KEY IDEAS IN CRIMINOLOGY SERIES

THE CORPORATE CRIMINAL

Why corporations must be abolished

STEVE TOMBS AND DAVID WHYTE

ROUTLEDGE

Few academic books demand the kind of critical attention that *The Corporate Criminal* demands. This is surely the most powerful and compelling critique of the corporation ever written. Tombs and Whyte pull no punches in this arrestingly accessible but scholarly book. Their argument is simple – its legal and historical construction is such that the resulting corporation is endemically criminogenic and thus beyond reform. Their conclusion is utterly persuasive, 'the goal of corporate opposition must be the abolition of the corporation'.

Penny Green, *Professor of Law and Globalisation and Director of the International State Crime Initiative at Queen Mary University of London, UK*

Tombs and Whyte provide a brilliant, unflinching and original account of corporate power in neoliberal capitalism. Their careful analysis – rich in both empirical and theoretical insights – convincingly reveals that corporations cannot balance economic progress with social welfare, but also that the only effective corrective is to disassemble the corporate form. This superb book is a must read for anyone wishing to understand how and why corporations have come to define and destroy our daily lives, and what do about it.

Susanne Soederberg, *Queen's University, Canada*

It is clear that today, everyone is aware of the devastating effects of corporate capitalism on the environment, global inequality, and various other aspects of our societies and daily lives. What is utterly refreshing about Tombs and Whyte's book, is the realisation that none of these effects can be mitigated by legal reform or neoliberal regimes such as 'corporate social responsibility'. What is needed is a revolution in our thinking about, and action towards, corporate capitalism, and Tombs and Whyte's call to 'bring down the corporation' deserves to be carried far and wide.

Grietje Baars, *The City Law School, City University London*

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THE CORPORATE CRIMINAL

Drawing upon a wide range of sources of empirical evidence, historical analysis and theoretical argument, this book shows beyond any doubt that the private, profit-making corporation is a habitual and routine offender. The book dissects the myth that the corporation can be a rational, responsible 'citizen'. It shows how, in its present form, the corporation is permitted, licensed and encouraged to systematically kill, maim and steal for profit. Corporations are constructed through law and politics in ways that impel them to cause harm to people and the environment. In other words, criminality is part of the DNA of the modern corporation. Therefore, the authors argue, the corporation cannot be easily reformed. The only feasible solution to this 'crime' problem is to abolish the legal and political privileges that enable the corporation to act with impunity.

Steve Tombs is Professor of Criminology at the Open University. He has a long-standing interest in the incidence, nature and regulation of corporate crime. He works closely with the Hazards movement in the UK and is a trustee and board member of Inquest.

David Whyte is Professor of Socio-legal studies at the University of Liverpool where he teaches and does research on the relationship between law, politics and corporate power. He works closely with Corporate Watch and is a member of the executive committee of the Institute of Employment Rights.

KEY IDEAS IN CRIMINOLOGY

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Why corporations must be abolished

STEVE TOMBS AND DAVID WHYTE

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This book is dedicated to Frank Pearce, an inspiration and our friend.

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1

INTRODUCING THE CORPORATE CRIMINAL

The dominant role that corporations play in our lives makes them appear to us as a fact of life. Corporations now take credit for, and profit from, providing most of the food that we eat, the clothes we wear, the communications systems we use, the films we watch, the music we listen to and so on. What corporations do well or badly fundamentally affects our chances of a healthy life. Corporations produce the chemicals that end up in the air we breathe and the food we eat, just as they produce the drugs that seek to keep us healthy and to prolong our lives. Corporations are central to virtually all systems of child-, social or health-care, criminal justice, education, energy and transport. The presence of corporations in every aspect of our lives is so overbearing that it makes it seem as if this presence is both normal and natural. There exists, popularly and politically, a resignation to the ubiquitousness and power of the corporation as the dominant form through which the provision of goods and services is – and should, even *must*, be – organised across the globe.

In this context, we should not be surprised that corporations also have a major cultural impact, an aspect of corporate power that is perhaps most obvious to us as citizens but that has in fact received relatively little academic attention. Following Mathiesen (1997), we would argue that the appearance of corporations in every aspect of our lives is a key element of the 'synoptic' or 'viewer' society. The corporate public relations and advertising industries, which impose upon us a constant diet of positive images of various corporations and brands, are a central part of the corporation's ability to assert its socially necessary and socially beneficial role (Stauber and Rampton, 1995). Yet the pervasiveness of the corporation is also upheld by what we can call the synoptic effect of corporate power. That is to say, the corporation projects itself in a way that is a reversal of the famous principle that Bentham used in prison design: the panopticon. Bentham's panopticon was based on the idea that if prisoners are aware that they are being observed, or at least potentially being observed, at all times from a central observation tower, then they would eventually regulate their own behaviour. The principle of the *synopticon* is based on the idea that we are disciplined into a particular way of thinking about power when *we* watch the powerful, as opposed to when we are being watched by the powerful. We are constantly being watched by corporations who track our shopping habits, our online activities and even our compliance with the law. Yet at the same time, the corporation, its brands and its self-images are, in contemporary societies, ever-present as a focus of our attention and our desires (Klein, 2000; Cederstrom and Fleming, 2012). We watch, for example, the promotion from their own ranks of entrepreneurial role models, the colonisation of public space for marketing branded goods that we are expected to desire, and the creation and maintenance of the celebrities whose fame, fashion 'sense' and

fit body shapes we are expected to crave. We do not now think anything of preferring particular brands of everything from coffee to denims. And at the same time to think of a world without our favourite brands seems like imagining a world in which there is something missing. It is this synoptic aspect of the corporate presence in our lives that significantly shapes how we think about corporations and makes the corporation appear to us as a 'natural' and permanent social institution.

Similarly, at the political level, it has become received wisdom for most governments around the world – whatever their formal political leaning – that, whatever its failings, the corporation is the single best way of organising the production and distribution of goods and services in the contemporary world, and, relatedly, that its efficiency is also a motor of innovation, economic progress and, ultimately, social good. Alongside this recognition or resignation are many claims, half-truths or irresistible falsehoods made to support the dominant status of the corporation. Among these are the claims that corporations are essentially benevolent institutions. It is often admitted that through their size, scope and power, corporations can generate deleterious, even destructive side-effects, but that these side-effects are marginal and peripheral rather than the inevitable consequences of corporate activity. Even if corporations appear to act illegally and irresponsibly, it is argued widely in political circles, it is corporations themselves that must lead the way or retain autonomy in reforming themselves along more socially responsible lines; only where 'corporate social responsibility' fails should governments step in to regulate (or enforce the law) in order to bring recalcitrant corporations into compliance. The dominant, unifying, principle in contemporary mainstream politics is that it is possible for corporations themselves to balance effectively economic progress with social welfare.

This book will argue that none of these claims withstand scrutiny. Through a combination of historical, empirical, conceptual and theoretical observation, we will show that the problematic consequences of corporate activity are not merely *side-effects*; they are not marginal aberrations, or deviations that are easily dealt with by either self-regulation or law enforcement. The problems caused by corporations – which seriously threaten the stability of our lives – as we shall demonstrate, are enduring and necessary functions of the corporation. Moreover, along the way, we will show that although the corporation appears as a 'natural' and ever-present entity, it is in fact a relatively short-lived historical construction, one entirely dependent upon state activity, continuously created and recreated through law, politics and ideology. In other words, we argue both that it is possible to imagine a world without the corporation; not only must this organisational form be challenged, but also it *can* be challenged. Our conclusion is that in order to improve our lives – indeed, in order to save our lives and the long-term future of human life – a challenge to the corporation is now more necessary than ever. In short, challenging corporate power in real and transformative ways is both possible and necessary. In this argument, we do not dismiss more piecemeal reform strategies per se – law, regulation, enforcement, political challenge – but we do argue that such efforts need to be placed within and judged against the wider more compelling political goal of meaningfully challenging corporate power through dismantling the corporate form itself.

THE DOMINANT CORPORATION

To call the aim of fundamentally re-ordering the power structure that is the corporation 'demanding' is, of course,

an understatement, not least because we all 'know' about the power of the contemporary corporation. For example, it is now commonplace for commentaries on corporate power to juxtapose the relative size of corporate economies with nation state economies and to note that the revenue of many of the largest companies exceeds that of many states. Thus, a recent report by Global Trends shows that, of the world's 150 largest economic entities, 59 per cent are corporations and 41 per cent are nation states (Keys and Malnight, 2011). The same report notes that: Ford has higher annual earnings than New Zealand's GDP; Shell earns more than Pakistan and Bangladesh combined (countries with a total population of 350 million people); and if Walmart was a nation state, it would be the twenty-second largest economy in the world (ibid.).

But this is perhaps not the most useful indicator of corporate power, because it only tells us, in a one-dimensional sense, that some corporations are very large. It does not tell us about *how* corporations are able to dominate political and economic life across the global economy. To get closer to understanding the structure of corporate economic power, we need to know more about what this complex structure of power looks like and how it operates.

Key writers have always looked to various indicators of the *concentration of corporate ownership* as a first step in exploring corporate power. Adolf Berle famously estimated in 1962 that '600 large corporations control between two-thirds and three-fourths of production today, and probably have done so for the last thirty years' (Berle, 1962: 434). A decade later, John Kenneth Galbraith (1972) estimated that 2,000 corporations contributed to around half of gross domestic product (GDP) in the US, indicating clearly that a relatively small corporate elite was controlling the bulk of the economy.

As a very broad range of scholars have convincingly and conclusively shown, the period from the late 1970s onward, a period in which 'neo-liberal' economic policies prevailed, positively enhanced the structural ability of the largest corporations to accumulate profits and to expand their political and social influence (Tombs and Whyte, 2009; Pearce and Tombs, 1998). Some have also called this period 'globalisation' (for example, Friedman, 2000). Concentrations of corporate power have been central to neo-liberal globalisation. Indeed, as Bellamy Foster et al. (2011) argue, the key trend in the 'globalisation' of business may be the internationalisation of the concentration of capital; that is, the elevation of domestic oligopolies – markets or industries dominated by a small number of large corporations – that allows them to operate on an international level. Oligopolies have been encouraged by a self-fulfilling ideological logic that asserts the need for national corporations to operate on a scale and size that enables them to 'compete' at a 'global' level.

Thus, although its basic co-ordinates remain the same, this web of corporate power has become more complex in the period since Berle, then Galbraith, described the concentration of corporate power. A recent analysis by the Swiss Federal Institute of Technology (Coghlan and MacKenzie, 2011) analysed inter-connected shareholdings to show how a very small group of companies – mostly banks and financial institutions – has ownership of a large part of the global economy. This study analysed ownership relationships across 37 million companies and investors worldwide. Their analysis discovered that 43,060 transnational companies were linked by a complex network of share ownership. From this analysis, it was found that a core of 1,318 companies with interlocking share ownership controlled 20 per cent of global operating revenues. Within this group,

147 'super' corporations controlled 40 per cent of the wealth in this network. This study, then, provides us with a snapshot understanding of how power in the global economy is concentrated and organised around a relatively small elite of super corporations. This snapshot in the ownership of businesses shows how economies of scale win out and that this process concentrates wealth in the hands of fewer and fewer corporations. Indeed, most investment that flows from the richer countries to the poorer countries is capital that is used to purchase and merge businesses. Around 85 per cent of foreign direct investment in the early 2000s was used in mergers and acquisitions of businesses (Globerman and Shapiro, 2005).

If the era of globalisation marks the latest in a series of merger waves, generating ever-increasing market concentration (Pearce and Tombs, 1998: 3–33), the latest of those waves[1] saw record takeover and acquisition activity recorded in both 2006 then 2007. As Weissman has noted, merger mania has seen sector after sector dominated by a small number, and fewer, dominant actors. Most key areas of market activity are now effectively oligopolised,[2] including 'oil, food, finance, pharmaceuticals, tobacco, aircraft, defense contracting, utilities, energy, insurance, hotels, mining, media' (Weissman, 2007).

For example, a recent survey of market dominance in agricultural production found that '[f]our firms control 58.2% of seeds; 61.9% of agrochemicals; 24.3% of fertilizers; 53.4% of animal pharmaceuticals; and, in livestock genetics, 97% of poultry and two-thirds of swine and cattle research', while across the food industry generally, 'the same six multinationals control 75% of all private sector plant breeding research; 60% of the commercial seed market and 76% of global agrochemical sales' (ETC Group, 2013: 3). Indeed, almost every

aspect of the food business is undertaken in oligopolistic markets – with specific segments of the agricultural market typically having levels of concentration on the part of the biggest four multinationals of up to 80 per cent (Hendrickson and Heffernan, 2007).[3] Oligopolistic production dominates all of the major agricultural commodities – including grains and oils, coffee, cocoa and bananas (Wilkinson, 2009). To take the latter as a typical example, five companies dominate the production and global trade in bananas, the world's fourth most significant crop, controlling over 80 per cent of the global market (after rice, wheat and maize in terms of ensuring food security in dozens) (Fairtrade, 2009). To be clear, this has real effects. The United Nations' World Development Report of 2008 'acknowledges that transnational corporations dominate a number of agricultural markets', and that 'growing agribusiness concentration may reduce efficiency and poverty reduction impacts' (cited in Ching, 2008). Ching adds that

> [c]oncentration widens the spread between world and domestic prices in commodity markets for wheat, rice, and sugar, which more than doubled from 1974 to 1994. A major reason for the wider spreads is the market power of international trading companies.[4]
>
> (Ching, 2008)

The rise to domination of a select group of supermarkets shows how this very same process is occurring at the end of the supply chain. The 'Big Four' UK supermarkets (Tesco, Asda, Sainsbury's and Morrisons), even in the face of increasing competition from discount retailers, account for almost three-quarters of the market share between them (BBC, 2014). A somewhat different illustration of market dominance is provided by Lynn's description of his walk around a

US Walmart store – a company that delivers between 30–50 per cent of the products consumed in the US. There, he finds that despite the plethora of brand names, everyday items from toothpaste to beer, potato chips to bottled water are in fact produced by a handful of firms; the store itself is constructed of steel likely to be produced and supplied by one of three iron-ore companies that dominate the global market (Lynn, 2010: 7).

The financial services industry is organised as a powerful oligopoly. In the US, for example, it has been calculated that, following 25 years of merger mania that saw the numbers of commercial banks halve, '[b]y mid-2008 – before a rash of mergers consummated amidst the financial crash – the top 5 banks held more than half the assets controlled by the top 150' (Weissman and Donahue, 2009: 88). These banks also own 97 per cent of financial derivatives (ibid.: 91). The accountancy sector, which has the key role of auditing banking and finance, is wholly dominated by the 'Big Four': PriceWaterhouseCoopers, KPMG, Deloitte Touche and EY (formerly, Ernst & Young).

Of course, it should also be noted that such crude, if stark and revealing, data on market concentration still do not capture fully the share of economic activity controlled by the largest transnationals, since corporate domination of the economy takes a variety of forms beyond mere market penetration – for example, via 'mega' or 'strategic' alliances and through the control of outsourcing and sub-contracting chains (Bellamy Foster et al., 2011).

