

Article

The horror of corporate harms

*Penny Crofts**

[This article argues that the nature of corporate harms — both the harms in and of themselves *and* the criminal law’s (lack of) response — can be (re)conceptualised by drawing upon both the emotion and genre of horror. Recent emotion studies argue that horror is a response to harm so extreme or abnormal that it cannot be easily assimilated into one’s understanding of the world. This article explores the ways in which corporate harms are currently schema incongruent, on an individual and social level, but particularly for the purposes of analysis, for criminal legal doctrine. This article analyses the ways in which harms are used in the horror genre to arouse horror and explore the commonalities between the harms on display in the horror genre with corporate and organisational harms. The significance of this analysis is that it shows both the way corporate harms are horrific in and of themselves *and* that the relative absence of a criminal legal response is horrific. This then leaves us with the question: do we want corporate harms to continue to be part of the horror genre — whereby harms are understood and conceptualised as schema incongruent — or can and should the schema of criminal law be reshaped to better conceptualise and respond to corporate harms?

There has long been recognition of the harms caused by large organisations and corporations and concern about the relative lack of any criminal legal response.¹ A

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¹ See, eg, Jennifer Taub, *Big Dirty Money: The Shocking Injustice and Unseen Cost of White Collar Crime* (Viking, 2020); Harry J Glasbeek, *Capitalism: A Crime Story* (Between the Lines, 2018); John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (Routledge Kegan & Paul, 1984); Gregg Barak, *Unchecked Corporate Power: Why the Crimes of Multinational Corporations Are Routinized Away and what we Can Do about It* (Routledge, 2017); Steven Bittle, ‘In the Land of Corporate Impunity: Corporate Killing Law in the US’ (2020) 1(2) *Journal of White Collar and Corporate Crime* 131; Samuel W Buell, ‘The Responsibility Gap in Corporate Crime’ (2018) 12(3) *Criminal Law and Philosophy* 471. To avoid legal technicalities of the definition of the ‘corporation’ (which may be used by large organisations to avoid liability), this article draws upon examples

common explanation for the dearth of responses by the criminal legal system to corporate wrongdoing is that criminal legal doctrine was historically organised and structured around a paradigmatic legal subject — the responsible human being — and this has led to difficulties in ascribing criminal responsibility to corporations, particularly in terms of identifying and proving mens rea.² On this argument, the basic principles of criminal law find it difficult to conceptualise and respond to organizational complexity, particularly in identifying who or what has intent for the purposes of criminal law, let alone proving that the corporation possessed the necessary criminal intention.³

Instead of focusing on the questions of criminal responsibility, this article focuses on the consequences of corporate wrongdoing — that is, the harms caused by corporations — to argue that, here too, the criminal legal system has great difficulties because organisational harms are too big, too nasty, too prolific or too much for the criminal law. The criminal legal system communicates blameworthiness, it organises and expresses right from wrong, backed by the force of legal sanctions.⁴ The inability of the criminal legal system to respond to corporate wrongs communicates that these harms are a cost of doing business rather than blameworthy wrongs.

This article argues that the nature of corporate harms — both the harms in and of themselves *and* the criminal law's (lack of) response — can be (re)conceptualised by drawing upon both the emotion and genre of horror. It draws upon recent

from large organisations which include corporations but extends beyond to include organisations which have many of the same characteristics and the same harm causing capacities as corporations eg, the Catholic Church.

² See, eg, Ngaire Naffine, 'Our Legal Lives as Men, Women and Persons' (2004) 24(4) *Legal Studies* 621; William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago University Press, 2012).

³ The dominant common law approach for ascribing corporate liability in Australia and the United Kingdom is that of identification theory, which requires proof that the 'directing mind' of the corporation has acted with the requisite fault, as set out in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153. The test was tempered somewhat by the Privy Council the people whose actions and state of mind are attributed to the company in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918. For an analysis of the common law position, see Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' in J O'Brien and G Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Hart Publishing, 2013).

⁴ Gregory Gilchrist, 'The Expressive Cost of Corporate Immunity' (2012) 64(1) *Hastings Law Journal* 1, 1–56.

emotion studies which argue that horror is a response to harm so extreme or abnormal that it cannot be easily assimilated into one's understanding of the world.⁵ This article explores the ways in which corporate harms are currently schema incongruent, on an individual and social level, but particularly for the purposes of analysis, for criminal legal doctrine. In this article, I use the term schema incongruent as a way to consider harms that do not fit within existing categories or taxonomies, particularly those categories expressed by criminal law. I analyse the ways in which harms are used in the horror genre to arouse horror and explore the commonalities between the harms on display in the horror genre with corporate and organisational harms. The significance of this analysis is that it shows both the way corporate harms are horrific in and of themselves *and* that the relative absence of a criminal legal response is horrific. This then leaves us with the question: do we want corporate harms to continue to be part of the horror genre — whereby harms are understood and conceptualised as schema incongruent — or can and should the schema of criminal law be reshaped to better conceptualise and respond to corporate harms?

Section one situates this methodology within the tradition of cultural legal studies and provides the broad theoretical framework for arguing that corporate harms are horrific in terms of (current) categories of criminal law and the jurisdictional claims of criminal law.

Section two highlights the link between studies of the emotion and its links with the horror genre and presents emotion theory about horror as a response to the schema incongruence outlined above. The remainder of the article considers the ways in which the horror genre represents (the threat of) harms to arouse horror and teases out similarities with the harms caused by corporations and how these are schema incongruent for current categories of criminal law.

Justifications for criminalisation and the turn to horror

⁵ Pamela Marie Taylor and Yukiko Uchida, 'Awe or Horror: Differentiating Two Emotional Responses to Schema Incongruence' (2019) 33(8) *Cognition and Emotion* 1548 ('Awe or Horror').

The idea of studying corporate harms through the prism of the horror genre is part of a larger cultural legal studies project of examining popular culture for how it reflects and expresses assumptions, values and wishes for and about the legal system.⁶ It provides a method for disrupting both common sense and legal understandings of corporate harms. This approach is a means of approaching the thorny issue about the relative lack of criminal legal response to corporate harms in a way that provides a critical and innovative answer for this lack and a normative answer about why the criminal legal system should engage with corporate harms. For the purposes of the analysis, I adopt a broad definition of the horror genre. Although there are disagreements about the boundaries of the genre, both fans and those who abhor it, recognise it when they see it. A simple definition for the genre is the (intention to) arouse horror. One of the ways that this is done is through the portrayal of (the threat of) harm.⁷ Whilst not comprehensive, the article provides examples from across the massive field of the horror genre and draws arguments about (threats of) harms which are broadly applicable to the genre in general.

My argument about the horror of corporate harms operates on two intertwined levels. First, I highlight the commonalities of corporate harms and harms portrayed in the horror genre to arouse horror to make the argument that many corporate harms are horrific in and of themselves. Second, I explore the ways in which corporations cause, and the horror genre portrays, harms that exceed or breach criminal law's categories, that is, harms that are schema incongruent.⁸ Criminal law categories are necessarily contingent and change across time and space, but as I argue below, corporations inflict an unprecedented configuration of harms that are so extreme that they cannot be assimilated into current existing categories of criminal law, that is, they are schema incongruent. This schema incongruence is

⁶ Austin Sarat, 'What Popular Culture Does for, and to, Law' in Austin Sarat, Desmond Manderson and Montre Carodine (eds), *Imagining Legality: Where Law Meets Popular Culture* (University of Alabama Press, 2011) 1; Michael Asimov and Shannon Mader, *Law and Popular Culture: A Course Book* (Peter Lang Publishing, 2004); William MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Stanford University Press, 2007).

⁷ Eg, this approach is adopted by Barbara Creed, *The Monstrous-Feminine: Film, Feminism, Psychoanalysis* (Routledge, 1993).

⁸ In my forthcoming book, I explore the legal question of causation, but note at this stage, that at criminal law causation is a threshold question requiring only that the perpetrator was a substantial and operating cause. See *Royall v The Queen* (1991) 172 CLR 378.

horrific. This is because corporate harms transgress central normative claims about the criminal legal system's jurisdiction. Jurisdiction articulates what belongs to law and the ordering of lawful relations. But it simultaneously organises what does not belong to law.⁹ The most visible way in which jurisdiction is expressed in contemporary law is through territoriality. However, McVeigh and Dorsett persuasively argue for a broader notion of jurisdiction that categorises harms and creates domains of legal knowledge, organising relations between law. Jurisdiction, in this sense, creates and represents what, for example, is a subject of criminal law (public wrongs), rather than tort or contract law (private wrongs).

