

Distorted Perceptions of Corporate Harm in Comparison to Crime: A Critical Analysis of the Workers' Compensation Act

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Abstract

This paper poses a critical analysis of the Worker's Compensation Act, providing a foundation for the argument that crime is a social construct and therefore, is incapable of considering various aspects of corporate harm. Worker's Compensation Board Appeals are examined to demonstrate the limits of the current state of the Worker's Compensation Act, pointing specifically to harms that originate from workplace fatalities, long-term illnesses, and threats to mental health. The overall argument contends that we should move away from the narrow scope of the current definition of crime and seek a harm-based approach that allows for the considerations of multiple harms, which are often obscured by the criminal justice system.

Introduction

What is crime? Without much internal debate, the most common answers that spring to mind are likely the individual one-on-one crimes that involve violence, such as homicide and sexual assault. However, the most critical aspect of this question is not in the answer but is in the inherent acceptance of what crime is and how that assumption is produced and reproduced by a distorted construction of the definition of crime by the criminal justice system and its many agents.

This distortion is not only presented as an objective reality but also obscures the reality that crime and criminals are both created and, arguably, do not exist until the criminal justice system labels them as such (Christie, 2004; Hillyard & Tombs, 2007). In criminology, there has been a recent but powerful shift questioning how criminology is done, and critical criminologists seek to bring to the forefront questions about how our current methods of conducting criminal justice work to reproduce social inequality and harm instead of working to reduce it as it claims to do, arguing that what we see in everyday discourse surrounding crime is not reality, but is the carnival mirror constructed based on ongoing inequalities

between the rich and the poor (Reiman & Leighton, 2013).

To contribute to this discourse, the scope of this analysis will focus specifically on corporate harm and the Worker's Compensation Boards of Canada, which operate within the Worker's Compensation Act. One of the most serious events that this act engages with is workplace fatalities. These are those fatalities that occur in response to corporate activities that put people in danger in ways that they are often unable to fully comprehend as a direct result of modern work culture, capitalism, and the criminal justice structures that contribute to the distorted perception of crime versus harm. In response to these brief considerations, I argue that the Worker's Compensation Act contributes to the harm experienced by workers and their families instead of reducing it, and that we should work towards a more critical way of doing criminology.

Workplace Fatalities and Homicide Statistics

In Canada in 2021, there were 1,081 workplace fatalities reported by the Association of Workers' Compensation Boards of Canada (AWCBC). To gain a better understanding of what this data indicates,

researchers have examined previous years' data in-depth, revealing some troubling concerns regarding the statistics. These concerns include, firstly, the relationship between freedom and sacrifice, where workers are entirely expected to embrace a reality in which they must sacrifice themselves to the risks of working so that they can prosper, and that any accidents that do occur, are merely a part of business (Bittle et al., 2018).

A second concern is the conflicting interests of the state and the working class, where capitalism produces a scenario in which governments are less interested in pursuing more serious sanctions for violations of workplace safety to serve and maintain the free market (Bittle et al., 2018). Within these concerns is a multitude of questions that follow, such as the impacts of the reality of capitalism and consumerism, how it has shaped the landscape of the workforce, and who is forced to operate within this tumultuous belief of death as an acceptable risk. This applies not only to fatalities that might occur due to the most obvious of circumstances, such as malfunctioning or neglected equipment, but also to exposure to dangerous chemicals, substances, viruses, and stress and anxiety.

Bittle et al (2018). argued that “approximately 466 annual collision fatalities have the potential to be work related” (p. 172). CAREX Canada, an organization that monitors the exposures of known and suspected carcinogens to Canadians, approximated that “152,000 Canadians are exposed to asbestos in the workplace” (as cited by Bittle et al., 2018, p. 182). Many of these deaths, due to the effects of passing time and subtle exposures, are not included in the workplace fatality data reported by the AWCBC (Bittle et al., 2018). Not only does this workplace fatality data struggle to include these exposures, as demonstrated by Bittle et al., but brings into light the multitude of ways people are potentially harmed by corporations.

Statistics regarding homicide in Canada, in comparison to workplace fatalities, are regarded as relatively more reliable. However, they come with their own considerations of what is recorded as statistics versus what actually occurs due to the crime funnel effect and its related dark figure of crime (Linden, 2020). In the 2021 report on homicides published by Statistics Canada, there were 788 reported homicides, with various other highlights that discussed the vulnerability

of Indigenous and female persons, who were the most common victims of these homicides (2022).

