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What to do with the Harmful Corporation? The case for a non-penal real utopia

Steve Tombs¹

Abstract

The central concern of this paper is how to respond to health and safety harms caused by corporations. I confine my considerations to health and safety harms, and focus on corporations, not individuals. Once one begins to try to identify ways of effectively ‘punishing’ the corporation, one is led to think about undermining the very basis of the corporation – that is, one is forced into envisioning real utopias. And it is an area in desperate need of ‘real utopian’ thinking, given the scale of harm at issue. The paper begins by indicating the scale and nature of this harm. Then, I critically discuss the use of the fine as the common response to corporate crime in this sphere, before going on to consider more effective responses to corporate crime and harms, and the extent to which they may further the task of abolishing the corporation.

Introduction

Media reports of corporate crime and punishment seem to be an almost daily occurrence – even if the word ‘crime’ is often notable for its absence. Central to such tales of corporate offending are financial services companies – not least, ‘the banks’. In fact, in July 2015, a calculation by the *Financial Times* claimed that ‘global banks have paid \$162.2bn in fines and legal settlements with US regulators since the financial crisis’ (Stabe and Stanley, 2015), while a month later it was estimated that ‘Britain’s big four banks [have] rack[ed] up £50bn in fines since the financial crisis with HSBC set to pay £500m in US for rigging foreign exchange markets’ (Salmon, 2015). Such headlines, of course, tell us virtually nothing about the scale and level of corporate crime or harm.

These are figures of unimaginable proportions, and raise some important questions: how are such fines calculated; who pays them; how do they affect

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individuals who might have benefited from the crimes of the banks so punished; and, how effective are such fines? These questions are even more problematic in the context of a form of corporate harm where there is far less popular, political and criminal justice scrutiny – namely occupational health and safety. In fact, this sphere of corporate harm tends to hit the headlines for quite different reasons to banking harms: the former is widely derided, synonymous with red tape, petty rules and regulations, where stories circulate about hanging baskets and kids playing conkers being banned by an over-zealous health and safety police (Almond, 2009).

This article considers penal and real utopian non-penal alternatives to responding to health and safety harms caused by corporations. More specifically, my concern is what to do with the harmful corporation? In these considerations, I should make it clear that I confine my focus to health and safety harms arising out of or connected to the activity of work and focus on corporations, not individuals. It should be noted that individuals can be prosecuted and punished for health and safety crimes, and that this can lead to imprisonment, albeit that this is very rare indeed. Interestingly, employees are almost as likely as employers (whether directors or senior managers) to be prosecuted for such offences. Thus, typically, 95 per cent of prosecutions by the UK Health and Safety Executive (HSE) are against organisations, 3 per cent against directors, and 2 per cent against employees (Tombs and Whyte, 2015b).

What is particularly of interest here, is that once one starts to try to identify any way of thinking about ‘punishing’ the corporation that is vaguely effective, one is led to think about undermining the very basis of the corporation – that is, one is forced into envisioning a *real utopian* response to the issue, that is, one which takes seriously concrete and specific redesign of the corporate form. Also of interest is that the issue of corporate harms in the form of health and safety violations is not one where we can detect punitiveness, ‘a punitive turn’ (Pratt et al, 2007; Bell, 2011), ‘a culture of control’ (Garland, 2001), and nor, then, is it one which has attracted the focus of those arguing for abolitionism, de-carceration, and so on. But it is an area in desperate need of ‘real utopian’ thinking, given the scale of harm at issue. It is to the latter issue which I now turn. Then, I critically discuss the use of the fine as the common response to corporate crime in this sphere, before going on to consider more effective responses to corporate crime and harms.

Socialising Harm with Impunity

Each year, HSE press releases the numbers of ‘fatal injuries’ to workers as the trail to its annual statistical publication. Often referred to by HSE as fatal *accidents*, this headline figure of somewhere around 150 deaths omits vast swathes of fatal injuries as well as deaths from occupational exposures which it in fact records. HSE’s *Health and Safety Statistics 2014-15* reveals: ‘Around 13,000 deaths each year from occupational lung disease and cancer are estimated to have been caused by past exposure, primarily to chemicals and dust at work’ (Health and Safety Executive, 2015: 2). This data still remains a gross underestimate. For example, in 2009, researchers from the European Agency for Safety and Health at Work calculated 21,000 deaths per year in the UK from work-related fatal diseases, though noted that such data ‘might still be an under-estimation’ and that deaths from work-related diseases are ‘increasing’ (Hämäläinen et al, 2009: 127). Another UK study estimated that up to 40,000 annual deaths in Britain are caused by work-related cancers alone. And long-term research by the Hazards movement², drawing on a range of studies of occupational and environmental cancers, the number of heart-disease deaths with a work-related cause, as well as estimates of other diseases to which work can be a contributory cause, showed a lower-end estimate of 50,000 deaths from work-related illness in the UK each year. This figure ranks highly in comparison with virtually all other recorded causes of premature death in the UK (see Tombs, 2014).