Criminal law claims as its own the worst public harms, such as homicide, sexual abuse, violent assaults, and property crimes. Despite difficulties in precisely articulating the concept of 'public' and critiques of the public-private dichotomy,¹⁰ a classic justification for and conceptualisation of criminal law is that it responds to public wrongs. Theorists such as Jeremy Horder have framed the jurisdiction of criminal law in terms of protecting 'public goods' that are necessary to support 'lives in common', that is, the interests of the community as a whole.¹¹ Horder has proposed a normative argument about what should be within the jurisdiction of criminal law, arguing the central concern of criminal law is to protect the best interests of society as a whole. As I argue below, the magnitude and widespread nature of corporate harms means that they *should* be regarded as public wrongs. Likewise, one of the classical narratives of criminalization is that of harmful consequences.¹² The liberal philosopher JS Mill famously stated the harm principle in his book *On Liberty* (1859) as the sole justification for intervention by the state:

[t]he sole end, for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose

⁹ Shaunagh Dorsett and Shaun McVeigh, *Jurisdiction* (Taylor & Francis, 2012) 5.

¹⁰ Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18(4) *Journal of Law and Society* 448.

¹¹ Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 9th ed, 2019) 47.

¹² Joel Feinberg, *Harm to Others* (Oxford University Press, 1984) vol 1, 11–12; George Fletcher, *Rethinking Criminal Law* (Little Brown, 1978); Victor Tadros, 'Harm, Sovereignty, and Prohibition' (2011) 17(1) *Legal Theory* 35.

for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.¹³

For Mill harm can be seen as the principle and justification for criminalisation and I highlight below the myriad and prolific ways in which corporations harm.

There are of course many theorists who argue that criminal law upholds existing structures of class or power, and the failure to adequately respond to corporate harms is an expression of these structural inequalities. On this account, liberal ideas of ‘the community as a whole’ actually cater to propertied classes or to institutions of power, thus excluding some people from being part of the protected ‘community’. These failings of the criminal legal system are, sadly, all too accurate and undermine broader validity claims of justice and equality before the law. However, I wish to emphasise that a central *claim* and justification of the criminal legal system is that it responds to public wrongs and harms in a fair and just way, that is, according to the rule of law. In accordance with the German philosopher Jurgen Habermas’ arguments articulated fully in *Between Facts and Laws: Contributions to a Discourse Theory of Law and Democracy*,¹⁴ I argue that rather than jettisoning criminal law’s validity claims of justice and equality, we can adopt a dual perspective. That is, we can take seriously the legal system’s normative claims of equality and justice, whilst also recognising that on a factual level these normative self-understandings of the law are counteracted by sociological studies highlighting the extent to which the criminal legal system manifestly fails to achieve these ideals. Thus, even whilst we recognise that the legal system does not always achieve justice, claims of justice remain relevant and powerful, a means to call the legal system to account.¹⁵ Based on classic justifications for criminalisation, public harms caused by corporations *should* be within the jurisdiction of criminal law, and yet they tend not to be.

¹³ John Stuart Mill, *On Liberty* (Penguin, 1859) 14.

¹⁴ Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996).

¹⁵ *Ibid* ch 2.

I argue that like the harms depicted in horror, corporate harms are conceptualised as too big, too much, and too nasty for the criminal legal system. This can be expressed as a problem of jurisdiction — although recognisable within the schema of criminal law, the harms exceed its categories. The difficulty is that criminal law is the primary legitimate, state sanctioned way in which we as a society proscribe and censure public wrongs. Criminal law organises and expresses right and wrong, innocence and blameworthiness. The failure to criminalise these kinds of public harms relegates them to the civil sphere of a cost of doing business rather than a blameworthy and culpable wrong worthy of criminal sanctions. Corporate harms thus generate horror on multiple levels — the horror of excessive harms *and* the horror of the failure of the criminal legal system to conceptualise and respond to those harms.

The emotion and theory of horror

Emotion studies have sought to consider *what* the emotion of horror is, whilst the horror genre seeks to arouse the emotion of horror (whether successfully or not). Accordingly, studies about the emotion and the genre of horror necessarily intersect because of their common concern with horror. Until recently, emotion theory regarded horror as a subtype of fear¹⁶ or disgust,¹⁷ or a combination of the two.¹⁸ Likewise, when considering the genre of horror, film scholar and philosopher of art Noël Carroll influentially defined it as an intention to arouse a combination of fear and disgust.¹⁹ In these accounts, horror is not an independent emotion but an expression of intensity. More recently, emotion theorists Taylor and Uchida have undertaken empirical studies of horror which have led them to argue that whilst horror, fear and disgust are adjacent emotional categories that can blend into each

¹⁶ See, eg, Klaus R Scherer, 'What Are Emotions? And How Can they be Measured?' (2005) 44(4) *Social Science Information* 695.

¹⁷ Michael Hauskeller, 'Moral Disgust' (2006) 13(4) *Ethical Perspectives* 571.

¹⁸ Eg, Kawin defines horror as a 'compound of terror and revulsion': see Bruce F Kawin, *Horror and the Horror Film* (Anthem Press, 2012) 3.

¹⁹ Noël Carroll, 'The Nature of Horror' (1987) 46(1) *Journal of Aesthetics and Art Criticism* 51.

other, horror is a distinct emotion category.²⁰ They articulate the characteristics of horror by distinguishing it from fear and disgust, arguing that:

Whereas fear and disgust are common emotions and the default categories used to describe many aversive experiences, the invocation of “horror” when describing one’s emotional response implies the event had certain rare qualities (e.g., severe harm, abnormality) that is experienced as psychologically different from normal fear or disgust.²¹

Taylor and Uchida argue that fear tends to be elicited by comprehensible threats, such as seeing a snake, or something that looks like a snake. Because these threats are immediately understood as dangerous, ‘we expect them to cause harm and are not shocked or horrified when they do’.²² Fear is aroused prior to a harm, and accordingly, can motivate a protective response prior to the occurrence of the actual harm, that is, fight or flight. Fear is usually self-protective and self-defensive. In contrast, horror arises *after* a schema-incongruent harm occurs, that is, harm so extreme or abnormal that it cannot be easily assimilated into one’s understanding of the world.²³

Taylor and Uchida also distinguish between horror and moral disgust. Drawing on researchers in the area, they argue that moral disgust is an ‘other-condemning’ moral emotion,²⁴ that is associated with the desire to punish perpetrators.²⁵ Moral disgust focuses on blameworthy agents and is a response to potentially harmful people or things who (want to) transgress social rules or norms, thereby harming another person, society or their own purity.²⁶ These moral violations are usually

²⁰ Taylor and Uchida, ‘Awe or Horror’ (n 5); Pamela Marie Taylor and Yukiko Uchida, ‘Horror, Fear, and Moral Disgust Are Differentially Elicited by Different Types of Harm’ (2022) 22(2) *Emotion* 346 (‘Horror, Fear and Moral Disgust Are Differentially Elicited by Different Types of Harm’).

²¹ Taylor and Uchida, ‘Horror, Fear and Moral Disgust Are Differentially Elicited by Different Types of Harm’ (n 20) 357.

²² *Ibid* 347.

²³ Taylor and Uchida, ‘Awe or Horror’ (n 5).

²⁴ Jonathan Haidt, ‘Elevation and the Positive Psychology of Morality’ in Corey L M Keyes and Jonathan Haidt (eds), *Flourishing: Positive Psychology and the Life Well-Lived* (American Psychological Association, 2003).

²⁵ Cendri A Hutcherson and James J Gross, ‘The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt’ (2011) 100(4) *Journal of Personality and Social Psychology* 719 (‘The Moral Emotions’).

²⁶ Taylor and Uchida, ‘Horror, Fear and Moral Disgust Are Differentially Elicited by Different Types of Harm’ (n 20) 347; William Miller, *The Anatomy of Disgust* (Harvard University Press, 1997).

schema-congruent, that is, they violate known moral rules and norms, and are represented in moral schemata as explicitly wrong, prohibited or sinful. Taylor and Uchida argue that they are recognised easily and quickly because they are schema-congruent. These arguments about disgust are in accordance with theoretical analysis of disgust, that is, that disgusting objects are identifiable because they breach or transgress existing norms and laws. Accordingly, they are instantly categorisable as a breach. However, I suspect Taylor and Uchida might understate the ways in which the actual disgusting thing or person intersects with the disorderly, uncategorisable, undecideable or abject.²⁷ This point can be made by turning to the genre of horror, where the central way in which the genre constructs monsters is through the transgression of the borders of humanity — a disturbance of the ‘natural order’ — or in the words of Taylor and Uchida, schema incongruence. For some horror theorists, the ‘supernatural’, or schema incongruence, is *the* defining feature of horror films.²⁸ Monsters break apart the ‘either/or’ syllogistic logic with a kind of reasoning closer to ‘and/neither’. For example, zombies are monsters that transgress the border of the living and the dead — they are neither/both dead nor/and alive. In Taylor and Uchida’s terms, zombies transgress a recognisable border — that of life and death — which arouses moral disgust. But they generate horror, not only because they break rules and cross borders, but because they also challenge the border itself, by being both and neither one thing and another. Accordingly, there is a proximity between the emotions of disgust and horror, which is capitalised upon in the horror genre in the creation of monsters.

