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Two Tier Society: Two Tier Crime: Two Tier Justice

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Introduction

In this paper I examine some of what might be considered the domain assumptions on the nature of corporate crime and corporate behaviour that are either explicit or implicit in many of the papers presented here and that indeed characterise debates in the literature on criminology about the behaviour of corporations and other powerful organisations. I wish to argue that many of the points put forward to defend the distinctiveness of corporate misbehaviour and that are said to make it unsuitable for regulation through the criminal law and through the processes of criminal justice are in fact open to serious dispute and that what distinguishes corporate behaviour is not something that is inherent in its nature but resides most decisively in the social judgements that are made about the kinds of people who are involved in illegal corporate behaviour. It is not some quality of their behaviour that renders them “unsuitable” for the criminal justice system and for criminal justice sanctions but the fact that they come from certain kinds of social backgrounds. It is this that renders prison “inappropriate” for them.

The assumptions that are involved in the attempt to argue for a behavioural distinctiveness for corporate crime are numerous. I wish to consider three of these. They are the question of the nature of crime and whether there is some essence to behaviour that makes it criminal, the issue of the nature of the enforcement process against corporate offenders and why it is so poor, and the issue of the effectiveness of criminal sanctions against corporate offenders. There are other issues that could be considered. For example, the question of whether the complexity of cases involving corporate crime makes it too difficult for juries to understand does merit extended consideration. It too contain traces of attitudes to class in the way it assumes that juries drawn from all sectors of the population might not be able to understand the nature of the evidence in the way in which a jury drawn from the professional middle class might. As such it underestimates the degree to which juries in the recent Securicor robbery trial and the case against Joe O'Reilly were able to assess complex technical evidence and arrive at a satisfactory conclusion.

It is necessary at this stage to clarify certain terms. The literature on corporate crime is replete with attempts to define what the key terms mean, a debate that goes back to the origins of the concern with white collar crime in the work of Edwin Sutherland [1] and his subsequent exchanges with, most notably, Paul Tappan [2] though, as Cottino [3] shows, the term has a somewhat longer parentage. For present purposes crime involving corporate behaviour can be divided in two. The first are crimes committed against corporations such as fraud and embezzlement by employees or by the public. As such, these fit reasonably comfortably into conventional criminal law. The second are crimes committed by corporations and as such involve corporate robbery, where corporations rob the public through offences like false advertising, tax evasion and the bribery of public officials, and corporate violence where corporations cause injury, death and destruction through neglect of health and safety legislation, the production and manufacture of dangerous products, and through the ways in which their products and production processes can cause serious environmental and social damage. It is this latter sense of the term that guides this discussion.

It is also necessary to point out that while criminological knowledge is relatively underdeveloped in Ireland, it is particularly so in the area of corporate behaviour. To the extent that we have accumulated such knowledge it tends to be about conventional criminal behaviour such as public order [4] , car theft [5] , and juvenile offending [6] . This means that any discussion about corporate crime has to rely on material from other jurisdictions, most notably the United States, Britain, Australia and Finland. The inclusion of this latter country may, to the parochial mind, seem surprising but corporate crime here has been a matter of extensive policy analysis and debate, activated and energised by the collapse of its banking system in the early 1990s. [7]

Crime and Its Essence

The debate on corporate crime has been marked by the notion because crime has some obvious essence that makes it "criminal" it is obvious that some forms of behaviour are quite clearly criminal and suitable for treatment by the criminal justice system and other are not. This point of view is often bolstered by reference to common sense and to what the public would accept is "criminal". The difficulty in this position is that there is not essence, the presence of which defines an act as criminal. Any kind of social or historical consideration shows that the criminal law is a social product and as such open to a range of influences but disproportionately to those of powerful social forces and social actors. Working with a strict definition of crime ignores this and with it the role of these powerful social elites play in shaping the nature of the law and in shaping where the distinction arises between criminal and corporate offences and between legal corporate behaviour and illegal corporate behaviour. As McBarnet[8] puts it, "we need to explore how economic elites actively use the institutions, ideologies and methods of law to secure immunity from legal control". Corporations can in effect manipulate the boundaries between lawful and unlawful behaviour, a practice that has no counterpart in "ordinary crime".

