

Corporate Crime and White Collar Crime: Inaccuracies of Criminal Labels

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Abstract

In all areas of life, labels are used to describe groups of people, animals, objects or concepts that are in some way linked or related to each other. For example, people may be described as black or white or as European or Asian. Animals may be described as mammals, reptiles, fish or birds. Edible plants may be described as vegetables or as fruit. The same can be applied to criminal law where convenient labels are used to group together linked or related concepts: violent crimes, sexual offences and property offences. Two such labels are ‘corporate crime’ and ‘white collar crime’. In this essay, the author seeks to show, by the use of a number of examples, that the terms ‘corporate crime’ and ‘white collar crime’ are no longer appropriate due to changes to both the law and the society in which the law operates. These changes have rendered the original meaning of these labels outdated. The author suggests that new labels, such as ‘organisational crime’ and ‘occupational crime’, are to be preferred.

Keywords: Criminal Law, Corporate Crime, White Collar Crime.

Essay

‘Corporate crime’ is generally regarded as any crime committed by a corporation or other form of business unit or by persons acting on behalf of such an organisation. It is usually associated with crimes motivated by the wish to maximise profits or otherwise further the business’s aims or interests. The term ‘white-collar crime’ was first used by the American sociologist Edwin H. Sutherland in a 1939 speech entitled “The White-Collar Criminal” to a joint meeting of the American Sociological Society and the American Economic Association. He defined it as “a crime committed by a person of respectability and high social status in the course of his occupation”.

Sutherland, no doubt, had in mind wealthy businessmen embezzling or bribing their way to greater personal wealth. This essay seeks to demonstrate that these terms are both now misnomers and no longer appropriate. They serve only to set such activities aside from the 'real' crimes of ordinary people in a way that suggests that they are somehow less culpable. This essay will suggest that if such categorisation is required at all, the terms 'organisational crime' and 'occupational crime' are now more apposite.

'Corporate' means: "forming a corporation; incorporated; of a corporation or corporations: corporate finance; of or belonging to a united group; joint" (Sinclair, 2003, p. 330). In every day parlance, it means 'big business'. The term 'corporate crime', at least in the mind of a non-lawyer, implies large-scale criminal offences committed by big businesses - national or multi-national conglomerates - abusing their power and wealth to commit crimes across the globe. It gives the impression that there is a distinct body of law to regulate such conduct. The English criminal law, however, applies equally (in theory at least - see below) to all legal persons (Interpretation Act 1978, Section 5 and schedule 1). There is no separate section of the English criminal law dedicated to such corporations but inapplicable to small and medium enterprises, like the one-man-band or the corner shop. The terminology also ignores the fact that the English criminal law applies to businesses whose *raison d'être* is to make a profit, as well as to non-profit organisations (for example, trade unions or associations), public authorities, public services (for example, National Health Service, police or fire department), non-governmental organisations and charities. The expression 'corporate crime' is therefore erroneous, both in terms of the implied dimensions of the enterprise concerned and in terms of the range of activities which might fall within its scope. The author considers that the expression 'organisational crime' can be argued to be more appropriate and will attempt to demonstrate this by a brief analysis of the (English) law relating to corporate homicide.

It can be noted that, despite using the word 'corporate' in its title, the Corporate Manslaughter and Corporate Homicide Act 2007 uses the word 'organisation' in defining the actual offence. Section 1(1) of the Act states: "An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased".

Organisations to which the Act applies include (a) a corporation; (b) a department or other body listed in Schedule 1; (c) a police force; and (d) a partnership, or a trade union or employers'

association that is an employer (Corporate Manslaughter and Corporate Homicide Act 2007, section 1(2)). Schedule 1 of the Act lists 48 government departments and agencies. These include such diverse bodies as the Assets Recovery Agency, the Cabinet Office, the Forestry Commission, Ordnance Survey, and the Serious Fraud Office. This clearly illustrates the fact that ‘corporate manslaughter’ is not limited to the criminal actions of corporations as traditionally understood as set out above. In fact, the first ever conviction under this Act was of a company employing only eight people at the time of the offence (*R v Cotswold Geotechnical (Holdings) Ltd.*, Winchester Crown Court, 16 February 2011 (currently unreported)). The victim had died when a trench in which he was collecting geological samples collapsed.