This is a significant toll of physical harm, produced on an annual basis, and does not even begin to incorporate the non-fatal injuries and illnesses caused by work each year – which even on recorded data runs into the hundreds of thousands, and on the basis of HSE’s collection of self-reported data is counted in seven figures (see next section). These data, for all their limitations, are enough to allow us to reach one indisputable conclusion: work is a major source of physical harm. If ‘capitalist class relations perpetuate eliminable forms of human suffering’, (Wright, 2010: 37) such data are a stark illustration of this observation.

Further, the harm is not simply physical – these physical harms are associated with a wider series of harms generated by each death, injury or illness. These include various emotional and psychological harms, many of which may be short-lived, others of which may endure over long periods. These in turn

² Independent organisation campaigning for justice and safety at work. See <http://www.hazardscampaign.org.uk/>

have knock-on harmful effects in terms of family, dependants, friends, and so on, and again may incur costs upon the State. In effect, each form of physical harm is, albeit differentially, likely to be associated with ripples of harms.

There are also significant financial costs entailed here, in the form of a loss of income or additional costs incurred by the injured person or the families of those bereaved. But there are also wider, economic costs, in the sense that all of these harms entail various layers of costs for the State, ultimately borne by taxpayers and with knock-on effects for the provision of other state goods and services; such costs range from those associated with health-care, welfare and sickness payments, lost income and production, legal and administrative costs, as well as regulatory resources, and so on. Where the harms are generated in profit-making settings, these costs are socialised, while profits remain privatised – so there are clear, harmful wealth-distribution effects, also.

HSE intermittently calculates the overall financial costs of injuries and ill-health, its most recent such calculation being for the year 2013/14. In that year, injuries and new cases of ill-health ‘cost society an estimated £14.3 billion’ (Health and Safety Executive (2015b: 2). Further, it notes that ‘The majority of costs fall on individuals, while employers and government/taxpayers bear a similar proportion of the costs of workplace injury and ill health’ (*ibid*). More specifically, the distribution of costs is estimated as follows: £8.2b borne by individuals, £2.8b by employers and £3.4b by government/taxpayers; thus employers bear some 20 per cent of the costs, the smallest absolute and relative figure (*ibid*).

This is quite typical. Corporations are generally not required to pay the costs of the most damaging effects of their activities. This is due to the system used in accounting practice that privileges some costs and benefits over others. In general, corporate balance sheets only reflect particular costs. The costs that typically *are* counted are the standard inputs of commercial or productive activity: the costs of raw materials, of processing these through energy and using technologies, the costs of building or renting and maintaining premises or the costs of labour power. However, industrial injuries and diseases, alongside harms such as environmental pollution and food poisoning, involve major social costs that are not included: these are what economists call ‘externalities’. It is the cost-accounting mechanisms used in standard accounting practice which reduces the value of death, injury and illness to mere externalities; that is, peripheral side-effects of corporate activity, which remain absent from the balance sheets of costs and benefits of such activity. Quite simply, some costs of doing business are counted and other costs are not. It is this principle that

enables corporations, to use Bakan's (2004: 60) term, to act as 'externalising machines'.

Responding to the Harmful Corporation

How, then, does the State respond to such a grotesque scale of routine, consistent harm? Formally, the State's approach is to seek to regulate the corporation with respect to health and safety law – and to be clear, this is regulation *not* policing. The term 'regulated' immediately indicates that those crimes are not policed in the usual sense of the word: corporate crimes are normally dealt with by different types of enforcement authorities ('regulatory agencies') and often with different types of ('administrative' or 'regulatory') law. But these are more than administrative distinctions, of course.

There now exists a mass of studies – mostly nationally based, though with some useful cross-national comparative studies also – regarding the practices of a whole range of regulatory bodies (see Clarke, 2000: 136-161). Several broad generalisations can thus be made about the practices and effects of regulatory enforcement agencies: non-enforcement is the most frequently found characteristic; enforcement activity tends to focus upon the smallest and weakest individuals and organisations; and sanctions following regulatory activity are light (Snider, 1993: 120-124)³. Prosecutions for corporate crime are relatively rare (compared with 'conventional crime').

The increasingly dominant strand of studies around regulatory enforcement focuses on specific business sectors and discrete areas of legislation, documenting the extent to which the compliance-oriented approach is the predominant one amongst regulatory bodies. Indeed, some have argued that there is a generalised convergence across enforcement bodies, jurisdictions, bodies of law, and so on, towards such an enforcement approach (see Tombs, 2015). On the basis of such a strategy, regulators enforce through persuasion – they advise, educate, and bargain, negotiate and reach compromise with the regulated. As a result, business offences typically remain outside the ambit of mainstream criminal legal procedure. If they do become subject to law enforcement, they tend to be separated from the criminal law (and processed using administrative or informal disposals rather than prosecution). Even if they are subject to the formal

³ These are, of course, generalisations: there are important national differences in enforcement strategies (Pearce and Tombs, 1998: 229-45) and important differences in enforcement strategies across different spheres of regulatory activity (Snider, 1991).

processes of criminal law, corporate crimes are rarely viewed as equivalent to 'real' crimes (*ibid*).