This has been shown in a notable article by Snider[9]. She has outlined how many countries, most notably the United States and Canada, acting under the

influence of neo-liberal ideologies and under the guise of deregulation, effectively speaking “dissolved” the problem of corporate misbehaviour. The disappearance of corporate crime was achieved through major changes in the laws regulating corporate behaviour, in her phrase, “less state regulation, fewer and weaker laws, less state-sponsored censure”. It is the “deregulation, decriminalization and downsizing of corporate crime”[10].

State regulation and punishment was replaced either by a more “educational and advisory approach, by self regulation or by passing the problem on to the operation of “market forces”. What she calls the “corporate counter revolution” was “grounded in arguments associated with monetarism and the neo-liberal economics of the ‘Chicago School’[11] under which the state “had no role except to get out of the way”.

Enron provides one of the best examples of this in the United States. Corporations did not, as Tillman[12] puts it, “just break the rules they made the rules”, they did not simply “react to imperfect markets but were part of the political process that created these markets”. He gives three examples of how corporations shaped the rules under which they were regulated and then benefited from this process. Pressure from industrial lobbies meant that the California Electrical market was in the late 1990s effectively free from government regulation. This allowed for the deliberate withholding of electricity from the market to drive up the price, the submission of false bids in energy auctions and the creating of congestion on energy lines to maximise their payments from individual states. These changes were facilitated by payments to politicians. The other two involved energy derivatives and stock options, both of which were used to falsely inflate sales figures, increase executive bonuses and facilitate tax evasion.

This process of the degree to which regulation is “a facilitative weapon for the powerful” in Britain is provided by MacKenzie and Green’s[13] analysis of regulation in the antiques industry. Here the considerable and acknowledged illegal trade in stolen antiques subsequently offered for public sale through antique dealers provoked public concern and a political desire to do

something about it. However their research shows the form that the relevant legislation took and the process that was selected to implement it was one that was significantly shaped by the industry and was generally agreed to be unlikely to interfere with the trade in illegal antiques. As such this illustrates two points about regulation. One is the degree to which legislation that appears to challenge the behaviour of powerful interests is "designed to be ineffective"[14]. The other is the way in which it illustrates the process of what Mackenzie and Green call, "prelegislative intervention: the legitimized manipulation and neutralization by white collar marketers of laws directed at them" [15].

An example of how corporate interest groups shape the content of law is currently unfolding in Canada. Here Health and Safety legislation is being reconfigured to change the responsibility for work place safety [16]. Under new legislation workers who do not exercise "individual responsibility" in relation to work processes can be sanctioned by health and safety officers. So, for example, a worker who does not refuse to work in unsafe conditions now bears some of the responsibility for any violations of health and safety that may result. The research evidence, though limited, suggests that this system sanctions frontline workers more than high-risk employers and that employer responsibility reduces the more closely the violation is related to the actual production process. While it may be initially intuitive that workers should share responsibility in this way it ignores the actuality of workplace relations. Theoretically it may seem reasonable that employees should refuse to work in unsafe conditions but in reality this is seldom a practical option for them and is more likely to result in their dismissal and replacement than in the remedy of workplace conditions. This form of legislation is, as Grey has put it, "a neo-liberal form of blaming the victim" [17].