Such market concentration data do not necessarily reveal the extent of power that oligopoly confers. This often requires a more detailed analysis, one example of which has been set out by Wilks' analysis of the relationships between law and accountancy firms; the dominant corporations whose functions are 'crucial to effective corporate governance' (Wilks,

2014: 5). The 'Big Four' accountancy firms mentioned earlier that dominate the UK market 'all originated in the UK although they have built large global businesses. They are a spectacular British success story. Between them, they are responsible for the auditing of 96% of FTSE 350 companies and also run thriving consultancy arms' (ibid.: 5). Alumni of these firms are heavily represented on FTSE 100 company boards; moreover, they are central to corporate regulation, since:

> [r]epresentatives of the Big-4 also dominate the Financial Reporting Council, responsible for regulating auditing and accounting practices, as well as the development and enforcement of the UK Corporate Governance Code, responsible, amongst other things, for guidelines on pay for corporate executives.
>
> (Ibid.: 6)

The 'Magic Circle' of law firms – Allen & Overy, Clifford Chance, Linklaters, Freshfields Bruckhaus Deringer, and Slaughter and May – is even more dominant (ibid.). Thus Wilks argues that these nine UK-based firms are central to an identifiable corporate elite:

> The 'Big-4' and 'The Magic Circle' firms constitute the elite of their respective professions and are so closely involved with the corporate elite that they appear as indispensible constituents of that wider elite. The partners of these large professional firms have close commercial relations with senior corporate management, they appear to share their norms, are engaged with shared social networks.
>
> (Ibid.: 9)

On the basis of their oligopolistic dominance – through activities ranging from lobbying against to interpreting new law,

through creative compliance and tax planning to dominating the regulation of their own professions – these nine firms, via an interlocking of a range of professional services with many of the world's largest corporations, run by individuals drawn overwhelmingly from private schools and Oxbridge, exercise a degree of power not just in the UK but also in the global corporate world that is impossible to quantify.

THE EFFICIENT CORPORATION VERSUS THE CRIMINAL CORPORATION

A system based upon small cabals of ever-powerful corporate elites is not the capitalism we find in classical economic textbooks. This is not a capitalism based upon healthy competition; it is not a system that is particularly open for business. The fact of oligopolistic capitalism flies in the face of dominant representations of what capitalism is supposed to look like and how it is claimed to work. Such a distinction between the *representation* of a particular power structure and its *reality* was described almost 40 years ago by Frank Pearce as the coexistence of, on the one hand, an 'imaginary' and, on the other, a 'real' social order[5] (Pearce, 1976: 79–80). 'Textbook' understandings of capitalism as a system of production and economic organisation idealise a system that encourages competition between economic actors. Indeed, the most basic argument for capitalism as an ideal form of social organisation is precisely that it is efficient on the basis of such competition. In contrast to the trends we have documented in this chapter so far, those who celebrate the corporation as a primary economic institution, tend to do so for reasons of efficiency and the encouragement of competition.

Adam Smith (1776/1937) is perhaps the most famous early critic of the monopoly power of corporations. Smith's

most acerbic comments were directed at the model of the joint-stock corporations that enjoyed 'perpetual monopoly' and so invested too much power in the company director, a process that led inevitably to 'negligence, profusion, and malversation' (Heilbroner, 1986: 301). Indeed, Smith's famous comments make a direct connection between corporate crime and the concentration of power in corporations. It is in this respect that the ideology and practice of *neo-liberalism* represents a departure from the idealised view of the 'free market' proposed by the architects of the capitalist system such as Adam Smith. The corporation in its twenty-first-century guise – the multinational or transnational firm that has structurally evolved in a form that merely represented an investment opportunity to owners and removed their day-to-day management role – would have been viewed as a gross manipulation of the free market to the liberal political economists of the eighteenth century.[6]

From a 'neo-liberal' economic perspective, it is generally claimed that there will be fewer transaction costs – 'search and information costs, bargaining and decision costs, policing and enforcement costs' (Dahlman, 1979) – for entrepreneurs to develop permanent, centralised, authoritative organisations (corporations) than to continuously renegotiate and monitor contracts with independent agents; in short, business organisations survive and grow when they are the most efficient way of organising production (Coase, 1937; Perrow, 1986). Furthermore, this assumption proposes that developing very large organisations may be a socially efficient way of organising production, distribution and investment structures.

This approach helps explain current trends towards a concentration of corporate ownership in many advanced capitalist economies. These trends can be seen as developing new

means of being 'efficient' due to engineering and production developments, new distribution techniques or new control and management techniques (Bork, 1978: 205–6; Williamson, 1975: 101, 102, 104). It is claimed that firms often grow through mergers because economies of scale can be exploited sooner than through internal expansion and because they place assets in the hands of 'superior' managers and penalise inefficient or corrupt managers through displacement (cf. Posner, 1976: 96). A further claim is that horizontal and vertical integration[7] may increase efficiency for the firm and for the society as a whole. It has been argued that in North America 'efficiency is the main and only systematic factor responsible for the organizational changes that have occurred' (Williamson, 1983; see also Chandler, 1969, 1977, 1990).

If this discussion seems to be straying from the core topic of the book, we have two reasons to engage with neo-liberal propositions on corporate 'efficiency'. The first is that efficiency remains the key justification for the social trend we allude to in this chapter: the global concentration of power in the corporate sector. The second is that this key justification for the concentration of corporate power submerges, and seeks to render irrelevant, discussions of corporate crime and corporate harm. Indeed, very often, the 'efficiency' of large corporations is crudely read as a measure of their social contribution and therefore their 'responsibility'. For example, as Carl Gerstacker, a former chairman of Exxon, famously argued, 'the large enterprise has the means, capabilities, and experience to perform large-scale economic tasks in a socially responsible manner when given the opportunity and flexibility to do so' (cited in Barnet and Mueller, 1974: 370).

There are two points of engagement with the 'corporate efficiency' claim that help us to illuminate the relationship

between the concentration of power and the production of corporate harm, and ultimately reveal corporate efficiency as, following Pearce, 'imaginary'. The first point of engagement is that neo-liberal claims about efficiency ignore 'externalities', and we discuss this problem briefly in the next section. Following that, we engage with the second of these claims at much greater length – namely, the claim that corporations are *autonomously* efficient; that is, that their economic efficiency exists *outside of* the infrastructure of the state or without any assistance from states. The central assumption here – of the independence of corporations and 'the state' – is one with which we engage throughout this text.

EXTERNALISING CRIME AND HARM

Corporations are generally not required to pay the costs of the most damaging effects of their activities. This is due to the system used in accounting practice that privileges some costs and benefits over others. In general, corporate balance sheets only reflect particular costs. Many of the costs associated with the long-term harms and damage caused by corporate activity simply do not appear in the annual accounts because, more often than not, corporations will not have to pay those costs. The costs that typically *are* counted are the standard inputs of commercial or productive activity: the costs of raw materials, of processing these through energy and using technologies, the costs of building or renting and maintaining premises and the costs of labour power. However, industrial injuries and diseases, environmental pollution and food poisoning involve major social costs that are not included: these are what economists call 'externalities'. The 'externalities' of commercial incineration or landfill sites might include, for example:

- external costs related to greenhouse gases causing climate change;
- external costs of conventional air pollutants and some airborne toxic substances causing, for example, health effects;
- external costs of leachate to soil and water;
- external effects of the impact of facilities on local environment, for example visual effects, noise, smell and litter.[8]

Those are the types of costs that might be factored into government decisions about whether to establish a particular industrial facility or not, but in the operation of such a facility, the owner or the operator would in all likelihood be liable for only a small proportion of the costs, if any at all. The bulk of those costs are borne by individuals (as losses of earnings to a family when someone is made ill by industrial activity) or they are socialised (for example as a burden on the National Health Service). It is the standard cost-accounting mechanisms used in standard accounting practice that reduce the value of death, injury, illness, widespread fraud, immiseration and environmental degradation to mere externalities; that is, peripheral side-effects of corporate activity, which remain absent from the balance sheets of costs and benefits of such activity. Quite simply, in standard systems of accounting, some costs of doing business are counted and other costs are not. The costs that aren't counted are not borne by the corporation and are therefore 'externalised' from corporate accounting. Corporations therefore are only generally financially liable for a proportion of the harmful costs of their activities. It is this principle that enables corporations, to use Bakan's (2004: 60) term, to act as 'externalising machines'.

As we shall see, in almost every major case of corporate crime corporations escape liability for the burden of the social costs: costs that always fall on the most vulnerable. In the case of the collapse of Enron huge losses were incurred by

pension fund holders and creditors, which led to a major loss of social protection for some and of jobs for others; the greatest burden of those costs were borne by the victims rather than the owners of Enron. In the case of the Bhopal disaster, tens of thousands of people continue to pay huge medical costs, or simply suffer without treatment, precisely because the owners of the operating company (first Union Carbide and latterly Dow Chemicals) have been shielded from paying those costs (Pearce and Tombs, 2012). As this book will show, the social costs of corporate activity far outweigh the claimed benefits. To take one example, the Global Trends report noted earlier has pointed out that although the earnings of the world's largest 44 corporations amount to 11 per cent of global GDP, the same corporations employed just 0.4 per cent of the world's economically active population (Keys and Malnight, 2011). Put this way, corporations do not look particularly efficient, or even particularly effective, in the organisation of our lives and our life chances.

THE MYTH OF THE AUTONOMOUS CORPORATION

This chapter has shown how a decreasing number of highly powerful actors are able to make key decisions that affect the global economy. Yet we stress that this does not necessarily mean that this relatively small group of actors actually *controls* the global economy. There has been a tendency in academic studies of 'globalisation' in recent years to assert that multinational corporations are now replacing states as the most powerful forms of actors. And the figures presented above, when taken at face value alone, appear to indicate precisely this. However, the mistake that many commentators and analysts make is that the rise of corporate power is

an effect of the diminution of state power, and vice versa. Typically, trends towards deregulation and privatisation in the developed world are cited as 'proof' of this trend. And yet, typically, it is in periods of social and economic crisis that the real basis of the relationship between corporations and states is revealed (Whyte, 2013). As we shall see, the bank bail-outs (Chapter 6) that followed the so-called 'credit crunch' represented one of those moments of exposure. For here was a moment in which national governments intervened to save 'private' banks from the ravage of market forces, a state intervention of the type that is so often disavowed as a strategy when jobs are threatened by offshoring production, or when meaningful curbs on executive pay are suggested. In the bank bail-out, the 'invisible' hand of the market began to look a little more like the very clearly visible hand of the state and a little less like a 'market'. It was a moment at which the illusion of the formal separation of bureaucratic power between states and corporations was shattered as governments around the globe scrambled to save their banks.

Indeed, it is becoming increasingly recognised across the globalisation literature that nation states have not only been the 'principal agents of globalization', but also remain 'the guarantors of the political and material conditions necessary for global capital accumulation' (Barrow, 2005: 125; see also Panitch, 1994: 64; Lee and Yeoh, 2004). Thus the nation state is neither peculiarly constrained (Somerville, 2004; Weiss, 2005), nor is the logic of deregulation a necessity (Mosley, 2005) in the international political economy. From this perspective, the increasing social and economic power of corporations may not be at the expense of, but may actually augment, the power of particular national and local states (Pearce and Tombs, 2002). We return to this

point in Chapter 5. But in what follows, we ask readers to bear in mind two points that follow. First, corporate crime and harm often occur with the permission of governments, or even at the behest of governments. The origins of corporate crime and harm, can, if we explorethe social dynamics of the corporation's history, be found in the pursuit of a state–corporate 'common interest'. Thus, second, we must interrogate carefully the political and regulatory strategies of governments and their institutions when they present themselves as powerless to prevent corporate crime and harm.

Actually the idea of the autonomous corporation is much better understood as a kind of abstracted wishful thinking on the part of neo-liberal theorists rather than anything that conforms to reality. After all, central to neo-liberal theory is the proposition not merely that that corporations *are* more autonomous, but that they *should be* more autonomous. The flip side of this proposal is the key trope in neo-liberal theory that the role of the state *should* be restricted. Ideally the state should act as a 'nightwatchman', providing nothing except security from enemies without and within, the protection of individuals from force and fraud, and the provision of legal frameworks to resolve disputes about property rights. State activity should aim to achieve stable prices, to restrict the money supply and to remove barriers to competition in labour, product and financial markets, hence encouraging innovation (cf. Clarke, 1988: 60). Law can be used to facilitate these 'natural' activities of economically rational agents and helps provide, through the courts, an objective price constraint that tells these actors what it will cost them to obtain a certain good. Generally speaking, the courts in common law countries can be relied upon, when confronted with new or controversial dilemmas, to make decisions that

contribute to economic efficiency. If and when inefficient decisions are made, then they are either evaded by private actors who write efficient contrary arrangements into their agreements or they are legislatively preempted by political pressure from interest groups acting in a generally economically rational manner (Posner, 1977: 289–91; and, with some qualification, Coase, 1988). The idea of a minimalist state or a 'nightwatchman' state proposes that where law is required to resolve disputes involving corporations, this should be done using corporate or civil law procedures, rather than criminal law. Where shareholders, employees and customers seek to assert their rights or entitlements vis-à-vis the corporation, such disputes are best dealt with civil courts. It is the resolution of such issues as disputes between individuals and corporate persons that from a neo-liberal point of view allows corporations to be encouraged to be socially responsible. This process also allows corporations to exist relatively autonomously from state interference. In this view, then, in so far as law is concerned, the modus operandi of civil law is, or should be, paradigmatic, even if, on occasion, 'regulatory' or criminal law may be used (Posner, 1980: 416–17; Kelman, 1987: 120).

In general, according to this neo-liberal view, too much state intervention in the economy poses tremendous dangers to the working of market rationality. For, although it is argued state activities are usually justified as being necessary to correct problems of resource allocation due to *market failure*, states normally allocate resources in a socially inefficient way. As we have seen in the previous discussion, from a neo-liberal perspective, markets are capable of self-correction, even in cases where corporations generate large-scale social harms and crimes.

And yet, as we have also noted, at key moments of crisis, states are always required to intervene to provide liquidity

to markets and to bail out vulnerable corporations. Most recently this process of 'bail-out' occurred in the wake of the 11 September attacks on New York and Washington in 2001 (Whyte, 2002) and in the wake of the 2008 crash. In the UK alone, the immediate value of the bail-out for the banks was £550 billion across 2008 and 2009. And this burden on all of us imposed by the banking bail-outs is by no means limited to those sums initiated in the aftermath of the 'crash'. As the New Economics Foundation has noted, 'too big to fail' banking subsidies exceeded more than £30 billion in 2011 and 2012.[9] Indeed, corporate subsidies are more common across all sectors of the economy than most of us realise. Thus, UK train operators are completely dependent upon government subsidies. Numerous sectors such as the care sector, health and pharmaceuticals, private security, the arms industry, educational suppliers and publishers etc. would be tiny by comparison without government contracts and the role of the public sector in stimulating those markets. The construction industry enjoys remarkably high levels of public subsidy. As Mair and Jones (forthcoming, 2015) have noted, the Private Finance Initiative (PFI), now institutionalised in various forms across national and local government, has valorised a state distribution from public to private that massively subsidises construction firms, guaranteeing returns on capital that are often over 60 per cent. The energy sector is also hugely subsidised by the UK government.[10] The consumer tax base for energy products is worth £1 billion, compared with direct government subsidies that are worth £10 billion (Blyth, 2013). In addition, the non-governmental organisation (NGO) Platform has noted that British companies operating abroad are granted massive subsidies through export credit subsidies (that enable companies to invest at low or no risk of exposure), diplomatic subsidies (where the government operates diplomatic services

to promote or support business abroad) and military/security support subsidies.[11] Indeed, if we had the space here, we could demonstrate that every single part of the corporate economy is subsidised in one way or another. This extends to virtually every area of social policy, the delivery of much of which has been handed over to private corporations, usually in the name of greater efficiency, but in fact representing massive, and increasing, levels of corporate welfare (Farnsworth, 2012).

