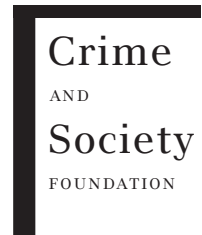


Criminal Obsessions: Why harm matters more than crime



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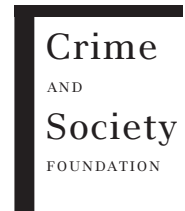
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1 Beyond Criminology?

Paddy Hillyard and Steve Tombs

Introduction

Criticism and debate of the relationship between criminology and social harm are long-standing. Arguments that the focus of criminology has moved away from wider socio-political questions to being an applied science influenced by political issues and the economic agenda, and the call for a reassessment of criminology as a result, have been prominent for over three decades (van Swaaningen, 1999; Muncie, 1999). This collection of essays attempts to answer this call. It aims to do this in three ways: by assessing the prospects of criminology *per se*; by re-examining the limits of criminology; and, above all, by investigating the merits or otherwise of criminology alongside an alternative set of discourses.

To begin we will look at of some of the key criticisms of criminology that have been put forward, largely in the past 30 to 40 years, by a range of critical social scientists. We shall do so by focusing critically upon the concept of crime, which remains central to the discipline of criminology, and concentrating on the processes of criminalisation, and the criminal justice system. In these essays ‘crime’ refers to the dominant construction of crime to which criminology is, and has historically been, wedded.

A brief 'critical' critique of criminology

CRIME HAS NO ONTOLOGICAL REALITY

Everyone grows up 'knowing' what crime is. From a very early age children develop social constructions of robbers and other criminal characters who inhabit our social world. But in reality there is nothing intrinsic to any particular event or incident which makes it a crime. Crimes and criminals are fictive events and characters in the sense that they have to be constructed before they can exist. In short, crime has no ontological reality; it is a 'myth' of everyday life.

The lack of any intrinsic quality of an act which defines an event as crime can be emphasised by reference to a variety of 'crimes'. For example, rape, credit card fraud, the use or sale of certain illegal drugs, and the (consensual) nailing of a foreskin to a tree are all defined as crime. As such, they should entail punishment. However, these situations can and do occur in very different circumstances and for widely differing reasons. Hulsman (1986) argues that since so many acts are dealt with under the heading of 'crime', a standard response in the form of the criminal justice punishment cannot *a priori* be assumed to be effective. Further, he points out that people who are involved in 'criminal' events do not appear in themselves to be a special category of people. Indeed, unless we have a story about what is crime and who is a criminal, it is impossible to recognise either. This is not to deny, of course, that there are some very nasty events which everyone calls crimes.

CRIMINOLOGY PERPETUATES THE MYTH OF CRIME

Criminology has, on the whole, accepted the notion of crime. So much is it considered to be an unproblematic concept that few textbooks bother to query it. For example, *The Oxford Handbook of Criminology* contained no discussion of the notion of 'crime' until the third edition was published. But even this edition contains no suggestion that crime has no ontological reality, and there is no sustained analysis of how criminal law fails to capture the more damaging and pervasive forms of harm.

At the same time, despite the post-modern critique of theory, criminology is still producing meta-theory to explain 'crime'. There is still a belief within criminology that it is possible to explain why people commit 'crime' notwithstanding that 'crime' is a social construct. The focus is still on *content* rather than on the social, political and economic *context* of the production of the regimes of truth.

'CRIME' CONSISTS OF MANY PETTY EVENTS

The term 'crime' always invokes a certain level of seriousness, both popularly and academically. However, the vast majority of events which are defined as crimes are very minor and would not, as Hulsman (1986) has pointed out, score particularly high on a scale of personal hardship. The *Criminal Statistics for England and Wales* illustrates this point. The police record the detail of over 1,000 different criminal events, most of which create little physical or even financial harm and often involve no victim. In addition, many of the petty events defined as crimes are often covered by insurance and individuals are able to obtain compensation for the harm done or, indeed, for harms which either have not occurred or which have been greatly exaggerated. There appears to be some expectation that since the potential harm has been insured against, it is legitimate (and not criminal) to make false claims in order to recover some of the outlay for the costs of insurance.

The inclusion of vast numbers of petty events which would score relatively low on scales of seriousness is not simply a function of the definition of crime in the criminal law. Amongst those events that get defined as crime through the law, a selection process takes place in terms of which crimes are chosen for control by criminal justice agencies, and how these selected crimes are then defined and treated by the courts. Reiman presents a 'pyrrhic defeat theory' of criminal justice policies and systems in which he argues that 'the definitions of crime in the criminal law do not reflect the only or the most dangerous of antisocial behaviours'; 'the decisions on whom to arrest or charge do not reflect the only or the most dangerous behaviours legally defined as criminal'; 'criminal convictions do not reflect the only or the most dangerous individuals amongst those arrested and charged'; and

that ‘sentencing decisions do not reflect the goal of protecting society from the only or the most dangerous of those convicted by meting out punishments proportionate to the harmfulness of the crime committed’ (Reiman, 1998, p.61).

‘CRIME’ EXCLUDES MANY SERIOUS HARMS

Many events and incidents which cause serious harm are either not part of the criminal law or, if they could be dealt with by it, are either ignored or handled outside of it. Box (1983) points out that corporate crime, domestic violence and sexual assault, and police crimes are all largely marginal to dominant legal, policy, enforcement, and indeed academic, agendas. Yet all are at the same time creating widespread harm, not least amongst already disadvantaged and powerless people.

There is little doubt, then, that the undue attention given to events which are defined as crimes distracts attention from more serious harm. But it is not simply that a focus on crime *deflects* attention from other more socially pressing harms; in many respects it positively *excludes* them. This is certainly the case for harms caused by corporations or by the state. For example, in the context of ‘safety crimes’, recorded occupational injury amounts to over one million workplace injuries per year in Britain; but restriction to the term ‘crimes’ means making reference to just 1,000 or so successfully prosecuted health and safety offences. These are enormous differences and have implications in terms of what can be done with such data conceptually, theoretically, *and* politically (Tombs, 2000). Thus, whilst retaining a commitment to crime and law, attempts to introduce currently marginal concerns such as state or corporate offences into the discipline of criminology (and, indeed, criminal justice) have raised enormous theoretical and practical tensions.

CONSTRUCTING ‘CRIMES’

In the absence of any ontological reality of crime, the criminal law uses a number of complex tests and rules to determine whether or not a crime has been committed. One of the most important tests is the concept of *mens rea* – the guilty mind.

It applies principally to the individual but not exclusively. For example, the highly questionable concept of conspiracy is used to prosecute groups of people (Hazell, 1974). In some contexts the simple failure to act is sufficiently blameworthy to be a crime. Each of these tests is an artifice in a number of respects. It is, for example, impossible to look into a person's mind and measure purpose, to understand what was going through their minds at the time, or indeed what a reasonable person would think and/or do. Therefore, *mens rea* has to be judged by proxy through examining the person's words and deeds and speculating as to the likely responses of a fictitious ideal/ordinary person. In addition, it is questionable whether a magistrate or jury in making a decision on guilt would actually arrive at their decision by the mere process of applying the appropriate technical legal tests.

The complex reasonings of the law in relation to defining crime, while not exclusively focused on the individual, have an individualising effect which extends beyond the notion of intent *per se*. Thus, even where intent is not the issue in determining liability – such as in the case of corporate manslaughter – then the individualising ethos of criminal law has militated against such successful prosecution. In contexts where this charge has been raised, such as following the Zeebrugge or Southall 'disasters', then charges of manslaughter have been made against relatively low-level individuals on the scene of the incident – namely, the assistant bosun or the train driver (see Tombs, 1995; and Slapper and Tombs, 1999, pp.30-34, pp.101-107; and Tombs, chapter 3).

The notion of intent presupposes, and then consolidates, a moral hierarchy which, once examined, negates common sense, certainly from the viewpoint of social harm. Reiman effectively illustrates this point by contrasting the motives (and moral culpability) of most acts recognised as intentional murder with what he calls the indirect harms on the part of absentee killers – for example, deaths which result where employers refuse to invest in safe plant or working methods, or where toxic substances are illegally discharged into our environment, and so on. Reiman notes that intentional murderers commit acts which are focused upon one (or, rarely, more than one) specific

individual. In such cases the perpetrator – whom in many respect fits our archetypal portrait of a criminal – ‘does not show general disdain for the lives of her fellows’ (Reiman, 1998, p.67). By contrast the relative moral culpability of the intentional killer and the mine executive who cuts safety corners is quite distinct and, he argues, contrary to that around which law operates. The mine executive ‘wanted harm to no-one in particular, but he *knew his acts were likely to harm someone* – and once someone is harmed, the victim is someone in particular. There is no moral basis for treating *one-on-one* harm as criminal and *indirect harm* as merely regulatory’ (Reiman, 1998, pp.67-70, original emphases).

For Reiman, indifference is at least if not more culpable than intention and ought to be treated as such by any criminal justice system. Yet the greater moral culpability that is attached both legally and popularly to acts of intention can also allow those implicated in corporate crimes to rationalise away the consequences of their actions (see Slapper and Tombs, 1999, pp.105-107, pp.118-122; Pemberton, 2004).

CRIMINALISATION AND PUNISHMENT INFLICT PAIN

Defining an event as a ‘crime’ either sets in motion, or is the product of, a process of criminalisation. The state – via the criminal justice system – appropriates the conflict and imposes punishment, of which the prison sentence is the ultimate option and symbol (Blad et al., 1987). Christie is very deliberate in calling this process ‘pain delivery: this is what is actually done by the criminal justice system: delivering pain in forms of punishments’ (Christie, 1986). He rejects the claims that prison, for example, seeks to rehabilitate, deter, or provide just deserts.

Indeed, the state’s infliction of pain through the criminal justice system involves a number of discrete, but mutually reinforcing, stages: defining, classifying, broadcasting, disposing and punishing the individual concerned. Furthermore, these very processes create wider social harms which may bear little relationship to the original offence and pain caused. For example, they may lead to loss of a job, a home, family life and ostracism by society. Moreover, such processes foreclose social policy or other responses to events (see below).

‘CRIME CONTROL’ IS INEFFECTIVE

The crime control approach has manifestly failed. On almost any publicly stated rationale upon which legitimacy has been sought for them, criminal justice systems are ineffective. Moreover, even on the basis of a narrow definition of ‘crime’, the number of events defined as ‘crime’ has been increasing steadily for many years with only a small, recent downturn (Home Office, 2003a). Many of those who are defined as criminal return to crime after the infliction of pain. For example, a recent UK report claimed that ‘of those prisoners released in 1997, 58% were convicted of another crime within two years. Some 36% were back inside on another prison sentence’ (SEU, 2000, p.1). If a car broke down on nearly 60 out of every 100 journeys, we would get rid of it.

The criminal justice system does not work according to its own aims. It is supposed to do something about certain crimes in society. It operates by processing those individuals (criminals) held responsible for certain actions. And the problem is seen to be solved if the offender has received a criminal justice system punishment. In his classic text *Prison on Trial*, Mathiesen (1990) collates evidence from a wide range of sources (penal, sociological, and criminological) regarding the defensibility of prison. He argues that no theoretical rationale for the prison – be this based upon individual prevention, rehabilitation, incapacitation, individual deterrence, general prevention or some attempt to calculate a proportional just punishment – is able to defend the prison. Yet though it has never been able to work according to any stated rationales, it continues to exist, indeed proliferate.

‘CRIME’ GIVES LEGITIMACY TO THE EXPANSION OF CRIME CONTROL

Because crime is so often considered in isolation from other social harms it allows for an expansion of the crime control industry. Successive governments over the last 20 years have made crime control a top priority. In the UK the amount committed to law and order has increased faster than any other area of public expenditure and, as a result, more and more peoples’ livelihoods are dependent on crime and its control. Modern social orders are thus being increasingly characterised

by an unacknowledged but open war between young males, mainly from poor and deprived backgrounds, and an army of professionals in the crime control industry (Box, 1983; Christie, 1993; Reiman, 1998). At the same time, many manufacturing industries have diversified to provide the equipment in the war against crime.

As Hulsman (1986) has pointed out, the criminal justice system is characterised by a fundamental uncontrollability. For Henry and Milovanovic, conventional crime control efforts fuel the engine of crime:

Control interventions take criminal activity to new levels on investment and self enclosed innovation.[...] Public horror and outrage call for more investment in control measures that further feed the cycle (1996, pp. x-xi).

Indeed, modernist criminological research, with the production of 'scientific results', plays its part in this circle by consolidating and affirming reality (ibid). More generally, numerous new courses in crime, criminology and criminal justice have been established in UK universities to train the personnel, whilst there have been large expansions in the collection and analysis of criminal intelligence and in the dissemination of crime news.