Under the Act, a ‘relevant duty of care’ includes (a) a duty owed by an organisation to its employees and persons working for or performing services for the organisation; (b) a duty owed as occupier of premises; (c) a duty owed in connection with (i) the supply by the organisation of goods or services; (ii) the carrying on by the organisation of any construction or maintenance operations; (iii) the carrying on by the organisation of any other activity on a commercial basis; or (iv) the use or keeping by the organisation of any plant, vehicle or other thing (Corporate Manslaughter and Corporate Homicide Act 2007, section 2(1)). The Ministry of Justice suggests in *A guide to the Corporate Manslaughter and Corporate Homicide Act 2007* (p. 6) that the offence:

will apply where a charity or voluntary organisation has been incorporated (for example, as a company or as a charitable incorporated organisation under the Charities Act 2006). A charity or voluntary organisation that operates as any other form of organisation to which the offence applies, such as a partnership with employees, will also be liable to the new offence.

It can therefore be seen that the scope of the Act is very much broader than the dictionary definition of a corporation. Furthermore, section 20 of the Act abolishes the common law offence of manslaughter by gross negligence “in its application to corporations and in any application it has to other organisations to which section 1 applies”. It appears, therefore, that the common law offence of corporate manslaughter still applies to all other organisations not falling within the definition found in section 1 of the Act.

The well-recognised legal problem of applying the common law offence of corporate manslaughter to organisations is the same problem which afflicts the application of other criminal offences

requiring proof of mens rea to organisations: the so-called ‘identification principle’. As Denning LJ said in *H.L. Bolton (Engineering) Co Ltd v T.J. Graham & Sons Ltd* [1957] 1 QB 159:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does ... directors and managers 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 is treated by the law as such.

Bingham LJ, in *R v H.M. Coroner for East Kent ex parte Spooner & Others* (1989) 88 Cr. App. R. 10, said that in order to convict an organisation: “it is required that the mens rea and the actus reus of [the offence] should be established not against those who acted for or in the name of the company but against those who were to be identified as the embodiment of the company itself”.

It is not enough to aggregate evidence against a number of individuals at different levels within the organisation (even if some of them are senior management) in order to build a case against the organisation. It is for this reason that large organisations are very often not prosecuted or are not convicted of criminal offences in situations where smaller organisations would be. In a large national or multi-national company it is very often impossible to apply the identification principle meaning that such companies escape prosecution. Compare, for example, the case of *R v P & O Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72 with the case of *R v O.L.L. Limited* [1994] (unreported). In the former case, related to the sinking of the *Herald of Free Enterprise* car ferry that resulted in the loss of 193 lives, the company escaped conviction. In the latter case, related to the loss of four lives in a canoeing incident, the company consisting of only four members of staff was convicted.

Organisations may be held liable to be convicted of strict liability offences (offences requiring no mens rea or ‘guilty mind’) through the doctrine of vicarious liability. In simple terms, this doctrine imposes criminal liability on an employer for acts done by an employee in the course of his or her employment. However, such strict liability offences usually concern regulatory rather than truly criminal matters. An often-quoted example is section 59(1) of the Licensing Act 1964. Where the offence is not one of strict liability, the organisation may still be convicted under the delegation principle (see Lord Goddard CJ in *Linnett v Metropolitan Police Commissioner* [1946] KB 290, p. 294). Under this principle, the mens rea (‘guilty mind’) of the employee or agent is imputed to the employer in circumstances where the employer’s authority has been delegated to

the employee or agent, provided only that the actus reus of the employee was within the scope of his authority (see for example *Allen v Whitehead* [1930] 1 KB 211). The courts, however, will not normally entertain charges against an organisation where “no effective order by way of sentence can be made” (per Stable J in *R v ICR Haulage Ltd* [1944] KB 551, p. 554), for example where imprisonment is the only sanction available.