Despite this, I agree with Taylor and Uchida that disgust and horror co-occur but are still differentiable from each other. An important distinction between the two emotions is that disgust can be aroused more by purity and norm violations than by

²⁷ Julia Kristeva, *Powers of Horror: An Essay on Abjection* (Columbia University Press, 1982); Mary Douglas, *Purity and Danger: An Analysis of the Concept of Pollution and Taboo* (Routledge, 2002).

²⁸ Along with many other horror theorists, I disagree with this restriction of the horror genre to only those with supernatural monsters. It precludes many films that fans (including me) regard as horror, including *Psycho* (Shamley Productions, 1960); *Silence of the Lambs* (Strong Heart Productions, 1991); *Seven* (Arnold Kopelson, 1995).

actual harm,²⁹ and there are some morally disgusting actions that cause no harm at all (that is, cutting toenails at the dinner table).³⁰ Unlike horror, disgust is not sensitive to the occurrence or magnitude of harm, but rather the likelihood a person could cause harm due to their intentions of breaching norms. A key difference for the purposes of this article is that unlike disgust, horror does not require having someone or something to blame. Horror is a response to harm itself, specifically schema-incongruent harm, rather than what caused it. This means that we can feel horror for extreme harms without a responsible agent, such as natural disasters or accidents, without feeling moral disgust.³¹ There are many horror films with ‘natural’ elements that lack a responsible agent, such as *Jaws*, *The Birds* and arguably most zombie films (leaving aside creators of the zombie virus).³² In relation to corporate harms, this idea that horror can be aroused when there is no blameworthy agent is particularly salient because these harms are frequently characterised as tragedies or accidents, and as I argue below, part of the horror is the absence of someone or something to blame. For example, the language around the use of the drug thalidomide is of ‘disaster’, ‘scandal’ and ‘tragedy’ as opposed to criminality.³³ Horror is, accordingly, a salient response to accidental harm – but a key argument of my work is to unpick the characterisation of corporate harms as ‘tragedies’ and ‘accidents’.

The horror of corporate harms

One of the key ways in which the horror genre seeks to arouse horror is through the portrayal of (threats of) harm. I will analyse the ways in which harms are used in the genre to arouse horror and explore the commonalities with corporate and organisational harms.

²⁹ Roberto Gutierrez and Roger Giner-Sorolla, ‘Anger, Disgust and Presumption of Harm as Reactions to Taboo-Breaking Behaviours’ (2007) 7(4) *Emotion* 853.

³⁰ Miller (n 26).

³¹ Taylor and Uchida, ‘Horror, Fear and Moral Disgust Are Differentially Elicited by Different Types of Harm’ (n 20) 356.

³² *Jaws* (Zanuck Brown, 1975); *Birds* (Alfred Hitchcock Productions, 1963).

³³ Susanne M Klausen and Julie Parle, “‘Are We Going to Stand By and Let These Children Come Into the World?’: The Impact of the ‘Thalidomide Disaster’ in South Africa, 1960–1977” (2015) 41(4) *Journal of Southern African Studies* 735, 736.

The horror of magnitude — Mass victimisation

One technique to arouse horror in the horror genre is through mass (potential) victimisation. There are many horror films that are limited in scope in terms of the number of people harmed.³⁴ But much of the genre is devoted to broader harms, where an entire community, country or the world is threatened and/or harmed. The monsters in *Stranger Things*,³⁵ the ghosts in *Ghostbusters*,³⁶ gremlins and Godzilla threaten all the people in a town or city. In *Aliens*, an entire colony and potentially human civilization is under threat.³⁷ Almost all zombie fiction depicts a world where the (infected) victims vastly outnumber the uninfected survivors.³⁸ In these films, part of the horror is the sheer quantity of (potential) victims (who may in turn become monsters). The victims are unquantifiable, unnamed and the vast number are unknown by the characters and the audience. Most are background, non-speaking extras who might appear in the credits as a list of names, or an acknowledgment to all the extras from a particular area. For example, *World War Z* opens with a scene where the character played by Brad Pitt and his family are stuck in traffic that fast turns into a death trap as unnamed, unknown people are infected with the zombie virus.³⁹ Horror is aroused by an excess of people (potentially) harmed, it is overwhelming and uncountable.

Likewise, the magnitude of harm caused by corporations in terms of quantity arouses horror. The sheer numbers generate conceptual difficulties in legal systems and social understanding. The mind boggles. The harms have different levels of severity but are manifold. A common theme that recurs in many of the examples I detail below is the language of estimation and approximation. There are too many harmed, too many losses to calculate accurately, and this represents and

³⁴ Eg, *Invisible Man* (Blumhouse Productions, 2020); *Room 1408* (Dimension Films, 2007); *Wait Until Dark* (Warner Brothers, 1967); *The Shining* (Warner Brothers, 1980).

³⁵ *Stranger Things* (21 Laps Entertainment, 2016–Present).

³⁶ *Ghostbusters* (Columbia-Delphi Productions, 1984).

³⁷ *Aliens* (Brandywine Productions, 1986).

³⁸ Eg, *The Walking Dead* (AMC Studios, 2010–Present); *28 Days Later* (DNA Film Company, 2002); *World War Z* (Skydance Productions, 2013); *Train to Busan* (Next Entertainment, 2016).

³⁹ *World War Z* (n 38).

simultaneously causes schema incongruence. In the majority of zombie films, there are difficulties of computation because rates of affliction are too rampant, most of the systems of order have collapsed, and the focus becomes increasingly on survival rather than counting the victims. For corporate harms, these explanations do not apply. Even with the passing of time, our systems to calculate harms cannot cope because the numbers are too big (and too widespread across time and space). Difficulties of calculation also arise in terms of which harms are to be counted, or when to stop counting. A central theme of horror is the idea of monsters as contaminated and contaminating, upon being bitten by a zombie you become a zombie. Horror films depict a ripple effect of harms, sometimes representing a complete collapse of order. Likewise, corporate harms have ripple effects, across populations, time and space, making calculation difficult and fraught. Given the magnitude, it is impossible to enumerate all the harms caused by corporations. Accordingly, I will give examples that are by no means the most egregious to highlight the problem of numbers.

Financial harms caused by large organisations and corporations are so massive they seem uncountable. For example, Enron collapsed in 2001, resulting in an estimated 4,000 employees at Enron and 28,000 Arthur Anderson employees losing their jobs; many employees lost their tax-deferred retirement plans; more than \$63 billion of shareholder wealth was destroyed as the firm's stock was rendered worthless.⁴⁰ The global financial crisis in 2008 was the most devastating economic crisis since the Great Depression of the 1930s. Millions of people lost their jobs, homes, and savings, and the GFC generated trillions of dollars of damage bringing the world economy to the brink of collapse.⁴¹ Likewise, millions of workers have been, and continue to be, affected by wage theft. Whilst wage theft has been a corporate

⁴⁰ It is difficult to find specific numbers regarding the consequence of Enron's bankruptcy. I have drawn from the *Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp* (Report, 1 February 2002) (Powers Report) and George Benston and Al Hartgraves, 'Enron: What Happened and What we Can Learn from It' (2002) 21(2) *Journal of Accounting and Public Policy* 105, 105–27.

⁴¹ Eg, Thomas E Woods, *Meltdown: A Free-Market Look at Why the Stock Market Collapsed, the Economy Tanked, and Government Bailouts Will Make Things Worse* (Regnery Publishing, 2009).

practice for many years,⁴² it has received mainstream attention in many jurisdictions recently with high-profile corporate underpayments reported in the media. In the USA examples include the Bank of America, Starbucks, and Radioshack.⁴³ In Australia, high profile examples include 7-Eleven, where employees worked double the hours that they were paid for.⁴⁴ Supermarket behemoths Coles and Woolworths underpaid hundreds of staff. The Fair Work Ombudsman found that Coles had significantly underestimated amounts owed and commenced proceedings in the Federal Court of Australia at the end of 2021, claiming that contrary to Coles' assertion that it had underpaid about 600 staff some \$20 million over 6 years, underpayments between 2017–20 were closer to \$115.2 million.⁴⁵ Health Insurance giant Bupa underpaid more than a third of its workforce (approximately 18,000 current and former staff) by as much as \$75 million since 2014.⁴⁶

The problem of magnitude also arises in relation to physical harms caused by corporations. As a society we tend not to think of corporations as homicidal, but commercial activity kills more people worldwide than those that are killed in wars or by individuals.⁴⁷ Corporations cause death through poor work practices and unsafe products. Here, too, there are difficulties in collecting accurate statistics but the International Labour Organisation ('ILO') states that more than 2.78 million die annually as a result of occupational illnesses and accidents at work. There are some 374 million non-fatal work-related injuries that take place each year.⁴⁸ The costs of

⁴² There was theft of Indigenous wages in Australia from the 1880s onwards, with workers or their families still waiting for appropriate reparation: Thalia Anthony, 'Indigenous Stolen Wages: Historical Exploitation and Contemporary Injustice' [2013] (118) *Precedent* 42.