'CRIME' SERVES TO MAINTAIN POWER RELATIONS

The concept of crime maintains existent power relations in many ways. First, although the criminal law has the potential to capture some of the collective harmful events perpetuated in the suites and in corridors of the state, it largely ignores these activities and focuses on individual acts and behaviours on the streets. This is in part a product of the individualistic nature of judicial reasoning and its search for the responsible individual. In part it is also in response to the notion of a very particular version of crime and its discourses in our culture. Second, by its focus on the individual, the social structures which lead to harmful events – such as poverty, social deprivation and the growing inequalities between rich and poor – can be ignored. Third, the crime control industry is now a powerful force in its own right; it has a vested interest in defining events as crime.

Fourth, politicians use crime to mobilise support both for their own ends and to maintain electoral support for their parties. Finally, recalling Reiman's 'pyrrhic defeat theory', he argues that the way in which the social reality of crime has been created in, and reproduced through, the criminal justice system and criminal justice policy has perpetuated 'the implicit identification of crime with the dangerous acts of the poor' (Reiman, 1998, p.61). Thus crime in many different sets of relationships serves to maintain existing power relations.

Indeed, since its inception, criminology has enjoyed an intimate relationship with the powerful. This relationship is determined largely by its failure to analyse the notion of crime – and disciplinary agendas set by this – which has been handed down by the state, and around which the criminal justice system has been organised (Foucault, 1980; Cohen, 1981; Garland, 1992, 1997).

The Potential of a Social Harm Approach

This section outlines some reasons why a disciplinary approach organised around a concept of harm may be more theoretically coherent and more progressive politically than the current, generally accepted, notion of crime. The approach that we have sought may encompass the detrimental activities of local and national states and of corporations upon the welfare of individuals, whether this be lack of wholesome food, inadequate housing or heating, low income, exposure to various forms of danger, violations of basic human rights, and *victimisation to various forms of crime*. Of course, when we speak of people's welfare, we refer not (simply) to an atomised individual, or to men and women and their families, the social units who often experience harm. For it is clear that various forms of harms are not distributed randomly, but fall upon people of different social classes, genders, degrees of physical ability, racial and ethnic groups, different ages, sexual preferences, and so on.

DEFINING HARM

This section aims to help define what is meant by social harm. Here we begin to mark out tentatively the range or types of harms to individuals with which a social harm approach would be concerned.

A social harm approach would first encompass *physical* harms. These would include: premature death or serious injury through medical treatment; violence such as car ‘accidents’; some activities at work (whether paid or unpaid); exposures to various environmental pollutants; domestic violence; child abuse; racist attacks; assaults; illness and disease; lack of adequate food; lack of shelter; or death, torture and brutality by state officials.

It would also include *financial/economic* harm, which would incorporate both poverty and various forms of property and cash loss. We are thinking particularly here about a variety of forms of fraud, such as pension and mortgage ‘mis-selling’, misappropriation of funds by government, malpractice by private corporations and private individuals, increased prices through cartelisation and price-fixing, and redistribution of wealth and income from the poorer to the richer through regressive taxation and welfare policies. Widening the notion of financial or economic harm would involve recognising the personal and social effects of poverty, unemployment, and so on.

Another possible, and much more problematic, area concerns *emotional and psychological* harm. These types of harms are much more difficult to measure and relate to specific causes. However, they are significant in many different contexts. An example would be the potentially damaging effects of disproportionate use of stop and search on young black males or on the Muslim community.

Sexual harm should also be considered, taking into account, for example, the degree of harm experienced by victims of rape – not simply in the event itself, but in the trauma of the consistent failures of criminal justice systems to respond at all adequately to such an offence - or those subjected to the myriad of oppressions associated with compulsory heterosexuality (Bibbings, 2004).

A developed understanding of social harm could also include reference to '*cultural safety*' (Alvesalo, 1999, p.4), encompassing notions of autonomy, development and growth, and access to cultural, intellectual and information resources generally available in any given society.

There are obvious objections to be raised at such attempts to even begin to define harms. At best, it could be proffered that harm is no more definable than crime, and that it too lacks any ontological reality; at worst, it might be objected that definitions of harm vary according to particular political orientations to the world. We shall return to these objections later. Here, however, two points need emphasis.

First, defining what constitutes harm is in fact a far more productive and positive process than simply pointing to a field of inquiry defined by an existent body of (criminal) law. Indeed, a social harm approach is partially to be defined in its very efforts to measure social harms. If we are attempting to measure both the nature and the relative impact of harms which people bear, it is at least reasonable to take some account of people's own expressions, and perceptions, of what those harms are! Thus a field of inquiry is (partially) defined by peoples' understandings, attitudes, perceptions and experiences rather than pre-ordained by a state.

Second, these objections seem to be premature and overly pessimistic. There are many examples where, despite some social phenomenon being difficult to define, we attempt to access and measure this via a series of indicators. What matters is what these indicators are, and how they are selected. Disputes on these issues should not preclude the validity or viability of the exercise.

So, there are real difficulties in, first, identifying a range of harms that might fall within the rubric of social harm, and, second, developing a valid series of means of measuring these. However, we view these more as technical issues *in*, rather than as insuperable obstacles *to*, the development of such a disciplinary enterprise. The following section proposes a number of arguments in favour of the development of a social harm approach.

THE VICISSITUDES OF LIFE

An analysis of harm is fundamental to developing a much more accurate picture of what is most likely to affect people during their life. Harm could be charted and compared over time. While crime is charted temporally and, increasingly spatially, it is seldom compared with other harmful events. Hence, crime statistics produce a very distorted picture of the total harm present in society, generating fear of one specific type of harm and perpetuating the myth of crime. A comparative and broader picture would allow a fuller understanding of the *relative* significance of the harms faced by different groups of individuals. Finally, an emphasis upon social harm would also help to focus upon harms caused by chronic conditions or states of affairs, such as exposure to airborne pollutants, poor diet, institutionalised racism and homophobia, as opposed to the discrete events which tend to provide the remit of criminology and the criminal law. This would not only benefit individuals, but could also provide a basis for more rational social policy: policies, priorities and expenditures could be determined more on the basis of data and less on the basis of prejudice and the seemingly irresistible need to reduce ‘crime figures’. A focus on harm could have benefits for local and national states, though such a focus would present a potential threat to these states since their activities (or inactivities) are likely to be highlighted as *sources* of harm.

THE ALLOCATION OF RESPONSIBILITY

The study of harm permits a much wider investigation into who or what might be responsible for the harm done, unrestricted by the narrow individualistic notion of responsibility or proxy measures of intent sought by the criminal justice process. It allows consideration of corporate and collective responsibility. Thus, while the responsibility for serious rail crashes is often impossible to determine legally in any satisfactory fashion, companies involved in looking after the track and the train operators surely bear some moral responsibility for the multiple-fatality incidents? Indeed, the UK’s Law Commission (1996) has recommended legal reform to allow criminal responsibility to be more easily allocated to corporate bodies – yet even were such a change to be enacted (and it still has not, despite a series of Government commitments since 1997), overall the restricted

scope of criminal responsibility would remain. A study of harm allows a sharper focus on political and ministerial responsibility, which appears to have been increasingly watered down in recent years if the failure of ministers to resign in the face of major disasters and other harmful events is any indication. The study of harm also raises the interesting new possibility of the allocation of responsibility in the failure to deal adequately with social problems. Dorling indicates in chapter 2, for example, that some areas have experienced no homicides over the last two decades while other areas have experienced 10 or more; these latter areas are highly correlated with poverty. Clearly, structural rather than individual factors are responsible. This conclusion thus raises the interesting question of whether the allocation of responsibility lies solely with the individual murderer or also with those who have either failed to eradicate or have reproduced poverty in these areas.

POLICY RESPONSES

A social harm approach might allow greater consideration to be given to appropriate policy responses for reducing levels of harm. The aim of welfare should be to reduce the extent of harm that people experience from the cradle to the grave. As we have indicated, the focus of criminology and the use of the criminal law tend inevitably to generate responses to illegality which entail some form of retribution or punishment on the part of the state; what is more, these processes are in the hands of judges, magistrates, barristers, and so on who are largely unrepresentative of general populations, and in whose hands 'justice' has time and time again proven elusive to say the least. A social harm approach, however, triggers quite a different set of responses to harm. Responses to social harms require debates about policy, resources, priorities, and so on. Surely these are more appropriate arenas for debate than relatively closed criminal justice systems inhabited by unelected, unaccountable and certainly non-representative elites.

The shift from criminal justice to a broadly defined social policy of course raises questions of efficacy and justice. There are some who might wish to extend the scope of the criminal law to deal with activities and omissions that are hitherto either not,

or inadequately, criminalised. For example, at least since the term ‘white-collar’ crime was coined (Sutherland, 1940), there have been successive generations of criminologists who have argued for the more effective criminalisation of white-collar and corporate offenders, not least in the name of some form of social justice. The argument goes that if lower class offenders are to be treated harshly, then an equal treatment should extend to other types of offenders. Such arguments have gone largely unheeded, so that the treatment of such offenders at all stages of the legal process remains highly favourable when compared with lower class offenders (Slapper and Tombs, 1999; and chapter 3).

This suggests something to us about the nature of the system – the criminal justice system – to which these arguments are directed. But even if successful, such arguments may tend to legitimate the existence of an extended system of social control, within which the weakest and most vulnerable members of our societies have always suffered disproportionately. Further, but relatedly, such calls for more effective criminalisation need to take into account the ‘flexibility’ of this system and its unequal functioning. Thus, those of us who have proposed reforms in the way in which corporate offenders, for example, are treated, must be clear that these reforms may then be developed in ways that we had not intended. That is, ‘progressive’ reforms which seek to alter the basic workings of a highly unequal criminal justice system can, and are often, turned on their head, and may ultimately serve to exacerbate existing structures of inequality and vulnerability; the intentions behind proposals clearly do not determine their actual uses (Alvesalo and Tombs, 2002).

MASS HARMS

A social harm approach might more accurately chart instances of mass harm. A basic weakness with criminology is that it is fundamentally related to the actions, omissions, intentions of, and relationships between, individuals. As such it has problems embracing corporate and state ‘crime’. All too often the debates around these issues focus on arguments regarding whether or not such harms do or should constitute crimes. Basically we have here attempts to squeeze into a discipline, organised around individualistic notions of action and intention, the outcomes

of bureaucratic entities which are not reducible to the actions, motives and intentions of the individuals who constitute them. There is, quite simply, a lack of fit.

Equally great efforts are *then* expended, if ‘crimes’ have been identified, in attempting to determine effective policy responses within the existing criminal justice system. This enormous effort might better be used in determining more appropriate public policy responses. Thus, for example, developing mechanisms to render the activities of internal security services involved in ‘anti-terrorist’ activities more transparent and publicly accountable is likely to be more effective than using the criminal law to determine which particular individuals bear what degree of responsibility for particular transgressions, such as the effects of a ‘shoot to kill policy’. Proposing changes to governance structures, or the nature of corporate ownership *per se*, is likely to prove more effective than seeking to identify individual company directors who might represent the corporate mind and who thus had the information to have prevented a particular ‘accident’ or ‘disaster’ occurring. The point is not that remedies through the criminal or civil law are worthless; but it is that by remaining wedded to crime, law and criminal justice, many criminologists are less open to wider, and at least potentially more effective, social and public policy responses.

CHALLENGES TO POWER

Of course a social harm approach is likely to pose quite different challenges for structures of power embedded within and around local and national states. All too often, criminological reasoning has been used to bolster states, providing rationales for the extensions of state activities in the name of more effective criminal justice. Since the products of research around social harm are likely to implicate states, then the relationship with states will be quite different – there is likely to be less symbiosis in terms of activity and interests. Indeed, the seemingly increasingly close and complex links between local states and local, national and transnational capital mean that these challenges are both political and economic. In respect of challenges to existent power structures in these senses, then, an emphasis upon social harm may have far greater potential to create change.

A CRITIQUE OF RISK

Our society is increasingly conceptualised as a 'risk society' where insurance has become fundamental to our dealings with the lottery of life. Feeley and Simon (1992) have applied the notion of risk to developments in penal policy and argue that there has been a shift away from a focus on rehabilitation and reform to a focus on risk. Reducing the risk in the control of dangerous populations is now a central concern of the penal system, and an actuarial criminology has replaced a rehabilitative criminology.

We would argue that a discourse around harm would challenge the overly-individualistic (Pearce and Tombs, 1998) and apolitical (Rigakos, 1999) forms of analyses embraced by the notion of risk. Harm focuses on collectivities not in order to calculate individual risk but to seek a collective response to its reduction. It opens up discussions about the conflicts in economic life around the differentials in wealth and life chances. A social harm approach would, in this sense, be more positive.

Criminology, Social Harm and Justice

It must be emphasised again that we are not arguing that a social harm approach has a necessary superiority over criminology. The key issue is that where there are competing claims then these must be judged according to which approach will produce greater social justice. This is ultimately a political question. Moreover, we would argue that these political questions must be addressed at both the strategic and the tactical levels. In a longer-term strategic sense, criminology is to be abandoned since its focus upon crime, law and criminal justice, which entails some reproduction of 'a class-based administration of criminal justice' (Braithwaite, 1995, p.118), has always been inadequate. But this is not to deny the politically progressive tactic of approaching crime, law and criminal justice as sites or objects of struggle, which facilitate the development of focused political action.