Even our argument to this point shows that claims about economic efficiency are both practically and theoretically impossible to sustain. But once we start to factor in the huge cost burden on all of us associated with corporate activity, the fact that states provide the infrastructure that enables corporations to act, *and* underwrite their chances of success, then corporations don't appear to be very 'efficient' at all. The rise to domination of the large, oligopolistic, corporation is not explained by 'efficiency', but as a strategy of overcoming any constraints or limits on the accumulation of profits (Soederberg, 2010: 12–14). This is an important starting point for this book, since it illuminates exactly the power of the 'imaginary' social order identified by Pearce, and it also illuminates the importance of reconstructing a social reality around the economic failings of corporations. The rest of this book is concerned with the realities of the corporation's *social* failings, rather than its *economic* failings. As this book will show, corporations are at best socially inefficient, and at worst systemically anti-social.

'REGULATION' – WHERE STATE AND CORPORATION MEET?

A central theme of this book is regulation – often represented as the point at which the state and the corporation intersect, or

meet. Throughout the following chapters, we shall return consistently to the regulatory relationship between states and corporations that is ever-present in capitalist social orders, and we shall subject it to various forms of critique. For now, however, we wish to extend our analysis of the 'autonomous' corporation through a brief, critical focus on the term 'deregulation'.

Across four Conservative governments between 1979 and 1997, literally hundreds of publicly owned companies were sold into private hands. In Britain during this period the following industries were all privatised: aerospace; telecommunications; gas, electricity and water supply; shipbuilding; freight and ports; coal; railways; and atomic energy. The rhetoric that accompanied this period of neo-liberalism – of deregulation and privatisation – gave little acknowledgement to the state's role in the creation and maintenance of *new* markets in all of these areas, focusing instead, upon the need to *reduce* government 'interference' in the economy, maintaining the fiction of an ontological separation between state and market (Crouch, 2011). In other words, if there were certainly some examples of deregulation – the removal of laws and/or their enforcement – deregulation is not sufficiently adequate to characterise this period. The empirical evidence suggests that the period spanned by the Conservative governments was a complex, and at times incoherent, era of re-regulation; that said, the *idea* of deregulation, itself claimed as economically determined by the seemingly naturally unfolding of neo-liberalism-as-globalisation, strengthened during this period.

Then a series of Labour governments from 1997 instituted a series of major 'reforms' to the public sector and the welfare state. These stopped short of further full-scale privatisation, but were generally couched in terms of greater 'choice' and 'efficiency', as the interweaving of state and private capital continued at

pace under the New Labour government (Farnsworth, 2006; Farnsworth and Holden, 2006). The arrangements involved in transfers of ownership from the state – which had created *new* and significant popular and political dependencies upon private capital, given the centrality of the goods and services now in private hands – continued to become more opaque. Notable here was a series of measures rolled out to attract private capital via opaque contractual relationships into the public sector, further intertwining state and private corporate activities. These measures are, again, best characterised as forms of re-regulation, albeit often in the name of deregulation.

Many such arrangements remained relatively invisible, while some achieved prominence through controversy. One notable example was the PFI (noted earlier), a key form of 'private' financing of 'public' infrastructural and service provision that in fact generated long-term public debt to consortia of private contractors. Of course, PFIs are subject to regulation through contract. Other 'reforms', captured generally by the terms privatisation and deregulation, have in fact furthered state–corporate interdependence through regulation. Most commonly regulation and contracts are used in tandem. Thus it is virtually impossible, currently, to think of any area of any 'publicly' provided good or service in which private capital is not significantly represented (see Boffey, 2012). All are accompanied by the creation and re-creation of immensely complex regulatory regimes.[12] Thus both deregulation and privatisation has increasingly seen government shift from acting as direct service provider to being the chief architect in the construction, then regulation, of markets. We can also see in the emergence of the 'regulatory state' the resolution to an apparent paradox – a government committed to privately owned, 'free' enterprise, which has created *a complex web of (re)regulation*.

In short, then, if the emergence of neo-liberalism in the UK apparently marked a period of state retreat, it is important to recognise that the promotion of 'anti-statist' ideas noted earlier (Coleman et al., 2009) is part of a hegemonic process. Any simplistic dichotomy between an interventionist state (via regulation) on the one hand and a laissez-faire state (with an impetus towards deregulation) on the other, is ultimately unhelpful when analysing corporate crime and harm. A key point for us is not that the state *is* anti-statist, but that it represents itself as such (Hall, 1988: 152). Thus we have to differentiate between state retreat as a real outcome of neo-liberalism and anti-statism as a hegemonic device (ibid.). In this context, it is clear that the period of the past 30 years or so is not accurately characterised simply as an era of *deregulation*. This point can be illustrated with reference to two observable policy developments in regulatory policy, via criminal or administrative law or both.

First, rather than acting to control or restrict markets, there emerged in this period regulatory forms that *promoted* market activity. Thus, the 'freeing' of markets in the privatisations of energy, water, telecommunications and, most tortuously, railways, was accompanied by a mass of regulatory institutions designed to establish and maintain what were effectively new markets (Prosser, 1997).

Second, there has been, at times, a considerable regulatory effort aimed at controlling the excesses of capital accumulation. In the sphere of environmental crime, 1990 saw the establishment of a new, and ultimately ineffective, Environment Agency. In financial services, the deregulatory 'Big Bang' in 1986 was followed very quickly by the establishment, uniquely under a Criminal Justice Act, of the Serious Fraud Office, a body that demonstrated prosecutorial zeal prior to it being largely neutered by its political masters

(Fooks, 1999, 2003b). In the sphere of health and safety, the second Thatcher government ultimately retreated from a full-scale deregulatory assault (Tombs, 1996); moreover, the last 30 years have seen changing fortunes in the context of health and safety regulation, albeit one best characterised by a long-term and, recently, accelerated emasculation of the Health and Safety Executive (HSE) as the key regulator in this area (Tombs and Whyte, 2010a), while there have also emerged some symbols of criminalisation, not least the new legislation on Corporate Manslaughter, enacted in April 2008. Meanwhile, at European level, competition law and its enforcement has witnessed staggering levels of fines for 'anti-competitive' practices levied against some of the world's largest corporations.

More generally, political characterisations of 'state retreat' and 'deregulation' are themselves manifestations of a common (sense) view of state–corporate relationships that are simplistically reduced to an autonomous (state) agency intervening (or not) against an autonomous (capitalist) organisation. Those crude characterisations posit a view of the relationship between the state and corporations or 'business' as one of *opposition* and *externality* – that is, the state stands as an institution or ensemble of institutions that is ontologically separate and distinct from 'civil society'. Contrary to this view, as we shall argue throughout this text, if corporations exist with some degree of autonomy from states, this autonomy can never be complete, since it is states – through regulation – that play a crucial role in reproducing the social conditions necessary for corporations to survive and thrive. Corporations always exist simultaneously 'inside' and 'outside' of state rules and institutions. In this sense, corporations are never entirely 'free' – nor are the markets within which they operate ever entirely 'free'. They are both legally

and politically constituted through a great deal of state activity. In these respects, the concept of 'deregulation' often fails to capture state–corporate relationships, since corporate activity is *always* regulated by states.

THE CORPORATE CRIMINAL: AN OVERVIEW

This book is directly concerned with the corporate *form*; that is, the legal structures that provide the corporation with the ability to act as both a political and an economic entity. Although we live in a global economic system that is dominated by large corporations, our concern in this book is with the general rules and practices that shape *all* corporations. It is in the next chapter (Chapter 2) that we will turn to survey some of the harms committed by corporations in more detail. And it is in this chapter that we will discover that the sheer scale and reach of the harms and the crimes of corporations inevitably raises questions about the benefits that corporations really bring us. Then, in Chapter 3, we will show how law provides corporations with a shield from liability for its crimes and harms, not least through the doctrine of 'corporate personhood'; at the same time, law constructs categories that enable both 'corporate persons' and the real persons who own and control corporations to enjoy impunity for the crimes and harms that the corporation produced. In Chapter 4, whilst rejecting an anthropomorphic view of the corporate person as capable of making 'human' decisions (or indeed decisions that are in any general social interest), we will consider in detail the ways in which the corporation 'decides', and how the decision and actions that result from corporate structures *necessarily* generate a-social, irresponsible outcomes. In Chapter 5, we begin by exploring the problem of naming corporate crime as 'crime', before

moving on to consider the ways in which regulation of corporate activity is central to what may appear to be merely a definitional problem. This leads us into a critique of the various ways in which regulation is conceived in criminological and socio-legal literatures, arguing that regulation should be understood less in terms of external relations of (potential) control, and more in terms of 'social ordering'.

The central argument of this book is that it is the *interdependence* between states and corporations – in contrast to the dominant and prevalent claim that these entities exist in relations of antagonistic, external independence – that must be the starting point for understanding the production of corporate crime and harm. More specifically, throughout the book, it will be argued that the corporation is an essential part of the infrastructure of the modern capitalist state, albeit that its place and roles therein are constantly in flux. Rather than viewing power as somehow distributed in a zero-sum fashion between states or corporations – as many of the cruder exponents of economic globalisation theses have done – we argue that it is more accurate empirically, and certainly more plausible theoretically, to understand the relationships between corporations and states as much more complex and often symbiotic. This understanding leads us, in Chapter 6, to offer some observations – both practical and utopian – on how we might reshape the corporate economy in ways that can control the production of corporate crimes and harms.

When most of us contemplate the presence of corporations in our lives, we probably do not think of their morality or their criminality. As we indicated in the opening paragraphs of this chapter, one of the consequences of the steady growth of corporate power throughout the twentieth and twenty-first centuries is that we now rely on corporations in virtually every area of our lives. If for a relatively brief

moment in industrial societies, social insurance and pensions were guaranteed by the public sector, we now rely upon the outcomes of years of investment of both public and private pensions in stock markets. Perhaps the most significant, if chilling, aspect of the ubiquity of the corporation – and one that is central to this text – is that private corporations are increasingly taking on the roles of regulation of other private corporations, previously functions virtually monopolised by the 'social protection state' (Supiot, 2013). In short, corporations are being expected to play even more central a role shaping our lives and our life chances, and indeed the future chances of survival of human life.

However, as we shall discover in this book, the modern corporation is a relatively recent invention; an invention of a set of bureaucratic/economic rules and legal peculiarities. And it is only by recognising the conditions of the socio-historical construction of the corporation, which follows a rather strange route to its present form as a legal and political entity, that we can realise that there is nothing natural or permanent about its presence in our lives. It is therefore still possible, and, as we will argue in this book, necessary, to begin to imagine a world without corporations. This argument becomes irresistible when, as we see in the next chapter, we begin to analyse the real effects of the corporation.

NOTES

1 The value of corporate mergers and acquisitions amounted to 'a total $1.4 trillion during the 1980s, exploding to $11 trillion in the 1990s, and continuing at an even greater frenetic pace of $7.6 trillion during 2000–2003' (Cray, n.d.).

2 An oligopoly is a market that is dominated by a small number of individual sellers or corporations.

3 These authors calculate the CR4 – the concentration ratio (relative to 100 per cent) of the top four firms in a specific food industry – in a range of segments of the agricultural industry.

4 Effectively, this spread means that less of the value of sales is retained in the producer country, with greater value accruing to the transnational corporations that buy the crop from producers and then sell on the global market.

5 Indeed, Pearce placed the phenomenon of corporate crime – its nature, scale, opportunity structure, 'regulation' and relative invisibility – within this disjuncture; that is, between 'the way things are supposed to happen and what actually occurs' (Pearce, 1976: 79–80).

6 See also Ruggiero (2009) for a contrasting discussion of Smith's ideas on enlightened self-interest as contemporary justifications for corporate and white-collar crime.

7 Horizontal integration refers to a company increasing its market share by acquiring a competitor; vertical integration is a strategy whereby the corporation establishes or acquires another corporation involved in upstream or downstream industrial or commercial activities – for example, a company that builds shopping centres acquires a firm that produces the chipboard or glass used to fit out these centres.

8 This list is taken from European Commission, DG Environment (2000).

9 See the NEF report online at: www.neweconomics.org/blog/entry/37.7bn-reward-for-britains-biggest-banks, accessed 24 July 2014.

10 Those figures exclude taxes paid through the purchase of fuel, the majority of which is paid for by individuals.

11 See the Platform report online at: http://platformlondon.org/p-publications/energy-subsidies-submission/#sthash.sDhUX1XR.dpuf, accessed 24 July 2014.

12 And, many might add, highly inefficient – though this somewhat begs the question of the task of different regulatory regimes; see Haines (2011: 31–61).

2

CRIME, HARM AND THE CORPORATION

INTRODUCTION

Late in 2012, as we prepared to write this book, a number of major stories concerning corporate crimes and misdemeanours erupted in the national and international press. We will briefly introduce three examples of the stories as a frame for the historical discussion that follows.

First, two incidents in Bangladeshi textiles factories resulted in the mass killing of workers. On 24 November 2012, a fire at the Tazreen Fashions factory in Dhaka killed 112 workers. A preliminary report by the government official leading the inquiry into the fire has provided evidence of gross negligence by the factory owners (Manik and Yardley, 2012). This was hardly an isolated tragedy. Five months to the day after the Tazreen fire, on 24 April 2013, at least 1,135 workers were killed in the collapse of Rana Plaza, also in Dhaka, a building housing mostly garment factories. According to the Bangladesh Institute of Labour Studies, these latter deaths took the total of fatalities in incidents in

the readymade garment industry to 1,841 within 12 years. In both of those incidents, questions have been raised about the responsibility of those who profit the most from cheap production sites such as those across Bangladesh: global retailers using the Tazreen factory to produce their brands included Walmart, Sears and C&A; Spanish labels 'Bershka', 'Lefties' and the French labels 'Sol' and 'Scott and Fox' use the Smart Fashion factory as a production facility. Yet the sub-contracted relationships with the factory owners, and the complexity of global supply chains, mean that those companies, the primary beneficiaries of cheap (and often dangerous) working conditions, are not likely to be held to account for those deaths. The corporate customer is invariably the principal actor in a supply chain and as such is able to dictate the conditions of production, though contract, within those chains. Thus the supply chain is – among other things – a technique for contracting out crime, passing down the ever-increasing likelihood of, or even compulsion for, illegality. This is achieved through sub-contracted relationships that impose ever tighter margins down that supply chain, so that for some organisations, at some points in the chain, the only way of meeting their contractual obligations whilst still making a profit is to break the law. Tying down suppliers via contracts in order to maximise profitability at the top end of the supply chain also builds in conditions of plausible deniability: if something goes wrong, both the explanation of the cause and the blame can be passed down the supply chain (Ben-Achour, 2013; see also Sethi, 2014).