Relatedly, then, what we know in terms of the sentencing and punishment of corporate offenders is that: smaller corporations are more likely to be prosecuted than larger counterparts; offenders are likely to be treated more leniently at sentencing stage than those successfully prosecuted for 'conventional' crimes; and overwhelmingly the most common sanction imposed on a company convicted of any criminal offence is a monetary fine, on which more below.

To illustrate the significance of these processes – effectively, processes of non- or de-criminalisation – let us return to recorded injury and illness data, extending our analysis beyond the sub-set of occupational fatalities. According to HSE's most recent data, in 2014/15, there were: an estimated 2.0 million people suffering from an illness (long-standing as well as new cases) believed to be caused or made worse by their current or past work; 76,000 reported injuries to employees; a total of 611,000 injuries which occurred at work, of which 152,000 led to over 7 days absence (Health and Safety Executive, 2015a: 1-4).

Yet the companies which cause these deaths, injuries and illnesses are subjected to virtually no regulatory oversight. Between them, the Health and Safety Executive and Local Authority Environmental Health Officers are responsible for enforcing health and safety law in over 2.5 million workplaces. In 2013/2014, inspectors from these two sets of regulatory agencies made just 130,000 inspections, with an 'average' of one in 20 workplaces receiving an inspection, and a total number of inspections that continues to be in long term decline (Tombs, 2016: 155). Moreover, it is not simply that inspections are low, and declining, so too are investigations: only a very limited sub-set of the deaths recorded by HSE – the 150 or so which constitute HSE's headline figure – are subject to investigation, while less than one in 20 major injuries are subject to regulatory scrutiny. On the basis of such state inactivity, then, it is unsurprising that prosecutions are few and far between.

Moreover, in 2014/15, there were 1047 separate offences successfully prosecuted by HSE and local authorities across Britain, the average penalty being just under £18,500.⁴ Thus, the chances of a death, injury or illness resulting in a successful prosecution are infinitesimal, while the sentence attached to any such conviction is, on any criterion, low.

Somewhat differently, in the case of a limited sub-set of deaths, companies may be charged with corporate manslaughter, on the basis of a new law introduced in 2007, the Corporate Manslaughter and Corporate Homicide Act

⁴ Source: <http://www.hse.gov.uk/statistics/prosecutions.htm>

(CMCH Act), designed to facilitate the prosecution of large, complex organisations for death or deaths. However, at the time of writing⁵, with the law in force for almost eight years, there have been just 14 successful prosecutions under the new Act. Further, only two had attracted a sentence which reached the putative minimum figure of £500,000: CAV Aerospace Ltd. was fined £600,000, while Sterecycle [Rotherham] Ltd was fined £500,000 – albeit, by the time the trial had begun, the company was in administration.

Sentencing guidelines for health and safety offences – under both CMCH Act and the Health and Safety at Work Act 1974 (HSW Act) – have recently been subject to revision. From February 2016, organisations which are convicted of breaches under the HSW Act should be fined in the range of £50-£10 million, while successful prosecutions under the CMCH Act should generate fines in the range of £180,000 fine-£20 million (Sentencing Council, 2015: 3, 21). Given the limited use of either body of law, and the fact that levels of fines under the previous guidelines failed to reach minimal suggested levels, it is tempting to view these guidelines as purely symbolic. In fact, what we have here is a sphere of activity which produces significant harm but which is effectively non- or decriminalised – in distinction to many much lower-level incivilities which, many have convincingly argued, are increasingly subject to punitive (and counter-productive) levels of state responses.

The Problem of Corporate Sanctions

Several objections are often noted about the efficacy of the use of fines – and these apply specifically in the context of responding to health and safety offences, even though they are usually made more generally – and it is worth rehearsing these briefly here.

First, fines are not proportionate to the offence committed or the harms caused, as is demonstrated by above data about actual levels of fines in respect to health and safety crimes and harms.

Second, even if fines were to be significantly increased, this still begs the question of whether heavy fines are an appropriate way to deal with corporate wrong? In relation to corporate crime it might be thought that the fine is a perfect disposal because, unlike individuals whose offending is often committed whilst the person is affected by alcohol or drugs, corporations strive, generally, to behave rationally. They conduct business through decision-making processes that *are*

⁵ March 2016

susceptible to rationally predictable outcomes like profits and fines. Businesses use cost-benefit analysis as a routine procedure. The problem is that such calculations are as much based on the likelihood of *being caught* as they are upon the level of fine if caught and convicted. Thus, many companies decide to take the risk of unsafe systems as there is a very low chance of being inspected or, indeed, if inspected and detected, of actually being prosecuted for the offence. Thus, the very factors which make the use of fines superficially attractive – that the corporation is a rational, calculative entity – also render them problematic. This is exacerbated by the fact that even high fines and the possibility of detection and their being imposed might be deemed as a calculable, rational risk to take as a cost of doing business – witness the classic Ford Pinto case, for example (Dowie, 1987).

Third, fines at whatever level do not aid rehabilitation – and, indeed, the higher they are set, they may actually hinder more effective systems of health and safety being developed in the aftermath of a conviction since they impose costs on the company.