A shift to a social harm approach is not, then, to entail any necessary abandonment of such struggles. However, a commitment to a focus upon social harm does carry with it two clear standpoints. First, that intellectual and political activity does not privilege law as a site of activity or struggle; and, second, that intellectual and political activity can address harm without making reference to law. These are short- and medium-term tactical political issues. Moreover, they are tactics that cannot adequately be adopted from the starting point of criminology, which is necessarily pulled towards dealing with crime, law and criminal justice.

A shift to social harm, then, entails no *restriction* of our work and political activity to law, while at the same time no simple abandonment of this focus. While critiques of criminology are well-made, they may tend ultimately towards a reification of criminology *as is*. The problem for us is when a tactical aim is confused with a strategic end. Criminology can be re-fashioned, but only within limits.

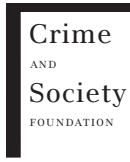
In general, then, it is our view that all forms of theorising and intellectual practice tend to reify, support and indeed enhance that very phenomenon which is at the centre of their activity. Disciplines produce and reproduce their objects of study. Thus, no matter how deconstructive, radical, critical a criminology is, in the very fact of engaging in criminology, this at once legitimates some object of ‘crime’.

This essay has referred constantly to the *potential* of criminology and the *potential* of a social harm approach. But criminology has been established as a discipline for well over 100 years. While it would be simply wrong to claim that criminology has not contributed to any progressive social change, its progressive effects must be seen largely in terms of potential. Indeed, there is significant room for debate as to whether or not these particular instances of progressive social change could not have been achieved more effectively through means quite different to criminology and criminal law. Even if we grant criminology its progressive effects, then the costs of this progress have been high. Indeed, one of the consistent effects of the category

of crime and criminal justice systems is the reproduction and exacerbation of social and economic inequalities. As Reiman (1998) put it in the title of a now classic text, *The Rich Get Richer and the Poor Get Prison*.

Criminology may have, and criminologists certainly have, been responsible for important and progressive theoretical and practical work. Nevertheless, the efforts of over 100 years' focus on the object of crime have been accompanied by: a depressing and almost cyclical tour around a series of cul-de-sacs in search of the 'causes' of crime; vastly expanded criminal justice systems which, at the same time, have proven unsuccessful on the basis of almost any publicly provided rationale for them; and ever increasing processes of criminalisation. If criminology is now well established as a discipline, the costs of legitimacy and professionalisation have been, and continue to be, high when measured against any index of social justice. An alternative discipline, such as that based around social harm, could barely be less successful. But this involves pitfalls, and some might argue that these are more problematic than those entailed in the work of criminology: while the dangers associated with criminology are at least known (formally), those that may follow from work on social harm are still relatively unknown.

Whether or not a new disciplinary focus is to emerge, we must accept that raising issues of social harm does not entail making a simple, once-and-for-all choice between representing these as *either crimes or harms*; each may form part of an effective political strategy. But it is crucial that whether or when we speak of crime or harm, we must be clear about which we are speaking on particular occasions. Description and analysis must not slide between the two, not least due to criticism that such analysis lacks rigour or displays bias, for example. In this respect, the development of a discipline organised around social harm may prove progressive since it provides a further disciplinary basis from which, and series of outlets within which, treatments of social harm may – where deemed appropriate – proceed.



2

Prime Suspect: Murder in Britain

Danny Dorling

Introduction

Murder is part of our everyday lives. Depending on the television schedules, we are exposed to far more fictional murders per day in Britain than actually occur across the whole country in a week, a month or even a year. The few actual murders that take place (between one and two a day on average) are brought vividly to our attention through newspapers, radio and television news. Murder sells the media. It buys votes through fear. Its presence almost certainly leads to many of us curtailing our daily activities, treating strangers in strange ways, avoiding travelling through parts of towns and cities, worrying who our children will meet. Our daily exposure to the fact and fiction of murder seeps into our subconscious and alters our attitudes and behaviour. The majority of people in Britain have traditionally favoured a return of the death sentence for the perpetrators of this rarest of crimes. They would sanction this murder, because they see murder as the isolated acts of individuals and so they think that if you kill the killer the killing goes away. What though, really lies behind murder?

A classic, and ever more popular, way in which murder is portrayed is through the eyes of its victims. The pathologist has taken a lead role in the story of murder that they tell through the bodies and reconstructed lives of their silent witnesses, second only to the murder detective. What would we see if we were to take that approach, but not with one murder, a dozen,

or even the hundred or so that the most experienced of murder professionals can have dealt with over their working lives, but with the thousands of murders that have taken place across the whole country over many years? Such an approach has the disadvantage of reducing each event to just a short series of facts, and turning detailed individual stories into numbers and rates. However, it has the advantage of preventing extrapolation from just a few events to produce unjustified generalisations and encourages us to look deeper for the root causes of murder. It also makes us treat each murdered victim as equal, rather than concentrating on the most complex, unusual or topical of murders, and it can be turned back into individual stories of particular people in places and times. This chapter attempts to illustrate the advantages of such an approach to the study of murder. To follow this story you need to follow the twist and turns of homicide statistics, social indexes, and population estimates, rather than *modus operandi*, suspects, bodies and weapons; but this is just as much a murder story as the conventional one. This, however, is a factual story of 13,000 murders rather than one, and of a search for underlying rather than superficial causes.

This chapter is structured through asking five simple questions:

- who is murdered?
- when were they murdered?
- where were they murdered?
- with what were they murdered and, finally,
- why were they murdered?

The killer, as is traditional, is not revealed until the end and, as is tradition, there is a twist to the plot. But, although this story is told in a dispassionate way, it is a story of real people and actual events. The story behind the thousands of murder stories is more a testament to our shared inhumanity than a thriller. Murder, behind the headlines is the story of the connected consequences to our collective actions. Murder, despite being the rarest of crimes, tells us in the round a great deal about millions of us who will never be even remotely connected to such a death directly.

Who is murdered?

Between January 1981 and December 2000, approximately 13,140 people were murdered in Britain, on average 1.8 per day. The number is approximate because about 13% of deaths which were initially recorded as murder are later determined not to have been murders and thus the numbers are revised periodically (these deaths have been excluded here). Similarly, deaths not thought to have been murders can subsequently be reclassified as murder. Figure 1 shows the rates of murder in Britain by single year of age and sex.

Figure 1 was constructed through examining all the records of deaths in England, Wales and Scotland and identifying those where the cause of death was either recorded as homicide (according to the International Classification of Diseases [ICD] ninth revision, E960-E969) or death due to injury by other and unspecified means (E988.8) which mainly turn out later to be homicides (Noble and Charlton, 1994). Each of these deaths was then given a probability of being a murder according to the year in which death occurred such that the total number of deaths classified here as murder sums exactly in England and Wales to the number of offences currently recorded as homicides per year (Flood-Page and Taylor, 2003, Table 1.01; see also Home Office, 2001). It was assumed that the annual probabilities that a death initially recorded as homicide remains being viewed as homicide would be applicable also to deaths in Scotland, although the system of initially coding cause of death differs in that country. The population denominators used to calculate the rates shown in Figure 1 are derived from mid-year estimates of the population and the data have been smoothed for death occurring over age two.

Figure 1 tells us many things. The overall 20 year average British murder rate that can be calculated from it of 12.6 murders per year per million people is of little meaning for anything other than international comparisons (British rates are low), for reassuring the population (99.88% of people are not murdered), or for scaring them (you are 176 times more likely to be murdered than win the lottery with one ticket). More usefully,

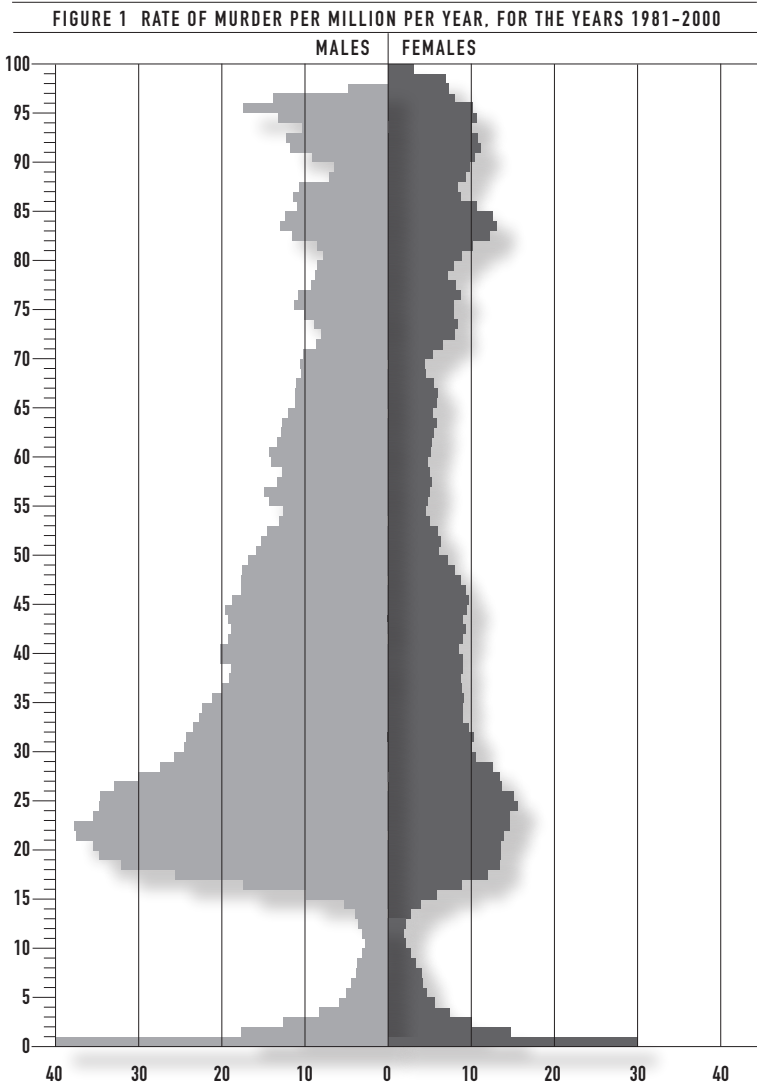


Figure 1: Rate of murder per million per year, in Britain, 1981-2000, by sex and age

the rate for men, at 17 per million per year is roughly twice that for women (at nine per million per year). The single age group with the highest murder rate are boys under the age of one (40 per million per year) and then men aged 21 (38 per million per year). A quarter of all murders are of men aged between 17 and 32. A man's chance of being murdered doubles between the age of 10 and 14, doubles again between 14 and 15, 15 and 16, 16 and 19 and then does not halve until age 46 and again by age 71 to be roughly the same then as it stood at age 15. Rates rise slightly at some very old ages for both men and women although at these ages the numbers of deaths attributed to murder are very small (as the population falls).

We often tend to concentrate far more upon the characteristics of the direct perpetrators and the immediate circumstances leading up to murder than on the characteristics of the victims or the longer-term context in which murder occurs. For instance, 50% of female homicide victims killed by men are killed by their current or former male partner; it is almost always parents but occasionally other family or acquaintances who kill infants; and alcohol is a factor in just over half of murders by men of men (Brookman and Maguire, 2003a). However, researchers commissioned to consider the short-term causes of homicide also know that

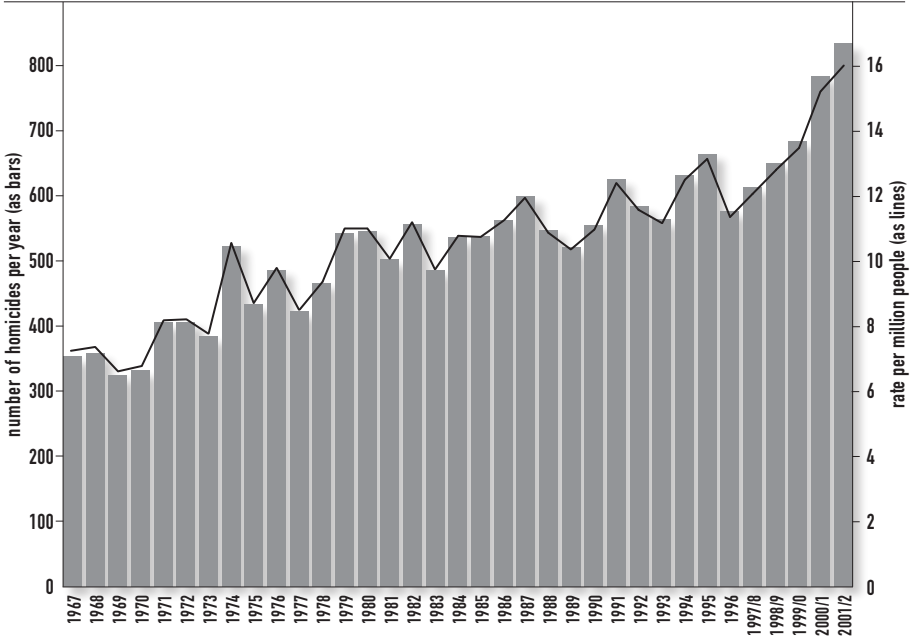
there is evidence of a strong correlation between homicide rates and levels of poverty and social inequality, and it may be that, in the long-run, significant and lasting reductions in homicide can best be achieved by strategies which take this fully into account. (Brookman and Maguire, 2003b, p.2)

Figure 1 suffers from only telling us what the chances of an average person of particular age and sex are of being murdered in Britain in a year. For any particular person those rates will vary dramatically according to knowing more about exactly who they are, where they live and so on. Before turning to those facts the next step is to determine the importance of when they were murdered.