⁴³ Steven Bittle and Laureen Snider, 'How Employers Steal from Employees: The Untold Story' (2018) 45(2) *Social Justice* 119.

⁴⁴ Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* 1035.

⁴⁵ Economic References Committee (Cth), *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (Report, March 2022) 19 <<https://apo.org.au/sites/default/files/resource-files/2022-03/apo-nid317205.pdf>>.

⁴⁶ *Ibid.*

⁴⁷ Garry Slapper, 'Corporate Homicide, Corporate Social Responsibility, and Human Rights' in Fiona Brookman, Edward Maguire and Mike Maguire (eds), *The Handbook of Homicide* (Wiley & Sons, 2017) 213.

⁴⁸ International Labour Organisation, *Quick Guide on Sources and Uses of Statistics in Occupational Safety and Health* (Guide, 2020) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_759401.pdf>.

occupational illness and accidents at work are estimated at 4% of gross domestic product each year. In Australia, 194 workers died in 2020 due to injuries sustained in the course of a work-related activity. Another 34 members of the public (bystanders) died as a result of the actions of a worker or a fault in a workplace, such as being hit by vehicles colliding or by moving objects. The rate has decreased to 1.5 fatalities per 100,000 workers in 2019–20, from the highest number of work-related fatalities recorded in 2007 of 3.0 fatalities per 100,000.⁴⁹ In the USA, a worker died every 111 minutes from a work-related injury.⁵⁰ The ILO describes the human cost of occupational safety and health deficits as ‘vast and unacceptable’.⁵¹ These figures rise if we take into account the thousands of people who die from conditions like asbestosis and mesothelioma which people get while they are working but take many years to kill them,⁵² leading Peacock to label James Hardie a ‘killer company’.⁵³

Corporate homicide in the global south is worse, where corporate exploitation in jurisdictions that are labour-rich but capital-poor is rife, where weaker regulations to protect workers facilitates lower costs but can lead to catastrophes and labour abuse. For example, Asian garment factories are dangerous places of work, with workers facing hazards that apparel workers faced in Western countries more than a hundred years ago.⁵⁴ In April 2013, an eight-storey garment factory in Bangladesh known to be unsafe collapsed, resulting in the deaths of 1,127 workers.⁵⁵ Likewise, the production of dangerous chemicals are situated in jurisdictions with less environmental and worker protection. For example, the Indian subsidiary of the American pesticide manufacturer, Union Carbide, located in Bhopal, leaked methyl

⁴⁹ Safe Work Australia, *Work-Related Traumatic Injury Fatalities, Australia* (Report, 2020) 9, 38.

⁵⁰ Bureau of Labor Statistics, *National Census of Fatal Occupational Injuries in 2020* (News Release, 16 December 2021) <<https://www.bls.gov/news.release/pdf/cfoi.pdf>>.

⁵¹ International Labour Organisation (n 48) 5.

⁵² Slapper (n 47).

⁵³ Matt Peacock, *Killer Company: James Hardie Exposed* (ABC Books, 2009); Harry J Glasbeek, ‘Contortions of Corporate Law: James Hardie Reveals Cracks in Liberal Law’s Armour’ (2012) 27(2) *Australian Journal of Corporate Law* 132 (‘Contortions of Corporate Law’).

⁵⁴ Ian M Taplin, ‘Who Is to Blame?: A Re-Examination of Fast Fashion after the 2013 Factory Disaster in Bangladesh’ (2014) 10(1) *Critical Perspectives on International Business* 72.

⁵⁵ *Ibid.*

isocyanate killing an estimated 15,000–30,000 people immediately and injuring more than 500,000 people.⁵⁶

Part of the history of production is corporations causing harm by producing and selling unsafe products. With the advent of mass production, the potential distribution of harm has increased exponentially, generating health problems for large parts of society. Whilst the dangers may not initially be known by the corporation(s) and/or society, with time, the dangers of these products have become apparent and caused incalculable harms to large numbers of people and/or the environment. Famous examples of unsafe products with negative impacts on colossal numbers of people include tobacco, asbestos, lead paint and pesticides.⁵⁷ The sheer number of people harmed and continuing to be harmed by these products is such that they are often characterised in terms of an epidemic or a public health crisis.⁵⁸

Given the magnitude of harms inflicted and the seemingly endless capacity for repeat offending (like a monster returning for a sequel), the pharmaceutical industry can be likened to a sub-genre of horror. There has long been recognition of misconduct by the pharmaceutical industry,⁵⁹ but it is getting worse, exacerbated by the intersection of the quest for profit with medicine, encouraging companies to create and market products that are less effective and more unsafe than their promotional claims lead doctors and patients to believe. Once again, the examples are too manifold to give even an overview, but an example includes Merck's medication Vioxx. It was launched in 1999, and was used in the treatment of osteoarthritis until it was withdrawn from the market in 2004. Merck promoted the drug to physicians relying upon academic research which omitted the deaths of some of the trial participants. It is estimated that systematic manipulation of data to downplay unfavourable safety results may have resulted in up to 140,000

⁵⁶ Pramod Nayar, *Bhopal's Ecological Gothic: Disaster, Precarity, and the Biopolitical Uncanny* (Lexington, 2017).

⁵⁷ Rachel Carson, *Silent Spring* (Houghton Mifflin, 1962).

⁵⁸ Eg, Roberts comments that lead paint has generated a 'silent epidemic' since the 1950s: David J Roberts et al, 'Lead Exposure in Children' (2022) 377(8335) *British Medical Journal* 157.

⁵⁹ Braithwaite (n 1).

cardiovascular events in the USA, 30–40% of which were fatal.⁶⁰ Most recently, the opioid epidemic in USA has generated its own health crisis. Since 2001, the opioid epidemic has taken an estimated \$1 trillion from the USA's economy.⁶¹ Jones summarises CDC sources of the impacts of opioids on USA:

In 2017, there were more than 191 million opioid prescriptions. One in four patients that receive pro-longed opioid treatment will struggle with addiction. Two out of three drug overdose deaths involve an opioid. Since the late 1990s, pharmaceutical companies have continuously downplayed the addictive nature of opioids. Out of 700,000 overdose deaths, roughly 68% are due to overdoses involving opioids. Approximately 130 individuals die each day from opioids. From 2015 through 2018, the opioid epidemic has cost the United States approximately \$631 billion in association with addiction. Of the \$631 billion, roughly \$205 billion is spent on healthcare, \$253 billion on premature deaths, \$49 billion associated with crime, \$39 billion associated with childcare, and approximately \$96 billion arises from a loss in productivity.⁶²

The sheer number of people harmed and the economic costs associated with it are mind boggling and horrific.

The proliferation of people harmed makes it difficult to accurately count or calculate harms, but also to sympathise. In horror (and disaster) films, this problem of magnitude is handled by focusing upon particular characters while the world falls apart around them. For example, in *World War Z*, the focus is on the character played by Brad Pitt and his family.⁶³ Recent public inquiries have chosen different methods to explore and personalise the stories of harms. The Royal Commission into Institutional Responses to Child Sexual Abuse listened to any victim who wished to tell their story, recorded them, and also provided detailed case studies as

⁶⁰ Jon Jureidini and Leemon B McHenry, *The Illusion of Evidence-Based Medicine: Exposing the Crisis of Credibility in Clinical Research* (Wakefield Press, 2020) 15; Linsey McGoey, 'Pharmaceutical Controversies and the Performative Value of Uncertainty' (2009) 18(2) *Science as Culture* 151.

⁶¹ 'Economic Toll of Opioid Crisis in U.S. Exceeded \$1 Trillion Since 2001,' *ALTARUM* (Web Page, 13 February 2018) <<https://altarum.org/news/economic-toll-opioid-crisis-us-exceeded-1-trillion-2001#:~:text=February%2013%2C%202018,health%20research%20and%20consulting%20institute>>.

⁶² Kristen S Jones, 'The Opioid Epidemic: Product Liability or One Hell of a Nuisance?' (2021) 39(1) *Mississippi College Law Review* 32, 33.