The role of powerful interests in shaping the content of the law and where the boundary between administrative and criminal law falls is a theme of considerable vintage in the sociology of the law whether it is the work of William Chambliss[18] on the Opium Acts or Carson [19] on the Factory Acts and the regulation of offshore safety in the oil industry. However this kind of

research has taken a more subtle and developed turn in the work of Doreen McBarnet [20]. She has show how corporations do not necessarily have to directly influence the content of the law but they have at their disposal a series of ways in they can comply with the law yet defeated its purpose. The best-known example is that of “creative compliance” with corporate and tax law. This is the practice of using the letter of the law to defeat its spirit and to do so with impunity” (ND. P1). McBarnet calls this “regulatory arbitrage”, “the practice of structuring an inappropriate transaction so its stays within the bounds set by a rule” [21]. But she argues that much of what passes as creative compliance is actually illegal. However it is presented in ways that makes its criminality difficult to detect..

Among the strategies used to achieve creative compliance is the management of disclosure. This is where all the relevant information is provided but in such an arcane way that it is difficult to interpret it’s meaning. The fact that firms negotiate with revenue, for example, means that they can also negotiate what and how they disclose, thus turning the encounter into a “gaming exercise” and so undermining “the rhetoric of full disclosure as a practical reality” [22]. McBarnet refers to this as the “non-disclosing disclosure”.

The strategies also include consultation with the revenue but consultation that only asks the Revenue questions that lead to particular answers - the ones that suit your purposes, - through hiding the relevant facts in “a welter of irrelevances” [23] or in different and well spread out parts of documents, the use of presentational devices that misdirect attention from larger issues to smaller ones, and the strategic use of legal opinion, know also as opinion shopping. Such behaviours avoid the stigma of criminality and prevent those who use them being labelled “criminal”.

It is easy to dismiss these behaviours as “gaming the system” and they are regarded in business circles as legitimate and “clever”[24]. But they have serious consequences. One is that financial reports become unreliable, a case highlighted by the example of Enron. The use of certain accounting devices, endorsed by accountants and financial advisers, meant that their

financial reports were no guide to their actual financial status and this may actually have misled the market. “Enron could use the different rules of tax and accounting to simultaneously report huge profits to the SEC and claim tax losses, and huge refunds, in its tax returns”[25]. They reported profits under one set of rules and showed a profit and then reported their accounts under another set of rules which showed they were making a loss and so paid no tax. The fact that the size of executive salaries and bonuses were based on the profits rather than the loss figures may also be relevant here. The way in which Enron executives were prosecuted and the narrow range of the charges against them meant that “the murkier waters of creative accounting” were never challenged and have not gone away[26].

This manipulation of legal boundaries is also present in the notion of “legal corruption”. Transparency International defines this as the “abuse of entrusted power for private gain” [27]. In a report on corruption on Ireland from 2006 to 2009, they conclude that there is very little of what they call “petty” corruption such as the bribing of officials. Similarly they find that there is little evidence that the kind of fraud and corruption that characterised the 1980s and 1990s and that was the subject of a range of tribunals is still a feature of the system.

What it did find however is that “Ireland is regarded by domestic and international observers as suffering high levels of legal corruption”. It defines this as situations where political policy and political decisions are “believed” to be influenced by personal connections, patronage, political favours and donations to politicians and political parties. It sees the risks of corruption as high in relation to appointments to public bodies, a power in the control of individual ministers, in the the funding of political parties where “influence-selling has yet to be completely outlawed”, where political lobbying is unregulated, where political parties do not have to publish accounts and where the public contracting system is open to “significant abuse”. The risk of corruption is especially problematic in local government where there is a “lack of adequate safeguards against planning corruption, false accounting, misuse of resources, influence-selling and fraud”. In addition there is insufficient recognition of this as few local authorities have contingency plans to deal with

fraud and corruption [28]. Overall it concludes that the system of governance in relation to fraud has important shortcomings, most notably a lack of transparency and weak enforcement of regulation in the business and financial sectors. And, it needs to be added, the lack of a significant body of law to regulate such behaviour.