When were they murdered?

Both the number of murders and the rate of murder have doubled in England and Wales in the 35 years since the official series began. Figure 2 shows this series (Flood-Page and Taylor, 2003, Table 1.01). It is very likely that the numbers for the last two years will be reduced as some of these offences come to be no longer regarded as homicide in the future, but it is unlikely that they will be reduced by much. Thus, until recent years the increase in the murder rate was slowly falling. In the first half of the 1970s the smoothed murder rate rose by 22% in five years, it rose by 13% in the subsequent five years, by 4% in the first half of the 1980s, 3% in the latter half of the 1980s, 8% in the first half of the 1990s and 14% in the latter half of that decade. In answer to the question of when, victims are more likely to have been murdered more recently. Over half of all murders in the last 35 years took place in the last 15 of those years.

FIGURE 2: OFFENCES CURRENTLY RECORDED AS HOMICIDE, ENGLAND AND WALES, 1967-2001



At first glance, Figure 2 appears to imply that murder rates have risen. However, for the majority of the population this turns out, on closer inspection, not to be the case. From here on, data for deaths occurring in the years 2001 or 2002 will not be used as we cannot yet be sure of their reliability. Instead the four five-year time periods from 1981 to 2000 will be compared (see Rooney

and Devis, 1999 for more details of time trends). It is important to remember that in calculating a murder rate it is not only the number of people who are murdered that changes over time, but also the number of people living who could be murdered.

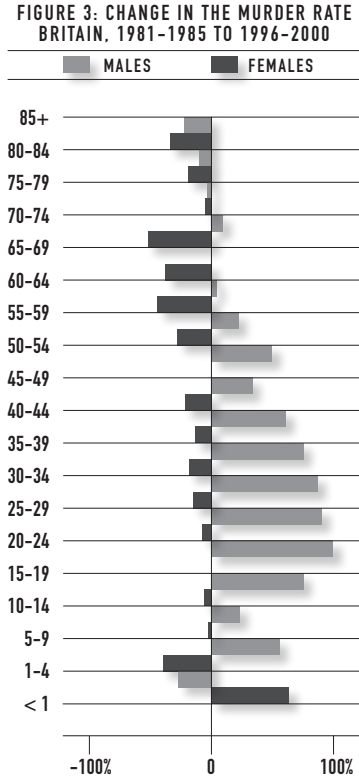


Figure 3 shows the percentage change in the murder rates that all contribute to the over-all change shown in Figure 2. Most strikingly, for all ages of women other than infant girls the murder rate has either fallen or hardly changed; for women aged 65 to 69 it fell to less than half its early 1980s levels. Murder rates have also fallen for men aged 60 and above and under five. For a majority of the population, given their ages and sexes, their chances of being murdered have fallen

over time, in some cases considerably. How then has the overall rate increased? For all males aged between five and 59, murder rates have increased significantly. At the extreme they have doubled for men aged 20 to 24 over the course of these two decades. The increase in the murder rate of men, and particularly young men is enough to more than outweigh the decreases that most groups have experienced over time. Of course, this is not true of all people, and so we next turn to where these changes have occurred.

Where were they murdered?

Having considered who is most likely to be murdered given their age and sex and how these rates are changing over time, the next step in the process is to consider where these murders take place. As already touched on, it is obvious to the public at large and to criminologists who consider murder in detail that place matters. For murder, internationally it matters more where you live than who (or when) you are. Living in the United States is more dangerous no matter whatever age you are, as compared to Britain. But then there are many places within the US with lower murder rates than places in Britain. Places are far harder to categorise than people's ages or sex, or time. However, we know that the key component to what makes one place more dangerous to live in as compared to another is *poverty*. The poorer the place you live in the more likely you are to be murdered. But just how more likely and how is that changing?

In Britain the most sensible measure of poverty is the Breadline Britain index, which can be used to calculate, for each ward in the country, the proportion of households living in poverty (Gordon, 1995). Fortunately for this study the index was calculated at the mid-point of the period we are interested in using, among other information, the results of the 1991 Census for over 10,000 local wards in Britain. For each ward we know the proportion of households living in poverty at that time. This tends to change very slowly over time and thus we can divide the country up into 10 groups of wards ranging from those within which people suffer the highest rates of poverty to those in which poverty is most rare. Next, for each of the four time periods we are concerned with, we make use of the changing number of people by their age and sex living in each of these 10 groups of areas. Given that information, and applying the murder rates that people experienced in the first period throughout, we can calculate how many people we would expect to be murdered in each decile area taking into account the changing composition of the populations of those areas. Finally, if we divide the number of people actually murdered in those areas at those times by the number we would expect if place played no part, we derive a standardised mortality ratio (SMR) for each area at each time.

For readers unfamiliar with this kind of approach the above paragraph was probably highly confusing. However, the results of applying this methodology are simple to interpret and also remarkable. They are shown in Table 1. The first line of this table should be read as saying that in the least poor areas of Britain, we find that for every 100 people we would expect to be murdered given how many people live there only 54 were murdered at the start of the 1980s and only 50 by the end, a fall of four per 100 expected (or 4%).

In the five years 1981-85, people living in the poorest 10% of wards in Britain were four and a half times more likely to be murdered than those living in the least poor 10%. Furthermore, the SMR for murder rises monotonically (always in the same direction) with poverty: for every increase in poverty there is a rise in the murder rate, such that people living in the poorest tenth of Britain were 143% more likely than average to be murdered. This rose in the successive five year periods to 161%, 171% and then 182% above the average SMR of 100. Most surprisingly, despite the overall national doubling of the murder rate over this time, people living in the least poor 20% of Britain saw their already very low rates of murder fall further. The increase in murder was concentrated almost exclusively in

TABLE 1: STANDARDISED MORTALITY RATIOS FOR MURDER IN BRITAIN, BY WARD POVERTY, 1981/85- 1996/2000

	1981-85	1986-90	1991-95	1996-00	Change
Least poor	54	59	55	50	-4%
Decile 9	67	65	67	60	-7%
Decile 8	62	69	68	66	4%
Decile 7	74	85	72	81	7%
Decile 6	79	77	83	88	9%
Decile 5	95	95	95	103	8%
Decile 4	112	122	125	130	18%
Decile 3	119	130	148	147	28%
Decile 2	151	166	191	185	34%
Most poor	243	261	271	282	39%
Ratio	4.50	4.42	4.89	5.68	

Note: expected values are based on 1981-85 national rates

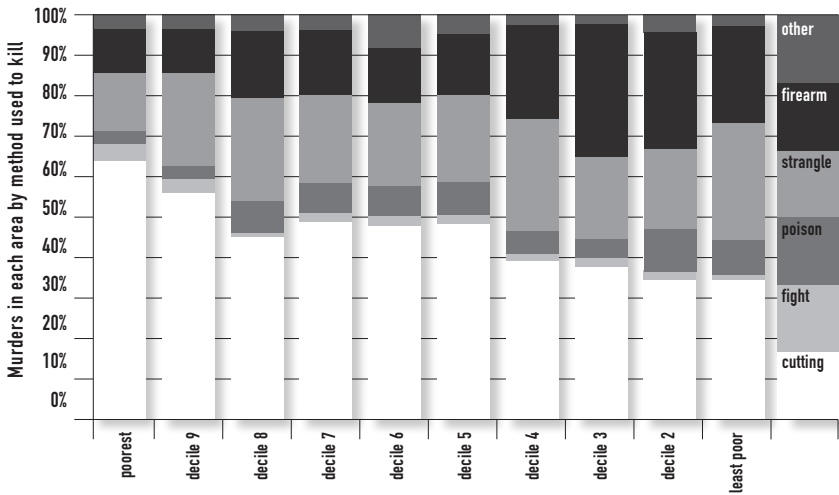
the poorer parts of Britain and most strongly in its poorest tenth of wards. By the 1990s the excess deaths due to murder in the poorest half of Britain amounted to around 200 per year, that is murders that would not occur if these places experienced average rates. Just over half of that number related to excess murders amongst the poorest tenth of the population. The rise in murder in Britain has been concentrated almost exclusively in men of working age living in the poorest parts of the country.

With what were they murdered?

What is causing these murders? How are they being committed? Is it a rise in the use of guns? This is a superficial question. It is what lies behind the murder rate that matters. A rise in drug use? Again superficial, it's what might lie behind that. Nevertheless, it is worth looking at how people by place are killed if only to help dispel some myths. The cause of death by method is specified on the death certificates of a proportion of those who are murdered. In many cases the exact cause is unspecified. If we take those cases for which a cause is specified then five main causes account for almost all murders: a fight (ICD E960), poison (ICD E962), strangling (ICD E963), use of firearms (ICD E965) or cutting (ICD E966). Figure 4 shows the proportion of murders attributed to these methods and all other causes for all murders in each ward of Britain grouped by poverty rate between 1981 and 2000.

The most important myth to dispel is that of gun crimes being a key factor behind the high murder rates in poor areas. Firearms account for only 11% of murders in the poorest wards of Britain compared to 29% of murders in the least poor areas. The more affluent an area, the more likely it is that guns will be used when murders are committed. The simple reason for this is that there are more guns in more affluent areas. They might be legal shotguns rather than illegal handguns, but that makes them no less lethal. The use of firearms has risen in the poorest wards over the 20 years, but only by roughly an additional five murders a year (roughly one extra murder per million people living there). There has been no change in the proportion of murders

FIGURE 4: METHODS OF MURDER BY WARD POVERTY, BRITAIN, 1981-2000



committed with firearms in richer areas, despite the introduction of legislation designed to limit their use.

The most common way in which people are murdered in the poorest fifth of areas in Britain is through being cut with a knife or broken glass/bottle or (in only 4% of cases, but still the largest proportion of any decile area) in a fight – usually through kicking. A higher proportion of people are poisoned or strangled in more affluent areas. In fact the use of poison in murder has increased its share by 15% in the least poor areas over the 20 years. Perhaps those murders still occurring in more affluent areas are becoming a little more premeditated there? In almost all areas the proportion of murders attributable to strangling is falling. This may well reflect the fall in the murder rate of women by men. This brief summary has concentrated on what is changing. In the round, however, much the same methods of murder are used now as were used 20 years ago, just more often in poorer areas and less often in the less poor parts of Britain.

Why are they murdered?

Our final, fifth question is ‘why?’ Why are some people much more likely to be murdered than others and why are the rates of murder in Britain changing as they are? These are the most difficult of all the questions to address, but clearly the most important. In a way, the answer to the second part of the question – why are the rates changing as they are? – can help answer the first – why are some people much more likely to be murdered? Table 2, is complicated but attempts to show how the changes can be examined in much more detail to try to uncover the reasons behind the rising overall murder rate.

Table 2 shows the murder rate of all men in Britain by age from 11 to 50. The table begins in 1993 because this was the first year in which deaths were recorded by year of occurrence rather than registration (year-on-year variations are unreliable before then). The rates have been smoothed slightly to make them more reliable, which has the effect of reducing the highest rates slightly. The first line of the table shows that the murder rate of 11-year-old boys has fluctuated between one and three per million over these eight years while the murder rate of the group now most at risk of murder, 21 year old men, has risen from 31 per million in 1993 to 51 per million by 2000. The figures in the table are shaded to allow for easier reading and it is the pattern to the shading that provides our clue as to why murder rates are rising. The shading forms a triangle and, on these kinds of figures a triangle indicates what is known as a cohort effect. A cohort effect is something which affects people born in a particular year or group of years.