Having dealt with the expression ‘corporate crime’, it is now necessary to analyse the term ‘white collar crime’ in the same way in order to demonstrate that it, too, is out of place in the modern world. The dictionary definition of ‘white-collar’ is “of or designating non-manual and usually salaried workers employed in professional and clerical occupations” (Sinclair, 2003, p. 1723). To a non-lawyer, the term ‘white-collar crime’ conjures up the image of the accountant falsifying the company books or a C.E.O. siphoning off profits for their own purposes. Again, it gives the impression that there is a distinct body of law to regulate such conduct. Again, there is not. The ordinary English criminal law applies to these so-called white-collar criminals in the same way it applies to the rest of the population.

It is submitted that ‘occupational crime’ could provide a more appropriate description of the type of activity encapsulated by Sutherland’s out-of-date phrase but even this might suggest to any non-specialised person that it refers to crimes committed in the course of paid employment. No doubt this is what Sutherland intended when he spoke in 1939 of “crime in relation to business” committed by “respectable or at least respected business and professional men” (Sutherland E. H., 1940, p. 81). However, it ignores identical crimes committed by persons who give their time voluntarily. As will be shown below, some of the types of criminality considered to be within the scope of ‘white-collar crime’ are often committed by persons not in paid employment, but in positions of trust in the voluntary sector. It is submitted that these deserve inclusion within this category of crime. A better title which encompasses both the paid and the unpaid spheres may be assigned as ‘breach of trust crimes’ because this type of offending inevitably involves a “violation of delegated or implied trust” (Sutherland E. H., 1940, p. 81). Perhaps ‘breach of trust crime’ lacks impact and is a little long-winded. The author contends, therefore, that ‘occupational crime’ is a more viable title so long as it is understood to include crimes committed during voluntary work in addition to crimes committed during paid employment.

Encapsulated within the term ‘white-collar (or occupational) crime’ are offences of inter alia, theft, fraud, conspiracy to defraud, false accounting, money laundering, bribery and insider dealing. According to Gobert and Punch (2007) these crimes:

are usually committed for the organisation, the prototypical [sic] situation which Sutherland envisaged, they may also be committed against the organisation. Or the organisation may simply be the vehicle for achieving personal goals and exercising power.

Hence, the link between organisational crime (corporate crime) and occupational crime (white collar crime) is that the latter is typically committed by persons: “who have risen sufficiently within the [organisational] hierarchy to be in a position to exploit the unique opportunities provided by their senior level management posts” (Clinard & Yeager, 1980, quoted in Gobert and Punch, 2007, p. 3). In other words, the crime is made possible by the person’s position within the organisation, often facilitated by a failure of management, supervision, and control within the organisation either as a result of incompetence or wilful blindness, and sometimes further aided by failures by external regulatory bodies. Nowhere is this better illustrated than in the fraudulent trading activities of Nick Leeson. The Conclusion of the Report of the Board of Banking Supervision Inquiry into the Circumstances of the Collapse of Barings Bank 18 July 1995 said:

13.11 We consider that those with direct executive responsibility for establishing effective controls must bear much of the blame...

13.13 The fact that Leeson was permitted throughout to remain in charge of both front office and back office at BFS was a most serious failing...

13.16 Leeson was not properly supervised.

In the case of Nick Leeson, the losses ran to over £800 million. There was a similar fraud by Jérôme Kerviel, an options trader at the French bank Société Générale with losses estimated at £3.7 billion. On 2nd March 2011, Catherine Kissick, who had been a senior vice president at Colonial Bank, Alabama, pleaded guilty to conspiracy to commit bank fraud, wire fraud and securities fraud which led to losses of almost US\$1 billion and the collapse of that bank in 2009.