Second, in January 2013 a series of household food retailers and manufacturers across the UK were found to be selling horse meat labelled as beef in a wide range of products sold. Perhaps most criticised was the British supermarket giant Tesco whose 'beef' burgers and 'beef' ready meals

were found to contain horse meat; in some cases as much as 100 per cent. The obfuscatory nature of the supply chain was revealed in early discussions, as the scandal unfolded, of the roles of 'criminals' in the food fraud. For the claim that the presence of adulterated processed beef on the high street is the 'likely result of a criminal act' (Catherine Brown, the chief executive of the Financial Services Authority (FSA), cited in Walker and Lawrence, 2013), while no doubt accurate, implied a separation between legitimate retailers/suppliers and backstreet criminal operators far down the supply chain. Government Food Minister David Heath told the UK parliament that it was important not to 'talk down' the British food industry, which in fact had very high standards:

> Because something has been discovered in Ireland, which is serious, which may lead to criminal proceedings, does not undermine the very serious efforts which are taken by retailers, by processors and by producers in this country to ensure traceability and ensure standards of food that are available to consumers. (BBC, 2013)

In this statement David Heath is clearly attempting to establish in the public debate a strict separation between legitimate (British) retailers, processors and producers and the criminal elements that exist further down the supply chain. Yet as we have argued, it is difficult to defend a clear-cut separation, legally or morally. Once again, the supply chain appears to have been a convenient narrative for those who would seek to deflect responsibility from the corporations that stand at the top of the chain. In fact, in this case, none of the companies involved in the supply chain were prosecuted (Smyth, 2013).

Third, a string of serious frauds in the banking and finance industry came to light during the winter of 2012/13

further exposed the routine corruption involving household-name UK banks. The ongoing saga of personal payment protection insurance (PPI) mis-selling aside, on which more follows below, UK banks were mired in a series of high-profile scandals and offences, which only served to highlight the fact that they have been, and remain, 'serially corrupt' (Sikka, 2012). From the fixing of the LIBOR (London Interbank Offered Rate, an inter-bank lending rate), and the price of both gold and silver, to the mis-selling of loans to small businesses, as well as 'organised and aggressive tax avoidance, tax fraud, money laundering, corruption and feeding misleading stock market research to investors to drum up business and higher fees . . . to mention a few of their misdeeds' (ibid.), such was the torrent of revelation regarding offending behaviour that nothing seemed to surprise any more. The effect of manipulating the LIBOR was to increase the cost of personal, business and state borrowing across the board – thus placing a premium on everything from personal loans and mortgages to the costs of building hospitals through the PFI (Pollock and Price, 2012). LIBOR is used to set the value of financial transactions worth an estimated $300 trillion (BBC, 2012a). Meanwhile, despite at times tough rhetoric, none of the major political parties in the UK seemed even close either to proposing more effective regulation or to supporting criminal justice responses to clear evidence of a range of offences. Indeed, the one high-profile criminal case during this period was, typically, against a sole, rogue trader. Kweku Adoboli, a junior City trader was sentenced to seven years' imprisonment for off-the-books trading, which generated losses for the Swiss bank UBS of over £1.5bn during three years. The City of London police referred to the Adoboli case as 'the UK's biggest fraud'

(Walker, 2012). Weeks later, the *same* Swiss bank agreed to pay $1.5bn (£940m) to US, UK and Swiss regulators after five years of manipulating the LIBOR (BBC, 2012b), a settlement that was tax deductible.[1]

These apparently disparate examples are introduced here for two purposes. First, they illustrate how cases from very different economic sectors often manifest themselves in very local ways but on further scrutiny require explanation in ways that span the globe; second, that the corporate production of harm and law-breaking are routine outcomes of the way that business is conducted; and, third, that corporate activities can have very serious social consequences, although these are not always immediately discernible. Moreover, these examples also indicate that corporate crimes and harms emerge in a variety of ways. Some emerge as a result of intentional, well-planned and systematic deception; others are much more likely to result from negligence and carelessness. For example, breaches of health and safety law or building regulations, even if they are criminal offences, and even if they are also products of the prioritisation of profit over worker safety, are rarely intended to cause death, injury or illness. Some offences are rendered possible by the multinational structure of the company, such as transfer pricing, in order to move assets from one part of a company in a high tax jurisdiction to another part of the same company that is registered in a lower tax jurisdiction. Moreover, some corporate crimes and harms have both a wide range and large number of victims, including employees (loss of jobs), governments (loss of taxation revenue) and investors (loss of returns). Health and safety offences, for example, may end in large-scale disaster – such as the gas leak at Bhopal, India, which killed tens of thousands (Pearce and Tombs, 2012) or a multiple

fatality train crash (Woolmar, 2001: 155–79) – but more often their effects are very localised, if tragic, in apparently isolated deaths, such as those that left the members of Families Against Corporate Killers (FACK) bereaved.[2]

BELOW THE RADAR: THE CRIMES OF EVERYDAY CORPORATE LIFE

All of the three cases we have described so far in this chapter involve incidents and practices that are unequivocally illegal, and can very clearly be represented and described as corporate *crimes*. In the Rana Plaza case, the owner of the building has been charged with murder and in the Tazreen case, the owner of the factory has been charged with culpable homicide (although none of the global retailers have been implicated in the proceedings); in the UK horsemeat case, two slaughterhouse owners have been charged with beaches of food regulations; and in the case of LIBOR, multi-million fines have been imposed on several banks, and the prosecution of a number of bank employees is currently underway.

Yet, for reasons we will explore in much more detail in Chapter 5 of this book, the various forms of social harm that we explore in this chapter are generally not constructed or represented as *crimes* nor *corporate* crimes. The bulk of social harms that are produced by corporations, even if they are theoretically punishable in law are rarely, in practice, criminalised. As we noted in the previous chapter, the term 'regulated' is used to indicate that those crimes are not policed in the normal sense of the word. Thus corporate crimes are normally dealt with using different types of enforcement authorities ('regulatory agencies'); if they do become subject to the practices of law and enforcement, then they tend to be

separated from the criminal law (and processed via administrative or informal disposals rather than prosecution); and even if they are subject to the formal processes of law, corporate crimes are rarely viewed in political or public discussion as 'real' crimes (Tombs and Whyte, 2008).

In this section we provide some indication of the scale of corporate harm in the UK, organised around a selection of exemplar categories: corporate theft and fraud, corporate crimes against consumers, corporate crimes against workers and corporate crimes against the environment. We describe those as *crimes* in the knowledge that a variety of social processes render the majority of the cases immune from criminal prosecution, and indeed from any legal process. Yet we also wish to emphasise that many of the cases we describe here are, to use Sutherland's term, 'punishable' (see Chapter 5) and in this sense *could* be criminalised under existing law. We will return to this discussion of what counts as 'crime' following our commentary on each of the selected categories of corporate crime.

We also wish to emphasis that the empirical detail of four types of corporate crime that we set out in the following sections is presented to demonstrate the routine and pervasive character of corporate crime. This is important since the few cases of corporate crime that ever reach the headlines tend to reflect very extreme cases in which the perpetrator is known, and where there is an attempt to explain the context, circumstances and consequences surrounding one specific incident.

In their analysis of press coverage of sexual violence, Soothill and Soothill (1993) identify a tendency towards reporting what they described as 'monster rapes', using language that emphasises the pathological and extreme individualistic behaviour of 'sex fiends' and 'sex beasts'. The social effect of such a focus on the monster cases is to downplay the

systemic, widespread, routine incidence of sexual violence. Analogously, the extreme or 'monster' cases of corporate crime and harm that gain visibility also tend to distort the systemic and widespread incidence of this type of offending. Indeed, there is a similar focus in public debate of a relatively small number of cases that obscure the everyday incidence of corporate crime. Such 'pulverisation' allows these events to be *isolated*, 'made into something unique, something incomparable, and something quite special, individual and atypical', far too exceptional for any generalised lessons to be drawn or arguments made (Mathiesen, 2004: 38).

While commentaries and case studies of crimes involving large companies – the 'monster' cases such as Bhopal, Enron, the Exxon Valdez, Thalidomide – may be the most prominent in public debate and in academic literature on corporate crime, there are good empirical and theoretical reasons for thinking that corporate crime is just as prevalent amongst small- and medium-sized firms in cases that are rarely reported and discussed (Croall, 2010). This is not to say that the 'monster' corporate crimes do not deserve scrutiny and analysis. But it *is* to say that, in order to build a more complete picture of the scale of corporate harm, we should seek to examine the scale and nature of routine, everyday harm. This is what we seek to do in the following analysis of categories of corporate crime: financial theft and fraud (financial services fraud), crimes against consumers (food crimes), crimes against workers (safety crimes) and crimes against the environment (air pollution).

Corporate theft and fraud (financial services fraud)

The serious frauds in the banking and finance industry noted earlier in this chapter fit closely into a more general category of corporate theft and fraud that has attracted some academic attention. This category includes: illegal share dealings;

mergers and takeovers; various forms of tax evasion; bribery; and other forms of illegal accounting. Enron is perhaps the classic example of the latter and has joined a list of offenders – including Guinness (involved in illegal share dealings in the 1980s; see *Punch*, 1996: 167–80) and BCCI, a global bank that was systematically involved in fraud, money laundering and bribery (ibid.: 9–15) – as symbols of what we mean by the term 'financial crime'. The general evidence available to us indicates that corporate financial crime is widespread. Rebovich and Kane (2002) have estimated that 37 per cent of the US population have been victims of some form of corporate theft or fraud, a figure closely approximated in a later such survey that measured victimisation to various kinds of business frauds (Huff et al., 2010: 17). As Charles Ferguson's book and documentary *Inside Job* showed with great clarity and skill, a large number of individuals in the US finance industry could easily be held accountable and prosecuted for a range of serious frauds that were causal in the 2008 financial crash (Ferguson, 2012). Yet the crisis has prompted little or no credible criminal justice response:

> None of the key guilty parties have been sent to prison; rather, Wall Street almost immediately called for returning to 'business as usual', has aggressively contested relatively modest new regulatory initiatives, and has altogether done well for itself while much of the balance of the economy and the American people continue to suffer.
>
> (Friedrichs, 2011)

By the spring of 2012, Greg Barak (2012: 102) had identified three criminal cases – all involving individuals 'pretty far down the financial food chain', so that 'no senior executives from any of the major financial institutions had been criminally charged, prosecuted, or imprisoned' (ibid.: 95) – as well

as 12 civil cases arising out of investigations connected to the US financial crisis (ibid.: 91–113).[3] Moreover, no senior level managers in the UK have been prosecuted for their role in criminal activities related to the 2008 financial crisis.

A dominant theme of political rhetoric has sought to portray the *retail* businesses of financial services companies as the 'clean' or 'safe' ('good') sector of banking – in contrast to the 'bad' risk-hungry, profit-maximising investment banking divisions that are now synonymous with the worst excesses of casino capitalism. Indeed, in the UK (and the US), the key regulatory response to the financial crisis has revolved around efforts to separate these two parts of financial services – albeit via a form of ring-fencing characterised as 'so weak as to be virtually useless' (Armistead, 2013). But the retail parts of these businesses are far from clean: consumers of financial services firms have been victims of three recent waves of offences in the UK, involving many of the same (well-known) financial services companies, since the deregulation of the sector marked, notably, by the Financial Services Act, 1986.

The first of these – widespread pensions mis-selling – had its origins in the gradual withdrawal of government support for state pension provision, coupled with deregulation of the retail financial services sector in the UK in the latter half of the 1980s. Pensions providers launched into a hard sell, targeting public-sector workers in well-developed pensions programmes, advising many to transfer their contributions to private schemes about which they provided false and misleading information. Less than one in ten pensions companies had complied with legal requirements when originally advising on these pensions transfers (Black, 1997: 178). Early in 1998, the new regulatory body, the Financial Services Authority (FSA), cited new research that estimated the final costs as 'up to £11 billion, almost three times the

original estimate. The number of victims could be as high as 2.4 million' (*The Guardian*, 13 March 1998).

At the end of the 1990s, an uncannily similar series of frauds began to emerge. The endowment mortgage frauds were based on advisers' claims that, on maturity of an endowment policy, the sum returned to an investor would pay off the costs of their homes, and likely leave a surplus balance. But such projections often proved to be false. The risk entailed in such products – which were cheaper for homebuyers – assumed that interest would be offset by the rise in value of the investment. A very large proportion of those mortgages were deceptively sold without their purchasers being made aware of the risk they were taking.

Again, the companies mired in the endowment mortgages episode were virtually all of the main high street providers of financial services. And, six years after the scandal was first uncovered, the FSA began, in July 2005, to investigate further 'the procedures of 52 firms which accounted for 90% of all the endowments mortgages that have been sold'. It claimed that this led to 75 per cent of rejected claims being re-adjudicated in favour of the customer (BBC, 2006).

The same pattern that characterised the pensions and endowment mortgage frauds was then repeated in the personal Payment Protection Insurance (PPI) policies that were widely sold at the start of this century. Financial services firms sold customers who had taken out financial products such as mortgages, credit cards or loans a form of insurance in the event of not being able to make payments. Again, these products were often sold when they were unnecessary, or without customers' knowledge, or indeed were to prove invalid when customers claimed against them. In 2005, the Citizens Advice Bureau filed a 'super-complaint' to the Office of Fair Trading, by which time the FSA had 'already fined several smaller firms for

mis-selling' (Neville, 2012); yet some 16 million PPI policies have been sold *since* 2005 (Pollock, 2012). Meanwhile, only in 2011 did the trade-body – the British Bankers Association – abandon a legal challenge to an FSA ruling on compensating victims. The companies embroiled in the mis-selling of PPI included many of the, by now, 'usual suspects' (ibid.).

These will not be the last mundane 'scandals' associated with the retail financial services sector and its direct targeting of individual consumers (Osborne, 2012) – none of which, of course, is even to mention the wider allegations of crime such as those associated with the fixing of the LIBOR, sanctions-busting, money laundering, cartelisation and insider trading.[4] As we write, amongst the contemporary candidates for the next major mis-selling scandal are those that bear a remarkable similarity to the waves of mis-selling reviewed above – for they include further pensions,[5] mortgages[6] and credit card identity-theft protection[7] mis-selling.

The finance sector is therefore characterised by an ongoing and seemingly endless litany of corporate crimes that target victims on a gargantuan scale.

Crimes against consumers (food crimes)

Another class of corporate crimes and harms – into which we might place the horsemeat labelling scandal – involves those committed *directly* against consumers, such as illegal sales/marketing practices, the sale of unfit goods (for example, adulterated food), conspiracies to fix prices and/or carve up market share (such as forms of cartelisation) and various forms of false/illegal labelling.

One industry in which crimes against consumers appear to be rife is pharmaceuticals, the production and sale of health-care products (see Braithwaite, 1984, for a classic

text). One such instance emerged in December 2011, when the French government recommended that women who had received breast implants from the manufacturer Poly Implant Prothese (PIP) should have them removed – they had been filled with industrial rather than approved medical silicone. The implants had been produced for 12 years, and some 300,000 were sold across 65 countries in Europe and South America (Sage, 2012). The case had echoes of silicone breast implants marketed by the US company Dow Corning, which led to tens of thousands of health complaints following alleged 'leaking, hardening and rupturing' of the implants (Dodge, 2005: 107); a class action prompted Don Corning to seek bankruptcy and then offer a settlement of $3 billion to some 177,000 claimants (ibid.).

Another category of crimes against consumers – to which many of us have likely been victimised – are those involving corporate price fixing, the illegal agreement between parties to keep prices artificially high. Illegal price fixing – for example, in the electrical goods, car and construction sectors – has become routine activity for many of the largest and most respected corporations (Slapper and Tombs, 1999; Croall, 2001). News of price fixing surfaces intermittently in reports of 'findings' by the Office of Fair Trading or the European Competition Commission (see, for example, Office of Fair Trading, 2007, and Walsh, 2007; European Competition Commission, 2008).