The notion that whatever about the legal niceties the public do not see this kind of behaviour as criminal directs our attention to two issues, one is how the public finds out about corporate misbehaviour, or how it is represented in the media, and the other is what they think of it and of how it should be dealt with, in other words, the question of what the state of public opinion is on such behaviour. Indeed it has been argued that one of the problems getting in the way of the consideration of corporate misbehaviour as a crime is the nature of media representation[29]. Again we have very limited research on this in Ireland but what we have would suggest that corporate misbehaviour is notable by its absence in the media[30]. While O'Connell found in his analysis of newspaper coverage of crime, that there was a disproportionate focus on crime of violence these were primarily crimes of interpersonal rather than corporate violence. Research in Britain would suggest that when the media covers this kind of behaviour there it is done in such a way as to present the behaviour as non-criminal and much of the regulation as frivolous.

Thus the media in Britain choose to portray corporate mis-selling of pensions from the late 1980s onwards arguably one of the country's largest corporate crimes, as the result of negligence and incompetence rather than as the product of criminal intent. The media have also focussed on minor cases that can be shown to be light hearted and then portrayed as examples of heavy handed and over zealous regulation. These stories create what Almond[31] calls "regulatory myths" which can in turn undermine the moral legitimacy of regulators and regulatory activity, and in turn have an impact on the procedural legitimacy of regulation. By portraying regulators as over officious and kill joys, Almond says that these stories, are "potential catalysts of regulatory delegitimation" [32].

One of the most notorious cases was the allegation that health and safety officers in the North of England had banned school children from playing with chestnuts unless they wore safety goggles. A more detailed analysis of the full circumstances shows that this was not imposed by a regulator but by a teacher involved as part of a publicity stunt. Many such stories have subsequently been shown either to have a different meaning when situated in their correct context or else to be simply untrue. Their impact has not been limited by this and they have become "shorthand signals of generalised regulatory inappropriateness"[33]. Such stories have also been linked into the template of compensation culture, the extent of which is often overstated and the consequences of which are to trivialise corporate misbehaviour and to trivialise and undermine regulation.

It is difficult to think of any law or set of regulations in the area of criminal justice that are subject to this level of ridicule or in which the enforcers come under the level of criticism to which those who regulate the corporate world are subject. Yet there are a number of areas in which there could be legitimate arguments, most notably the area of the regulation of illegal drugs in which the state expends serious amounts of money with what would appears to be limited signs of success. There is little evidence of any shortage of illegal drugs in the country or of people willing to sell them.

However despite the media coverage there is evidence that the nature of public opinion on corporate crime is changing. It is often assumed that the criminalisation of such behaviour would not have a basis in a supportive public opinion and not achieve the degree of legitimacy that such laws would require for their successful implementation. In the United States, for example, the debate on white collar and corporate crime has moved to a different dimension and in a different direction to that which underlies many of the essays in this book. Research would suggest that the desire of the public and the balance of public opinion is that the criminal law needs to be expanded to encompass to cover more forms of corporate misbehaviour. This is very much against what the received wisdom had been in the past where the tendency has been to change the law to reduce the level of regulation on corporate

behaviour. It was widely believed that the relatively benign attitudes of the public to corporate misbehaviour coupled with apathy and ignorance about such behaviour were an impediment to using the criminal law to control corporations. There was, as John Conklin has pointed out, "widespread acceptance of the view that the public is 'condoning, indifferent, or ambivalent' towards business crime".[34] This has been changed by a number of recent scandals, most significantly those of Enron and World.Com, and the recent collapse of the banking system, and by the general loss of faith in the lax regulation that made these forms of behaviour possible.

As a result public opinion very much favours a more punitive approach to such behaviour and a greater willingness to use the criminal law against corporate offenders. According to Frances Cullen and his colleagues[35] attitudes towards corporate crime have transformed in the last few years. They characterise public opinion as having gone through three phases since the 1970s. The first was when the public were indifferent to business crime, the second was a period of rising attention marked by an increased awareness of business crime and a third period, that of transformed attention, when there is significant social support for sending corporate offenders to prison. While they see this as in many ways a significant development, they are concerned that a focus on individual "bad guys and on the need to punish them" may deflect "attention away from the structural and political conditions that made many of the most egregious scandals possible".[36] There is also the outstanding question of the degree to which such attitudes influence or over-ride the wishes of corporate elites in the shaping of the law.