It should not be assumed that all occupational crimes are of this magnitude. For example, on 19th July 2006, at Warwick Crown Court, Leslie Pattison (an estate agent) and Philip Griffiths (a solicitor) were sentenced to 3 years imprisonment and 18 months imprisonment respectively for

money laundering offences. Pattison had knowingly purchased a house belonging to convicted drug traffickers for one third of its true market value. Griffiths carried out the conveyancing work. Pattison had acquired criminal property (Section 329 Proceeds of Crime Act 2002) and had failed to disclose a suspicious transaction (Section 330 Proceeds of Crime Act 2002) while Griffith had also failed to disclose a suspicious transaction (Section 330 Proceeds of Crime Act 2002). On 7th April 2008, Thomas McGoldrick (a solicitor) was sentenced at Manchester Crown Court to 10 years imprisonment for defrauding a disabled client of £1.2 millions of his compensation for injuries received in a road accident. On 7th January 2011, David Chaytor (a former Member of Parliament) was sentenced at Southwark Crown Court to 18 months imprisonment for fraudulently claiming £18,350 in parliamentary expenses. At Snaresbrook Crown Court, on 8th February 2011, Salima Rashid (a driving instructor) and Nick Madigan (a driving test examiner) were convicted of bribery offences in relation to cash payments in exchange for pass certificates issued to learner drivers who should otherwise have failed the driving test. What these cases serve to illustrate is that there are opportunities in almost every occupation to commit what might be considered occupational crimes. In all the cases cited, the offender was in the position to commit the offence because of their paid employment. However, as argued above, occupational crime should not be thought of as something only those in paid employment can commit. Joseph Mulcahy and Maureen Lewis founded the Dream Foundation charity, the aim of which was to grant the wishes of sick and disabled children. Over six years the charity raised about £1.2 million of which only £320,000 was spent on sick children. Mulcahy and Lewis spent the rest on themselves. At Newcastle Crown Court, on 12th December 2003, they were sentenced to 5 years imprisonment and 21 months imprisonment respectively. The National Fraud Authority estimates fraud against charities at around £1.3 billion per year, of which 47% is estimated to have been committed by an employee or a volunteer (National Fraud Authority's Annual Fraud Indicator 2011).

It could be argued that some of the above examples are not 'white-collar crime' according to Sutherland's original definition ("crime in relation to business" committed by "respectable or at least respected business and professional men") (Sutherland E. H., 1940, p. 80). After all, a driving test examiner or an estate agent is not a high-level executive in a business scenario. There is no dispute that the crime was committed as a direct result of their being employed to do a certain job. If they were not so employed, the opportunity to commit that particular offence would not have

arisen. The sums of money involved may not be so large. If what they have done is not 'white-collar crime', it is necessary to consider what it is that distinguishes their crimes from those of the senior managers and professionals envisaged by Sutherland. The answer seems to be merely their station in life. They were not senior managers or professionals, so they are to be regarded as common criminals. The suggestion is that 'white collar criminals' are somehow less culpable. It is submitted that this is an artificial distinction which reinforces among senior executives the idea that their crimes are not real crimes.

The above examples of occupational crime are all cases in which the offender had committed the crime against the organisation or had used their position within the organisation for their own purposes. The 'Guinness Affair' is an example of occupational crime committed for the organisation by very senior management, respected businessmen and other professionals recruited to assist in an illegal share support operation during Guinness's 'battle' with Argyle for the take-over of Distillers. Arguably, some of the defendants were acting in the best interests (or so they thought) of the company (Guinness) and its shareholders. They were, however, variously charged with and convicted of offences of theft, false accounting, conspiracy to defraud and violations of section 151 of the Companies Act 1985 (see *R v Saunders (Ernest Walter)*, *R v Parnes (Anthony Keith)*, *R v Ronson (Gerald Maurice)*, *R v Lyons (Isidore Jack)* No. 2 [1996] 1 Cr. App. R. 463.

In conclusion, this essay sought to demonstrate that the terms 'corporate crime' and 'white-collar crime' are both now misnomers and no longer appropriate. The terms 'organisational crime' and 'occupational crime' respectively are to be preferred provided that 'occupational' is understood to include both paid and unpaid work. The link between organisational crime and occupational crime has been established by showing that 'occupational crime' can only be committed in the work environment, whether that work is paid or unpaid. It is often committed either for the benefit of the organisation or against the organisation due to a lack of effective management, supervision, and control within the organisation and, on occasion, by external regulators.

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