Take a man born in 1960. At age 33, in 1993, his cohort suffered a murder rate of 24 per million; this went up and down slightly as he aged but was still 24 per million by the time he was 40 in 2000. The murder rates that these, now older, men experience in Britain are not falling as they age, and, in general, each successive cohort is starting out with a higher murder rate at around age 20 to 21 and carrying that forward. However, for one particular group of men their murder rate is actually generally increasing as they age – men aged 35 or below in 2000, men born

TABLE 2: MURDER RATES PER MILLION IN BRITAIN, BY AGE/COHORT, 1993-2000

Year	1993	1994	1995	1996	1997	1998	1999	2000
Age								
11	1	1	3	3	2	1	1	3
12	1	2	4	5	3	2	3	5
13	2	3	6	6	4	3	4	6
14	5	5	6	7	6	4	5	7
15	7	8	11	12	10	9	11	11
16	13	13	17	19	17	17	19	17
17	21	21	23	24	25	26	27	26
18	24	24	27	28	28	31	35	35
19	24	25	30	31	28	30	37	42
20	26	29	32	33	30	32	41	49
21	31	33	34	34	35	36	42	51
22	32	34	34	32	33	32	34	42
23	29	31	33	31	27	27	30	34
24	26	29	33	33	29	27	30	33
25	28	30	33	34	31	27	27	30
26	27	29	31	30	28	26	29	31
27	21	23	27	27	24	25	33	36
28	20	21	26	24	21	26	35	38
29	23	23	23	20	23	30	36	37
30	24	25	24	24	26	30	30	31
31	23	24	26	27	27	26	27	30
32	24	25	25	24	25	27	29	31
33	24	28	25	21	23	27	30	32
34	22	27	26	22	21	24	31	39
35	19	25	27	21	17	22	30	36
36	20	27	29	22	18	21	25	26
37	21	26	28	23	20	19	21	24
38	20	23	26	25	21	18	21	25
39	20	23	26	26	23	22	24	25
40	22	23	24	25	25	25	25	24
41	24	22	22	23	26	25	23	24
42	22	22	21	21	24	23	22	27
43	17	20	19	17	19	22	23	25
44	15	18	19	16	18	23	22	18
45	15	19	20	19	19	21	18	13
46	16	18	19	19	18	17	15	15
47	15	17	17	16	15	16	18	18
48	13	15	16	14	16	20	21	19
49	14	16	15	14	17	21	22	20
50	17	18	15	14	16	17	17	18

Notes: The statistics in this table are the murder rates per million per year of all men in Britain by single year of age and by the year in which they were murdered (due to small number problems the statistics have been smoothed by two passes of a simple two-dimensional binomial filter). To aid reading the table cells are shaded by value. The cohort of 1965 is underlined.

in 1965 and after. Why should they be different to men born in 1964 or before? Most men born in 1965 left school at the age of 16 in the summer of 1981 (some may have left at 15 slightly earlier, only a small minority carried on to take A Levels). The summer of 1981 was the first summer for over 40 years that a young man living in a poor area would find work or training very scarce, and it got worse in the years that followed. When the recession of the early 1980s hit, mass unemployment was concentrated on the young, they were simply not recruited. Over time the harm caused in the summer of 1981 was spread a little more evenly, life became more difficult for slightly older men, most of the younger men were, eventually, employed. However, the seeds that were sown then, that date at which something changed to lead to the rise in murders in the rest of the 1980s and 1990s, can still be seen through the pattern of murder by age and year shown in the figure. Above the cohort of 1965 line in Table 2 murder rates for men tend to rise as they age.

Table 2 concerns all men, there are too few murders and we know with too little accuracy the numbers of men by single year of age living in each ward in the country in each year to be able to produce the same exhibit for men living in poor areas. Nevertheless, we can be almost certain that this rise is concentrated in the poorest parts of Britain and is far greater there. Most worryingly, in the most recent years the rates for the youngest men have reached unprecedented levels. If these men carry these rates with them as they age, or worse, if their rates rise as have those before them, overall murder rates in Britain will continue to rise despite still falling for the majority of the population in most places.

There is no natural level of murder. Very low rates of murder can fall yet lower as we have seen for older women and in the more affluent parts of the country. For murder rates to rise in particular places, and for a particular group of people living there, life in general has to be made more difficult to live, people have to be made to feel more worthless. Then there are more fights, more brawls, more scuffles, more bottles and more knives and more young men die. These are the same groups of young men for whom suicide rates are rising, the same

groups of which almost a million left the country in the 1990s unknown to the authorities, presumably to find somewhere better to live. These are the same young men who saw many of their counterparts, brought up in better circumstances and in different parts of Britain gain good work, or university education, or both, and become richer than any similarly sized cohort of such young ages in British history. The lives of men born since 1964 have polarized, and the polarization, inequality, curtailed opportunities and hopelessness have bred fear, violence and murder.

Why is the pattern so different for women? One explanation could be that the rise in opportunities (amongst them work, education and financial independence) for women outweighed the effects of growing inequalities. Extreme ‘domestic’ violence leading to murder, almost always of women, has fallen dramatically over this time period. Women’s rates of suicide are also falling for all age groups of women and there has been no exodus of young women from Britain as the 2001 census revealed had occurred for men. Women working in the sex industry still suffer very high rates of murder, but to attempt to identify these deaths through the postcodes of the victims would be taking ecological analysis a step too far. There were also several 100 people, mostly elderly women, murdered by Harold Shipman and these deaths are not included in any of the figures here (he wrote the death certificates and only a few cases were formally investigated at his trial – and thus officially reclassified as murders). But even taking these into account, the fall in extreme violence suffered by women in Britain implies that when a group gains more self-worth, power, work, education and opportunity, murder falls.

Conclusion

Murder is a social marker. The murder rate tells us far more about society and how it is changing than each individual murder tells us about the individuals involved. The vast majority of the 13,000 murders that have been considered here were not carefully planned and executed crimes; they were acts of sudden

violence, premeditated only for a few minutes or seconds, probably without the intent to actually kill in many cases (often those involved were drunk). There will have been hundreds of thousands of similar incidents over this time period that could just as easily have led to murder, but did not. There will have been millions of serious fights and assaults beyond this, and beyond that tens of millions, even hundreds of millions of minor acts of violence and intimidation. Murders are placed at the tip of this pyramid of social harm and their changing numbers and distributions provide one of the key clues as to where harm is most and least distributed. Behind the man with the knife is the man who sold him the knife, the man who did not give him a job, the man who decided that his school did not need funding, the man who closed down the branch plant where he could have worked, the man who decided to reduce benefit levels so that a black economy grew, all the way back to the woman who only noticed 'those inner cities' some six years after the summer of 1981, and the people who voted to keep her in office. The harm done to one generation has repercussions long after that harm is first acted out. Those who perpetrated the social violence that was done to the lives of young men starting some 20 years ago are the prime suspects for most of the murders in Britain.

Workplace Harm and the Illusions of Law

Steve Tombs

Introduction: Routine work-related harm and criminal law

Work kills. It kills workers and members of the public through acute injury and chronic illness. The scale of this routine killing – deaths occur across all industries, all types of companies – is almost incomprehensible. That said, relatively little is known about the numbers of people killed by work activities.

This notable lack of knowledge says a great deal about the priorities of the societies in which we live. To take deaths from work-related disease, the official statistics do not begin to capture the scale of physical harm wreaked by employing organisations. However, it is possible to highlight the *sheer scale* of deaths involved. One example is the deaths from asbestos exposures in the UK. The Health and Safety Executive (HSE) noted that in 2000, there were 1,628 deaths from mesothelioma, an asbestos-related cancer, and 186 death certificates mentioning asbestosis (HSE, nd, p.17). In fact, as the HSE itself recognises (*ibid*), actual deaths related

to asbestos exposure are far, far higher. Asbestos-related deaths continue to rise in this country (not to peak until around 2025, according to the British government), years after the demise of the industry (the worst affected group are men born in the 1940s), and 70 years after the first official recognition of the cancer-causing properties of this magic mineral. Thus ‘excess deaths in Britain from asbestos-related diseases could eventually reach 100,000 ... One study projected that in western Europe 250,000 men would die of mesothelioma [just *one* asbestos-caused cancer] between 1995 and 2029; with half a million as the corresponding figure for the total number of West European deaths from asbestos’ (Tweedale, 2000, p.276). A later study extrapolates from current asbestos-related deaths and concludes that more than 3% of men in Europe will die of asbestos-related diseases in the next 10 to 20 years (Randerson, 2001).

Thus, asbestos-related deaths are not simply a matter of historical record – the industry remains vibrant globally. Even more chillingly, ‘asbestos is only one of a number of hazardous substances in our lives’ (Tweedale, 2000, p.277). In many respects, it is one of the safest since there is now generally accepted knowledge regarding its deleterious health effects and it is highly regulated, at least in most advanced economies.

Now, if there are *some* technical reasons for this lack of knowledge with respect to deaths from work-related *ill-health*, then one might expect that deaths from work-related *injuries* would be much more accurately recorded. This is not the case. For example, despite HSE claims that fatality data are virtually complete, recording 633 in 2001/2, recent work using official data and the HSE’s own categories indicates that there are closer to 1,500 occupational fatalities per year (Tombs, 1999). In comparison, the annual number of homicides in England, Wales and Scotland stands in recent years between 700 and 850. This is an apt comparison, since the HSE’s own evidence indicates that ‘management failure’ is the cause of about 70% of occupational fatalities (Bergman, 2000, pp.31-32), suggesting that there is at least a criminal case to answer.

Reference to this point has been to deaths. These fatalities are

only the most visible forms of physical harm caused by work-related activities. Much more common are major and minor (over-three-day) injuries¹. According to most recent HSE data, there were 30,666 major injuries and 129,143 minor injuries to workers in Britain in 2001/02 (HSE, nd); members of the public suffered 13,575 non-fatal occupational injuries.

Yet even these official data fail to capture the extent of physical harm caused by working in the fourth most developed economy in the world. While the HSE has long been aware of the significant scale of under-reporting of injuries, recent use of the Labour Force Survey (LFS) has produced evidence of levels of injury that far outweigh 'official' injury data. Based upon the discrepancies between 'official' and LFS data, the Health and Safety Commission (HSC) has concluded recently that, "overall, employers report about 44% of the non-fatal injuries that they should report" (HSC, 2002, p.1).

Indeed, following the addition of questions on occupational injury as a supplement to the Labour Force Survey, it has now been estimated that official data record 'less than 5%' of injuries to the self-employed (HSC, 2005, p.14). Moreover, even this recognised level of under-reporting still in principle excludes three potentially significant areas of occupational injuries, namely those incurred by workers in the illegal economy, as well as by home- and child-workers (see, for example, O'Donnell and White, 1998; 1999).

But these deaths and injuries do not involve 'merely' *physical* harms. They have widespread, if largely unrecognised, financial, psychological, as well as social effects. However, it is the financial costs of injuries and ill health which have been the focus of recent attention by official organisations and interest groups. Thus the HSE and governments have, for almost a decade,

¹What constitutes a 'major injury' is defined in legislation and includes certain forms of fracture, dislocation, loss of sight, strain, burn, electrical shock, asphyxiation, poisonings and concussion. Minor injuries are work-related injuries which fall outside of these categories, but which cause the injured to be absent from work for three or more days.

sought erroneously (see Cutler and James, 1996), to argue the ‘business case’ for improved health and safety (HSE, 1993; HSE, 1994; Davies and Teasdale, 1994; HSC/DETR, 2000), seeing the costs to companies of injuring and causing illness as a lever to raise standards of compliance! In this context, it has been estimated that the costs of injury and ill health is £18 billion a year (see, for example, HSC/DETR, 2000). Yet one of the contradictions within such an argument is that employers do not *actually* meet the costs of workplace injuries and illness. Most of the £18 billion cost of workplace injury and illness is paid for by the government and the victims. Even the HSE itself estimates that employers, who cause the health and safety risks, pay between £3.3 billion and £6.5 billion (TUC, 2003). In other words, costs associated with injuries and ill-health represent a massive redistribution of wealth from the poor to the rich. That is, through supporting the cost of industrial injury benefit, health and other social services, paying higher insurance premiums, paying higher prices for goods and services so that employers can recoup the costs of downtime, retraining, the replacement of plants and so on, private industry is subsidised on a massive scale by employees, taxpayers and the general public.

Of course, such bald statistics of deaths or losses to corporate profits or GDP mask other searing, but less quantifiable, social and psychological harms. Families and communities are subjected to trauma in the event of death and injury: children lose fathers, spouses lose partners, workers lose their colleagues, and so on. Moreover, such losses and harms have effects across generations, so that, for example, children who experience poverty following the death of the main wage earner are themselves more likely to grow up in conditions of relative insecurity, a situation that is then more likely to be experienced by their own offspring.

Further, the psychological trauma is often magnified greatly by the consistent inability of the state, through the criminal justice system, to provide ‘answers’ as to why someone who leaves for work either does not return, or returns in a considerably less fit condition². And if the state cannot provide such answers to the bereaved then the accountability that victims expect that

they will secure from the criminal justice system is almost entirely lacking³. The bulk of this essay analyses some of the key dimensions of the systematic discrepancies between the promise of the law and criminal justice system, and the realities of the protection and accountability that these actually offer in relation to workplace safety and health.

