects within the field are best explained, at least in the first instance, by close attention to the field itself (Levi Martin, 2003). That is, the specific context or field within which a call for criminalisation occurs is critically important. The impact of the call – or indeed the impact of a particular criminal penalty can only be assessed by looking in a detailed fashion at the place itself, and tracing how these events shape subsequent controls on business (and indeed business behaviour itself). Only on this basis can we understandi whether significantly higher penalties in the US (or indeed in Iceland) are important when compared with Germany, Indonesia or China.

Debates within the fields of struggle literature contain further insights. One such debate centers on whether there is one set of rules or a struggle over which rules apply. Fligstein and McAdam (2011) argue that a single set of rules that are explicit within a field with actors acting intentionally to try to gain advantage by drawing on those rules. The rules have general agreement (even from 'challengers' who receive less of the gains and a greater degree of the harms within the field) because of the stability afforded by agreed rules. Others disagree, arguing that part of the struggle is about *which* rules apply (Emirbayer & Johnson, 2008; Goldstone & Useem, 2012; Swartz, 2008, 2014). The latter makes sense. In its simplest terms, the debate that is often seen around whether civil or criminal law applies in the case of business harm is precisely one of which rules count in this case. But this can be taken more broadly. The call for a 'social licence' to govern business activity rather than simply a legal mandate is another example of struggles around mining, oil and gas exploration that are precisely about what the rules of the game should be (Curran, 2017).

Rules are significant in another way. In a strict legal sense, appeal to law requires standing before the law. In other words, action against businesses by regulators, or indeed by communities claiming redress requires that they have the requisite legislative mandate to be able to do so. Hence the

problem arises with multi-national companies and legislation that cannot cross jurisdictional boundaries. However, activism can cross borders and in very real ways can have an impact on the rules by which multi-national businesses act and behave. But, whether the rules of the game are, or are not, shaped by activism around a particular case of corporate damage (e.g. deforestation due to palm oil) requires careful empirical scholarship. The impact of activism can be blunted, too, by host country efforts such as in India and Indonesia curtaining the capacity of foreign actors to support local activist groups (Balaton-Chrimes, 2015; Balaton-Chrimes & Macdonald, 2015) that again shapes the legitimacy of actors in the field.

In terms of assessing the impact of criminalisation, understanding criminalisation as a constituent element of the rules themselves in a given field suggests further insight. Namely, does a call for criminalisation lead to changes in the rules themselves allowing criminal sanctions to be used? If so, does it change the rules of the game? That is, does criminalisation in its many social and legal guises act, within a particular context, an integral component that ensures businesses in that location act in the public interest?

The call for criminalisation might also be seen not as a constituent element of the rules – but rather a strategy. The conceptualisation of criminalisation as social property suggests that the claim is critically part of a strategy of those who wish to see a change in a particular field of struggle. Utilising a criminal prosecution too might also be understood as a strategy. It is here that the purpose of a criminal sanction becomes critically important to understand. If the purpose of a criminal penalty is accountability then perhaps a prosecutions are more likely to be an end in of themselves independently from the broader impact they have. They act to reassure that the rules of the game are, after all, fair. But, to be true to the fields' perspective the proof of this depends on context and the nature of a particular field. Emirbayer and Johnson (2008) point to a basic feature of the fields literature namely that strategies are used by both those who wield significant influence in a field and

those who do not. Strategies such as criminalisation can be used to conserve the status quo or to subvert it.

Understanding which strategies are influential and why is also important. Those drawing from a Bourdieusian base within the fields of struggle literature, understand actors as drawing on their economic, cultural and symbolic capital (that they may bring from different fields) to argue for influence within a particular field (Emirbayer & Johnson, 2008). Not surprisingly, they use the capital with which they are best endowed either the challenge or to conserve power. Criminalisation is redolent with symbolic power. In contrast to understanding criminalisation as a constituent element of the rules, understanding and tracing its symbolic influence as a strategy might yield further insights. The call to criminalise is a form of symbolic capital which can be widely dispersed. On the other hand, access to technical capital is not distributed in the same way. That the response to corporate harm is often one of criminalisation is then not surprising. What its impact is, though, is a different question.

Exploring criminalisation by reference to a field of struggle has considerable potential. It allows criminological analysis to take context seriously and to value close and critical empirical work through a framework that goes well beyond 'mindless empiricism'.

Conclusion

This chapter has used criminalisation of white collar crime as an anchor to understanding criminology's contribution in the public sphere. It is here that criminology makes its most unique contribution to the field of business harm and crime. To be sure, criminological contributions extend well beyond this, into the range of possible strategies that can be used to control business, insightful analyses of the underlying dynamics that shape business behaviour and the need to pay close attention to the particular harm, or actuarial risk itself. Attention to detail and gaining at least a semblance of expertise in different areas is important but is both a challenge and a paradox. In these

broader fields, criminological knowledge is joined, and to some extent competes with a range of other perspectives and finding a distinct voice can be harder. This is not to suggest that scholarship should be confined to what makes criminology unique – far from it, but it might make it more understandable why the demand for harsher penalties and in particular criminal penalties against individual business actors remains such a prominent part of the criminological cannon in the white collar crime literature. However, the focus on criminalisation might be a way to explore in a more nuanced way the connectedness between different forms of business harm. To do so, however, the chapter has argued there is a need for a more reflexive framing to understand the role played both by criminalisation by state agencies and by activists and the broader public. Understanding criminalisation as part of a field of struggle, either one that is a constituent element of the rules of the game or a strategy, has much to offer. It is here that we might understand the multiple and different roles criminalisation can play both in conserving the status quo that supports continuing and chronic levels of harm by business and how, and under what circumstances, it can be seen as part of the way change can arise. The nature of the change is important and whether it pertains simply to a narrow form of harm or more broadly to generating business that is systemically capable of acting in a socially and environmentally just way. The answer to this cannot be answered in the abstract alone. Rather, it is to be found in critical engagement with the particular places where we undertake our research, act in concert with others, teach our students and write our papers.

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