Fourth, however, such costs may not at all be borne by the offending company itself – many argue that the costs of fines tend to be counter-productive since they are dispersed to the ‘innocent’. Thus it has been argued that the burden of such fines is inappropriately borne by employees, through worsening working conditions, cuts to, or deferred increases in, wages, or even potential redundancy; or by consumers, through higher prices; or both. In other words, if the corporation is indeed an externalising machine, then it is difficult to see any rational response to large fines other than attempting to externalise these.

Fifth, the very use of fines is partly an effect of the fact that the overwhelming object of prosecution is the corporation and not its directors or other senior managers. In this approach, the criminal justice system acts upon, but at the same time continually reproduces, what is known as the ‘corporate veil’, an effect of corporate personhood and limited liability.

The combination in law of the principle of limited liability (limiting the liabilities of investors in a company to the sum invested) and the creation of the corporation as a legal subject (a legal person), recognised as having a single identity or ‘personhood’ that is separate and distinct from the human persons that make up the corporation (its owners, directors, managers, employees and so on), are the two key legal principles which constitute the corporate veil – and are the basis for the corporation as a structure of irresponsibility. The veil protects those who own, control and benefit from the corporate entity, as the corporate entity is the object of responsibility and accountability for ‘its’ actions or omissions. Note here a double-movement: the emergence in law of the

corporate person was accompanied by a process of *depersonalising* the corporation, that is, setting it free from, independent of, and indeed structurally separate to, the actions and decisions of its senior managers, directors and shareholders.

The idea of the anthropomorphic corporation – the metaphorical person-writ-large which thinks, decides, acts, innovates, and so on – is one which holds considerable sway on the popular and legal consciousness. But it is clear that in reality the corporation is not, and can neither think nor act as a person, while legal personhood is historically and contemporaneously deployed in ways which generally allow corporate entities to evade legal accountability. But it is the separation of the various human elements of the corporation that is crucial in permitting what the company actually does – what it produces, the services it provides, its investment activities and so on – to become abstracted from the human actions that occur within the corporation itself.

Beyond Monetary Fines

I return to the issue of the corporate veil, and corporate personhood in particular, below. For now, it is worth noting that there are a range of other responses to corporate offending which have been proposed or attempted, if not in the UK and if not necessarily nor solely in the context of health and safety offences (see, for example, Braithwaite and Geis, 1982; Croall, 2005; Etzioni, 1993; Punch, 1996; Slapper and Tombs, 1999). That said, many of these responses have been considered in two recent UK consultations on sentencing corporate offenders – the Macrory Review (Macrory, 2006) which was held very much as part of the Hampton-Better Regulation initiative (Tombs, 2016) – and an HSE consultation in 2012. The latter, for example, sought views on restorative justice, conditional cautioning, enforceable undertakings, remedial orders, probation (for companies and directors) and adverse publicity orders.⁶ Both remedial and publicity orders are available as sanctions under the CMCH Act.

Amongst these, arguments for corporate probation are particularly worth exploring. The starting point for this is that if rehabilitation has generally failed as a doctrine for the control of traditional crime, it can perhaps better succeed with corporate crime (Braithwaite and Geis, 1982). That is, many corporate crimes, but one might argue health and safety crimes in particular, arise from defective control systems, insufficient checks and balances within the organisation, and poor

⁶ HSE, Alternative penalties for health and safety offences, <http://www.hse.gov.uk/consult/condocs/penalties.htm#alternative>

communication systems (Braithwaite, 1985). These failings are sometimes deliberate, and made by the corporation to reduce costs, and sometimes the failings are inadvertent. Either way, it is possible for legal orders to force corporations to correct criminogenic policies and practices. Thus:

Rehabilitation is a more workable strategy with corporate crime than with traditional crime because criminogenic organizational structures are more malleable than are criminogenic human personalities. A new internal compliance group can be put in place much more readily than a new superego. (Braithwaite and Geis, 1982: 310; see also Etzioni, 1993: 155)

Moore argues that this alternative strategy of ‘rehabilitation’ could be achieved by putting the offending corporation on supervised probation with the stipulation that it must implement stated reforms (Moore, 1987). Failure to comply could warrant other, more severe sanctions (such as incapacitation, below) to be applied. The object of internal reform, he concludes, is a preferable alternative to a deterrence strategy based on increased sanctions to control corporate wrongdoing through punitive means. This does not, however, address the potentially enormous resource requirements necessary to effectively monitor such reform for hundreds of corporate convicts – any forms of remedial orders or corporate probation currently in use require oversight, a point I return to in the following section.

Braithwaite and Geis (1982: 307) have argued for sentences which would limit the charter of a company by preventing it from continuing those aspects of its operations where it had seriously failed to respect the law. Following Braithwaite and Geis, Moore (1987:395-396) suggests a form of corporate incapacitation, whereby a corporation may be limited in the type of economic activity or regions in which it could legitimately operate. This is logically related to contract compliance, whereby the buyer of corporate goods and services imposes conditions upon the way in which those goods and services are delivered. Such contract compliance is used ubiquitously where central or local government – major customers of the private sector – are the purchaser, and there is absolutely no reason why these contractual terms cannot include those preventing health and safety harms. Failure to deliver on the conditions of such a contract means that the corporation is prevented from bidding for future tenders.