⁶³ *World War Z* (n 38).

an explicit methodology.⁶⁴ The Australian *Misconduct in the Banking, Superannuation and Financial Services Industry Royal Commission* was less focused on victims telling their stories, but chose some judicious examples to emphasise the harm.⁶⁵ A particularly infamous example was Freedom Insurance pressuring a young man with Down syndrome to buy insurance. It was then very difficult to cancel the insurance because Freedom insisted that the son utter the specific words ‘I want to terminate the policy’. His father recorded the conversation of his son struggling to articulate the words, let alone understand them, to cancel the policy.⁶⁶ Part of the horror for (families of) victims of some corporate harms is that their stories and names are forgotten, they are part of a multitude of victims.⁶⁷

Harms caused by large organisations range from the relatively minor to very serious — but the central point here is the proliferation of harms. On a pragmatic level, the kind of systemic harms that corporations can cause radically exceed what individuals can cause. The excessive number is schema incongruent in criminal law — it is beyond categorisation. For example, in Gosport Hospital in the 1990s, Doctor Barton prescribed palliative care medicine which nurses administered to patients who were not dying. Police investigations into deaths at the hospital stalled over concerns about ‘finding necessary resources’⁶⁸ and the coroner stated that he could not investigate suspected homicides because the ‘ten deaths would put considerable strain’ financially and in terms of staff resourcing.⁶⁹ More than a decade later, the Independent Inquiry concluded that the ‘lives of over 450 patients were shortened while in hospital’.⁷⁰ In a climate of neoliberalism and deregulation,

⁶⁴ Shurlee Swain, *History of Australian Inquiries Reviewing Institutions Providing Care for Children* (Report, October 2014).

⁶⁵ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Royal Commission* (Final Report, 2019). Henceforth referred to as the Banking Royal Commission in text.

⁶⁶ ‘Banking Royal Commission: Insurer “Misconduct” in Down Syndrome Case’, *SBS News* (online, 21 September 2018) <<https://www.sbs.com.au/news/article/banking-royal-commission-insurer-misconduct-in-down-syndrome-case/y3e2hea5v>>.

⁶⁷ This issue of mass victimisation also arises in mass murders and families try to remember and honour the victim and want them recognised as individuals. Only some corporate harms raise this issue of depersonalisation, because in many cases victims of corporate harms do not see themselves as victims of crime.

⁶⁸ *Gosport War Memorial Hospital: The Report of the Gosport Independent Panel* (Report, 20 June 2018) ch 5, 103. www.gosportpanel.independent.gov.uk

⁶⁹ *Ibid* para 5.79 page 117.

⁷⁰ *Ibid* v (Foreword).

regulators are likewise underfunded and unable to enforce regulations or even consider the more expensive and time consuming option of criminal prosecution. Criminal offences are unitary, requiring massive numbers of offences charged to meet the level of wrongdoing committed by corporations. In the absence of specially created corporate offences, on the rare occasions where prosecution arises, the sheer numbers can only be handled through high numbers of individual indictments. Likewise, punishments are geared to offences structured around interpersonal offences with limited numbers of victims. In the absence of adequate penalties to reflect the quantity of harms, why take the time and expense to prosecute?

Widespread

A common feature of the horror genre and corporate harms is that the harms in question are geographically widespread. There are of course classic horror films which are primarily restricted to a particular place or person.⁷¹ Many of these site-specific films have a gothic heritage which features ‘a sinister, grotesque or claustrophobic atmosphere’.⁷² However, these films frequently breach their (self-imposed) spatial restrictions, often at the climax of the film. This breach of containment elevates the horror by transgressing sites that were represented as safe. For example, although much of *Poltergeist* occurs inside the Freeling’s home, this expands to include the hole for the swimming pool in the yard, and then culminates with the entire housing estate imploding into a portal.⁷³ Likewise, the Demogorgon in *Stranger Things* appears to be confined to the laboratory and the alternative dimension of the Upside Down. However, these boundaries are insecure and porous. The Upside Down dimension poisons the parallel dimension of the town, killing animals and vegetation. The Demogorgon is able to forage for children who are in areas that parallel the Upside Down. At the finale, the Demogorgon exits the

⁷¹ Examples include *The Haunting of Hill House* (Flanagan Films, 2018); *Poltergeist* (MGM Entertainment, 1982); *The Conjuring* (New Line Cinema, 2013); *Insidious* (Haunted Movies Studios, 2010); *The Exorcist* (Hoya Films, 1973).

⁷² Chris Baldick, ‘Gothic Novel’ in *The Oxford Dictionary of Literary Terms* (Oxford University Press, 4th ed, 2015).

⁷³ *Poltergeist* (n 71).

Upside Down and stalks the corridors of the school. It is a classic trope of the horror genre to represent a boundary — in this case a spatial boundary — and then transgress it to arouse horror.⁷⁴

This trope of spatial transgression is represented in many horror films with geographically widespread harms. Apocalyptic horror fictions with monsters such as zombies arouse horror by the spread of harms across state borders. In *World War Z*, each time Brad Pitt's character visits a state in his quest to find the origins of the zombie virus, zombies invade whatever borders are set up and the state collapses as he leaves.⁷⁵ A particularly awesome spectacle in the film is the breaching of the Israeli cordon sanitaire around Jerusalem by a seething mass of zombies.⁷⁶ Horror films frequently portray borders of the state as key sites promising safety and security which are rendered precarious and then spectacularly and irreversibly fail.⁷⁷ In these films, monsters and the harms they cause, unsettle geopolitical and cultural walls. State borders and the order that they assume become meaningless.

With the advent of the global economy, the risk of global damages by corporations (and large organisations) has increased and become a feature.⁷⁸ For example, there is now a 'massive proliferation of pollution sources'.⁷⁹ This has been shown in analysis of the harms caused by the oil industry such as the blowout on the Deepwater Horizon, an offshore oil rig under contract to British transnational corporation BP in 2010. The spill began in the Gulf of Mexico when a surge of natural gas blasted through a cement wall cap, travelled up to the rig's platform, ignited and killed 11 workers and injured 17. The oil platform collapsed 2 days later. Before it was finally capped in September, an estimated 134 million gallons

⁷⁴ *Stranger Things* (n 35).

⁷⁵ *World War Z* (n 38).

⁷⁶ Penny Crofts and Anthea Vogl, 'Dehumanized and Demonized Refugees, Zombies and World War Z' (2019) 13(1) *Law and Humanities* 29.

⁷⁷ *Ibid.*

⁷⁸ Karin Van Wingerde and Nicholas Lord, 'The Elusiveness of White Collar and Corporate Crime in a Globalized Economy' in Melissa Rorie and Charles Wellford (eds), *The Handbook of White-Collar Crime* (Wiley Blackwell, 2019) 469.

⁷⁹ François Jarrige and Thomas Le Roux, *The Contamination of the Earth: A History of Pollutions in the Industrial Age*, tr Janice Egan and Michael Egan (MIT Press, 2020) 7.

of oil were released and coated the Gulf states in oil. Analysis of the widespread impact of ‘disasters’ has been coupled with an increasing recognition of the central role of the oil industry in creating environmental damage which contributes to the critical problem of global warming and climate change which affects us all.⁸⁰

By definition, transnational corporations transcend state borders. Transnational companies capitalise on lesser regulation in some countries to commit ‘crimes without lawbreaking’.⁸¹ For example, the production of dangerous chemicals is frequently sighted in jurisdictions with lower environmental regulation and less worker protection. Union Carbide was established in India after it was declined authorisation in Canada. Investigations later revealed that operating and safety procedures at the understaffed factory in Bhopal caused the catastrophic leak of gas in 1984.⁸² Major decisions about the Bhopal plant were made by the American parent company headquartered in the USA, including the large-scale storage of chemicals at Bhopal and the failure to develop a disaster plan to warn and evacuate residents in the event of a catastrophe at the plant. Union Carbide’s West Virginia plant had safety mechanisms such as computer monitoring, record keeping and data collection that the parent company did not bother to instal in Bhopal despite previous safety incidents.⁸³ Although there is some representation in horror films of the intersection of pre-existing disadvantage (whether due to race, disability, sex and/or class, etc) on harms and suffering (for example, *Candyman*, *Get Out*),⁸⁴ it is clear that corporate harms do not manifest themselves in the same way everywhere or disperse evenly across the landscape. Many corporate harms impact greatly on

⁸⁰ Elizabeth Bradshaw, “‘Obviously, We’re All Oil Industry’: The Criminogenic Structure of the Offshore Oil Industry’ (2015) 19(3) *Theoretical Criminology* 376.

⁸¹ Nikos Passas and Neva R Goodwin, *It’s Legal but It Ain’t Right: Harmful Social Consequences of Legal Industries* (University of Michigan Press, 2005) 3.