To be clear at the outset, whilst occupational safety and health protection falls squarely within the criminal law, criminalisation in practice has never formed a central part of states' agendas. In general, across developed economies, the records of protection in relation to workers' health and safety have historically been poor, as a tough regulatory climate tends to be antagonistic towards the interests of firms operating within a capitalist economy. It is possible to agree with Snider when she notes it is *generally* the case that,

²Of course, the inability and/or institutional reluctance of state bodies to provide 'answers' in relation to the production and reproduction of private troubles and public issues has been well documented, not least by critical criminologists. Notable here has been a critical focus upon the role of coroners' courts and the inquest system. (See, for example, Scraton and Chadwick, 1987; Scraton, 1999.)

³The misery heaped upon the bereaved, and their desperate struggle for 'answers', is clear from the work of the Centre for Corporate Accountability (CCA). The CCA was established as a not-for-profit organisation in 1999, and seeks to promote worker and public safety through addressing law enforcement and corporate accountability. While the Centre's activities fall into three main categories – advice, research, and advocacy – its key activities are its Work-Related Death Advisory Service, and a similar service relating to workplace injuries, each of which provides free, independent and confidential advice to families on how to ensure that deaths (and injuries) are properly investigated and that evidence subjected to proper prosecution scrutiny. For further details on these services, see http://www.corporateaccountability.org/death_advice.htm and http://www.corporateaccountability.org/injury_advice.htm.

states will do as little as possible to enforce health and safety laws. They will pass them only when forced to do so by public crises or union agitation, strengthen them reluctantly, weaken them whenever possible, and enforce them in a manner calculated not to seriously impede profitability. (Snider, 1991, p.220)

That is, all things being equal, the preference of capital is for less rather than more regulation, and this preference is more or less reflected through the state's practices and rhetoric. Thus it is important to recognise that historically, health and safety legislation, and any improvements in enforcement, have been *forced upon* states by pro-regulatory forces and, notably, by trade unions, the representative organisations with the key interest in this area.

The key, overarching piece of relevant legislation in the UK is the *Health and Safety at Work Act 1974*, an Act informed by the philosophy of self-regulation. According to this principle, criminal law and its enforcement has a fundamental, but minor, role to play in ensuring occupational health and safety protection – the principal responsibility for achieving protection is to be left to those who create and work with the risks, namely employers and employees (see Tombs, 1995).

Two points need to be emphasised here.

First, this philosophy therefore places an enormous onus upon the balances of power – within and beyond workplaces – between capital and labour. At the policy level, self-regulation is linked to a system of tripartism: employees and employers determine policy within the Health and Safety Commission – though this is clearly an organisation in which employers' interests predominate and which tends towards less rather than more protection (Dalton, 2000). At the level of workplaces, the balance of power is intimately related to the level and strength of the workers' organisation, not least because subsidiary legislation grants formal roles to trade union representatives in the organisation of health and safety.

Second, in terms of the functions of law, it must be clear that

any system of self-regulation is predicated upon a range of credible enforcement techniques to which regulators have access and which allow an escalation of sanctions if the regulated body fails to co-operate. In essence, this is an enforcement philosophy based ultimately on the principle of deterrence. Such an enforcement process, however, can only effectively function where escalation towards greater punitiveness – and the sanctions that are formally at the disposal of regulators – are both credible. Central here is that the state maintains a minimal level and threat of presence within workplaces, that it actually inspects and, following a complaint or incident, is able credibly to respond to these in the form of an investigation. Yet both historically and currently, it is difficult to see this whip of punitive enforcement as credible in the context of a HSE which is increasingly advocating a movement away from external control.

Enforcing the law?

A look at some of the results of a detailed statistical audit undertaken into the work of the Health and Safety Executive – the government body with primary responsibility for enforcing health and safety law in Britain⁴ – gives an indication of how the HSE’s ‘operational inspectors’ investigate reported injuries, and decide whether or not to impose enforcement notices or to prosecute. This essay concentrates on the work of the HSE’s ‘Field Operations Directorate’ (FOD). FOD is the largest directorate within the HSE and its 419 field inspectors (which represent two-thirds of all HSE’s field inspectors) are responsible for enforcing the law in 736,000 premises concerned with construction, agriculture, general manufacturing, quarries, entertainment,

⁴The analysis was undertaken by the CCA on behalf of the public services trade union UNISON. I am grateful to each organisation for their kind permission to use this data so extensively. Of course, the views expressed here are my own, and do not in any way represent views of either the CCA or UNISON. The data which forms the bulk of this chapter is taken from a much more detailed report; see Unison/CCA, 2002, which is available at www.corporateaccountability.org/HSEReport/index.htm.

education, health services, local government, crown bodies, and the police. The tables in this chapter have been compiled after analysing raw HSE data. This was the first such audit ever undertaken.

The audit considers the activities of these inspectors over a five-year period between 1 April 1996 and 31 March 2001. It examines specifically: the number of premises that they inspect; the number of reported incidents that they investigate; the number of enforcement notices that they impose; the number of organisations and individuals that they prosecute; and the levels of sentencing following successful prosecutions. It further documents how the levels of inspection, investigation, notices and prosecution vary, focusing on the differences between the five industry groupings – agriculture, construction, manufacturing, energy and extractive industries, and the service sectors and points to some regional discrepancies and notes the levels of fines imposed by the courts after conviction.

CONTACTS AND INSPECTIONS

A contact refers to an occasion an inspector makes some form of contact with premises. There are 14 types – the main ones being contacts involving ‘inspection’, ‘investigations’, ‘advice’ and ‘enforcement’. Between 1996/7 and 2000/01 the total number of contacts with premises by inspectors decreased by 13% (Table 1).

There was, however, no consistent pattern in this decline. Decreases ranged from 1% to 36% across 15 HSE areas, while there was an increase in three HSE areas. A decrease in inspector contacts existed in all industrial sectors – though the energy/extractive sector suffered the greatest percentage decline of 34%.

TABLE 1: TOTAL NUMBER OF HSE CONTACTS, 1996/7 - 2000/01

Year	Total contacts
1996/7	194,650
1997/8	178,267
1998/9	176,229
1999/00	169,959
2000/01	169,876

Of the 14 different types of contact that can be made by inspectors, the analysis undertaken showed that it was ‘inspections’ that suffered the greatest decline – a reduction of 48,299 throughout Britain

(41%, Table 2). ‘Inspection’ refers to all planned and unplanned preventative inspections of existing, new and transient premises.

**TABLE 2: NUMBER OF ‘INSPECTION’ CONTACTS BY INDUSTRY,
1996/7 - 2000/01**

Industry	1996/97	2000/01	% Difference
Construction	37,774	17,908	- 52%
Manufacturing	34,660	26,460	- 24%
Agriculture	13,484	6,542	- 52%
Energy/Extractive	2,596	1,397	- 46%
Service	28,642	16,550	- 42%
TOTAL	117,156	68,857	- 41%

INVESTIGATIONS

This analysis indicated that the sharp decline in the number of inspections is related to an increase in the number of investigations into reported incidents. However, these latter levels still remain extremely low. This is significant in itself, since investigations are important, first, to ensure that any unsafe practices that resulted in any incident may be stopped, and, second, that evidence can be collected to determine if a criminal offence on the part of the company, organisation or individual has been committed. Thus, failures to investigate impact upon both prevention and criminal accountability.

The analysis shows that until recently a large number of reported deaths were not investigated. In the five-year period a total of 75 worker deaths were not investigated. This lack of investigation has reduced over the five-year period. In 1996/7 12% (40 deaths) were not investigated, while in 2000/01 3% (seven deaths) were not investigated. In the same period a total of 212 deaths of members of the public were not investigated. This lack of investigation has also reduced. Some 48% (115 deaths) were not investigated in 1996/7, while 10% (18 deaths) were not investigated in 2001.

Certain kinds of the most serious injuries are defined as ‘major injuries’. This analysis shows that between 1996/7 and 2000/01, the percentage of reported major injuries to workers that was investigated almost doubled from 11% to 19%. This percentage also represents an increase in the actual number of major

injuries investigated from 2,532 to 4,335: however, this increase still means that in 2000/01 *81% of major injuries were not investigated*. Indeed, looking at the whole five-year period, some of the injuries to the most vulnerable workers remained uninvestigated: there was no investigation into 905 of the 1,144 reported major injuries to trainees, or into 126 of the 164 injuries to those involved in work experience.

In April 2000, following criticism by a Parliamentary Select Committee Report (Select Committee on Environment, Transport and Regional Affairs, 2000), FOD piloted a new investigation criteria policy, approved throughout the HSE, which sets out what types of incidents inspectors should investigate. The analysis shows that although the new policy requires them to have investigated the following worker injuries in 2000/01, a substantial number of cases remained uninvestigated including:

- 16 out of 62 amputations of hand, arm, foot or leg;
- 337 out of 633 injuries resulting from contact with moving vehicles;
- 69 out of 178 injuries involving electricity;
- 569 out of 1,384 falls from a height of over two metres; and
- 1,327 out of 2,396 industrial diseases.

INDUSTRY AND HSE AREA COMPARISONS

The level of investigations across industries and HSE areas is not consistent. In 2000/01, levels of investigation ranged from 41% in agriculture to 10% in the service sector (Table 3).

TABLE 3: NUMBERS OF REPORTED AND INVESTIGATED MAJOR INJURIES TO WORKERS, BY INDUSTRY, 2000/01

Industry	Numbers reported	Numbers investigated	Percentage investigated
Agriculture	647	262	41%
Manufacturing	7,240	1,974	27%
Construction	4,636	1,073	23%
Extractive/Energy	297	65	22%
Service	9,618	958	10%
TOTAL	22,438	4,332	19%

The differences between the service and agricultural sectors are partly explained by the high level of reporting in the service sector and the low level of reporting in agriculture. It is less easy to explain the inconsistent levels of investigation in different parts of the country, which range from 11% to 26%.

WHAT INJURIES ARE NOT INVESTIGATED?

How serious are the injuries that are not investigated? This analysis shows that some of the most serious injuries have not been investigated, including in 2000/01, for example, 72 ‘asphyxiations’ (44% of the total), 31 ‘electrical shocks’ (35% of the total), 333 ‘burns’ (57% of the total) and 418 ‘amputations’ (41% of the total).

Looking at all types of injuries apart from those resulting from ‘trips’, 74% of major injuries still remain uninvestigated. In 2000/01, around 40% of injuries resulting from ‘contact with electricity’, ‘contact with moving machinery’, ‘high falls over 2 metres’ and ‘drowning, suffocation or asphyxiation’ – a total of 1,303 out of 3,214 injuries – were not investigated.

OVER-THREE-DAY INJURIES

An over-three-day injury is an infliction (other than one defined as a ‘major’ injury) that results in a worker being off work for more than three consecutive working days. The rate of investigation into this type of injury is far lower than the level of investigation into major injuries – 5% compared to 19% in 2000/01. The number of over-three-day injuries investigated did however increase significantly over the five-year period – from 2,803 to 4,378.

TABLE 4: NUMBER OF REPORTED AND INVESTIGATED OVER-THREE-DAY INJURIES BY INDUSTRY, 2000/01

Industry	Numbers reported	Numbers investigated	Percentage investigated
Agriculture	1,416	166	12%
Manufacturing	37,127	2,624	7%
Construction	9,753	478	5%
Extractive/Energy	1,304	49	4%
Service	55,023	1,061	2%
TOTAL	104,623	4,378	4%

DANGEROUS OCCURRENCES

Certain sorts of incidents – whether they cause an injury or not – are defined as ‘dangerous occurrences’. Investigation into such occurrences is crucial in the state’s own terms, which place an emphasis upon prevention: dangerous occurrences allow unsafe conditions to be rectified often without the cost of injury to a worker or member of the public being incurred, and without thus raising more calls for resort to formal sanctions or prosecution. Dangerous occurrences fall into two different categories – those that result in death and injury and those that do not. To avoid counting incidents that have been previously included in the injury sections above, and in order to take on the regulators in terms of their own rhetorical commitments, the following analysis considers only those dangerous incidents that did not result in death or injury.

The analysis shows that the level of investigation into dangerous occurrences increased from 26% in 1996/7 to 31% in 2000/01 (Table 5).

TABLE 5: NUMBERS OF REPORTED AND INVESTIGATED DANGEROUS OCCURRENCES BY INDUSTRY, 2000/01

Industry	Numbers reported	Numbers investigated	Percentage investigated
Agriculture	60	28	47%
Manufacturing	1,072	381	36%
Construction	1,208	342	28%
Extractive/Energy	394	67	17%
Service Sector	1,035	366	35%
TOTAL	3,769	1,184	31%

The analysis also found that, in 2000/01, amongst the dangerous occurrences not investigated were 73 out of 128 (57%) ‘building collapses’, 146 out of 224 (65%) ‘plant fire and explosions’, 179 out of 230 (78%) ‘flammable liquid releases’, 88 out of 126 (70%) incidents involving a ‘release of biological agent’, and 592 out of 944 (63%) incidents involving ‘failure of lifting machinery’.