Relatedly, Braithwaite and Geis (1982: 307) argue for sentences which would limit the charter of a company by preventing it from continuing those aspects of its operations where it had seriously failed to respect the law. They also consider ‘capital punishment for the corporation’. This would entail the imposition of a

‘death penalty’ which could be accomplished through absolute revocation of a corporation’s charter, nationalisation, or being put into the hands of a receiver. Moreover, to preserve jobs as well as the goods and services provided by the firm, the assets of the offending company could be sold or otherwise transferred to a new parent company or companies with an established record of compliance with the law.

Disrupting the Corporation

The preceding section leads us to the view that in responding to corporate harm, a key aim must be to disrupt the corporation, both in terms of *how* and *where* it operates. Either approach entails challenging the power of the corporation to operate as freely as it would otherwise prefer. Thus, this principle of disruption opens up other possibilities for responding to, and preventing further, corporate crime and harm.

In this context, I can return to the issues of fines and, specifically, to Coffee’s (1981) argument for a system of ‘equity’ fines against owners of corporations on conviction – a reform which, *inter alia*, is designed precisely to undermine the integrity of the corporate veil. This proposal for ‘equity fines’ entails offending companies being ordered by a court or regulatory authority to issue a set number of new shares in the firm. The shares would then be controlled by a state-controlled compensation fund. More radically, these could be handed over to a victims’ or campaigning organisation, or a (relevant) trades union. This process, which effectively dilutes the value of shares held by the owners of the company, prevents the corporation from simply passing on the costs of a sanction to customers through price increases or to workers through job or wage cuts, since the funds for investment would not be depleted, merely reallocated from existing shareholders to the compensation fund. Such proposals were debated – though rejected – by the Scottish Parliament in 2010.⁷

There are further, logically related demands, to be pursued through other bodies of law, and these can be activated as a response to corporate crime and harm. Numerous proposals exist for reform of company law, not least those which enable a diverse range of stakeholders to be increasingly empowered; these range from weak reforms to corporate governance, to rights of and protections for whistle-blowers (however limited and individualising such forms of challenge may be, they can have some minor progressive effects – see

⁷ The Criminal Sentencing (Equity Fines) (Scotland) Bill (SB 10-54) was introduced and debated at the committee stages of the Scottish Parliament on the 1st June 2010.

Pemberton et al, 2012), through to legally facilitating the strength of collective organisation and corporate oversight from within companies.

A key example here, crucial in the context of health and safety regulation in the UK, is that of legally protected rights inside companies. Thus, firms with legally-protected, effective trade union safety representatives and safety committees have half as many recorded injuries as those where these countervailing sources of power do not exist (James and Walters, 2002; Reilly et al, 2005; Walters et al, 2005). Legally-protected workers' rights at best place inspectorial oversight within workplaces, on a daily basis, by those who know the details of a job and workplace most intimately. Violations of law can be immediately responded to, as workers stop-the-job or impose Provisional Improvement Notices (PINs) on their managements, requiring improvements to plant or process by a certain date with the threat of work then being stopped. Roving safety representatives, moving across different workplaces, can play similar roles where workplaces are not organised. All of these rights exist in certain jurisdictions. It is important to emphasise the level of disruption at issue here: such workers' rights impinge upon capital's tendency towards maximising profitability, allowing organised workers to challenge management's expropriated rights to manage, and hence generate a surplus as freely as they wish.

It is no coincidence, then, that the central demand of 'The Hazards Campaign Charter'⁸ is about extending safety representatives' rights, thus:

Hazards Campaign demand: Full recognition and enforcement of existing safety reps' rights and the establishment of additional rights, including the right to be Roving Reps, serve Provisional Improvement Notices (PINS)⁹, refuse dangerous work by stopping the job, and to fully participate in all aspects of health and safety in the workplace.¹⁰

⁸ As noted above, the Hazards campaign is a UK-wide network of resource centres and campaigners established in 1987 to improve health and safety at work; its Campaign Charter sets out its key demands on Government.

⁹ PINs have long been argued for by the Hazards and trades union movement. It was in Victoria, Australia, where safety reps were first given the legal power to impose a Provisional Improvement Notice. This is a notice whereby workers' representatives have the power to stop the job when there is an imminent danger. PINs thus represent a legal challenge to managements' 'rights' to manage and grant power to those who best know the risks of any job.

¹⁰ The Hazards Campaign Charter, at <http://www.hazardscampaign.org.uk/charter/newcharter.htm>

In this context, Snider's (1991) analysis of the emergence and level of regulation is useful, and revolves around two central sets of claims. She argues, first, that regulation must be understood dialectically, via a dynamic complexity of 'specific mechanisms' which affect 'the balance of power between the regulated firm and the regulatory agency' (Snider, 1991: 210). Second, these relationships need to be set in the context of a similarly dynamic set of relations between the State and capital, and between the State 'and the broad electorate, as represented by relevant pressure groups' (ibid). Through this at once simple yet sensitive schema, Snider analyses four areas of regulation, including 'occupational health and safety laws'.