⁸² Reece Walters, ‘Bhopal, Corporate Crime and Harms of the Powerful’ (2009) 9(3) *Global Social Policy* 324.

⁸³ Tomás Mac Sheoin and Stephen Zavestoski, ‘Corporate Catastrophes from UC Bhopal to BP Deepwater Horizon: Continuities in Causation, Corporate Negligence and Crisis Management’ in Lisa Eargle and Ashraf Esmail (eds), *Black Beaches and Bayous: The BP Deepwater Horizon Oil Spill Disaster* (University Press of America, 2012) 53.

⁸⁴ *Candyman* (Propaganda Films, 1992); *Get Out* (Blumhouse Productions, 2017).

environments and people that are already disadvantaged, and/or have less capacity to mitigate the harms.⁸⁵

In the horror genre, this breach of geographic borders poses a challenge for who or what is in authority. In many American films, this is frequently portrayed as a local versus state authority issue.⁸⁶ If the threat is intergalactic, then national differences are jettisoned and humans unite to fight.⁸⁷ In *World War Z*, the threat of the zombies is against all humans, resulting in what is left of the United Nations on a ship as the sole pre-pandemic authority left standing.⁸⁸ The transgression of state borders in the horror genre and by corporations poses a challenge to jurisdiction. Traditionally, territory is one of the specific modes of jurisdiction, particularly so for criminal law.⁸⁹ Thus, Halsbury LC stated confidently in 1891: ‘All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her subjects, Her Majesty and the ... Imperial Legislature have no power whatever.’⁹⁰

The territorial principle is expressed in the (rebuttable) presumption that most offences do not have extra-territorial effect. The criminal law theorist Lindsay Farmer has commented:

The power of law is always a territorial question. The law draws physical boundaries in geographic space. The law orders the interior of this space into political and administrative units. Legal sovereignty means nothing without these physical aspects of space and organisation. The law is also always the law of the land.⁹¹

⁸⁵ Jason Prior et al, ‘A Geography of Residents’ Worry about the Disruptive Effects of Contaminated Sites’ (2019) 57(1) *Geographical Research* 52. See, eg, Van Wingerde and Lord’s analysis of the dumping of toxic waste by the Probo Koala on the Ivory Coast by the transnational corporation the Trafigura: Van Wingerde and Lord (n 78).

⁸⁶ Eg, *ET* (Universal, 1982); *Stranger Things* (n 35).

⁸⁷ Eg, *Independence Day* (Centropolis Entertainment, 1996); *War of the Worlds* (Paramount, 2005).

⁸⁸ *World War Z* (n 38).

⁸⁹ Eg, the High Court expressed that territoriality is a ‘general thesis of the common law’: *Thompson v The Queen* (1989) 169 CLR 1, 33 (Deane LJ).

⁹⁰ *MacLeod v A-G (NSW)* [1891] AC 455, 458–9 (Halsbury LC).

⁹¹ Lindsay Farmer, ‘The Law of the Land: Criminal Jurisdiction 1747-1908’ in Peter Rush, Shaun McVeigh and Alison Young (eds), *Criminal Legal Doctrine* (Routledge, 1997).

This phrase ‘the law of the land’ captures the overtly spatial form of law. In Australia, legislative reforms have modified the traditional territorial test of jurisdiction by supplementing the common law test with a statutory test of jurisdiction based on ‘territorial nexus’ or ‘geographical nexus’.⁹² But transnational corporations, the global economy and potential for international harms, greatly complicate the problem of criminal legal jurisdiction — leading the criminal law philosopher Peter Alldrige to label the process of jurisdiction as a ‘metaphysical activity’.⁹³ The expansion and fragmentation of territoriality raises questions as to who or what should enforce the law, which law should apply, and also raises problems of double jeopardy.

Horror films represent breaches of territoriality through harm, meditating on challenges to lawful relations and whether law exists at all in particular spaces. Transnational harms undermine the value and validity of the ‘law of the land’, unmooring the sense of corporations as subjects of criminal law, and undermining the authority of the state and its criminal law.

Broad temporal frame

A frequent trope of horror is harm caused across time in various ways. Past harms and wrongs provide an origin story for the trials and tribulations of the present and/or future. For example, revenge for past wrong is frequently a motivation in slasher films.⁹⁴ Likewise, a central concern of the gothic is revenant history — whether personal or collective: ‘In traditional gothic texts, time is dislocated through repetitions, hauntings, ghostly visitations, the sense of *déjà vu* and *presque vu* (literally, ‘almost seen’).’⁹⁵

⁹² *Criminal Code 2002* (ACT) pt 2.7; *Crimes Act 1900* (NSW) s 10C; *Criminal Law Consolidation Act 1935* (SA) s 5G.

⁹³ Peter Alldrige, *Relocating Criminal Law (Applied Legal Philosophy)* (Ashgate Publishing, 2000) 142.

⁹⁴ Vera Dika, *Games of Terror: Halloween, Friday the 13th, and the Films of the Stalker Cycle* (Fairleigh Dickinson University Press, 1990).

⁹⁵ Nayar (n 56) 1.

Following from Derrida's analysis in *Specters of Marx: State of the Debt, the Work of Mourning and the New International*,⁹⁶ the spectre or ghost has been understood as an analytical tool. In common with monsters, the liminality of ghosts — between invisibility and visibility, immateriality and materiality, life and death, ambiguity and unruliness — challenges supposedly static concepts.⁹⁷ A feature of ghosts (and sometimes a theme of monsters), is that they disrupt time, they 'interrupt the presentness of the present'⁹⁸ from the past. Ghosts suggest that 'there lurks another narrative, an untold story that calls into question the veracity of the authorised version of events'.⁹⁹ They destabilise grand narratives, reintroducing history to the present.¹⁰⁰

The glorious grand narrative of capitalist progress is disrupted by reading imperialism as a history of state-corporate crime, where colonial states used corporations to do their dirty work.¹⁰¹ Beloved companies like Cadbury have a history of knowingly profiting from slave produced cocoa, even whilst claiming to be involved in the anti-slave movement.¹⁰² Whilst our narrative of progress tends to characterise slavery as a problem of the past, the ILO makes it clear that many workers continue to work in slavery-like conditions — workers are not free to leave, are subject to whatever punishment the employer chooses to enforce for rule violations. For example, although it is difficult to arrive at accurate numbers it is estimated that there are 144,000 slaves in Cote D'Ivoire, many of which are

⁹⁶ Jacques Derrida, *Specters of Marx: State of the Debt, the Work of Mourning and the New International* (Routledge, 1994).

⁹⁷ Esther Peeren and Maria del Pilar Blanco, *Popular Ghosts: The Haunted Spaces of Everyday Culture* (Bloomsbury, 2010).

⁹⁸ Jeffrey Andrew Weinstock (ed), *Spectral America: Phantoms and the National Imagination* (University of Wisconsin Press, 2004).

⁹⁹ *Ibid* 5.

¹⁰⁰ Evangelia Kindinger, 'The Ghost Is Just a Metaphor: Guillermo del Toro's *Crimson Peak*, Nineteenth-Century Female Gothic and the Slasher' (2017) 6(2) *European Journal of Media Studies* 55.

¹⁰¹ Melissa L Rorie and Charles F Wellford, *The Handbook of White-Collar Crime* (Wiley-Blackwell, 2019).

¹⁰² Hinch details the 1909 case in which Cadbury sued the British newspaper *The Standard* for wrongfully calling Cadbury a hypocrite for involvement in the anti-slavery movement whilst refusing to boycott cocoa from Portugal slave colonies in Africa. The jury agreed that Cadbury had been defamed but awarded contemptuous damages of one farthing: Ronald Hinch, 'Chocolate, Slavery, Forced Labour, Child Labour and the State' in Allison Gray and Ronald Hinch (eds), *A Handbook of Food Crime: Immoral and Illegal Practices in the Food Industry and What to Do about Them* (Policy Press, 2018) 77.

children.¹⁰³ There are increasing international attempts to address supply chain issues through *Modern Slavery Acts*, however these primarily focus on reporting requirements.¹⁰⁴

In some films, such as *Poltergeist*,¹⁰⁵ the ghosts emerge due to injustice in the present, that is, the failure to remove their bones so that a new housing estate could be built on top of the former cemetery more cheaply. In other films, ghosts haunt to protect characters from suffering the same harms that they did. In the *Fear Street* trilogy, a series of brutal slayings is blamed on a centuries-old curse by the character Sarah Fier.¹⁰⁶ In the final film it becomes apparent that she was not a perpetrator but a victim of the powerful and wealthy Goode family, and she was haunting the protagonist to protect her from police officer Goode. Films like *Fear Street* and *Crimson Peak* have the female protagonist escape their fate through a reconstruction of historical memory,¹⁰⁷ and suggest that the existing social order is more dangerous than the supernatural.¹⁰⁸ With the advent of #MeToo, many victims of sexual abuse, sexual assault and sexual harassment have spoken up about past harms that they have suffered in organisations. For many victims these harms were inflicted decades ago — and some speak of being haunted today by these harms, haunted by victims who came after them, and are speaking up in part to protect potential victims in the future.