INDUSTRIAL DISEASES

Certain forms of occupational diseases must be reported to the HSE. In 2000/01 there were 2,396 reported cases of industrial disease, of which 1,069 (45%) were investigated. This was a

rise of over 20% from the investigation levels in 1996/7. This percentage increase took place even though the total number of disease reports had increased dramatically. However, it still means that over 55% of reported industrial diseases were not investigated.

In 2000/01 significant numbers of the most common industrial diseases were not investigated including 590 of 889 (66%) hand–arm vibrations, 221 of the 477 (46%) cases of occupational dermatitis, and 89 of the 161 (55%) cases of carpal tunnel syndrome.

**TABLE 6: NUMBERS OF REPORTED AND INVESTIGATED INDUSTRIAL DISEASES
BY INDUSTRY, 2000/01**

Industry	Numbers reported	Numbers investigated	Percentage investigated
Agriculture	16	10	63%
Service	642	366	58%
Construction	194	96	50%
Manufacturing	1,289	555	43%
Extractive/Energy	255	42	17%

PROSECUTION

An inspection or an investigation into a reported incident (death, injury, dangerous occurrence and so on) can result in more than one company, organisation or individual being prosecuted. In addition, each of those prosecutions may allege that more than one offence has been committed.

A single death or injury can therefore result in one or more prosecution. This analysis is concerned with the total number of *incidents* that have resulted in *at least one* organisation or individual being prosecuted. Here, a prosecution that has resulted in at least one conviction counts as though the incident itself has resulted in a conviction. Data in this section cover reported incidents that took place between 1996/7 and 1998/9. (Deaths beyond this period are not covered as some incidents occurring after April 1999 might not have come to court at the time of research.)

PROSECUTIONS FOLLOWING DEATHS In 1998/99, 83 out of 250 investigated worker deaths resulted in a prosecution, compared to 70 out of 285 in 1996/7. This represents an increase of 19% in the number of prosecutions, and an increase of 32% in the proportion of deaths that resulted in a prosecution. Notably, just nine out of 854 deaths of workers *reported* (just over 1%) during the three-year period resulted in the prosecution of a company director or senior manager.

TABLE 7: NUMBERS OF PROSECUTIONS AND CONVICTIONS FOLLOWING DEATHS OF WORKERS, 1996/7 - 1998/9

Year	Numbers investigated	Numbers prosecuted	Percentage prosecuted	Numbers convicted
1996/7	285	70	25%	68
1997/8	254	78	31%	75
1998/99	250	83	33%	82

The percentage of investigated deaths of members of the public that resulted in prosecution was a quarter of the proportion of prosecuted worker deaths – an average of 7% throughout the three-year period. So in 1988/9, only 14 out of 134 (just over 10%) investigated deaths resulted in a prosecution.

PROSECUTIONS FOLLOWING MAJOR INJURIES Compared to deaths of workers, a much smaller percentage of investigated major injuries to workers resulted in prosecution – in 1998/9 it was only 297 out of 2,740 (11%). That proportion hardly changed in the three-year period.

Only four out of 7,982 major injuries that took place between 1996/7 to 1998/9 resulted in the prosecution of a company director or senior manager. However, 13 employees were prosecuted.

As with deaths, the level of prosecution after major injuries to the public is far less than those suffered by workers – though there has been about a three-fold increase in the percentage of prosecutions in the three-year period from 2% in 1996/7 (14 out of 576 investigations) to 6% in 1998/9 (34 out of 549).

TABLE 8: NUMBERS OF PROSECUTIONS FOLLOWING MAJOR INJURIES TO WORKERS IN 1998/9, BY INDUSTRY

Industry	Numbers investigated	Numbers prosecuted	Percentage prosecuted	Numbers convicted
Manufacturing	1,372	167	12%	165
Construction	658	80	12%	79
Service	479	36	9%	36
Agriculture	199	13	7%	13
Extraction	32	1	3%	1

OTHER PROSECUTIONS The number of dangerous occurrences that resulted in prosecution is very small – 39 out of 927 (4%) in 1998/9. Prosecution levels are low in every industry and HSE area, albeit with wide variations in rates between HSE areas and sectors. As for investigated reports of industrial diseases, less than 1% of these resulted in prosecutions. Over the three-year period only 11 of the 1,404 investigated ill-health incidents resulted in prosecution.

SENTENCING

SENTENCING FOLLOWING DEATHS In the three years between 1996/7 and 1998/9, the average fine following a death has more than doubled from £28,900 to almost £67,000. The data indicate that this is the result of two factors. First, there has been a 20% increase in the number of cases that have resulted in sentencing in the Crown Court; and second, the average fine imposed by the Crown Court for each death has nearly doubled from about £55,000 to £100,000. The average fine following a conviction for a death of a member of the public is about half the level following a worker’s death – £33,200 following a prosecution for a death in 1998/9.

TABLE 9: SENTENCES FOLLOWING DEATHS OF WORKERS, 1996/7 - 1998/9

Year	Number of convictions	Total average fine ⁵	Numbers in Magistrates’ Courts	Percentage in Magistrates’ Courts	Average fine in Magistrates’ Courts	Average fine in Crown Courts
1996/7	70	£29,000	43	61%	£12,000	£55,000
1997/8	75	£43,000	42	56%	£11,000	£82,000
1998/9	82	£67,000	33	40%	£15,000	£100,000

SENTENCING FOLLOWING MAJOR INJURIES The average fines relating to major injuries to workers are much lower than those relating to worker deaths – in 1998/9, six times less – and the average level of fines did not increase over the three-year period. The relatively low level of fines is linked to the high percentage of prosecutions – over 80% in all three years – that resulted in sentencing in the Magistrates’ Court.

TABLE 10: SENTENCES FOLLOWING MAJOR INJURIES TO WORKERS, 1996/7 - 1998/9

Year	Number of convictions	Total average fine ⁵	Numbers in Magistrates’ Courts	Percentage in Magistrates’ Courts	Average fine in Magistrates’ Courts	Average fine in Crown Courts
1996/7	201	£10,000	176	86%	£6,300	£26,900
1997/8	291	£8,000	253	87%	£6,900	£12,000
1998/9	294	£11,000	239	81%	£9,000	£14,800

OTHER SENTENCING The average fine following a dangerous occurrence has more than doubled over the three years from £12,900 to £28,300. One of the reasons for this is that more cases are sentenced in the Crown Court. There are again big variations by HSE area and industry. Whilst six convictions in the North West resulted in an average fine of £71,000, in six HSE areas the average fines were less than £10,000.

The level of fines following industrial diseases has decreased by over 75% over the three-year period – from £24,100 in 1996/7 to £5,600 in 1998/9.

Conclusions

The arguments and data in this chapter lead to two sets of conclusions. One set of conclusions is ‘internal’, that is, regarding the enforcement of law within the state’s own terms – recalling that the promises of law in the area of occupational health and safety protection are already highly limited. A second set of conclusions lies outside this analysis, and raises more general issues about the relationships between the state, law, and social

⁵Average fines have been rounded up to the next thousand.

harm. Each of these is now considered in turn.

In terms of the state's own claims, this analysis raises several problems. First, is the inability of the HSE to deliver any form of consistency across both enforcement areas and industry sectors in levels of inspection, investigation, and prosecution. One of the 'promises' of law is that it will be enforced consistently. Yet the analysis here confirms that in the area of health and safety law enforcement this promise remains unfulfilled. Of course, consistency does not mean uniformity. So, for example, differences in levels of investigation or prosecution across different HSE industries or regions no doubt partly reflect the different types of health and safety problems that beset different sectors or reflect differences in the types of economic activity which predominate within different regions respectively. But none of these possible variables removes the need for the HSE, in particular, or government, in general, to be open about or accountable for, or indeed to seek to explain, such wide variations.

Second, it is clear from the data presented above that even on the basis of the limited subset of injuries actually reported to the HSE – recall the woefully inadequate levels of reporting of injuries referred to in the introduction to this chapter – only a percentage of these injuries are ever investigated. Thus, for example, in 2000/01, 29% of amputations, 44% of asphyxiations, 67% of burns, and 40% of the injuries resulting from 'contact with electricity', 'contact with moving machinery' and 'high falls' were simply not investigated. It is difficult to imagine a Chief Constable being able plausibly to defend such levels of failure to investigate, even cursorily, assaults on the part of their police forces.

Third, taking at face value the stated mission of the HSE – to *prevent* injury and disease rather than prosecute after the event – a mission statement perfectly consistent with the Robens philosophy regarding health and safety regulation (James and Walters, 1999), then one would expect an emphasis to be placed upon the investigation of dangerous occurrences – 'near misses' – yet 69% of these are not investigated.

Fourth, there are insurmountable problems in the HSE's strategy of re-organising priorities within the framework of relatively fixed resources. As the data have indicated, increasing levels of investigation have only been achieved alongside decreases in inspection. It is worth noting, in fact, that while the years from which the data presented here was drawn were ones in which there was, overall, a small increase in government resourcing of the HSE, this agency currently faces cutbacks, which are certain to affect its enforcement capability (Prospect, 2003). Of course, almost any organisation is likely to face resource constraints, but there are specific reasons for accepting that state regulators will never have the resources to enforce regulatory law effectively (Braithwaite and Fisse, 1987). But to accept this is not to accept, as HSC and HSE appear to have done, that there is no need even to attempt to argue for more adequate resources.

But this essay leads to a second set of conclusions, adding to the body of evidence that clearly indicates that the criminal law *does not* offer effective occupational health and safety protection. Such is its failure in key respects of this task that it is not a great leap to infer that in fact the criminal law *cannot* offer effective occupational health and safety protection. Yet this is not an argument for eschewing struggles around the law and its enforcement. As Hillyard and Tombs (chapter 1) argue, while a social harm approach is clearly distinct in analytical and practical terms from a focus upon the nature and use of criminal law, such an approach does not deny the politically progressive tactic of approaching crime, law and criminal justice as sites or objects of struggle, which facilitate the development of focused political action. Thus, raising issues of social harm does not entail making a simple, once-and-for-all choice between representing these as *either crimes or harms*. Much of this essay has proceeded on the basis that there is institutionalised condoning of widespread violence in terms of offences against health and safety law, and ultimately has pointed to an acceptance that much of this offending is and will remain beyond the scope of the law. Nevertheless, this should not lead us to abandoning arguments for more adequate law and its more effective enforcement.

Without entering into details here⁶, I would like to reiterate that the criminal law when aimed at offending organisations has important actual or potential qualities:

- in the area of corporate offending, the law retains some deterrent potential, since it is aimed at organisations that claim rationality for themselves and operate on the basis of calculability, as well as being managed by individuals with careers, prestige and status to protect;
- criminal law retains a symbolism as a means of marking out socially unacceptable forms of behaviour and outcomes, a quality important given the fact that many companies, regulators, academics and, to some extent, members of the public, cling to the ideological assumption that corporate crimes are not ‘real’ crimes; and
- for all its failings, it is clear that the use of the criminal law is that to which the victims of corporate violence turn as a means of achieving accountability and justice – not least because of the law’s own claims.

However, as was emphasised in the introduction to this chapter, and as should now also be clear in terms of the scale of officially recorded harms upon which this chapter has focused, criminalisation has never formed a key part of the state’s agenda. From the very rationale and enforcement philosophy of the HSE, through to the levels of inspection and investigation that it has achieved, to the outcomes of cases successfully pursued through the courts, law’s *promise* with respect to protecting workers and members of the public from work-related death, injury and disease is more or less an illusion. It is for these reasons that a social harm approach is useful. Beyond a potential ability to document more adequately the scale of carnage wreaked through such economic activity, a social harm approach points to a range of other, potentially productive, strategies for mitigating such offences that are beyond – but not in contradiction to – the use of criminal law. In particular, such approaches are likely to point to

⁶But see Pearce and Tombs, 1998, chapters 7 and 9.

mechanisms (including the use of law) to empower those who are most likely to be the victims of particular harms to play a role in their prevention.

The weight of available evidence now indicates that the one most effective means of making workplaces safer is for these to be unionised and to have union-appointed safety representatives (James and Walters, 1999, p.83). This one piece of evidence itself emphasises that securing safer and healthier working environments is based upon redressing balances of power within and around workplaces. Within workplaces, this means wresting power away from employers and their claims regarding their rights to manage in an unhindered fashion. Beyond workplaces, this means challenging those ideologues who portray the protection of workers and the public as matters of nanny-state ‘red tape’. And while the law – from criminal law but through public and social policy – has some role to play in these developments, these are issues of a more general struggle towards a more democratic and socially just society. To the extent that a social harm perspective might help us critically dissect and ultimately shed the illusions of law, then it may help us to further the struggle to mitigate the violence of working.

'Social Harm' and its limits?

Paddy Hillyard, Christina Pantazis, Steve Tombs
and Dave Gordon

From Criminology to Social Harm?