What appears to have been important in changing attitudes to corporate crime has been the recent financial scandals and in particular those involving global and national banking systems. As we have seen it has been important in changing attitudes to corporate crime in the United States and and it has also been a significant factor in Finland. In the absence of polling data in Ireland it is difficult to determine if the desire to use the criminal sanction against corporate offenders has a supportive basis in public opinion though in the wake of the collapse of the banking system there was some political support

for it. John Gormley, the then Minister for the Environment said that there was a need for the use of the criminal law against white collar offenders. He cited the United States in his justification. “In the United States”, he said, “you see people who are white collar criminal led out in handcuffs. I want to see the same regime in Ireland” (Irish Times, 13th February, 2009). The Association of Garda Sergeants and Inspectors wanted to see more prosecutions against bankers” and spoke about the “apparent weaknesses in dealing with white collar crime” (Irish Independent, 7th April, 2009). The Minister for Finance was more energised. He wanted them “pursued to the gates of hell”, though he didn’t make clear whether he wanted them to bypass Mountjoy in the process. If, as Ruggiero and Walsh claim, reputational intermediaries” …”collude with corporate executives to give legitimacy to their illegal schemes”[37], then in this case they would appear to be doing the opposite, suggesting that such executives be subject to the force of the criminal law. It is, however, useful to remember that Bertie Ahern in his role as Minister for Finance in 1994 said that he looked forward to seeing tax evaders going to prison. This was said in the context of the introduction of an amnesty for tax evasion, at a time when Ahern had received in excess of €50,000 in unacknowledged “donations, which could open him to a charge of tax evasion, and it was a statement that did not alter the already “abysmally low” level of prosecution and imprisonment of such offenders.

As Nils Christie says it is hard to imagine zero tolerance being applied to economic crime”. [38] “The international evidence would suggest that a key element in the criminalisation of corporate misbehaviour and “a precondition for economic crime being tackled with any degree of efficacy” does not necessarily lie with policy makers and politicians but with the pressure that can be put on them by, what Sutherland (1983: 60) called, the “organised resentment” of the general public. [39] The pressure needs a basis in an organized social movement and when it has this, as Snider [40] shows, it can be successful. Such successes are however fairly limited and in a country such as Ireland, as Transparency International shows, the extent of such citizen movement is low. There may be diffuse support for the use of criminal

sanctions against corporate offenders but it is unlikely to transform itself into the kind of social movement that would be successful in making this possible.

The Issue of Enforcement and Agency Capture

Michael McDowell in his paper says that compliance with company law was at an abysmally low level in the late 1990s. The working group that he chaired concluded that criminal law alone was not enough as a form of corporate regulation and argued for the availability of sanctions “wholly outside the process of criminal justice”. However the justification for this is interesting. This is that when the criminal law was the only route available for dealing with corporate behaviour prosecutions were rare and though he does not mention it, it is unlikely that terms of imprisonment resulted from these prosecutions. This leads him to consider the case for administrative sanctions and other sanctions for such behaviour and to tease out the question of whether these are compatible with the Irish constitution.

What is interesting here is the way in which this is at odds with a long tradition in the study of corporate crime that has argued consistently for the use of the criminal law against these kinds of offenders and that argues that in the light of recent scandals this case has become more urgent and insistent. While debates in other countries can revolve around the strengthening of the criminal law and its greater use in the regulation of criminal law, here it would appear that we are seeking to avoid it.