The criminal law has historically imposed time limits on harms — including the now abolished year and a day rule — and statutes of limitations which deprive the courts of jurisdiction to prosecute an offender.¹⁰⁹ Trials also occur at a specific point in time when the level of harm is calculated according to specific definitions, such as whether it is grievous bodily harm or actual bodily harm. These kinds of temporal rules and assumptions about harm are not always satisfactory for harms caused by

¹⁰³ Ibid 83.

¹⁰⁴ *Modern Slavery Act 2018* (Cth); *Modern Slavery Act 2015* (UK).

¹⁰⁵ *Poltergeist* (n 71).

¹⁰⁶ *Fear Street Trilogy* (20th Century Cinema, 2021).

¹⁰⁷ *Crimson Peak* (Legendary Pictures, 2015); Kindinger (n 100) 32.

¹⁰⁸ C Huggan, 'Ghost Stories, Bone Flutes, Cannibal Counter-memory' in Ken Gelder (ed), *The Horror Reader* (Routledge, 2000).

¹⁰⁹ DEC Yale, 'A Year and a Day in Homicide' (1989) 48(2) *Cambridge Law Journal* 202.

individuals, let alone corporations. Harms are not necessarily time-bound — and harms can be felt and persist across time. A recent development in franchise horror is the impact of (past) horrific harms upon characters and the town. For example, *Halloween Kills*, one of the latest offerings from the prolific *Halloween* franchise, thematises the idea that the townspeople have become traumatised and hypervigilant after years of suffering multiple homicides by Michael Myers.¹¹⁰ The issue of temporality is particularly raised by past wrongs, including those which might not have been recognised as harmful at the time but cause ongoing harms. Products such as lead paint, tobacco, asbestos and Per- and Polyfluorinated Substances (PFAS) slowly accumulate to danger levels. Tobacco has a 50-year lead time.¹¹¹ Many of the corporations that produced dangerous products may no longer exist or may have employed complicated legal strategies to avoid liability.¹¹² Harms may be ‘discovered’ or revived years later and return to ‘haunt’ a company.¹¹³ Like horror films representing complex harms across time, corporate harms disrupt the focus of criminal law upon an ‘event’ isolated in time.

Types of harm

One reason why the horror genre is particularly apposite for corporate harms is the horrific types of harms inflicted — they are nasty, haunting, insidious and imaginative. The horror genre represents original harms that are at least as nasty as, or comparable with, existing offences. For example, death is not necessarily the worst harm. Vampires and zombies are frequently referred to as *suffering* a form of living death, and many characters in zombie films prefer to die or be amputated rather than become zombies. Part of the suffering is that those infected no longer

¹¹⁰ *Halloween Kills* (Blumhouse, 2021).

¹¹¹ Donald G Gifford, *Suing the Tobacco and Lead Pigment Industries: Government Litigation as Public Health Prescription* (University of Michigan Press, 2010) <<http://ebookcentral.proquest.com/lib/uts/detail.action?docID=3414840>>.

¹¹² Glasbeek, ‘Contortions of Corporate Law’ (n 53).

¹¹³ Maurice E Punch, *Dirty Business: Exploring Corporate Misconduct: Analysis and Cases* (SAGE, 1996) 2 <<http://ebookcentral.proquest.com/lib/uts/detail.action?docID=1024131>>. Eg, Guinness took over Distillers which had been involved in the Thalidomide disaster and had contributed to a trust fund for the victims. The fund needed a reinjection of cash to secure its future, and Guinness faced lobbying and publicity, leading to it topping up the fund with £37.5 million in 1995.

care about the things that make them human. In the series *The Strain*,¹¹⁴ one of the horrific aspects of infection is that the newly created vampire wants to return home to its family to infect its family members. Imaginative harms may mean that the horror does not require gore — instead a creeping dread may be evoked by an innovative (threat of) harm. For example, the Weeping Angels were voted the scariest monsters in the *Doctor Who* series, above the Daleks famous for their *raison d'être* and catchcry 'Exterminate'.¹¹⁵ The Weeping Angels modus operandi is to take victims from their time to live forever in another, unfamiliar time with just one touch.¹¹⁶ Although they do not literally kill their victims, they threaten to destroy personhood — they rob a person of who they are by extracting them from who and what they cared about. Hence the Doctor regards this as a form of death, commenting that they are 'the only psychopaths in the universe to kill you nicely'.¹¹⁷ Stephen King's series *The Stand*, portrays a highly contagious, nasty virus where most of the world's population drown in their own snot, paralleling the breathlessness of illnesses caused by asbestos or emphysema and lung cancer.¹¹⁸ Many corporate harms are inflicted and emerge slowly, across time, in insidious ways. Lead paint has generated a 'silent epidemic' since the 1950s, stunting cognitive and behavioural growth in children and causing a variety of ailments in children and adults — blood pressure, mood disorder, memory impairment, reduced sperm count, and increased risk of miscarriage.¹¹⁹ In terms of horror, the harms of the opioid crisis are almost unimaginable and uncategorizable in criminal law. Amongst other harms, companies such as Purdue that produce and distribute opioids have caused widespread addiction, ruining countless lives and families, resulting in mass prosecutions and imprisonment of unfortunate addicts. In desperate need, addicts have committed acts that they would never otherwise have done — in a horror film they might be portrayed as possessed, causing harms to

¹¹⁴ *The Strain* (Fox, 2013).

¹¹⁵ Eg, in a 2012 poll conducted by *Radio Times*, more than 10,000 respondents voted the Weeping Angels the scariest Doctor Who monster: Paul Jones, 'Doctor Who: Weeping Angels beat The Daleks to be voted fans' favourite ever monsters', *Radio Times* (10 June 2012).

¹¹⁶ 'Blink', *Doctor Who* (BBC, 2007).

¹¹⁷ Penny Crofts, 'Don't Blink: Monstrous Justice and the Weeping Angels of *Doctor Who*' in Timothy Peters and Karen Crawley (eds), *Envisioning Legality: Law, Culture and Representation* (Routledge, 2018) 46.

¹¹⁸ *The Stand* (Vertigo Entertainment, 2020).

¹¹⁹ Roberts et al (n 58).

their loved ones and themselves.¹²⁰ As shown on the rare occasions where pharmaceutical companies have been prosecuted, there is no clear, existing offence which encapsulates the harms caused by the opioid epidemic.¹²¹

The recent Royal Commission into Aged Care Quality and Safety in Australia highlighted the common use of restraint in aged care homes which has been characterised as elder abuse.¹²² Examples of physical restraint include the removal of a mobility aid for ‘safety’, clasping a person’s hands or feet to stop them moving, applying restraints or lap belts, locking over-bed or chair tray tables, seating residents in chairs with deep seats that the resident cannot stand up from, and confining a person. Chemical restriction is the prescription of psychotropic medication exceeding reasonably expected clinical needs of the people receiving care.¹²³ All the evidence asserts that restraint causes more harm than benefit, and can seriously undermine physical and psychological health, increasing agitation, discomfort and anxiety, potentially causing death.¹²⁴ The idea that our elderly loved ones, who are some of the most vulnerable people in the community, are suffering in unnecessary and harmful restraints in the last years of their lives, is repugnant.

Sexual harassment is likewise a nasty harm that can occur in corporations (and large organisations) across time, ‘leaving a trail of devastation’.¹²⁵ It has the potential to cause adverse physical and psychological health effects including anxiety and depression; post-traumatic stress disorder; alcohol and drug abuse; other forms of

¹²⁰ Desmond Manderson, ‘Possessed: Drug Policy, Witchcraft and Belief’ (2005) 19(1) *Cultural Studies* 35, 36; Penny Crofts, ‘Monstrous Bodily Excess in *The Exorcist* as a Supplement to Law’s Accounts of Culpability’ (2015) 24(3) *Griffith Law Review* 372.

¹²¹ Jones (n 62); Katherine Spiser Rios, ‘Combatting the Opioid Epidemic in Texas by Holding Big Pharma Manufacturers Liable’ (2019) 50(4) *St. Mary’s Law Journal* 1353.

¹²² Royal Commission into Aged Care Quality and Safety, *Care, Dignity and Respect*, (Final Report, 2021) vol 1, 193.

¹²³ *Ibid.* See also at 193–5.