An example of corporate offending in a particular industry that captures these diverse offences is 'food crime' – crimes at all stages of food production, distribution, preparation and sale that may ultimately result in consumers being over- or wrongly charged, misled, made ill or even killed (Croall, 2007). We now discuss in greater detail the scale of corporate food poisoning in the UK.

The full scale of food poisoning-related deaths remains unknown, partly because of the poverty of official data, but also because of the complex ways in which food infection affects human health. Food poisoning cases are known to have lasting and complex effects on health. For example, it has been estimated that salmonella and campylobacter triple the average person's chances of dying from any other disease or condition within a year (Helms et al., 2003).

What is most commonly referred to as 'food poisoning' is a major source of death and illness in the UK. According to a recent report from the Chief Scientist, '[o]ur best estimate suggests that there are around a million cases of foodborne illness in the UK each year, resulting in 20,000 hospital admissions and 500 deaths' (Food Standards Agency, 2012: 11); while this clearly is a significant 'public health impact we estimate the cost to the UK to be about £1.9 billion' (ibid.: 7). Even these estimates of food-related illness are likely to understate the scale of the problem (Food Standards Agency, n.d.; see Tam et al., 2011). And while these data do not distinguish foodborne from person-to-person infections, the study was able to conclude that in the case of the incidence of campylobacter – 500,000 cases annually by the year of 2008–9 (according to Food Standards Agency commissioned research, cited in Advisory Committee on the Microbiological Safety of Food, 2012: 18) – 'the majority . . . was likely to be foodborne' (ibid.: 19).

To gain some sense of the prevalence of campylobacter, a Food Standards Agency (FSA) research study is useful. Between May 2007 and September 2008, the FSA had conducted a UK-wide survey of fresh retail chicken, testing 927 samples for campylobacter; it found that 'the prevalence of campylobacter in chicken at retail in the UK was 65.2%' (Food Standards Agency, 2009: 1), a 'significant'

level of contamination (ibid.: 3). In other words, two-thirds of chicken sold in retail outlets contained a pathogen that is the major source of hospitalisation from food poisoning in the UK.

Now, it is certainly the case that campylobacter and many other bacteria carried in foodstuffs can be killed through thorough cooking. But this is rather to miss the point. More relevant for us is that the prevalence of such bacteria, for example in chicken, is so widespread when the conditions under which its spread can be eradicated are well known, and amount to little more than meeting basic standards of hygiene in poultry production and processing. The prevalence of the bacteria is a consequence of two conscious decisions taken in the food retail business, both of which are directly linked to the maximisation of profitability: one is the driving down of costs to undercut competitors, not least amongst the handful of supermarkets that dominate the UK retail food sector (see Chapter 1); another is the complex line of sub-contracting that makes effective self-regulation virtually impossible even were it desirable on the part of industry (Lawrence et al., 2014; Blythman, 2007).

Overall, in 2011, there were 83 *general* outbreaks of food-borne infectious disease in England and Wales reported to the Health Protection Agency, an increase on the 63 in the previous year (Health Protection Agency, 2012). The overwhelming majority of these cases – 80 per cent – were linked to the food service sector (66/83) – notably 'restaurants, pubs, hotels, event caterers'. Most of the others are traceable to 'institutional or residential settings (13%; 11/83) – such as prisons and care homes, the community, i.e. disseminated cases (5%; 4/83) – or retail settings (2%; 2/83)' (ibid.).

Crimes against consumers generally, and food crimes in particular, are therefore a category of crimes that are largely

made possible, and indeed mainly produced, by profit-making corporations. And those are crimes that victimise all of us on a routine basis.

Crimes against workers (safety crimes)

Our examples from the Bangladeshi and Pakistani textiles industries fit into a broader category involving offences that arise directly from the employment relationship. These include cases of sexual and racial discrimination, violations of wage laws, of rights to organise and take industrial action, and various occupational health and safety offences. One further recent, and ongoing, example of this in the UK was the revelation, in 2009, that some 3,000 building workers were on a 'blacklist', preventing them gaining employment, mostly as a result of trade union health and safety activity (Ewing, 2009; Whyte, 2015a). It is in this case that we find examples of three types of offences against workers – involving breaches of data protection, workplace safety and human rights laws, respectively.

If we turn to focus upon occupational health and safety harms we find that the scale of these is very significant indeed – albeit, as with much corporate harm, obscured. If we begin with deaths from occupational injury, each year the HSE releases a statistical bulletin with a figure for work fatalities – the most recent such press release, for 2012/13, stated that in that reporting year, 148 workers were fatally injured (HSE, 2013a). But what we have elsewhere called this 'headline' figure is highly misleading. Following the link from the press release takes us to the HSE's full document, *The Health and Safety Executive Statistics 2012/13*. This informs the reader that, '[t]here are currently around 13,000 deaths each year from work-related diseases' (ibid.: 5). This immediately makes the

press-released figure of 148 work-related fatal injuries look like a grossly misleading under-estimation of the scale of death as a result of working in contemporary Britain.

But the under-estimation does not stop there. Also reportable to HSE are deaths to members of the public that arise out of work activity. HSE's statistical report does not refer to these at all – although they are generally accessible at a section of their own website headed 'Fatal injury statistics'. In October 2013, this stated, for 2012/13, that '[t]here were 113 members of the public fatally injured in accidents connected to work in 2012/13 (excluding railways-related incidents)' – a figure that significantly augments the 148 fatal injuries to workers. A much fuller HSE document, its 'Full-year details and technical notes', in fact states that '[t]here were 423 members of the public fatally injured in accidents connected to work in 2012/13. Of these deaths, 310 (73%) related to incidents occurring on railways' (HSE, 2013b: 4). The end result of this trawl through official data takes us from 148 deaths to almost 14,000 deaths in 2012/13.

Still, the under-estimation does not stop at this point. As HSE now openly acknowledges, there are significant categories of deaths – at sea and associated with air travel, for example – that are occupational but recorded by other regulatory agencies. But by far the biggest omission are the deaths of those who die whilst driving as a normal part of their work. This omits some 800–1,000 occupational deaths per annum because such deaths are recorded as road traffic rather than occupational fatalities. Still, these additions do not capture the full scale of the problem of work-related deaths. For while HSE's figure on fatal occupational illness is an estimation (the 13,000 noted above), as it acknowledges, it is in fact a gross under-estimation. For example, researchers from the European

Agency for Safety and Health at Work calculated, in 2009, 21,000 deaths per annum in the UK from work-related fatal diseases, while accepting both that such data 'might still be an under-estimation' and that work-related diseases are 'increasing' (Hämäläinen et al., 2009: 127, 132). A UK study has estimated that up to 40,000 annual deaths in Great Britain are caused by work-related cancers alone (O'Neill et al., 2007). And long-term research by the Hazards movement, drawing upon a range of estimates derived from studies of occupational and environmental cancers, of heart-disease deaths that have a work-related cause, as well as estimates of other diseases to which work can be a contributory cause, produces a lower-end estimate of up to 50,000 deaths from work-related illness in the UK each year, or around four times the HSE estimate (Palmer, 2008).

This annual total of vicitmisation that we have set out here ranks highly in comparison with virtually all other recorded causes of premature death in the UK (Rogers, 2011). And the overwhelming majority of deaths caused by work occur in the context of corporations or profit-making business activities of some type.

Crimes against the environment (air pollution)

A final category of crimes and harms are those that harm us by damaging our natural environment. These include: illegal emissions to air, water and land; hazardous waste dumping; and illegal manufacturing practices. Air, land and water pollutants are a further key cause of death and disease; the focus here is on exposure to airborne pollutants. In global terms, a recent estimate of the scale of death and disease as a result of outdoor air pollution concluded that ambient air pollution causes about 800,000 (1.2 per cent of the total) premature

deaths (Cohen et al., 2005): a figure supported by the World Bank (Vidal, 2005) and the World Health Organization (Global Atmospheric Pollution Forum, 2007). And as with the global distribution of work-related deaths, the effects of air pollution too are predominantly located in those states that are the least able in terms of resources either to prevent or respond to such harms – namely, the developing world. An estimated 65 per cent of deaths from air pollution are in Asia (Cohen et al., 2005).

It is extremely difficult to be precise either about the levels or the sources of such pollution and, specifically in the context of this book, what proportion of air pollution is caused by corporate activity. These points being made, we have enough official indications to begin to approximate the scale of this type of harm.

First, in terms of the scale of harm, there has been a series of UK government estimates in recent years that indicate that the level of deaths caused by pollution runs into the tens of thousands. For example, recently the all-party Environmental Audit Committee concluded in 2010 in its report on air quality that '[a]ir pollution probably causes more deaths than passive smoking, traffic accidents or obesity, yet it receives very little attention from Government or the media' (Parliamentary News, 2010). It added that evidence indicated that

> air pollution could be contributing to as many as 50,000 deaths per year . . . Averaged across the whole UK population it is estimated that poor air quality is shortening lives by 7–8 months. In pollution hotspots it could be cutting the most vulnerable people's lives short by as much as nine years.
>
> (Ibid.)

A subsequent 2011 report by the same committee claimed that '[d]angerous levels of particulate matter (PM2.5 or

PM10) and chemicals (such as NO_2) in the air are contributing to tens of thousands of early deaths every year in UK cities', estimating that '30,000 deaths in the UK were linked to air pollution in 2008 – with 4,000 in London alone' (Parliamentary News, 2011). Finally, in 2010, discussing upper and lower limits on the relationship between air pollution and deaths, as well as the degree of contribution of such pollution to these deaths, the Committee on the Medical Effects of Air Pollutants[8] concludes that

> it is more reasonable to consider that air pollution may have made some contribution to the earlier deaths of up to 200,000 people in 2008, with an average loss of life of about two years per death affected, though that actual amount would vary between individuals. However, this assumption remains speculative.
>
> (Committee on the Medical Effects of Air Pollutants, 2010: para. 21)

Although it is virtually impossible to estimate precisely how much pollution is caused by *corporate* activity, as opposed, notably, to private car or fuel use, it is clear that that most pollution is produced by commercial activity. On sources of pollution, the House of Commons Environmental Audit Committee (2010) stated that '[i]ndustry and road transport are the main sources of air pollution, though domestic combustion and agriculture are also to blame' (ibid.: para. 2). Moreover, according to government figures, 96 per cent of SO_2 is commercially produced (Department of the Environment, Food and Rural Affairs, 2001). Meanwhile, it has been estimated that 72 per cent of PM10 – the standard air pollution particle measure – is a result of commercial activity (Greater Manchester Air Quality Steering Group, 2002), as is most of the carbon monoxide, ozone, NO_2, 1,3-Butadeine and lead pollution (all cited in Whyte, 2004: 135). Lorry traffic,

buses, as well as aircraft engine emissions, airport operations and road transport to and from airports – all commercial or directly linked to commercial activity – are specifically cited as key sources of pollutants by the cross-party Environmental Audit Committee (House of Commons Environmental Audit Committee, 2011: paras 8, 16, 22).

So, while we cannot be certain about the precise, relative contributions of commercial and domestic to the overall burden of pollution, we can at least be clear that corporations certainly produce most of the air pollution that threatens our health, economy and environment.

BUT IS IT CRIME?

It should be clear even from this brief review that it is difficult, if not impossible, either to quantify the full scale of corporate harm, or to be conceptually clear about whether we can describe this harm as *crime*, that is, to understand whether the phenomena we point to are violations of criminal or indeed any other bodies of law.

And this is where we return to our discussion of the extent to which we can understand the phenomena we have explored here as 'crimes'. As we have noted, the waves of corporate frauds in the finance industry that have emerged over four decades have involved clear, serious and repeat breaches of financial regulation. Yet they have largely been dealt with in ways that have enabled the companies themselves to play a key role in identifying and organising compensation settlements with victims. They are unequivocally crimes, but they have hardly been treated as such.

It is also the case that the vast majority of deaths caused by work go unprosecuted. This is despite clear evidence that shows the majority of deaths at work can be linked

to breaches of the law by employers. Even when they are prosecuted, most result in a fine being imposed on a corporation (Slapper and Tombs, 1999). Occupational illnesses and diseases that are reported to the HSE are almost *never* processed as breaches of the law, and therefore prosecution rates are very low indeed. The vast majority of deaths and illnesses caused by work go unreported. Of the very small number that do get reported, much less than 1 per cent of occupational illnesses investigated by the Health and Safety Executive are prosecuted (Tombs and Whyte, 2007).

Similarly, it is likely that a large number of the food poisoning cases we describe here result from criminal breaches of food hygiene and food safety legislation. However, prosecutions of any food regulation breaches, including those that lead to death, are also very rare indeed. For example, in 2012/13, food safety and hygiene inspectors made almost 350,000 visits to premises in England and Wales – but these generated just 398 prosecutions (Tombs, 2015a).

In the case of environmental pollution-related deaths, few are even likely to result in prosecution. This is partly because cases of deaths brought forward by pollution are neither criminalised or subjected to any process of investigation and partly because of the complexities of investigating and prosecuting such cases. Unless the victim lives or works close to a major source of pollution, it may be difficult to identify a link between the source of the pollution and the victim. However, even in cases where identifying a source may be possible, prosecution for causing a death is likely to be difficult to pursue unless there has been a breach of regulations. One issue that takes us out of the scope of criminal process is that much of the air and water pollution that has deadly effect is often legalised – it is permitted by government licence.

It is therefore very difficult to know whether each of the examples of thefts, deaths, injuries and illnesses caused by corporate activity might have involved explicit breaches of the law. It is possible to make generalisations about the likelihood of a particular proportion of cases being explicitly illegal or criminal. It is also possible to discern particular trends within the categories that we have identified. And we can make relatively accurate estimates of the proportion that are caused by corporate activity. But we cannot accurately count them as *crimes* because the vast majority are unreported to or uninvestigated by state enforcement agencies. Indeed, because corporate crime is not treated as 'crime', those forms of crime appear to us – even when we are victimised – in a relatively abstract form (Tombs and Williams, 2008; Whyte, 2007).

Nonetheless, even if we often cannot accurately quantify corporate crime on a case-by-case basis, they still generate hugely significant deleterious costs on a routine basis. And we can say with some certainty that those costs are measured in volume terms as more deadly, more physically damaging, and more economically costly than any comparable 'street' crime (Friedrichs, 1996). What we have described here are examples of four broad categories of corporate crimes and harms that are routine and mundane, and that do not generally attract headlines. Those harms affect the lives of the vast majority of us, whoever we are or wherever we live, even if we are unaware of that fact. To say this is not to slip into the erroneous claim that corporate activities affects us all equally.

The social theorist Ulrich Beck famously claimed that the deleterious effects of industrialisation affect us all. Thus, he argued 'smog is democratic' since it transcends 'class-specific barriers' in its effects (Beck, 1992: 36). We do not dismiss his general point that environmental degradation threatens the

collective well-being and even survival of the human race. But exposure to airborne pollutants remains skewed along lines of structural disadvantage. So, for example, if you are poor, you are more likely to live close to a polluting factory. Indeed, Friends of the Earth's 1999 'Pollution Injustice' study concluded that the poorest families are on average twice as likely to have a polluting factory in their neighbourhood. In some contexts, this results in a racialised distribution of vulnerability to corporate pollution that Bullard (1994) calls 'environmental apartheid'. His work shows how in eight southern states of the U.S., three-quarters of hazardous waste landfill sites were located in predominately African American communities. Around 60 per cent of African Americans across the US live in neighbourhoods with abandoned toxic waste sites. Thus, racialisation and class interact to expose certain communities to greater risks. Further, understanding *women's* vulnerability as consumers and as workers is central to understanding the unequal distribution of corporate crime victimisation along lines of class and gender (Whyte, 2007a; Croall, 1995; Haantz, 2000; Szockyj and Fox, 1996; Wonders and Danner, 2002).