What this response to corporate behaviour diverts attention away from is a more detailed and nuanced analysis of why if the criminal law exists it is underutilised. That fact that it requires a higher standard of evidence and proof is not sufficient. There are other areas of criminal law where when the standard of proof has proved difficult to achieve we have simply changed the law. Vaughan and Kilcommins [41] have documented this fairly extensively but the Criminal Assets Bureau is perhaps a good example, using, as it does, a civil standard of proof to pursue what are in effect criminal activities. Equally so is the law on what constitutes organised criminality, the criteria for which

seem to the non-legal person is be fairly loose and of a fairly low standard. Amendments to the right to silence, restrictions on bail and the extension of the time periods for which suspects can be questioned would also fit the bill. So it hard to accept that these are the main barriers to the use of the criminal law against corporate offenders. There must be more to it than that.

Similar issues arise in the consideration of regulation and that faith that some of the papers in this volume have in it. It seems to be assumed that once a process of regulation is established regulation follows in some straight line or unproblematic format. It is not that simple. Take the current situation in Ireland. There appears now to be general agreement that the crisis on the Irish banking system was facilitated by poor regulation, an attitude epitomised by the Irish Times editorial (14th January 2009) with the headline, "Bad Policing, Bad banking". It went on to say that "[T]he Irish Financial Services Regulatory Authority is a badly broken organisation"… [Instead] of closely supervising the banks and their staff, the regulator trusted them to act responsibly". They didn't. The fact that the relationship was based on trust is in many ways as classic example of regulatory capture. This is the way in which regulation is circumvented by the fact that the regulator comes to see the world from the point of view of the regulated and structures his or her intervention accordingly, a process facilitated by the similarity of social background and mindset between the regulator and the regulated.

This phenomenon has been identified in a wide range of research on regulation. In some cases it is at the level of being involved in the design of the system through which the industry is regulated, where "the subject industry plays a key role in its own regulatory design". [42] This, for example, was the case with the asbestos industry in the United States. It is also, as we have seen, the case in the regulation of the antiques industry to disrupt the market in illegally obtained antiques. This kind of behaviour has been described as "regulation as performativity" where regulators create the impression that they are regulating but are doing nothing of the kind.

Justin O'Brien' has claimed that outside Ireland the belief is that the regulatory system here has "been captured" (Irish Times, 9th January, 2006). In the Irish case it would appear that the shape of the regulation that emerged was the result of internal politics through which the Central Bank successfully resisted the attempt to set up a new independent regulatory body and as a result created a regulator that failed. There was serious confusion in the bank between its belief that the need to maintain the stability of the banking system was as much a matter of creating the impression of regulation and stability rather than ensuring that the stability was securely based. Hence the obsession in Irish financial circles with the notion that speaking publically about problems in the banking system was a form of treachery in that it suggested that the emperor had no clothes. Perhaps the most direct illustration of the way regulation and impression management was subsumed into each other was that fact that the regulator and the Central Bank operated out of the same building.

The comments of Richard Painter Professor of Law at the University of Minnesota would also suggest that there is more to it than simply a matter of law. He argues that the United States has more criminal statutes covering corporate behaviour than any other country but has relatively few prosecutions, though he argues that it is mainly because of "prosecutorial difficulties" (Irish Times, 28th February 2009).

The case of insider dealing in Fyffes/DCC is usually cited as a relevant example in an Irish context of the difficulties of establishing guilt in a corporate crime case. But there are examples of similar complexities in cases of what might be regarded as ordinary crime. The complex technological evidence given in the murder case against James O'Reilly for the murder of his wife is a case in point. It clearly was understood and accepted by the jury. They found him guilty. Colm Keena has also argued that the complexity of corporate crime cases may not "be entirely due to the law but down to the fact that "the people against whom the allegations are made are usually well heeled and can engage expensive legal teams" (Irish Times, 28th February, 2009).

