

Corporate Crime and Punishment: Can the U.S. Learn from Canada's Westray Law?

By Charlie Cray

Center for Corporate Policy

ccray@corporatepolicy.org

<http://www.corporatepolicy.org>

(202) 387-8030

Why Focus on the Corporation?

They often have the power to decide what technologies are selected and used.

Market and other pressures often make it hard for executives to err on the side of caution.

Therefore, the key issue may not be scientific uncertainty, but how to address the legal and socio-economic pressures that cause harm.

A “few bad apples” or a “criminogenic” system?

“The socio-cultural environment within which many modern American corporations operate actually encourages unethical or criminal behavior. Lawbreaking can become a normative pattern within certain corporations.”

**U.S. Department of Justice,
“Illegal Corporate Behavior,” 1979**

Corporate crime: How bad is it?

“When deaths and injuries due to unsafe products, environmental hazards, and other illegal corporate acts are added to the equation, corporate crime is perhaps the most dangerous and consequential kind of crime that occurs in our society.”

Sally S. Simpson,

Corporate Crime, Law, and Social Control

Corporate Killing v. Homicide: What's Worse?

- U.S. Murder Rate = **16,000/year**
(Uniform Crime Reports, U.S. Department of Justice, *Crime in America*)

1. Defective Consumer Products

25,900 deaths/yr

33.2 million injuries/yr

Total cost: \$700 billion/yr

(U.S. Consumer Product Safety Commission 2006 Budget Request and Performance Plan Budget Request 2007, page iii, available at <http://www.cpsc.gov/cpsc/pub/pubs/reports/2007plan.pdf>)

Defective Products: Examples

- **Merck/Vioxx: 35 to 55,000 died** (Dr. Graham, FDA)
- **Guidant** Implantable Defibrillators
- **Ford SUVs/Firestone Tires:** at least 35 deaths and 130 injuries before NHTSA probe, companies knew from lawsuits.

Example: Tobacco

- **438,000 deaths in U.S. each year.**
- **One out of 5 deaths is “smoking related.” (CDC)**
- **Secondhand smoke: 3,000 deaths/yr (CDC)**
- **5 million deaths/yr globally (WHO)**
- **Will rise to 10 million/yr by 2020. (WHO)**

2. Pollution

- **Joel Schwartz, Harvard School of Public Health: 70,000/yr die from air pollution in US alone.**
- **Globally, between 200,000 and 500,000 die each year from air pollution. (American Lung Association)**

3. Death on the Job

- AFL-CIO: 5,703 workplace fatalities 2004 (“Death on the Job”, 2006)
- **66,971** total job-related injury and occupational disease deaths in 1992 alone

(J. Paul Leigh, et al., *Costs of Occupational Injuries and Illnesses*. Ann Arbor: University of Michigan Press, 2000)

U.S. Workplace Deaths

- **BP** refinery blast (Houston) March, 2005
blast: 15 killed, 170 injured. (No criminal referral from OSHA; just a record \$21 million fine.)
- **Sago**, WV (1/2/06): 12 miners dead.
No criminal charges, though “serious and substantial” violations quadrupled at the coal mine in 2005.

Need for criminal sanctions: Fines Don't Do the Job

- **Serious OSHA violations posing a substantial probability of death or injury carry an average fine of just \$ 910.**
- **Fines treated as “cost of doing business.”**
- **Rational cost-benefit calculation by the corporation ensures they will be protective of consumer and public health only when doing so is profitable.**
- **Even then, not always: The burdens can be shifted to consumers, taxpayers.**

Is Corporate Manslaughter as Important as Accounting Fraud?