We do not therefore argue that corporate harm victimises us all in equal measure. If corporate crime is now an endemic and pervasive part of the societies in which we live, such crimes magnify existing social divisions and inequalities; it is the most vulnerable who are the most victimised.

This chapter has also begun to reveal how any recognition of corporate crime can only proceed adequately with an understanding the role of the state. Most obviously, states bear some culpability here for the formal legalisation of such crimes, their failure to develop adequate law and regulation that might mitigate them, their failures to enforce adequately such laws as do exist, and/or their

failures to impose effective sanctions where violations of law are proven. In the next section we deepen our analysis of the role of the state as bystander, facilitator and even conspirator in corporate crimes. And we do this by looking to a different category of corporate crimes. Rather than analysing the routine, and relatively invisible corporate crime that can be found *below* the radar at the routine, the next section explores the more visible high crimes of war, genocide and crimes against humanity that can be found *above* the radar.

ABOVE THE RADAR: HIGH CRIMES OF CORPORATE–STATE COLLUSION

In Chapter 1, we considered the claim that the corporation appears to be a rational response to problems of efficiency. Within what is claimed to be a free market, states may at times intervene, but such intervention must necessarily be kept to a minimum, since this impinges upon corporate freedoms and hence market and economic efficiency. Such claims hold great political, popular and academic currency to this day. But there is another version of corporate history that posits quite a different view of state–corporate relationships. Corporations are institutions that are created for the mobilisation, utilisation and protection of capital within recent socio-historical state formations. As such, throughout this book we seek to demonstrate that corporations are wholly artificial entities whose very existence is provided for, and maintained, through the state via legal institutions and instruments, which in turn are based upon material and ideological supports. In this section, we explore how corporate activity very often relies upon the war-making capacities of states in order to flourish.

In the early twentieth century, Brigadier General Smedley S. Butler, the most decorated US military officer of his day, famously published what is perhaps the most graphic illustration of this relationship. In his polemical assault upon the relationship between military operations and business interests, *War Is a Racket*, Butler spelled out in meticulous detail the huge profits that war generates for a nation's private corporations (Butler, 2003). The 1914–18 war, according to Butler, created at least 21,000 new American millionaires and billionaires. Butler famously noted his role in the US armed forces as a 'muscle man' or 'racketeer for capitalism':

> I helped make Mexico and especially Tampico safe for American oil interests in 1914. I helped make Haiti and Cuba a decent place for the National city Bank boys to collect revenues in. I helped in the raping of half a dozen Central American republics for the benefit of Wall Street. I helped purify Nicaragua for the International Banking House of Brown Brothers in 1902–1912. I brought light to the Dominican Republic for the American sugar interests in 1916. I helped make Honduras right for the American fruit companies in 1903. In China in 1927 I helped see to it that Standard Oil went on its way unmolested.
>
> (Butler, 1935)

Butler raises important questions about US military and security state interventions on behalf of business at home and abroad, and points the finger at the private interests that benefit as 'partners' in war. It is a relationship that, more than half a century later, was summed up famously by neoliberal commentator Thomas Friedman (1999):

> The hidden hand of the market will never work without a hidden fist – McDonald's cannot flourish without McDonnell Douglas, the builder of the F-15. And the hidden fist that keeps the world safe for Silicon Valley's technologies is called the United States Army, Air Force Navy and Marine Corps.

The similarities between Friedman and Butler's conclusions are telling, given that the former is one of capitalisms most dogmatic enthusiasts and the latter was one of its most trenchant 'muckrakers'. Both reveal an historically enduring aspect of the relationship between states and corporations.

As one recent history of the world's first multinational has succinctly put it, the East India Company was the product of a contractual 'bargain with the state', albeit that this early corporate form 'was on constant life support, repeatedly having to justify its existence to the state' (Robins, 2006: 27). Certainly it is the case that maintaining the conditions of existence of contemporary corporations, even, or perhaps especially, in 'free' markets, requires an enormous amount of state activity. The corporate form and the state are thus inextricably linked to the extent that, in contemporary capitalism, each is a condition of existence of the other.

Corporate violence on behalf of the state

Throughout two and a half centuries, the English (latterly British) East India Company was implicated in countless atrocities as part of an ongoing military suppression of local peoples. Its proxy colonial role on behalf of the British government extended to the outlawing of many customs and religious rites of both Muslims and Hindus. The Company's private army also waged war against its French, Portuguese and Dutch counterparts to protect their access to raw materials and the factories and warehouses set up along the Indian coastline. The torture, decapitation and burning alive of corporate rivals was not unusual, in many cases merely for breaking mutual trade agreements. By the end of the Company's reign, as Karl Marx (1857) observed in his *New*

York Daily Tribune column of the time, 'torture formed an organic institution of [British] financial policy'. The routine use of torture was, for Marx, the East India Company's main contribution to the British Empire. Yet this conduct, which often followed the direct orders of officers of the East India Company, invariably escaped criminal or even administrative punishment.

For the British state there were two main of advantages in chartering companies that would secure the colonial territories for British interest. Those advantages accrued through the reduction of both political and economic risks to the British state that peripheral economic activity always generates.

First, the risk of political exposure was reduced. Whilst the activities of their companies had an impact upon diplomatic relations with other colonising states, they did allow government officials to distance themselves from particular atrocities committed by the Company. Parliamentary intervention to regulate and then effectively disable the British East India Company came after a moment of exposure for the Company after the Indian rebellion of 1857. At home, the British state was able to distance itself from popular criticism for the brutal methods employed by those companies since they were not directly accountable to parliament for their military campaigns.

Second, those companies were established to enable the burden of economic risk in the colonies to be shifted from the state to private wealthy individuals. This, in essence, is why the first limited liability companies were created: to enable private investors to shoulder the state's burden during this period of rapid expansion in markets and trade routes. Private capital was mobilised for a task that was beyond the capacity of state administrative and military apparatuses. By

arming the East India Company, the British state found an efficient way of reducing the need for a constant military presence along the trading routes. In the seventeenth and eighteenth centuries, this was a task way beyond a fledgling British Navy.

It is precisely those dynamics that we find as key factors in the contemporary use of private military companies. Such companies expand state capacities for war-making under relatively safe conditions for states. At the same time, state-led military excursions also expand the opportunities for business. The invasion of Iraq in 2003 was aided and abetted by major figures in the US and UK oil companies who had been involved in the planning of the invasion and even in the capture of the oil fields (Whyte, 2007b). After the war, UK ministers intervened directly on behalf of the British oil company BP in the negotiations of the carve-up of Iraq's oil fields (Muttitt, 2011). Indeed, the military occupation that followed the invasion was distinguished by an opening up of the economy to mainly Western corporations seeking to profit from the post-war economy. The invasion was a moment at which we witnessed corporations playing a key role in the military planning, the military invasion and the military occupation of Iraq (Klein, 2007; Whyte, 2007c, 2008).

Indeed, the story of the corporation throughout the twentieth century has been a story in which many of the largest household name corporations have collaborated and supported the most brutal and violent states and have participated in the most reviled acts of war. It is to a selective overview of some of the most notorious of those collaborations that we now turn.

The centrality of business to the rapid rise to power of the Italian and Germany Fascists was excavated as early as 1936

by French scholar Daniel Guerin in his classic account *Fascism and Big Business*. Guerin's analysis revealed how Italian Fascist and German Nazi parties came to power aided to no small degree by their own domiciled capital. German and Italian business, it seemed, prized the stabilisation of the capitalist order that those regimes initially promised. However, for the Fascist states to develop war machines capable of sustaining a military campaign in Europe and beyond, they required the backing of foreign capital. Indeed, capital investment from all industrialised nations made such a difference to the rise of the Italian Fascist and German Nazi governments, it is unlikely that the war machine could be built with anything like the same efficiency and speed. In 1937, William Dodd, the US Ambassador to Germany noted:

> A clique of U.S. industrialists is hell-bent to bring a fascist state to supplant our democratic government and is working closely with the fascist regime in Germany and Italy. I have had plenty of opportunity in my post in Berlin to witness how close some of our American ruling families are to the Nazi regime. . . . Certain American industrialists had a great deal to do with bringing fascist regimes into being in both Germany and Italy. They extended aid to help Fascism occupy the seat of power, and they are helping to keep it there.
>
> (Cited in Seldes, 1947: 122)

Mussolini and Hitler were sustained not only by their own loyal businesses, but also with the patronage of international capital. This patronage was only withdrawn when German imperialism threatened to colonise the markets of the US and the major European nations. Collectively, the amount of capital committed to Nazi Germany by Wall Street ensured the expansion of the war machine (Sutton, 1976). Just one example of the importance of this commitment to

the Nazi war machine illustrates how that corporate collaboration had become indispensable. Ethyl G.m.b.H. (now Ethyl Inc.) was a subsidiary formed by US companies Du Pont, General Motors and Standard Oil of New Jersey with I.G. Farben to build the plants that would supply the German armies with synthetic tetraethyl fuel at the request of the Third Reich. Germany's petroleum reserves were not up to their requirements and, according to Nazi documents seized after the war, '[w]ithout lead-tetraethyl the present method of warfare would be unthinkable' (Higham, 1983: 166). It is therefore likely that without business collaboration, the Third Reich's war of aggression through Europe could not have been launched.

The story of corporate collaboration with the Nazis is a yet more shocking one, and is a strong that can be found in the modus operandi of the genocide. In mid-1930s New York, IBM, a rapidly growing company that made counting machines was nurturing a cosy deal with the Hitler regime. A partnership with IBM's subsidiary Dehomag ensured that the Nazis would be supplied with the sorting machines that identified, and lead to their slaughter the victims of the concentration camps. In fact IBM, in partnership with its German associates, modified the design of their equipment for this purpose. The Nazis also tailored their data that identified those to be exterminated to fit the IBM machine. Without IBM's technology, it is therefore unlikely that the Nazis would have been capable of killing 6 million people with the same brutal efficiency (Black, 2001, 2009). The IBM story allows us to see a different side to the war racket than that illuminated by Butler. What this story brings to light is the direct impact that profiteering can have on the way in which wars are prosecuted. Not only was this corporation on the make, but also it was prepared to enter into an intimate relationship with

perhaps the most murderous political regime in history to ensure the utmost efficiency of the holocaust. IBM was more than simply racketeering, it actively collaborated with the Nazis.

IBM was by no means the only corporation to enter into commercial deals with the Nazis. It is well know that Nazi-controlled firm I.G. Farben used slave labour from Auschwitz and supplied gas to the concentration camp and that it was Swiss banks – including Union Bank of Switzerland, the Swiss Bank Corporation and Credit Swisse – that facilitated the theft of Jewish property (BBC, 1998). General Motors manufactured German tanks and ITT ran Hitler's telecommunications systems and operated aircraft factories for the Nazis on the agreement that they would be financially recognised for this after the war (Sampson, 1973). It also knowingly supplied fuses to the Nazi regime for artillery used against the Allied forces and bombs that were dropped on London (Higham, 1983). In 1942 Standard Oil of New Jersey (now Exxon) entered into a huge cartel agreement with I.G. Farben that essentially carved up the global oil and chemical markets. Standard agreed not to develop processes for manufacturing synthetic rubber, crucial for the war effort in exchange for the I.G. Farben's agreement not to compete in the American petroleum market. Eventually the US government were forced to seize the patents, but only after Standard had threatened to withdraw their supply of fuel to the US forces (Mintz and Cohen, 1977).

A little more than 30 years after their collaboration had been cut short by the defeat of Hitler, ITT was up to old tricks again, playing a crucial role in destabilising the democratically elected Allende government in Chile, channelling $700,000 to Allende's opponent Jorge Allesandri and offering $1m to the Central Intelligence Agency (CIA) for covert

operations to help defeat Allende. Some authors have argued that ITT were acting as a surrogate for US military covert operations. Certainly the company enjoyed a close relationship with the US security intelligence and were in communication with the CIA every step of the way (Kornbluh, 2004). The company funded both the political challenge to Allende and created the conditions that made Pinochet's coup possible. In so far as the coup may not have been successful without ITT's intervention, here we have yet another example of the indispensability of capital to this brutal and totalitarian regime. The Chilean Truth and Reconciliation Commission estimated that no less than 20,000 government opponents or suspected opponents were killed or 'disappeared' by regime (Berryman, 1993). But what did the executives at ITT care, for the corporation was well rewarded by the regime, recovering a total of $235 million lost revenue and assets from the military junta (Day, 1975)? The white rum manufacturer Bacardi was involved in a similar attempt to recover lost assets in Cuba by funding of covert paramilitary operations against Castro's government. Bacardi had funded a military means of pursuing a compensation claim against the Cuban government for the loss of assets following the revolution. There is evidence that it even purchased a B26 bomber to attack Cuba's oil refineries, but could not find a band of mercenaries willing to complete the job on its behalf (Calvo Ospina, 2002).

If the second half of the twentieth century is scattered with similar examples of corporate collaboration with an array of totalitarian regimes, such collaboration often warrants little more than a footnote in histories and political commentaries on such regimes. So, whilst it is commonplace to find accounts of the arming of Saddam's war machine by the US and Europe, corporate collaboration – the businesses

that supplied the vital ingredients in Saddam's chemical and biological armoury – are less recognised (Whyte 2002/3). One report, published in 1990, by the Simon Wiesenthal Centre, collated evidence that had already been published in government sources and official publications, but remained largely unreported in the public sphere (Timmerman, 1990). The report documents a total of 207 Western firms from 21 countries implicated in production of chemicals and missile parts sold to the Iraqis for illegal poison gas and nerve gas warfare. And this is only the companies that were caught! Amongst the firms named in the report were Daimler-Benz; Phillips Petroleum; BP (Germany); Siemens; United Steel and Strip Corporation; Hewlett Packard; and a subsidiary of Fiat.

An important first lesson from recent history, then, is that some of our best known corporations – many of them household names – have guaranteed their own financial health at the expense of the human slaughter generated by wars and by war-mongering regimes. A clear lesson that we can draw from recent history is that corporations have, during the twentieth century, been indispensable to, and have positively supported the most violent and vile political regimes. In fact, it is no exaggeration to say that in some cases, without the support of foreign corporations, those regimes would not have come to power in the first place. This is likely in the case of Chile. The war racket knows no moral boundaries and its greatest profits have been extended to the supply of the means to wage war and terror against the civilian population. Even when the consequences are genocide, it seems, corporations never take their eye off the glittering prize at the end of the balance sheet.

The racist regimes of South Africa and Rhodesia were sustained by US and European capital. In both those states,

British corporations notoriously worked in collaboration with British civil servants to illegally circumvent international embargoes (Bailey, 1979).

There is a point at which corporate collaboration takes on a much greater significance than simply the act of doing business with totalitarian regimes; the point at which corporate collaboration actually determines the very existence of the regime. This point can be defined as the point in the development of the regime where the nature of, or the volume of, business and capital investment is significant enough that were it to be withdrawn, it would threaten the existence of the regime.

It would be a mistake to assume that the business people who supported Hitler had any kind of political allegiance to fascism. Some may have, and some may have not. But this is not the most relevant question for business. The post-Second World War years are littered with similar examples of indispensable collaboration. In those cases, collaboration with foreign capital – often because of the scale of investment required to build heavily militarised states – has proven most indispensable to totalitarian regimes.