There might be a more prosaic explanation for the unwillingness to initiate prosecutions in cases of corporate crime, that of resources. The Office of Corporate Enforcement has been looking for extra staff since 2005 as the Director of Corporate Enforcement has pointed out that his current level of staffing was "wholly inadequate" (Irish Times, 28th February 2009). But even allowing for that, there is clear evidence that the system of regulating corporate behaviour has been seriously compromised by explicit or implicit collusion between the regulator and the regulated. There is no direct equivalent with the enforcers of the criminal law and the criminals against whom it is enforced.

The example of the Irish Financial Services Centre (IFSC) is relevant here. Though perceived locally as one of the successes of the Celtic Tiger its international reputation is somewhat less benign. The spokesperson for the British Liberal Party described it as "Liechtenstein on the Liffey". He didn't mean it as a complement but as a description of the lax regulation that applied there. Firms are attracted to the IFSC because of this and according to O'Toole, because of the way in which facilitates "avoidance of tax by British corporations" (Irish Times, 17th February 2009). Justin O'Brien said that the IFSC was perceived as the wild west of the financial industry and "the wider regulatory community now perceives Dublin as a rogue market" (Irish Times, 9th January, 2006). According to him, investigations in the United States and Australia concluded that "loopholes on the governance of the reinsurance industry created systematic risks. Each has identified Dublin as the weakest link in the enforcement firmament".

Then there is the relationship between dodgy corporations and the law, a dilemma captured in the book title "It aint illegal but is it right?" (Passos and Goodwin, 2004). This arises very clearly in the context of the behaviour of Anglo-Irish Bank directors and their shifting of money with Irish Nationwide. The legal status of these activities is unclear but politicians and business leaders have already adjudicated on that. Minister for Finance Brian Lenihan is, we are told, "disappointed about the actions, although not illegal". The now retired Financial Regulator is quoted as saying that "it does not appear that

anything illegal took place in relation to these loans", an attitude that may explain why he is no longer the regulator. Finally the CEO of Dublin Chamber of Commerce said, "I think it is worth remembering that this wasn't an illegal practice" (quotes from Irish Times, 20th January 2009)

Corporate Crime and the Penal Sanction

The final concern that needs to be addressed and that is seen as preventing the application of criminal sanctions to corporate misbehaviour is the alleged ineffectiveness of such sanctions in the case of corporate behaviour.
This is the notion that penal sanctions will not work against corporate offenders. Quite why this is the case is seldom made explicit but would seem to consist of two different propositions. One is the unlikelihood that courts would give custodial sentences to corporate offenders and the second is if they did they are unlikely to have a deterrent effect. There are a number of difficulties with these arguments. The main one is that because so few corporate offenders are sent to prison we have no idea about the effectiveness of prison and about its deterrent value. As Alvesalo and Tombs put it in relation, to corporate crime, "experiments in punitive-based enforcement … are relatively rare". [44]

The other problem with this argument is that lurking within it is the notion that while imprisonment may not be appropriate for corporate offenders there are offenders for whom it is. Quite who these are is not immediately obvious. Judged purely as a deterrent device there is little evidence that prison has this effect on its "traditional" population, those who commit "ordinary" crime. There is some dispute in Ireland about the proportion of those in prison who have served previous custodial sentences, or what is known as the rate of recidivism. O'Mahony [45] claims that about 90% of those imprisoned in Mountjoy had served previous prison sentences, a feature that gave Ireland the dubious distinction of having one of the highest rates of recidivism in the developed world. A more extended piece of research by O'Donnell, Baumer and Hughes [46] did a follow up on all prisoners released form Irish prisons between 2001 and 2004. It looked at the proportion that re-entered prison by

the end of 2004 thus looking at recidivism over a period of between one months and four years after their release. It concluded that the rate of recidivism was lower than what it is generally considered to be. Around half of those released from prison were back in again within four years. The lower figure here may be attributable to the number of sex offenders in the sample, a group with a low level of recidivism though whether this is due to desistance or to them being more adept at evading further exposure is open to question. Recidivism was highest among young, uneducated, poorly employed and illiterate young men, the traditional foundation of the prison system. So the evidence that a penal sanction is appropriate here is weak.