The stability of this data refers to the perceptions of the relative consistency for which homicides are recorded in police statistics, in contrast to the multi-level considerations, biases, and loopholes that workforce fatalities must go through before they can be recorded as official statistics. Like homicide data, this requires the work of investigators, however unlike homicide data, they are not reinforced by the drive to find the murderer(s) responsible, or any reasonable facsimile onto whom these charges can be laid, but by the required boxes that must be ticked in order for the payment of an innocuous lump-sum (Appeals Commission for Workers Compensation, 2022; Bittle et al., 2018; Workers Compensation Act, 2000). Although these perceptions sound logical, there remains the existence of human actors who work within these decisions and have an ongoing effect on what becomes a recorded statistic and what does not. However, the most poignant aspect of statistics is not simply the debate about these previous considerations, but about what these statistics represent.

These crime statistics and workplace fatality statistics, on the surface alone, present some difference between homicides and workplace fatalities – even while discussing the limitations of each - demonstrating the objective difference in their level of societal harm. On a deeper level, these statistics represent the carnival mirror effect which distorts the perceptions of harm and who is to be blamed or feared when it comes to crime and criminal activity (Reiman & Leighton, 2013).

Perceptions of Crime Compared to Harm

How pervasive are these perceptions of street crime versus the dangers in the workplace and how do they come to exist? Michel (2016) found that participants both felt that corporate crimes were less serious than violent street crimes and that the perpetrators of corporate crimes deserved less penal punishment. This research identified some of the key issues that this paper has already discussed, including the obscuring of potential risk in workplace fatalities versus the very public fear of violent one-on-one crime, and the delayed effects of corporate harm, which include diseases like cancer and exposure to dangerous viruses and chemicals (Bittle et al., 2018). Briefly, Michel's

2016 research touches upon the tendency of North American culture and media to trivialize the harms of corporations as both a means of protecting capital gain and demonstrating the fundamental inequalities between the working class and those in power, such as CEOs, who are commonly affluent white men.

This differentiation is a critical representation of the carnival mirror effect of the criminal justice system. Reiman and Leighton discussed this carnival mirror theory in the 2013 publication *The Rich Get Richer and the Poor Get Prison*, in which it is argued “the criminal law does not reflect an objective reality about ‘dangerous crime’...the criminal justice system acts as a carnival mirror that distorts reality by magnifying the threat of street crime while minimizing other harmful behaviors” (p. 65). As I discussed previously, demonstrated in Michel’s (2016) study, the perceptions of street crime were of a far greater magnification and concern to participants than were the perceptions of corporate crime.

This distortion is not only reinforced by the funhouse mirror, but in the surrounding terminology that is used when discussing the harmful events that occur due to the acts of corporations. Many, if not all, people who enter the workforce barely think twice about the risks since they are under the impression that the chances of a workplace accident occurring are rare and negligible in the face of having to conform to the pressures of employment and capitalism. When referring to the incidents that occur in the workplace with the term *accident*, it hardly engenders the full potential of what can occur. As Reiman and Leighton discussed, the actions of a negligent mine operator whose choices end with the deaths of 10 people, versus the acts of a weapon-wielding train commuter that result in 6 deaths, are separated by terminology, with one referred to as an accident, and the other a murderer (2013).

The key difference is the perceptions that are formed with the use of each word, where ‘murder’ implies violence, proximity, and an individual who is responsible, whereas an ‘accident’ implies events that couldn’t have been avoided, that it was an infrequent occasion where there is no one at fault. However, as the AWCBC statistics indicate, these occasions are more frequent than homicide and far more frequent than people perceive. Additionally, there are unquestionably those who are at fault when workplace accidents occur,

yet the criminal justice system is unable to handle collective responsibility and, for the sake of the economy, often chooses not to (Hillyard & Tombs, 2007; Reiman & Leighton, 2013).