On occupational health and safety, she notes that crucial considerations are that: occupational health and safety is not viewed as necessary for capitalist survival; enforcement in this context may be antithetical to capitalist interests (in terms of a direct attack on profitability; see Szasz, 1984); states are most likely only to make symbolic efforts to regulate. But the key observation here is that pro-regulatory forces are potentially strong since they are most likely to originate in organised labour, making opposition to corporate freedoms here more viable and achievable in this context than many others, thus altering what Wright calls the balance of possibilities for transformation (Wright, 2010: 1-29). Moreover, there is political traction here, since the imagery of victimisation is powerful in this context. To this it might be added that the key problem for employers are injuries – since these are immediate, visible, perhaps attract wider public sympathy, and are easily associated with a specific employer and, perhaps, working conditions or practices. This is in contrast to ill-health, which often has such long incubation periods and causal chains that any company evades virtually all responsibility for these.

Quite differently, in the realm of criminal law, we can still identify reforms which have the potential to be transformative – that is, which maintain the potential for more radical reform, rather than ultimately bolstering the power of capital through a limited instrumentalism, a mere symbolism, or indeed both. Key contemporary examples of legal reforms which might radically undermine the legal protections which corporations currently enjoy are those which seek to pierce the corporate veil – that ideological and material, legal construction through which the corporate form exists as if independent of those who own and control it, guaranteeing a compartmentalisation of legal (and moral) liability. A key instance of this was the possibility, during the tortuous passage of the CMCH Act, that *positive* duties as regards health and safety might be placed upon directors; thus an early Home Office consultation document on the

law proposed that, alongside a corporation being convicted for manslaughter, company directors should be able to be disqualified if it is found that their conduct has ‘contributed’ to the company committing the offence, while the Government also stated that it ‘would welcome comments’ on whether company directors should be able to be prosecuted for such conduct (Home Office, 2000). Ultimately, organised lobbying from employers organisations, and notably the Institute of Directors¹¹, saw the potential criminalisation of Directors removed from the law. Yet, this debate represented a sustained period in which there was a genuine possibility to pierce the corporate veil. Similar proposals continue to circulate in the context of legal liability for workplace killings that precisely establish a clear legal relationship between such deaths, the corporate form, and the senior officers and shareholders of that corporation. These are potentially radical, and are on various political agendas (Tombs and Whyte, 2015a: 173-5).

Thus, the key task must be to attack the legal basis upon which corporate power and irresponsibility is constituted – legal personhood, from which follow so many of the features of the corporate form. It is no coincidence, then, that ending legal personhood was one of the original demands of Occupy Wall Street.¹² Although those proposals are hardly likely to be adopted in any meaningful form, they are visible on mainstream political agendas and they are beginning to be visible in some academic work that has engaged politically with the possibility of reforming or abolishing limited liability protections (Plesch and Blankenburg, 2008; Blankenburg et al, 2010). The debate on the privileges afforded by the legal construction of corporations as ‘persons’ also reached the US Congress when Bernie Sanders, Senator for Vermont, introduced a Bill to abolish the recognition of corporate persons in the US constitution in December 2011.¹³ The Bill sought to overturn a decision made by the US Supreme Court in

¹¹ The key UK body which represents individual directors, senior managers and ‘entrepreneurs’.

¹² See DETAILED LIST OF DEMANDS and OVERVIEW OF TACTICS FOR DC PROTEST, at <http://occupywallst.org/forum/detailed-list-of-demands-overview-of-tactics-for-d/>

¹³ A series of cases dating back to 1819 have asserted that corporate persons have the same rights as real persons. Those rights have been most famously asserted under the Fourteenth Amendment to the US Constitution which was introduced after the abolition of slavery to give all persons equal rights before the law. In a key judgement, the US Supreme Court in *Pembina Consolidated Silver Mining Co. v. Pennsylvania* (125 U.S. 181; 1888) decided: ‘Under the designation of "person" there is no doubt that a private corporation is included [in the Fourteenth Amendment]. Those rights have been invoked by corporations to claim the right as "citizen" to participate in the funding of political parties and to use the courts to challenge state regulatory laws and rules’.

January 2010. In this case, *Citizens United v. Federal Election Commission*, the Court ruled that corporations are persons, entitled by the U.S. Constitution to fund parties standing in elections. Although the Bill fell, similar Bills have been supported in several state legislatures.¹⁴ The Bill also gave impetus to a wider movement based around the umbrella organisation ‘Move to Amend’ that has developed a popular basis for the campaign against corporate personhood.¹⁵

Beyond the Archetypal Capitalist Corporation

Such proposals and considerations, however radical they may appear, can only at the moment be an interim demand and tactic in the abolition of the corporate form *per se*. But this transformative goal is furthered through the kinds of intermediate demands indicated because each has the effect of disrupting, disturbing and undermining the legal bases upon which the corporation is structured.