Yet there are reasons to suspect that a penal deterrent might work with corporate offenders. These lie in the nature of their crimes. With traditional property crimes there is evidence that much of it is unplanned and opportunistic, so the issue of deterrence does not enter into their calculations. Most property crime is a random and impulsive response to perceived criminal opportunities. The same may be true of other kinds of crime. A recent study of street robbers (known more colloquially as muggers) in England and Wales showed that there was little planning and a lot of impulse involved. [47] Indeed the researchers concluded that it was difficult to regard their involvement in crime as part of a rational decision-making process, it "could reasonably be argued that they are not really decisions at all but rather the almost inevitable result of a street-oriented life style". [48]

By contrast corporate crime is more calculated, more planned and more the product of conscious decision and intent. [49] It is better explained through theories of rational choice than is more traditional crime and so is more open to being deterred by a prior knowledge of the consequences. If this knowledge does not involve the perception that a penal sanction is a possibility then the prevention of such behaviour is unlikely. This is evidenced in the fact that, according to many researchers, levels of recidivism are high for corporate offenders, a realisation that is as old as Sutherland's work. The evidence that the use of penal penalties is effective against, for example, tax evaders is limited, but there is evidence that when it is used in specific circumstances it

can be effective against corporate criminals. [50] Again however the limited nature of such research has to be noted. This may at one level be an obstacle to progress in this area but it also indicates the way in which research in criminology has reproduced standards definitions of crime by being more interests in street rather than suite crime.

A further argument that has been used here is that many of the people who are currently imprisoned are there for crimes that involve the use or threat of the use of violence. As such they are the kinds of people that society needs to protect itself against and the best way to ensure this is to imprison them. However this is being narrowly construed if it is seen as a justification for keeping corporate offenders out of prison. Many of the offences they have been involved in, such as those relating to dangerous working conditions, the sale of dangerous products, and the pollution of the environment, involve violence against workers, consumers and the wider society respectively. At the height of a major panic about street assaults in the United States it emerged that American workers were at greater risk of injury in the workplace than they were in the street. As Beirne and Messerschmidt put it, “we are safer almost anywhere than the workplace”. [51]

Finally if the argument against the use of criminal sanctions is put entirely in the context of effectiveness, and as we have pointed out, it is not one that applies very well to prison anyway, then this misses a crucial feature of a penal sanction. This is its expressive purpose. It is one of the ultimate statement of what society considers harmful. It is one of the definitive ways in which social boundaries are set, reinforced and reproduced. And it is one of the ways in which this is communicated to citizens. The absence of equality in the use of the penal sanction reinforces a pattern of inequalities that is present in the wider society and recreates the basic power structure of society. As Carson said “the power to criminalise is one of the most powerful ones that the state has at its disposal”. [52] It is important that it is used in a way that emphasises the equality of citizens. Excluding corporate offenders from the possibility of serving prison sentences for their misbehaviour is not a good place to start.

Conclusion

Much of the debate on corporate crime assumes that such behaviour is different to what we might characterise as “ordinary” crime. The argument of this paper has been that corporate crime is indeed different but the manner in which it is different does not come from the nature of the behaviour involved but from the way in which this behaviour is treated in society. Corporate misbehaviour is different because business and commercial elites play a central role in the design of the laws that shape whether their behaviour is defined as criminal or not. They also have the power and influence to compromise systems of regulation and their behaviour is immune from the threat of a penal sanction.

Because of the differences in the way we respond to corporate and ordinary crime, the criminal justice system “systematically reinforces extant power relations” [53.] The differences between both kinds of behaviour do not lie in the levels of social harm that they cause. For both kinds of behaviour these can be substantial. The differences are in the social position and relative power of the people who engage in such behaviours. To repeat and recycle a hackneyed but still accurate phrase, the justice system operates in such a way that “the rich get richer and the poor get prison”. [54]

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