The Individualization of Crime

As Reiman and Leighton (2013) argued, the label of crime is primarily directed toward the poor, where the carnival mirror takes the reality of who or what poses the greatest threat to everyday life and turns it into a threat posed by those most marginalized. Not only are criminal acts more commonly seen as acts of the poor, but it is also the poor who are at the greatest likelihood of being harmed by the criminal negligence of corporations. It is the poor, working, blue-collar class who must submit themselves to the risks posed by menial, manual, and monotonous employment, and who are then exposed to the most callous of actions by those in upper management positions, those who are of the white-collar class.

Reiman and Leighton’s Pyrrhic defeat theory identifies this failing and argues that it is a *purposeful* failure that is fundamental for the carnival mirror – that it is a failing done to ensure that a certain image of crime is presented. This image is the same image presented previously: the poor, marginalized, working class who are not only identified as the typical criminal, but are also more likely to be harmed in the workplace than their affluent working cohorts.

The question posed at the beginning of this paper is an example of how the definition of crime has been individualized to apply to those crimes that are one-on-one; however, the most harmful acts committed are not those committed by individuals participating in violent acts, but by those who are engaging in collective harm. Hillyard and Tomb’s (2007) criticized criminology’s use of ‘crime’ as constructing crime due to the lack of ontological reality. This construction involves the premise that crime is committed on the individual level, as it relies primarily on the existence of *mens rea* to judge the culpability of those charged. Although this premise does not overtly require the act to be committed on the individual level, it still has, as Hillyard and Tomb’s (2007) argued, an individualizing effect.

This effect is the fundamental feature that undermines the law's ability to properly evaluate collective harm, those harms that come from corporations – from the collectives of people who allow for those at the lowest levels, the poor and marginalized workers at the bottom - to be harmed in ways they are not capable of comprehending. However, this harm, whether intentional or unintentional, is still harmful on scales that currently cannot be properly measured. The media and the criminal justice system reproduce perceptions of certain types of crime that are related to the poor to obscure the harms of the rich. Not only is this reflected in the methodology of law and its reliance on individual perpetrators, but it also creates acts and regulations in which corporate negligence is given reprieve. This reprieve allows for the economic exchange of money for life, while the more visible law focuses on the violent street crimes that distract from the real, more serious harms faced by the working class.

Law and the Workplace

In this section, I will look at a specific case that highlights the vulnerability of working-class people and how this vulnerability is a direct and causal result of the law's inability, arguably, its refusal, to punish corporations for negligence that results in workplace fatalities.

The appeals for this analysis were selected using Canlii, searching for specific cases in which the appeals represented supporting arguments of this paper, and which demonstrated the inability of the Worker's Compensation Act and its related policies to properly respond to harms experienced by the appellants. Appeals that were selected were limited to those occurring in the past five years, resulting in three appeals examined in due course.

Workplace Fatalities and the No-Fault Principle

A 2022 appeal to the Alberta's Appeals Commission for Workers Compensation presented a case in which the relative of a person who passed away due to workplace negligence requested a more severe punishment for the corporation responsible. The context of the individual's death involved a negligent supervisor, who, after warning the workers they would be fired if they did not show up to work because of COVID-19, allegedly knowingly came into work

infected with the virus. They then proceeded to infect 23 more people, including the worker in question, who was a vulnerable 71-year-old who tragically passed away due to respiratory complications of COVID-19. In the appeal, the relative of the worker who passed away described the negligence of the supervisor as murder, and that if not for the, as the relative argued, criminal negligence of this supervisor, her relative would not have died.

This is a case in which the supervisor's alleged callousness is a stark echo of what Reiman and Leighton described as they compared those who kill in the heat of the moment and those who know their acts may cause harm, but act in these ways regardless, evidence of the "general disdain for all his fellow human beings" (2013, p. 82). Reiman and Leighton question, then, what is the definition of a murderer, if not one who causes death with an "extreme indifference to human life"? (Model Penal Code, as cited by Reiman and Leighton, 2013, p. 82). The alleged conduct of this supervisor should, then, fall under the category of criminal, yet this category; this constructed label, is unable to consider these actions in that regard. Because the criminal justice system, in its pervasive and hardly questioned legitimacy, excludes social harms committed by corporations and focuses instead on the individualization of criminal acts, it cannot and will never be able to consider these circumstances on a scale that would be indicative of meaningful social justice.