Thus there are wider challenges to be faced than legal reform. We should be continually demanding that a range of services should be (re-)nationalised and taken out of the for-profit sector, as the latter demonstrates its inability to deliver these according to its own promise, and as the State consistently demonstrates its inability to hold consistent corporate failure to account. Thus we must also challenge corporate claims of efficiency, of freedom, of choice, of autonomy from (and superiority over) government, claims which are disproven for all of us on a daily basis, perhaps so obviously that we almost become anaesthetised to the supporting rhetorics of corporate power. At the same time, we must seek out, document and evaluate experiments in alternative forms of delivering goods and services – they have long existed and continue to exist all across the globe. There are a whole plethora of ways in which the production, distribution and sale of goods and services can be organised in ways which depart from archetypal capitalist models (Wright, 2010: 191-269), including a variety of social and employee-owned enterprises, community-based public offerings and co-operatives. Each of these deserve our interest and evaluation, and might offer the basis for real, utopian inspiration.

The struggle for safer and healthier workplaces is, as has been intimated above, essentially a struggle over the level of exploitation – it impinges upon ‘the most minute details of production’, making safety and health at work ‘antagonistic

¹⁴ Sourcewatch provides a guide to those states:
http://www.sourcewatch.org/index.php/Move_To_Amend

¹⁵ See <https://movetoamend.org/>

to the logic of firms within a capitalist economy' (Szasz, 1984: 114), so that 'safety' and 'profits' are, ultimately, contradictory (Nichols and Armstrong, 1973). In this context, worker self management – 'essentially the idea that those who produce value should control their workplaces, making decisions on what is produced, how it is produced, and how the organisation is structured' (Corporate Reform Collective, 2014: 155) – is of potential significance. The traditional model of worker self management is via the co-operative model, heralded by Marx as 'a major achievement of the working class' (cited in Wright, 2010: 235), not socialist *per se* but a key element of a strategy for building alternatives to capitalism and the dominant forms of organising production within it (ibid); as such, the co-operative form can be pre-figurative of a new form of economic organisation. By far the most celebrated example of such an organisational form is the Mondragon Co-operative. The Mondragon co-ops had their origins in the Basque country in 1956, eventually reaching their present form at the Mondragon Congress of Co-ops in 1991. By 2008, the end of the last decade, 120 Mondragon co-ops employed over 100,000 people across industrial, financial, consumer goods, agricultural, educational, research and welfare services. By this time, there were 69 production plants across many countries. Representation in all Co-ops includes a health and safety Committee (Hitchman, 2008).

The Mondragon principles are ten-fold, and include the following:

- Democratic Organisation. A basic equality of worker-members in a democratically organised company based on the sovereignty of the General Assembly, electing governing bodies and collaborating with managerial bodies.
- Sovereignty of Labour. A recognition that labour is the main factor for transforming nature, society and human beings themselves, with full sovereignty so that wealth created is distributed in terms of the labour provided.
- The instrumental and subordinate nature of capital. Capital is an instrument subordinate to labour, necessary for business development.
- Participatory management. The steady development of self-management and, consequently, of member participation in company management which, in turn, requires the development of adequate mechanisms for participation, transparent information, consultation and negotiation and training.

- Social Transformation. A process that helps towards all peoples' economic and social reconstruction and the construction of a freer, fairer and more caring Basque society.
- Universality. Solidarity with all those who work for economic democracy and share the objectives of Peace, Justice and Development which are inherent to the International Co-operative Movement.
(<http://www.mondragon-corporation.com/eng/co-operative-experience/our-principles/>)

For Schnall and Wigger (2013), what is 'most profound' about these are their

focus on the sustainable relationship of mutual benefit between worker and company. In contrast to most capitalist companies, whereby the measure of a successful company is almost always based on maximum profitability, the cooperative model offers an alternative approach that supports democracy in the workplace through an egalitarian voting system, while at the same time promoting job security for worker-members, social justice and community responsibility.

Thus, it is claimed, both its structure and values allow Mondragon to 'vouchsafe' the health and safety of its workers (Schnall and Wigger, 2013).

Such initiatives are not without their critics. Kasmir (1996), for example, has argued that most social scientists who have commented upon the Mondragon cooperatives have idealised them as a form of alternative capitalist organisation, claiming that these do not resolve but merely transform and/or displace worker-management conflicts. The idea that Mondragon is a superior form of organisation is, for her, a myth. More specifically, others have argued that any business enterprises with high levels of worker control are not necessarily *safer* places to work: in employee-owned firms in the wood-processing sector, for example, Grunberg et al (1996), conclude that such forms might actually 'be hazardous for worker morale and worker safety' due to the 'precarious economic conditions these employee-owned firms find themselves in'. Others have responded to this claim by warning that we should be careful about equating employee ownership with high levels of worker participation (Kardas, 1997) – it is the latter which is likely to protect against business harms, not the former. As one Mondragon employee noted, then, the co-operative business has 'all sorts of problems': 'We are not some paradise, but rather a

family of co-operative enterprises struggling to build a different kind of life around a different way of working.’ (cited in Wolff, 2012)