Sarbanes-Oxley Accounting Reform Act (2002)

- * Up to 25 years for corporate financial crime.**
- * Up to 20 years for obstructing or impeding government investigations (e.g. shredding).**

“Wrongful Death Accountability Act” (2003)

- * Up to 20 years for wrongful death.**
- * Never passed (S. 1272)**

Tort “reform” Impairs Victims’ Right to Sue

- **U.S. Chamber of Commerce’s long-term strategy. (Powell Memo, 1971)**
- **Institute for Legal Reform, “Citizens Against Lawsuit Abuse” and other front groups have mounted big legislative campaigns in the states.**
- **Prop. 64 (2004) gutted CA’s Unfair Competition Act by nixing lawsuits designed to prevent non-financial harms like loss of health, environmental damage or consumer deception.**
- **Key court precedents have also stacked the deck against plaintiffs: *Daubert* (Dow/Bendectin) and subsequent rulings let judges sift evidence and screen experts according to “sound science”. (See SEHN. “Detox for Torts,” 2003)**

Canada's "Westray Law": Origins

- **26 killed when Westray mine exploded on May 9, 1992.**
- **Investigation report: "Westray Story, A Predictable Path to Disaster" blamed company executives for ignoring H&S of employees.**
- **No company executive convicted.**
- **Government knowingly failed to enforce H&S regulations**

“Westray Law”

- **12 year struggle.**
- **In effect on March 31, 2004.**
- **Holds corporations (organizations), directors and executives criminally accountable for knowingly putting workers’ lives at risk.**
- **Severe penalties:**
 - **Up to 10 years (if result is bodily harm)**
 - **Life imprisonment (if result is death)**

“Westray Law”: Precautionary Language

Amends Canada’s Criminal Code:

“Every one who undertakes or has authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”

Canada's "Westray Law": Modernizes Criminal Liability

- **Before: Not easy to determine “directing mind” (*mens rea*) in larger corporations with complex structures – which is necessary to prove for purposes of attributing criminal liability.**
- **After: “Directing mind” is person(s) with authority to direct work: “Duty of Care” (may be narrowly focused)**

Westray's Reach Still Uncertain

- **All workplaces. E.g. secondhand smoke. Criminal negligence case against tobacco companies?)**
- **The law requires employers to prevent bodily harm to workers and “any other person”. (Consumers?)**

It's all about enforcement

- **Citizens can't bring criminal charges.**
- **U.S.: “Thompson Memo” (DoJ) has led to widespread use of deferred prosecutions for corporations. (Corp Crime Reporter)**
- **In the last 20 years, fewer than three dozen criminal convictions have sent killer employers to jail. (NYCOSH Safety Rep, June 2004)**

Lax Enforcement for Corporate Manslaughter (1982 – 2002)

- **2,197 workers died in 1,242 cases as a result of employers' willful violation of OSHA standards.**
- **OSHA referred just 119 cases to DOJ for criminal prosecution.**
- **DoJ "declined" to pursue 57 percent, reached pre-trial settlements in 63 percent of 51 cases pursued.**
- **Only 9 cases resulted in prison time for defendants.**
- **Since 1982, DoJ has won convictions in just 4 CASES against employers whose willful violations of OSHA standards caused the death of a worker.**

-- New York Times, 2004

Beyond Canada

- **C-369 introduced in 2006 by former NDP leader Ed Broadbent would extend to companies operating outside Canada.**
- **UK's Movement to reform Corporate Manslaughter Law (Corps, not Individ's)**
www.corporateaccountability.org
- **World Criminal Court for Corporations?**
(People's Tribunals)

Support in U.S. Congress?

- **Senate Judiciary Committee Chair Arlen Specter (R-PA) hearings 3/10/06: “Defective Products: Will Criminal Penalties Ensure Corporate Accountability?”**

Creative sanctions are needed, too.

- **Equity fines reduce value of existing shares, thus they**
 - **Send message to company analysts,**
 - **Reduce market incentives to commit crimes.**
 - **Give shareholders incentive to demand corporations comply with the law**
 - **Increase managers' fear of hostile takeover)**
- **Superadded liability for privileged classes of stock. (“Piercing the veil” to passive beneficiaries)**
- **Suspension and debarment from government contracts; license revocation.**
- **Adverse Publicity: Educate consumers, affected victims.**
- **Invasive probation w/structural remedies, or court/appointed overseer/monitor (similar to receivership).**
- **“Corporate death penalty” (i.e. charter revocation and dismantlement), as suggested by the Department of Justice.**

For more information

- <http://www.corporatepolicy.org>
- <http://www.corporatecrimereporter.com>
- www.multinationalmonitor.org
- **“The People’s Business: Controlling Corporations and Restoring Democracy” (Berrett-Koehler, 2004)**