To return to the appeal being examined, regarding the legislation specific to worker fatalities, which falls under the provisions of the Workers Compensation Act, the no-fault principle replaces any tort remedies and the possibility of the victim's families to pursue criminal proceedings, providing them with the only option of requesting a lump sum payment of \$90,772.20 (Workers Compensation Act, 2000). The no-fault principle waives the rights of either party, the worker or the employer, to sue and allows the worker to be paid benefits despite how the injury happened (WCB Alberta, 2021). Although this principle appears to be beneficial, it works to undermine the collective responsibility of corporations and places a monetary compensation upon such events, including the most tragic of all: workplace fatalities. Due to the existence of the no-fault principle, the finding of the appeals

commission in response to this appeal was not in favour, citing that the provisional lump sum had been paid and that that alone was all that was required of both the law and the company.

Taking a moment to consider this finding, it is both horrifying and troubling in the face of the critical analysis that has been conducted thus far. Not only has this law decided, pre-emptively, the cost of a human life in pure economics – as if there is no question to the moral or ethical sanctity of what a life is worth, or even if it can be measured – but it also provides a dollar figure that represents the cost of fatal negligence in a working space. To return briefly to the criticisms and argued purposeful failings of the criminal justice system, we see how this specific act and its no-fault provision are part of a system that continues to harm people, whether they be the direct victims of the workplace or the families who are also harmed.

Long-Term Illnesses

A 2020 appeal to the Alberta Appeals Commission for Workers Compensation presented a case in which the worker had previously submitted and had approved a claim for asbestos-related pleural disease because of work-related exposure in 2014. The worker later passed away in 2018, and the worker's estate disagreed with the Worker's Compensation Board's (WCB) decision that the worker's death was directly related to his work. The board examined three different physician's notes and the official Medical Certificate of Death, which stated that the immediate cause of death was respiratory failure caused by aspiration pneumonia, with its underlying cause as Alzheimer's disease.

The claim was denied, despite differing opinions of testifying physicians, and the physician given the most credibility by the board was the WCB medical consultant who was a pulmonary specialist and was credited with a higher level of expertise. This physician claimed that although the pleural disease caused by the asbestos exposure may have been a contributing factor, it was not the direct cause of death.

This appeal demonstrates the semantics of the law, which carefully considers the evidence surrounding the death of the worker without considering the impact of the harm caused by the initial exposure. Despite the WCB medical consultant's claim that the asbestos

exposure was not a direct result of the worker's death, there is no absolution given to the worker who suffered for four more years before passing away or their potential family. Because the Worker's Compensation Act reduces these claims to monetary exchanges, it allows for claims like this to pass through the WCB and the criminal justice system as yet another harmful event obscured within the semantics of due process. It fails to express the ongoing dangers of asbestos exposure and the quality of life that was lived afterward. There is no concern for the ongoing harm experienced, only for the immediately preceding death that will either be paid the lump sum death benefit or not.

The ability of this process to reduce these events into binary decisions is both limiting to the potential for true social justice, including the visibility of these harms committed by corporations, but also to the protection of those who are at the greatest risk for these exposures.

Suicide

Another 2020 appeal to the Alberta Appeals Commission for Workers Compensation presented a case in which the worker's spouse requested fatality benefits due to the nature in which the worker lost his life, which was by suicide. The widow's representative argued that the worker committed suicide due to the stress and anxiety associated with the working conditions he experienced, as well as a recently demanding job promotion. The appeals board acknowledged that WCB policy required a confirmed DSM-V diagnosis as well as ongoing chronic onset stress, among other logistical requirements, such as a compensation fatality claim and other presumptions.

Throughout the board's diligence, it was noted that the WCB investigator did not interview the worker's co-workers or supervisors about their working conditions and did not propose the required questions to the WCB medical consultant whose testimony was then found insufficient. The appeals board, after determining that the WCB investigator did not meet the requirements of the initial investigation, resolved to return the case to the WCB to complete the necessary report.

The worker, in this case, was a fatality that Bittle et al. (2018) argued is part of a growing recognition that working conditions have a strong impact on mental health, resulting in approximately 400 work-related

suicides in Canada yearly. This case demonstrates not only the long list of checkmarks an appellant must have to be considered for approval, but also indicates the problems human actors experience when working with these kinds of logistics. Because the WCB investigator was unable to satisfy the requirements of the investigation, the claim was returned to WCB, prolonging the process, and providing no reprieve to the widow who was harmed by the event and process.