Mondragon is not, of course, the only model of a co-operative organisational form. One recent commentary noted that, ‘In England in 2010 there were 4,784 co-ops with a turnover of £29.7billion’ (Corporate Reform Collective, 2014: 157). The International Co-operative Alliance claims that co-ops employ 250 million people worldwide, generating 2.2 trillion USD in turnover (<http://ica.coop/en/facts-and-figures>). Equally obvious is the fact that existing co-ops will range from the more to less efficient and indeed from the more to less exploitative and harmful. The point is, however, that alternatives to traditional business models are a-plenty and ubiquitous, so that there are ‘many different institutional designs that in one way or another embody the idea that producers should ‘own’ their means of production’ (Wright, 2010: 237).

Conclusion: Thinking beyond the corporation

This article has highlighted a heterogeneous set of considerations, from the reformist to the utopian. But there is no necessary contradiction here: the idea that there is a mutual exclusivity between ‘reform’ and ‘revolution’ or ‘practical’ and ‘utopian’ is not the concrete experience of many counter-hegemonic organisations. And there is a lesson here for academics, since neither utopianism nor radical imagination can emanate from an atomised realm of ‘mere’ thought. As Haiven has put it,

imagination is not a thing that we, as individuals, ‘have’. It’s a shared landscape or a commons of possibility that we share as communities. The imagination doesn’t exist purely in the individual mind; it also exists between people as a result of their attempts to work out how to live and work together. The imagination can, therefore, be extremely dangerous... The radical imagination is a matter of acting otherwise, together. (Haiven, 2014: 218)

The first thing we have to do is reject the idea that being idealistic can never be pragmatic or useful in winning concessions or influencing policy. Second, and following this, a reformist discourse and agenda can, under some circumstances, bolster more radical movements for fundamental social change. Third, it is possible to remain outside the ideological terrain of the State and at the same time to engage on the terrain of the policy world or with the current political

system. In fact, there are a number of counter-hegemonic groups that stand firmly and unapologetically in opposition to the State's regulatory agenda but still remain engaged with government in consultations, lobbying and policy work. Those groups, which in the context of UK health and safety campaigns include the Hazards Campaign and its network of Hazards centres, Families Against Corporate Killers, the Blacklist Support Group, the Construction Safety Campaign, and Asbestos Victims Support Groups, have shown us that idealism does not necessarily constrain the effectiveness or political impact of counter-hegemonic struggle. Therefore, the question remains: how best we might develop a pragmatic idealism that revolves around making connections between, and interventions across, state, economy, politics, history and 'culture', and which stands in direct opposition to 'principled pluralism' with its 'tendencies towards fragmentary problems and scattered causation' (Mills, 1970: 104).

I need to emphasise that avoiding these tendencies is dependent upon us retaining an element of utopianism – our demands and our actions must be achievable yet at the same time unashamedly utopian (Wright, 2010). And, following Jacoby, we would argue that these should be utopian in an 'iconoclastic' rather than 'blueprint' sense (Jacoby, 2005). Further, not least if we are to avoid political immobilisation likely to be induced by a perceived need to set out a blueprint which lays down an image of a future utopia in detail, we should, as one commentator has recently put it, 'learn to think about capitalism coming to an end without assuming responsibility for answering the question of what one proposes to put in its place' (Streeck, 2014: 46). This radical imagination means abandoning the acceptance that things cannot change much, an acceptance which ever-narrows hope and possibility:

The current conjuncture's dominant liberal culture has redefined idealism and pragmatism to realign the usual opposition between them. Now, those who adopt the 'pragmatic' position of slightly modifying the existing system's socioeconomic framework are redefined as the idealists. Conversely, in this current period of economic crisis and rapidly approaching environmental change to believe that the current order can continue indefinitely should be defined as idealistic – even insanely so – but, instead, it is defined as pragmatic as we seek individual solutions tailored to the systems 'problems' as they crop up. To adopt such a position means turning away from a reality judged too traumatic to be faced head-on, and falling victim to the belief that any attempt to

change it will only succeed in making things worse. (Winlow and Hall, 2013: 167)

Thinking about what dealing with the harmful corporation might actually mean, and how it can be achieved, requires a utopianism 'essential to any effort to escape the spell of the quotidian. That effort is the *sine qua non* of any serious thinking about the future – the prerequisite of any thinking' (Jacoby, 2005: Preface). Utopian thinking is not the opposite of seeking reform. And, indeed, a real utopianism, one which identifies alternative forms of institutions and practices which are at once desirable, viable and achievable, not least by their very existence, is a key illustration of how reforms can both co-exist with and be sustained by utopian thinking. Indeed, reforms without a utopian spirit are likely to lapse into reformism, not just with relatively few positive effects, but indeed are likely to be counter-productive, bolstering the corporation as it seems to have been somewhat tamed. If we cannot even imagine a world without corporations, then we will never inhabit a world without them – and the devastation that the corporate form wreaks on human life, with state, legal and regulatory acquiescence will remain but a fact of life.

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