These essays have raised a number of methodological issues for those concerned with social harm. Methods of this enterprise would include the attempt to chart and compare social harms through qualitative research techniques such as locally based interviewing, and the production of life-histories and biographies, as well as the use of existing data. There are now numerous databases which provide information on some aspect of harm. These include the census, health, morbidity and mortality data, poverty indices, measures of pollution and air quality, workplace and labour market data. There is also a large amount of crime data, from police recorded crimes to victim surveys, which can be compared with these data to provide an objective assessment of the amount of harm caused by crime and other causes. New research needs to be carried out to produce objective measures of what people consider are the most harmful events so that an index of harm can be produced.

Language is important. Collisions on the road resulting in the death of drivers or passengers are described as 'accidents' notwithstanding that one of the drivers may have been drunk or using their mobile phone. Deaths arising from pollution are

quaintly referred to as ‘deaths brought forward’. Imagine the uproar if the police in their annual reports talked about the number of ‘deaths brought forward’ as a result of homicides. Where larger numbers of people are killed in a single incident it is referred to as a disaster, suggesting some sudden misfortune for which no one is responsible. Yet, the disaster may have been far from sudden. It may have been totally predictable because some piece of machine had not been maintained or the demand to increase profits meant that basic safety procedures were ignored.

The problem, however, goes much further than the limiting and sometimes confusing effects of the discourse. Many instances of substantial harm involve silences, denials, lies and cover-ups by governments.

While the critique offered by a social harm perspective in terms of the limits of current academic disciplines is not *confined* to criminology, a shift from a focus upon crime and law to social harm, and from analyses and explanations located in pathological individuals or malfunctioning institutions to more structurally based modes of inquiry, analysis and prescription, do impinge *particularly significantly* upon criminology. One key advantage that a social harm approach might have over criminology is that it might have greater potential for ‘joined up’ analysis and prescription. That is, understanding and treating harm requires reference to a range of disciplines and spheres of social, public and economic policy. This approach has much more potential for a multi-disciplinary perspective than criminology, and therefore also the potential to escape from the narrow subject-based confines to which criminology is confined. Further, a social harm approach would draw upon the experiences and voices of a range of professionals and social groups, including, for example, doctors, accountants, police, lawyers, economists, trade unions, and non-governmental organisations.

Critical criminologists have long recognised that ‘crime’ has social and economic ‘causes’ which must be addressed at that level. The problem for criminologists, however, is that while pointing to the need for understanding of, and reforms in, areas beyond ‘criminal justice’, they are inevitably drawn back to proposing reforms of

the criminal justice system and to understanding crime through a (albeit ameliorated) criminological discourse. Criminology necessarily entails some privileging of law and criminal justice – even if only, to borrow a famous phrase, ‘in the last instance’! And of course it was precisely this ultimate privileging that led many critical criminologists to abandon the criminological enterprise altogether. By contrast, social harm has fewer theoretical constraints than the notion of crime; for example, a harm perspective could be developed to have something meaningful to say about human rights and distributional justice theory, a potential unlikely to be realised within the discipline of criminology.

What is more, given that the birth of criminology was located in the emergence of a concern to seek the causes of crime – and thus the ‘remedies’ for crime – within individuals (Pasquino, 1991), it is unsurprising that criminology and criminal justice remain infected with individually-based analysis, explanation and ‘remedy’. We would argue that this remains the case despite decades of resistance to these notions from within the discipline of criminology itself. In other words, for us, criminology cannot entirely escape such discursive practices because this is what it is, where it was born, how it has been constructed.

A social harm approach, by contrast, starts from a different place. It begins with a focus upon the *social* origins of harms, upon the structures that produce and reproduce such harms, albeit that these harms are refracted through, and suffered by, individuals. This approach does not reject the need to account for human agency, but it is to accept a view of the world that sees human agency as defined by structures, structures which must be known and of which we must provide accurate accounts. If this is a defining characteristic of a social harm approach, then there is immediately potential for charting a theoretical and prescriptive trajectory which is quite different to that which criminology has (necessarily) followed.

THE LIMITS OF A SOCIAL HARM APPROACH?

It seems appropriate in the conclusion to consider the theoretical and political *attractions* of retaining a focus upon crime, law and criminal justice, and attention to some of the *problems* consequent

upon a focus on the concept of social harm. It is to a brief sketch of these tasks that we turn.

In short, it might be argued that a key advantage of retaining a commitment to criminology and crime is that, for all its attendant problems, reference to law is to point to some readily defined standard against which some social actions and omissions are judged; to speak of crime is to invoke certain social and political meanings. While criminalisation is rightly treated as a problematic process by many criminologists, the politics of criminalising certain activities – for example, certain activities of states and corporations, or behaviours against women or minority ethnic groups – has been progressive, further contributing to the development of social change. Further, it might be argued that law and established forms and processes of legal reasoning direct attention to the identification of offenders through locating responsibility; that law and established forms and processes of legal reasoning can direct attention to establishing means of redress for victims of wrongs and offences; and that law invokes a range of sanctions (and/or forms of state monitoring) where its violation has been ‘proven’; moreover, these do not tend to *preclude* other forms of responses or resistances to social harms, nor indeed to crimes themselves. All of these may be used as arguments for retaining a commitment to criminology.

These objections amount to the claim that social harm – certainly in contrast to crime – appears to be a generalised, amorphous term, covering an enormous range of quite heterogeneous phenomena. However, one of the major advantages of a social harm perspective is precisely that it has the potential to have a much greater degree of ontological reality than is possible with the notion of crime. For example, there are international agreements on the meaning of death, serious and minor injuries, disease and financial loss – and there are compilations of comparable statistics on these subjects produced by a range of organisations representing different disciplines – for example, the International Labour Organisation, World Health Organisation, European Union, and so on. By contrast, given that one of the most prevalent ‘crimes’ in the UK is ‘failure to pay the TV licence’ while the most common crime in Turkey

is 'being rude to a public official', there is not even a theoretical prospect of being able to make meaningful international comparisons of the extent of crime, except in relation to a relatively small sub-set of 'crimes'.

Nevertheless, it may still be argued that if the criminalising processes that cohere around the label crime are at least related in some way to 'organised public resentment', then this cannot necessarily be said for many 'harms'. However, this argument is rather less convincing when one recalls how processes of criminalisation are overwhelmingly directed at so-called lower class offenders, while white-collar, corporate and state offenders have consistently managed to evade these. Indeed, Christie's argument regarding what constitutes a 'suitable enemy' indicates that these effects are necessary rather than contingent aspects of criminal justice systems. In analysing 'the suitable enemy', Christie questions the possibility of law and order campaigns against white-collar criminals. 'Who has heard of a society using its police force against its rulers?' According to Christie, it is hard to imagine the same extraordinary rules of the zero-tolerance game – provocation, infiltration, the police pretending to be businessmen, bugging of telephones, payment to informers, the complete stripping by customs officers of business executives, and intimate body searches – being applied to economic crimes as opposed to, for example, drugs crimes (Christie, 1986; Alvesalo, 1998).

A further objection to a social harm approach might be that, if the concept of harm is relatively open, and if this may indeed be productive, as we have claimed (above), then this also makes it potentially fraught with danger. There are at least three forms, or sources, of this danger, one more significant than the others.

First is the problem that harms become defined socially by their being recognised as problems by a majority of the population so that certain groups such as 'asylum seekers' or 'aggressive beggars' or practices such as congestion charging or environmental taxes might become defined as 'social harms'. Now, certainly, where one seeks to access peoples' experiences of harms, then there is a danger – though one that may be avoided

– of simply accessing and reproducing manifestations of racism, sexism, and so on. Yet the real danger here is in an approach to such data which take such views without question, letting popular opinions ‘speak for themselves’. People’s experiences must inform, but cannot constitute, a social harm approach, nor indeed any social science.

Second, and related, is that techniques which seek to access experience are still more likely to produce data about relatively manifest harms, or the superficial manifestations of harms, rather than more latent harms. Again, this is a problematic, though not necessary, tendency. A social harm approach might, for example, develop studies, which examine the poor health effects resulting from environmental harms. These should be developed regardless of whether or not a given population explicitly recognises such health effects or any relationship between these and other forms of environmental harm.

Third, is the problem that if what constitutes social harm is relatively open, then this makes it particularly open to debate. Consequently a social harm approach might be particularly prone to being fashioned by relatively powerful social and political interests. Again, this is a strong potential objection to an acceptance of the term harm as the central object of academic focus. Yet it is also long established within critical social science that academic work which begins by recognising the relationship of knowledge and power, and indeed starts from a political position of resistance, emancipation and social justice, is best placed to mitigate its infection by the demands and concerns of ‘the powerful’ (more generally, see Tombs and Whyte, 2002).

In the context of the above concerns, the distinctions drawn by Hulsman between different kinds of ‘problematic situations’ seems a particularly useful analytical device. Thus, following Hulsman, we would want to distinguish between those situations ‘which are considered problematic by all those directly concerned’, those ‘which are considered problematic by some of those directly involved and not by others’, and those ‘not considered problematic by those directly involved, but only by persons or organisations not directly involved’ (Hulsman, 1986, p.35).

The objection regarding the lack of clarity in the focus of a social harm approach has an explicitly philosophical underpinning. One version of this objection may be that to speak of social harm is simply to reflect a moral or political viewpoint, so that one descends into mere moralising or political posturing. There is some superficial force to these claims. Certainly, for example, the charge of moral entrepreneurialism is one that has frequently been directed at those who have sought to focus upon corporate crimes (Shapiro, 1983; Nelken, 1997) to the extent that academics pursuing this area of study have been labelled 'corporate crime crusaders' (Shapiro, 1983). In response to this objection, however, it seems that if to adopt a definition of harm is partly a moral choice, then we must accept that to adopt a definition of crime as the guiding criterion of a field of study is equally a moral choice. This is no less the case simply because such a choice rarely receives (or seems to require) any justification since it is produced by, coheres with, and is reinforced by, the power of criminological discourses. One response to the charge of political or moral entrepreneurialism which proponents of a social harm approach may attract is simply to accept it. However, at least such choices can be made openly and explicitly, in a way that renders them liable to justification, contest and debate. This is in stark contrast to the choices entailed in retaining a commitment to criminology, which are masked by reference to an apparently objective focus around criminal law (itself sometimes rationalised by reference to it being some – albeit imperfect – form of collective consciousness, or national morality, or socially agreed sense of justice, and so on).

Further, in the context of objections regarding a potential moral relativism, we would argue that a notion of harm which is rigorously operated and monitored and reflects the concerns of the population would carry considerable political force because of its democratic articulation. The Paddington Rail disaster¹

¹Serious safety omissions in driver training led to the death of 31 people, with hundreds more injured, when a commuter train collided head-on with another train in 1999. Although Thames Trains, the company involved in the crash, was fined a record £2m, it drew heavy criticism by those who questioned the point of fining companies which are dependent on public subsidy.

illustrates only too well the way in which the public's perception and definitions of harm can counter the official discourses emanating from the government or private corporations. People who use the railways in Britain experience on a daily basis the reality of a declining service, crumbling physical condition and the increasing reality of a major incident. And they associate this with privatisation, which is why in the aftermath of the disaster, there emerged calls for re-nationalisation. And this is not to say that rail users look back to the days of British Railways with rose-tinted spectacles, since those who remember British Rail recall years of under-investment by the state, aspects of an overly bureaucratic system, and hence a service which was never as good as it should have been. But it is also their experience to be even more concerned regarding railways that are run for a profit, so that rail users reject the bland statements made by operating companies and Railtrack that safety comes before profits. They know that privatised railways produce the potential for mass harm; and it is precisely such knowledges that a social harm approach would attempt to access and take seriously.

The other objections raised above, regarding the practices and procedures entailed in law for the identification of offenders, location of responsibility, establishment of means of redress for victims, the invoking of a range of sanctions, and so on, seem to us to have somewhat less force. Of course these *are* characteristics of criminal justice and legal systems. The point is, of course, that none of these have been used with any degree of vigour or consistency – despite the exigencies of many criminologists – beyond dealing with ‘conventional’ offences and offenders. Even where they have been used then their effects have hardly, as we have noted above, been successful (at least, that is, according to their stated rationales). Holding out hope that this situation might change through ever greater pressure from within criminology is at best highly optimistic, at worst illusory.

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Criminal Obsessions is an innovative, groundbreaking critique of conventional criminological approaches to social issues. The contributors show how social harm relates to social and economic inequalities that are at the heart of the liberal state. Only once we have identified the causes of social harm, they argue, can we begin to formulate possible responses, whether criminological or political. Through exploring the issue of murder and work place harms and deaths, the contributors offer an innovative new approach that goes beyond criminology that should be of interest to students, academics and policy-makers.

The Crime and Society Foundation is a social policy and criminal justice think tank based at the Centre for Crime and Justice Studies at King's College London. The Foundation stimulates debate about the role and limits of criminal justice and enhances understanding of the foundations and characteristics of a safer society.

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