¹²⁴ Royal Commission into Aged Care Quality and Safety, *Restrictive Practices in Residential Aged Care in Australia* (Background Paper No 4, 3 May 2019); Yvette Maker and Bernadette McSherry, ‘Regulating Restraint Use in Mental Health and Aged Care Settings: Lessons from the Oakden Scandal’ (2019) 44(1) *Alternative Law Journal* 29.

¹²⁵ Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Report, November 2021) 8 <<https://humanrights.gov.au/set-standard-2021>>.

psychological distress such as feelings of anger and powerlessness; physical symptoms such as headaches, difficulty sleeping, nausea, and loss or gain of appetite; and loss of job satisfaction, commitment and productivity.¹²⁶

Shi and Zhong argue that sexual harassment can also be understood as undermining the victim's autonomy, particularly in cultures where victims feel greater pressure to tolerate sexual harassment or leave — exacerbating and enabling long-term impacts and minimising likelihood of reporting.¹²⁷ Victims of sexual harassment have expressed the experience as their dream job turning into a nightmare.

Many horror films revolve around reproduction — whether attempts to reproduce, reproduction or bad babies.¹²⁸ This area is such a ripe subject for horror, particularly because there are so many fears and hopes bound up with it and our lack of control over outcomes. Thalidomide, first developed and marketed by the West German company Chemie Grünenthal GmbH and later distributed internationally by multiple corporations including The Distillers Company, is an infamous drug that had a 'calamitous impact on at least 10,000 children born between the late 1950s-1960s'.¹²⁹ Thalidomide is most usually associated with limb damage (phocomelia) but it is now recognised that almost any tissue or organ could be affected by thalidomide. Approximately 40% of thalidomide-affected neonates died soon after birth. In their analysis of thalidomide, Parle and Wimmelbücker quote a Mozambican article that labelled thalidomide a 'cursed drug': 'These are medicines that "make" monsters and that must be destroyed so as not to cause more tragedies. This is our warning to the entire population'.¹³⁰

The medicine caused horrific injuries by 'making' monsters. The journalists expressed the harms consistently with the themes of this chapter. The threats were

¹²⁶ Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *University of New South Wales Law Journal* 155, 164.

¹²⁷ *Ibid* 167.

¹²⁸ Creed (n 7). See, eg, *Rosemary's Baby* (William Castle, 1968); *Aliens* (n 37).

¹²⁹ Julie Parle and Ludger Wimmelbücker, "'These Are Medicines That 'Make' Monsters": Thalidomide in Southern Africa, 1958-1962' (2019) 33(3) *Social History of Medicine* 898, 898.

¹³⁰ Quoted in *ibid* 917.

manifold and widespread — they threatened the entire population. The harms crossed national borders. The threat had a broad temporal frame, with journalists warned of the drugs ‘simply waiting for a thoughtless future mother to take it without consulting a doctor’ — they might have been placed in a drawer or left in a medical centre or home in the past but were a continuing threat. Like a classic biblical threat or monster that is Legion, thalidomide could be found under multiple names. The threat was such that drugs that were previously sold over the counter were now classified as poison.¹³¹ The newspaper article proposes a radical solution of destroying all and every drug that may be found.

An example of an insidious harm caused by a corporation is Monash IVF’s development and promotion of a new genetic test in 2019 to determine which embryos were best for implantation, that is, which embryos had the best chance for becoming a baby. It later transpired that this test was inaccurate. The standard test involves taking a biopsy from the embryo which can destroy the embryo in the process. But Monash IVF promoted a new test that was non-invasive, taking DNA from the liquid surrounding the embryo, in which it had been growing, in the lab. The test was promoted as cheaper and with almost the same accuracy rate as the riskier biopsy method. 1,300 patients were given the test, and more than half were told that their embryos were non-viable. For many women, by the time that they were informed that the test was incorrect, it was too late for them to undertake more IVF. ‘Many women now have lost the opportunity for those embryos to become children’.¹³²

Many of the harms caused by corporations do not fit neatly or sufficiently with existing harms recognised by criminal law. They may exceed the categories organised and communicated by criminal law by being particularly nasty or imaginative. These nasty corporate harms not only breach territorial jurisdiction but also breach the domains of legal knowledge. This schema incongruence is expressed in horror and real life as a scrambling for which precise organisation

¹³¹ Ibid 919.

¹³² Rachael Brown, ‘Monash IVF Group’s “Inaccurate” Genetic Test Potentially Robbed these Women of Viable Embryos’, *ABC News* (online, 23 April 2022) <<https://www.abc.net.au/news/2022-04-23/monash-ivf-group-faulty-genetic-test-class-action-compensation/101005352>>.

and/or law is ‘in charge’. For example, in the United States, the opioid epidemic has crossed state lines with production and distribution — leaving various local, state and federal arms of government and regulatory agencies scrambling to respond. There is no clarity about which legal domain or domains are best able to respond — should this be classified as health, criminal, tort or organised crime? What is clear is that the manufacture, distribution and marketing of opioids does not neatly fit within existing criminal legal categories despite causing egregious, imaginative harms that are public wrongs.

Conclusion

The harms caused by corporations generate a category crisis for criminal law. Leaving aside the difficulties that the criminal law has in conceptualising the corporation as a criminal legal subject, corporate harms in and of themselves raise categorical challenges because they are beyond the imagination of the criminal law in terms of size, type and quality. It is quite common to use euphemism and palliative terms to avoid harms caused by corporations being labelled as criminal.¹³³ For example, the Report into the more than 450 homicides at Gosport Hospital preferred the phrase ‘foreshortening of life’ to homicide.¹³⁴ Instead of ‘wage theft’, the Australian Retailers Association prefers ‘unlawful non-payment or underpayment of employees’ remuneration’,¹³⁵ stating that they were ‘disturbed by the phraseology and tone used in framing the Terms of Reference’:

the heavy use of emotive and loaded terms such as ‘theft’, ‘stolen’, ‘deterrence’ and other formulations suggestive of serious criminal behaviour implies a level of prejudgement of, and guilt on the part of, business in general and our retail industry in particular that we reject in their entirety.¹³⁶

¹³³ Penny Crofts, ‘Strategies of Denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services’ (2020) 29(1) *Griffith Law Review* 21.

¹³⁴ *Gosport Independent Panel Report* (n 68); Penny Crofts, ‘Gosport Hospital, Euthanasia and Serial Killing’ in Daniel Fleming and David Carter (eds), *Voluntary Assisted Dying: Law? Health? Justice?* (Australian National University Press, 2022) 1 <<https://press.anu.edu.au/publications/voluntary-assisted-dying>>.

¹³⁵ Economic References Committee (n 45).

¹³⁶ Quoted by the Senate Committee at *ibid* 7.

However, even if we strip away the rhetoric, corporate harms are horrific in and of themselves because they are novel forms of damage on an unprecedented scale.¹³⁷ Moreover, the reason why corporate harms tend not to be subject to criminal law is not because they are insufficiently serious for criminal law and run the risk of over-criminalisation as suggested by the rhetoric above,¹³⁸ but because they exceed the currently existing categories of criminal law — they are too bad, too widespread, too nasty for criminal law offences as they are presently organised. This is despite the harms conforming with classic justifications for criminalisation, that of, harmful consequences and public wrongs. Accordingly, the harms are not only horrific in and of themselves, but the exclusion of the biggest and most systemic harms because they are ‘too much’ for current criminal law categories is perverse and horrific.

The horror genre can shed light on the effects and likely outcomes of this failure to adequately conceptualise and respond to corporate harms. It is as though we are potential victims at the beginning of the sequel of a franchise horror film where we do not understand and recognise the threats and harms until it is too late. To be clear, bad things happen to characters in horror films who are in denial. As this article has argued, in the absence of a reconfiguration of criminal law, horror is currently the most appropriate emotion and genre to respond to corporate harms. There are insights that can be drawn from the horror genre, including that monsters require and justify extreme responses.¹³⁹ This suggests that if we remain within the horror genre we need to recalibrate our responses to corporate harms commensurate to the type, magnitude and nastiness of the harms.¹⁴⁰ Additionally, and relatedly, we may choose as a society to shift away from the horror genre. If we rewrite categories of criminal law to include the magnitude and nastiness of corporate harms so that they are no longer schema incongruent then we may no longer have a horror story and shift instead to a crime story.

¹³⁷ Klausen and Parle (n 33) 736.

¹³⁸ Andrew Ashworth, ‘Conceptions of Over-Criminalisation’ (2008) 5(2) *Ohio State Journal of Criminal Law* 407.

¹³⁹ Phillip Cole, *The Myth of Evil* (Edinburgh University Press, 2006).

¹⁴⁰ For further argument see Penny Crofts, ‘The Corporate Monster Metaphor’ (2022) 26 *Law Text Culture* 75.