STATE COMPLICITY IN CORPORATE CRIME AND HARM

This discussion of corporate collaboration chimed closely with a growing body of literature around state–corporate crime (Aulette and Michalowski, 1993; Kauzlarich and Kramer, 1993; Kramer, 1992; Friedrichs, 1996; Kramer and Michalowski, 2006). In this literature state–corporate crime comes in two varieties: 'state-initiated' (in which government agencies play the leading and organising role and are assisted

by corporations) and 'state-facilitated' crime, a category that describes crimes arising not from a positive engagement or encouragement to commit crimes, but negative forms of complicity (failure to adequately regulate, wilful blindness and so on). More recently, Lasslett (2010) usefully expanded upon these sub-categories. He identified 'Corporate-initiated state crime', which 'occurs when corporations directly employ their economic power to coerce states into taking deviant actions'; further, he defined 'corporate-facilitated state crime' to encompass situations where 'corporations either provide the means for states criminality (e.g. weapons sales), or when they fail to alert the domestic/international community to the state's criminality, because these deviant practices directly/indirectly benefit the corporation concerned' (Lasslett, 2010; see also Whyte, 2009, on 'corporation-initiated' and 'corporation-facilitated' state crime).

An illustration of corporation-facilitated crime is illustrated by Shell's relationship with the Nigerian government during the 1990s. There is a convincing case that the Nigerian state assassination of writer and activist Ken Saro-Wiwa, along with the 'Ogoni 8', could have been prevented by Shell. This is not only because the focus of the Ogoni 8's protests was the social and environmental destruction of their communities by Shell in the Niger Delta, but also because of the unrivalled influence that the company had over the government of Nigeria. Oil accounts for approximately 90 per cent of foreign exchange earnings and 75 per cent of government revenue; and Shell is the largest foreign oil company operating in Nigeria (Royal Dutch Shell PLC, 2014).

In the preceding discussion we have explored numerous cases of corporation-initiated crime: corporations taking a leading role in wars and war crimes in which military forces are also involved. In terms of the latter, there are often cases where

relatively powerful corporations fail to intervene or act with wilful blindness when state or government bodies commit crimes.

What we are beginning to explore here are the ways that governments and private corporations interact as 'partners in crime' (Whyte, 2009). The depth of this partnership raises the possibility that particular groups and institutions that are normally regarded as existing 'outside' of the state, can be used to project state power. Indeed, following our discussion in Chapter 1 of this book, we can question the extent to which an institution or group is considered to exist 'outside' the state if it is committing acts on the state's behalf, or if there exists a symbiotic relationship between 'public' and 'private' interests. The distinction between the 'private sector' and a 'public sector' is a distinction that is defined in law. It is the formal definitions and powers prescribed in law and custom that decide which institutions are regarded as 'public' and which are regarded as 'private'. As Althusser (1971/2008: 18) put it: 'the State . . . is neither public nor private; on the contrary, it is the precondition for any distinction between public and private'.

So what exactly is 'the state'? The prominent state theorist Bob Jessop (1990) argues that the state is not a 'thing' that possesses or concentrates power but an ensemble of institutions and processes that provide a basis for the organisation of social forces. Schools, churches, business organisations, as well as police forces and armies, are part of the ensemble that projects state power. They contribute to a projection of state power by providing leadership and tutelage in the dominant morals and political ideas, or they contribute to the institutional ordering of a society. The state mediates power relationships in society through key institutions (workplaces, the family, the market and so on), and as such the state can be more usefully thought of as a complex of mechanisms and apparatuses that mediates

and organises social relations of power. And corporations play a crucial role in those mechanisms and apparatuses.

To say that private institutions can be defined as part of the state ensemble is not to say that they are under the spell of governments or that their interests always coincide with those of public institutions. Corporations enjoy some measure of real autonomy from the states – they have their own histories, customs and belief systems. Indeed, many of the largest corporations in the world today exist on the same scale – in economic terms – as some national governments and this makes them formidable power structures in their own right.

CONCLUSION

In the brief, and selective, history of corporate wrong-doing that we have presented in this chapter, private corporations have been implicated and directly involved in a full range of offences, from the apparently petty, such as misrepresenting the value of an insurance policy against the inability to pay a small loan, through to crimes against humanity, and even genocide. Such harms and crimes are ubiquitous – as the weight of evidence in this area attests, this level of offending and harm production is ubiquitous, involves corporations of all sizes, in all sectors, of all 'home' nationalities. These have a range of effects – economic, physical, social – some of which are much more transparent than others. And many of them implicate states very directly.

Indeed, it is at least possible to argue that evidence of such offending and harm production is so prevalent that it is almost normalised – at times generating popular anger but at the same time perhaps anxiety or even political and social apathy. On the latter, the routine and seemingly endless production of harms may inure people to their perniciousness,

as the population becomes anaesthetised to such harm, seeing, but not seeing, which is the most pernicious effect of all. What is there to be surprised about any more about the corporate world? About the state? And – in the absence of alternatives to either, nor mechanisms for achieving these in any case, certainly not in the formal political sphere – is it not a reasonable response simply to slide into apathy, alienation and atomisation? In this context, if there is a sense in which these crimes and harms are inadequately known, they are at the same time all too well-known by the population. The problem here, then, is not necessarily the invisibility of the structural violence routinely inflicted – it is in some ways its very visibility through its 'ceaseless repetition' (Dilts, 2012: 192; Winter, 2012). It is this ceaseless repetition that represents an academic and, most of all, a pressing political challenge for those who would resist such harms (Tombs, 2013b). And it is on this basis, too, that this book is devoted not to an exposure of this harm, but to the central producer of it, the private corporation.

Academic criminology has not over the years devoted a significant proportion of its mass of output and activity to corporate crime and harm (Tombs and Whyte, 2003a). It is almost by default that the kind of offender with which criminologists are overwhelmingly concerned tends to reflect gestalt image of the 'usual suspect'. This ideal-typical offender has arms, legs, most likely is young, male and probably black. That observation made, where criminology has discussed *corporate* crime and harm – and there is now a solid if still relatively marginal body of literature on this subject – its overwhelming focus has been upon characteristics of the *crimes* and *harms* rather than the corporation itself. Thus this work is characterised by several strands: case studies of particular crimes or harms, or even of particular industries;

critical discussions of the levels of regulation if such crimes and harms; debates as to the relationship between harm and crime; and the extent to which corporate crime can in fact be labelled crime. In general, relatively absent from these considerations of corporate crime and harm, is the corporation qua corporation.

The focus of this text is upon the *corporation* as a key institutional site in the production of crime and harm. Further, and as we have already begun to outline in Chapter 1, critical considerations of the corporation must at the same time engage in critical analysis of the role of the state or states. In this context, we should bear in mind a rather important obviousness: namely that the corporation is a creation of the nation state, *and* is maintained through an awful lot of state activity (not least the forms of subsidy and political support that we outline in Chapter 1). Corporations are institutions that are created for the mobilisation, utilisation and protection of capital. As such, they are wholly artificial entities whose very existence is provided for, and maintained, through states' legal and political institutions and instruments, which in turn are based upon material and ideological supports. As one recent history of the East India Company put it, the company was the product of a contractual 'bargain with the state'; moreover, that this early corporate form 'was on constant life support, repeatedly having to justify its existence to the state' (Robins, 2006: 27). Certainly it is the case that maintaining the conditions of existence of contemporary corporations, even, or perhaps especially, in 'free' markets, requires an enormous amount of state intervention. The corporate form and the state are thus inextricably linked to the extent that, in contemporary capitalism, each is a condition of existence of the other. It is this condition of existence, through a discussion of the development of the legal

form of the corporation, and of the form that criminal law takes, that the next chapter will explore.

NOTES

1 UBS was one of several banks to be fined or reach settlements with UK and US regulators for LIBOR fixing; others included Barclays, the Royal Bank of Scotland and Lloyds Banking Group.

2 FACK is a national network that campaigns to stop workers and others being killed in preventable incidents, and supports bereaved families in terms of legal help and emotional support. It was formed by relatives of people killed at work (see www.hazardscampaign.org.uk/fack/about/).

3 And this also indicates that corporate and senior management impunity is dynamic – Pontell et al. (2014) contrast these levels and quantity of prosecutions with the far greater prosecutorial zeal that followed the Savings and Loans crises of the early 1980s.

4 The 'Conduct Costs' project at the London School of Economics has examined 'the costs accrued by ten of the world's leading banks across the UK, Europe and America as a result of misconduct. When put together, and reviewed over the period 2008–2012, these ten banks alone incurred nearly £150 billion for misconduct of various kinds, including mis-selling PPI and other products, manipulating the LIBOR, and failing to observe anti-money laundering rules' (see www.lse.ac.uk/newsAndMedia/news/archives/2013/11/ConductCostsProject.aspx).

5 See Simon (2012) and BBC (2012c).

6 See Bachelor (2012).

7 See Bachelor and Treanor (2012).

8 The Committee on the Medical Effects of Air Pollutants is 'an Advisory Committee of independent experts that provides advice to Government Departments and Agencies on all matters concerning the potential toxicity and effects upon health of air pollutants' (http://comeap.org.uk).

3

CONSTRUCTING THE CORPORATION

INTRODUCTION: THE COLONIAL CORPORATION

The law and practice of combining wealth as a means of generating capital has a long history, which stretches back at least to the thirteenth century. In British history, the first corporations were organisations acting under charters issued by governments or monarchs to fulfil a particular task, such as hospitals or universities. The granting of corporate status by Royal Charter or by Act of Parliament would enable those organisations to present themselves as independent entities or corporate bodies and therefore have an identity that was separate from the individuals that comprised them. Until the beginning of the seventeenth century, all such charters were issued to non-profit organisations.

Amongst the first recognised companies to be chartered for commercial purposes were the colonial corporations, established to open new trade routes and to settle new lands for the English, and latterly, British, Crown. One of the

earliest was the Company of Merchant Adventurers to New Lands, chartered in 1553 to open up a new trade route to China and Indonesia. This company was a partnership of 240 investors, each of who invested £25 in exchange for a share in the company. The East India Company, chartered in 1600, probably the most infamous of the colonial companies, was granted exclusive rights to trade and to establish trading posts in the Indian sub-continent and South East Asia. As such, the East India Company played a crucial role in establishing the forms of trade routes that were the foundation of the British Empire. In order to build the company's capacity for the expansion of commerce and trade, it was given a monopoly on this trade. This monopoly structure provided wealthy individuals with the incentive to invest. Other colonial corporations, such as the London Company and the Plymouth Company, were established to open up trading routes to the Americas. Similar companies established new states in colonial America: Virginia was founded by the Virginia Company in 1607 and Massachusetts by the Massachusetts Bay Company in 1628 (Pencak, 2011).

In the mid-seventeenth century, the East India Company fully adopted a 'joint-stock' model in which investors allowed their wealth to be fully combined by transferring ownership of their stock from the 'partnership' to the company, which was given legal status as a separate entity. Each member of the partnership therefore received shares in the 'joint stock' of the company. The advantage of this to investors was that the company would continue, even if investors withdrew their investment, since shares could be sold or transferred to another investor. The corporation thus had a legal identity separate from the investors. This separate legal identity gave investors some major advantages. On one hand it allowed some legal liabilities that investors would previously have

been responsible for to be held by the 'company', and, on the other hand, the 'company' was exempt from some of the taxes that individuals paid. At first, the East India Company was regarded as a maverick corporation, and the move to a joint-stock model was widely regarded as unlawful since the charter and constitution of the company did not permit this model. Yet the East India Company was not challenged by the British government or asked to rescind its joint-stock model of investment.

The reason for this reluctance on the part of the government to demand legal compliance most probably arose from the central function the East India Company played in the affairs of the British state. The colonial corporation – based upon a joint-stock model – was a phenomenon that arose not only from those advantages to individuals, but also was created out of a common interest between the Crown and a small, wealthy elite. The combination of wealth in the company offered the chance to investors to profit from a monopoly in a new field of commercial activity, and at the same time provided the state with a means of extending its sphere of influence into colonial territories. The English East India Company competed viciously, sometimes violently, with rival companies with allegiances to other states, perhaps most notoriously with the Dutch East India Company. The company played a key role in the exercise of military and administrative control in India, acting as a proxy for English, latterly British, foreign policy for around 100 years.

THE RISE OF THE JOINT-STOCK CORPORATION

The joint-stock model of the corporation certainly had a chequered early history. The South Sea Company, formed in 1711 and chartered to run a monopoly on new trade with

South America, was to precipitate a corporate collapse of monumental significance. Despite Spanish control of much of South America, and of the main Atlantic ports, the value of the South Sea Company's shares price rose quickly as a result of speculation around the certainty of the company's future profits as soon as access to South American posts was secured. As soon as the company was refused access, the share price collapsed and the event, known as the 'South Sea Bubble', precipitated the first stock market crash.

The collapse of the South Sea Company led parliament to take action against this form of speculative investment. The 1720 Bubble Act banned the buying and selling of shares by people who were not involved in the management or direction of the company. The Act led to a number of companies being wound up or taken into ownership of the Crown. In the hundred or so years following the Bubble Act, the issue of charters was largely limited to large-scale public works and building projects. Any partnerships remained generally unincorporated and, although there were numerous unincorporated associations, in practice, parliament regulated those associations and considered legal matters pertaining to them on a case by case basis. Yet, as Harris (2000) notes, it is also important to recognise that the joint-stock company was central to the model of industrial development in some key sectors, including shipping and mining. The proliferation of joint-stock firms in such industrial sectors developed a peculiar set of norms and practices that were outside the realm of common law and were and therefore had a questionable legal status.

The Bubble Act was eventually repealed in 1825 and the practice of investments based on the buying and selling of shares was made possible again. The 1844 Joint Stock

Companies Act allowed this model of investment without the need for a charter. Under the 1844 Act, companies could now simply establish a constitution and apply to the Registrar of Joint Stock Companies for incorporated status.

The 1855 Limited Liability Act created a major advantage for companies and their investors by officially enabling them to limit their liabilities to the sum they invested. In other words, under the Act, owners were no longer responsible for the debts of the company, or for the costs of any legal proceedings that may arise from its activities. We shall return to the significance of this principle below.

The repeal of the Bubble Act and the Limited Liability Act that followed effectively established new possibilities for investors who were accruing profits from colonial trading and expropriation and from domestic industrial expansion. Those investors had a new vehicle to reap even higher returns on their capital: the corporation. Those conditions, stimulated by the broadening of the legal basis for property ownership (the 'shareholder'), led to a rapid growth of the corporation. Robb (1992) notes that between 1844 and 1856, 966 new corporations had been registered. Table 3.1 shows this general trend and its acceleration throughout the early part of the twentieth century in some more detail.

The trends in the growth of the corporation outlined in Table 3.1 relate, of course, to the British context.[1] But we can also observe similar trends in the US, where 335 corporate charters had been issued up to 1800, most for turnpike, canal and bridge construction (Trebing, 1970). Acts that introduced general rules of incorporation were passed in Massachusetts in 1799 and in New York in 1811. Those Acts established the principle of limited liability and, by the 1840s, most states had established similar rules of

Table 3.1 Number of incorporated companies in the UK 1866–1937

Period	*Number of incorporations*
1866–1874	6,660
1875–1883	10,570
1884–1892	19,785
1893–1901	37,172
1902–1910	44,069
1911–1919	53,348
1920–1928	76,575
1929–1937	103,707

Source: table compiled from data in Nelson (1959)

incorporation. Evidence of the comparable impact of this legislative reform in the US in the following century is provided by Berle and Means (1968: 14–15) who note that in 1899, 67 per cent of goods were manufactured by corporations. By 1919, this figure had risen to 87 per cent; by 1932, more than 94 per cent of goods in the US were manufactured by corporations.