When considering the timeline of these events, the initial submission, the dispute, and then the appeal that returned the case back to WCB, it is hard not to wonder what this temporal effect will have on the investigator's ability to determine their finding. Arguably, the greater the time between the event and the investigation, the greater the ability for this harm to be forgotten, for new co-workers to be hired, for supervisors to be transferred, and for the required evidence to be concealed. The timeline of this process is not only unsatisfactory, but the appellant has no other recourse in the matter. It did not fall into either of the binary categories outlined earlier, so it returns to the beginning of the process, with an increased chance of denial, and the initial harm further obscured, both by design and by time.

Lastly, I present a final note on these WCB cases, and the nature of the Worker's Compensation Act which oversees them. The cases from the Appeals Board are visible on Canadian law websites such as CanLII. However, the cases on which they are based – the initial Workers Compensation Board findings - are not. When a worker or family member submits a claim, it is reviewed by a WCB case manager and adjudicator, and if that decision is questioned, it moves to the Dispute Resolution and Decision Review Body, and finally, if that decision is disputed, it can then move to the appeals commission. The ongoing hoops that workers or their loved ones must jump through to have their appeals heard is a long, arduous journey, and some of them will not have the strength to make it. This is but another way that these harms are obscured by the criminal justice system and removed from the projected reality of what or who harms society the most.

Visibility and Responsibility

The workplace poses real harm, and the probability of being harmed at work has been demonstrated to be

higher than being a victim of homicide, and those events that do end in fatality are not openly available for legal ramifications. The mere payment of a lump sum in exchange for the loss of human life is sufficient. The working poor are both subjected to the worst of these probabilities while also being continually framed as the most dangerous, conveniently working to obscure the actions of the corporations that harm them.

The circumstances that led to the harm occurring are merely artifacts and are brushed off as an accident instead of identified for what they really are: purposeful ignorant callousness and disdain, for which there is no real consequence. Supervisors may be fired, and policies may be rewritten, but the true culprit at hand – the continued obscurement of the reality of harm - is not changed and will continue to cause more fatalities and harm. Although the Worker's Compensation Act represents legislation in which the worker can claim benefits without having to claim negligence, it also creates a system in which the specific events that caused the harm aren't brought to the forefront. By enacting this act and its provisions, such as the no-fault principle, without having to prove harmful acts, without having to identify them, they remain nameless and formless.

Another important concern of the modern workplace is the degree to which workers are capable of consenting to the risks posed by their employment. As Reiman and Leighton (2013) argued, workers who are unable to appreciate the full breadth of the risks they face are unable to wholly consent to working conditions. Working culture and consumerism have both become so commonplace, so engrained in society, that we hardly imagine a life in which we do not engage in employment to fulfill our desires to interact with goods and services. This ubiquitous societal norm means that the workplace enjoys status as a legitimate fundamental structure of society, which is often overlooked and unquestioned, much like the definition of crime itself. The Worker's Compensation Act and its associated implications add to this legitimacy, allowing for workplaces to operate in a capacity that brings protection to corporations, but exposes workers to further exploitation despite claiming to be for their benefit.

Although this act was instated to help workers, it fails to do so and instead allows for the continued harm of

workers and the distortion of the reality of harm. Without its existence, workers would be forced to prove the negligence of corporations, and although this may seem daunting and harmful in and of itself, I argue in favour of those critical criminology advocates who contend we should move towards a harm-based approach. A harm-based approach involves the transformation of the current definition of crime and seeks to find ways in which social justice is the ultimate goal, where physical harms, financial harms, psychological harms, and societal safety can be seriously considered (Hillyard & Tombs, 2007).

There is no strict method for how this approach would be constructed, and as Hillyard and Tombs (2007) contend, the development of measures to recognize these harms is more a technical issue than an obstacle. By moving workplace harms into a continuum of collective responsibility, important questions could be posed that start to allow for these situations to move away from the limiting binary of the current compensation system.

This movement would allow for a more robust and comprehensive ability to allocate responsibility for harm and expand the limiting options that exist within the current legislation as it relies on the limited scope of the prevailing definition of crime. Additionally, it would begin to change the reflection of the carnival mirror – where the true serious harms of society cannot be so easily hidden or distorted – and the harms faced by working-class people would be more easily fought against.

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