Those are remarkable trends that are nothing short of history-making in terms of establishing the limited liability corporation as a key economic, social and political actor. We have already noted in Chapter 1 that the dominant explanations of why the corporation emerged in its *particular* form – that it represented the most efficient means of organising particular economic and social functions – are at best unconvincing and at worst unsustainable. The myth of economic efficiency, in other words, cannot explain the emergence of the corporation, initially in the form of the joint-stock company and then superseded by its dominant contemporary form based upon a complexity of very particular principles of organisation: 'legal personality, limited liability, transferable shares, delegated management and shareholder'; neither

can the myth of economic efficiency explain why the latter elements are now 'thought to be economically indispensable' (Ireland, 2007: 2). Again, mainstream economics explains the emergence of this particular form via claims about efficiency.

In fact, the key drivers for the emergence of the corporation were rooted in the structural conditions of a rapidly developing industrial landscape. During the nineteenth century Britain's GDP rose fourteen-fold, directly as a result of the industrial revolution and the economic power that came with Britain's colonial domination (Crouzet, 2005). This rate of economic growth meant that enormous surplus wealth was accumulated in the hands of the rapidly growing British bourgeois class and this surplus needed to be located somewhere productive; new opportunities to invest were heavily in demand. It was in the joint-stock corporation that those investors were to find such opportunities. The rapid growth of the joint-stock corporation was encouraged initially by the repeal of the Bubble Act, the break-up of monopolies in banking, marine insurance and, not incidentally, the East India Company's monopolies in India and China, which were also broken up at the beginning of the nineteenth century (Harris, 2000). At the same time, there were a number of newly independent Latin American states that offered major investment opportunities, particularly in mining and natural resource extraction, in the City of London (ibid.). By the time of the liberalisation of corporate law in the 1840s and the institutionalisation of limited liability in 1855, savers – both large and small – had a proliferation of opportunities to invest in risky enterprises without endangering their livelihoods (Johnson, 2013). We return to the significance of the concept of limited liability later, but before doing so we turn to examine the wider legal context in which this legal concept was developed, namely the emergence of a system of 'bourgeois' or class-based law.

LAW, LIBERAL INDIVIDUALISM AND INCORPORATION

The social transformation that occurred in the period of industrialisation had profound consequences for the form of criminal law that developed in different jurisdictions across Europe. From the seventeenth century onwards, criminal law adapted to the demands of a society that was experiencing major shifts in social relations of power.

Prior to the industrial revolution, economic dominance and the power to rule rested upon the control of land. Generally, pre-industrial societies were characterised by relations of serfdom, in which peasants worked the land in exchange for the patronage of the land-owner, and by limited manufacturing systems, whereby specialised artisans were the producers of goods in a relatively limited division of labour. In pre-industrial societies, social relations of power were therefore broadly defined by patterns of land ownership; and the form of the criminal law was shaped by the concentrated power of land-owners. The criminal law corresponded closely to the form of property relations that the society took. Thus, in agrarian societies, as Thompson (1991: 261) noted: 'the distinction between law, on the one hand, conceived as an element of the "superstructure", and the actualities of productive forces . . . becomes more and more untenable'. Here, he uses Marx's concept of the 'superstructure' to indicate the forms of institutions that are distinct from, but have their foundations in, the economic base of societies. The law, he argued, was not a structure that existed outside of the system of socio-economic power relations. And in pre-industrial societies the close correspondence between law and socio-economic power was obvious to all:

> For law was often a definition of actual agrarian practice, as it had been pursued 'time out of mind'. How can we distinguish

> between the activity of farming or of quarrying or the right to this land or that quarry? The farmer or forester in his daily occupation was moving within visible or invisible structures of law: this milestone which marked the division between strips; that ancient oak . . . which marked the limits of parish grazing . . . Hence law was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law.
>
> (Ibid.)

The law was therefore *locally* stable and predictable in its connection to the social ordering of property ownership: the law supported the structure of property ownership very directly. But in its very localised character, the law was also *arbitrary* in its capacity to punish (Hay, 2011). The harshest penalties could be administered for the most trivial offences.

The growth of new groups of economically powerful factory owners and merchants in the industrial period – predicated upon a *new* property relationship, on new working patterns and on the mass migration of rural populations into the cities – had profound consequences for the form of criminal law. The old form of arbitrary law, with power vested in local lords and landowners had, as Foucault showed clearly in *Discipline and Punish*, proved itself an unstable and 'bad economy of power' (Foucault, 1991: 79), ill-suited to a post-enlightenment social order. The new social order required a rule of law that gave it legitimacy. This rule of law, formally, at least had to be based upon 'requirements of universality and equity in its application' (Norrie, 2001: 24–6). In order to support a new social system of power, based upon formal principles of liberty and equality, the law therefore had to be *consistent* and *proportionate* rather than *arbitrary*, and at the same time had to meet the demands of the new industrial societies.

Industrialisation brought with it the demand for new forms of enclosure of land and the expropriation of common

lands by the rich (Thompson, 1991). In the period of transition, through the eighteenth century, the *ideology* of a fair and consistent rule of law was necessary to sustain the hegemony of the ruling classes (Hay, 2011). Penal reform and the emergence of a new *urban* economy of punishment were primarily structured around new categories of property offences. The process of urbanisation was therefore imbued with a *legal* significance. This legal significance largely attached to new forms of property ownership that came with the new systems of production and urbanisation. As Linebaugh's (2006) book, *The London Hanged* makes clear, the theft of property became an opportunity to enhance meager wages for many, and, for still more, a necessity for survival. Both motivations were part and parcel of urbanisation. Thus, in order to repel the predatory crimes of necessity, the new property relations not only had to be codified in law, but also the new property ownership patterns had to be *protected* by law. Foucault (1991) noted that losses in theft of property at the end of the eighteenth century in London were large enough to threaten the stability of those new patterns of property ownership. Thus, for example, a number of previously tolerated customary practices, such as the taking of 'sweepings' or 'skimming' the excess raw materials or goods that workers could find and pilfer from factories, workshops and docks, were now dealt with harshly: by prison or by transportation to Australia (Linebaugh, 2006). In short, urbanised capitalist societies brought with them a new 'economy of the power to punish' (Foucault, 1991: 87).

At the heart of this new economy of punishment was the enlightenment concept of the free-thinking and -acting individual. Criminal responsibility was seen as a product of individual rational choice; where an individual had knowingly transgressed the law, punishment by the state became both

legitimate and necessary. The criminal law became chiefly interested in the psychological state of the *individual* – a psychological state of the ability to reason as to an act's commission, rather not any form of motivation for the act.

The embedding of a concept of liberal individualism as a central, defining, concept in the criminal law is key to understanding how the law conceptualises the corporation. If the individual wrongdoers became the main object of the criminal law much earlier than the period of industrialisation, in the twelfth century (Slapper, 1999: 46), it was during the later medieval period that the idea of a legal, fictional person became established. In fourteenth-century England, boroughs and towns could be regarded as having a single 'personality' in their responsibilities to the Crown (such as paying levies or fulfilling particular duties). Broadly speaking, in medieval England, punishments for crimes were very often applied collectively to a social group. In some cases punishments for the most serious crimes such as homicide would be collective imposed on the 'village' or the 'community'. The notion of group responsibility in criminal punishment has abated in recent centuries so that

> [t]he individual has been abstracted from the complex of relationships, such as nationality, class, or occupation, by which she was previously defined. At the same time, society became an abstraction, from its earlier meaning, 'the society of [her] fellows', in the late sixteenth century it began to develop as a thing in itself 'the system of common life'.
>
> (Wells, 2001: 72)

Whilst the architecture of the law's liberal individualism was fully constructed in the period of industrial development, as Wells has observed, the legal construction of the individual as an absolute – wholly disconnected and separate from the

communities or social groups in which it is situated – has more distant origins in the sixteenth century.

The criminal law of the eighteenth/nineteenth centuries placed the individual full square at its centre. Thus, the state of the individual's mind – *mens rea* – became a key concept in attributing criminal liability, rather than, as Norrie (2001) notes, the concept of motive, or any other concept that could have revealed the social content of a criminal act. The foregrounding of the concept of *mens rea* – coupled to the removal of the 'motive' or social cause of crime in the process of attributing guilt here was central to the development of the modern concept of crime. Those processes were *also* central obstacles to legal constructions of the modern concept of corporate crime. Just as the liberal individual became consolidated as the primary object of the criminal law, the notion of 'collective' crimes generally, and those applying to partnerships and corporations particularly, were absented from the new economy of punishment. And it is to how the corporation was constructed in law that our discussion now turns.

THE LEGAL FICTION OF CORPORATE PERSONHOOD

The process of incorporation, as the term suggests, refers to the formation of a corporation. In corporate law, the term incorporation essentially refers to the creation of a legal subject that can be recognised as having a single identity or 'personhood' that is separate and distinct from the human persons that make up the corporation (its owners, directors, managers, employees and so on). An incorporated organisation may take the form of a business, a non-profit organisation, a public corporation such as a city or town, or even

an educational establishment such as a university – albeit that the focus of this text is upon business corporations constructed purely for the basis of profit-making, a defining characteristic that separates the private business corporation from other forms of corporate entity.

The period in which the corporation grew the fastest was the mid–late eighteenth century, when a series of legal reforms enabled the surplus capital produced in the factories and the colonies to be re-invested in corporations of various types. As we saw earlier in this chapter, the limited liability corporation in this period became the main channel of investment for newly acquired industrial wealth, as the discussion around Table 3.1 indicated. Crucial in its historical formation was the development of the corporate structure in a form that enabled it to limit the liability of owners or shareholders.

The principle of combining wealth in one entity – the corporation – brings with it the possibility that responsibility or *liability* can also be combined – or in other words absorbed collectively by the owners or investors. This possibility is known in its different forms generally as joint or several liability, and is established in situations where investments are combined in a separate entity such as a corporation. As the history of the corporation set out in earlier in this chapter demonstrates, for the purposes of legal definition, we can make a distinction between business organisations that are incorporated in law in order to limit their liabilities to the sum invested in the corporation, and other business organisations that are formed as 'partnerships', where investment – and the liabilities for that investment – may be combined by one or more parties, and both profits and losses are shared.

The key advantage to investors of this creation of the corporate form as a single entity – or what is commonly known as 'corporate personhood' – is that it can bring to life the principle of *limited liability*. Limited liability reduces the financial risks to which the owners or shareholders of the corporation are exposed: investors can only lose the value of capital that they invested in the first place, so that, if the company incurs losses higher than the value of the sum invested, then the owners or shareholders bear no responsibility for this loss. This means that investors will neither be made to pay the full financial losses of the corporation, nor be made to pay for the damage caused by the corporation when social harms are caused.

Paddy Ireland has described this process in fine historical detail, and has argued that prior to the nineteenth century, 'there was no conception of the "company", even if incorporated as something with an existence entirely of its own, as an object completely separate from its shareholders' (Ireland, 1999: 39). Rather, the company *was* the embodiment of the shareholders. As we has seen earlier in this chapter, a series of Acts of Parliament introduced in the mid-nineteenth century was important in that it conferred the legal status of 'corporation' upon the joint-stock model, which was an economic concept (Ireland, 2007: 44). A series of court judgments from the mid–late nineteenth century on further consolidated the idea that the company was no longer a 'plural entity' but was an entirely separate entity. Since people no longer formed themselves into companies, but formed companies, the company was now 'a singular entity, an "it", an object emptied of people. Both the company and the share had been reified' (Ireland et al., 1987: 159).

As Glasbeek (2013) has noted, an important dimension of the corporate personhood and limited liability doctrines is that separate companies can be established to limit the

losses of owners in cases where the social cost of business is high. He clearly shows how this happened in two recent cases in Australia: the disaggregation of the asbestos firm James Hardie to mitigate potential liabilities for causing asbestos-related diseases, and the establishment of a separate corporate entity with sole responsibility for employing workers within the Patrick Stevedores group which enabled the casualisation of those workers. Thus, to

> organize a large firm as a *corporate* group, however, is more attractive because, in addition to the operational benefits, it permits the firm to determine how it will insulate itself from some of the costs attributable to materialized risks that occurred because of its activities.
>
> (Ibid.: 4)

Another way of thinking about those liability protections for owners and investors is that they erect an invisible barrier that effectively separates the real people who own the corporation from the corporation itself. In legal parlance, this is commonly known as the 'corporate veil'.

Paradoxically, then, the limited liability corporation – based on the notion of the corporate 'person' – has a *dehumanising* effect. In other words, the primary function of corporate personhood is actually to depersonalise the human consequences of the corporation: to remove its human content. The corporate form removes the necessity for the human consequences of its decisions to be considered at all by its owners. The next chapter in the book (Chapter 4) explores how this process of depersonalisation has been understood in key commentaries on the relationship between the corporate structure and its ability to act responsibly. For the time being, it is worth reflecting that brief review of legal history has therefore taken an odd twist. For, in the same period that

the law's reification of the individual as its primary subject began to unfold, a notionally separate body of law – corporate law – emerged re-imagine the corporation in the image of the individual for legal purposes of escaping *financial* liability. As we will discover in the following section of this chapter, the corporate person has also become a useful device in shielding the corporation's *criminal* liability.

THE CORPORATE *CRIMINAL* PERSON

Thus far we have seen how corporations gained the status of legal personhood, and also the ways in which the 'corporate veil' enables real people to escape financial liability and social responsibility. In this section of the chapter we explore how the individualising criminal law categories – which, as we have seen, are wholly ill-suited to apply to the corporation – have been clumsily and largely unsuccessfully applied to the corporation, before exploring what we call a 'de facto' corporate veil that operates in criminal law.

As we have noted above, the state of criminal mind, *mens rea*, emerged in English law as the key concept in attributing criminal liability; and in this central legal development, the criminal law became focused upon the psychological state of the *individual* in the immediate moment that the act is committed. This embedding of a concept of liberal individualism as a central, defining, concept in the criminal law is paradoxically key to understanding how the law conceptualises the corporation. The architecture of the law's liberal individualism was fully constructed in the period of industrial development; therefore it is still possible to find in key legal texts before the eighteenth and nineteenth centuries, a more open approach on questions about the collective criminal responsibility of groups and organisations. One example is

to be found in the second edition of George MacKenzie's *Law and Customes of Scotland in Matters Criminal*, published in 1699. In England, as Slapper (1999: 50) has observed, key legal texts indicate that the courts had begun to renounce the possibility of corporate criminal liability form the late seventeenth century onwards.

As we have already noted, the course of legal history in the UK and beyond generally took the latter path; the centrality of *mens rea* was crucial in ensuring that *corporate* crime evolved as a peripheral concern of law. This is not to say that the prosecution of the corporations for its crimes was not possible, or that it did not happen. We will discuss the turn towards a particular notion of corporate crime ('corporate manslaughter') later in this chapter, but certainly there was a concerted attempt in the nineteenth century across a range of offences, to 'differentiate' corporate crime from 'real' crime involving individual protagonists (Norrie, 2001).

The different mental states captured by *mens rea* are normally delineated across the following categories: intention; knowledge; recklessness; or criminal negligence. It is normally – though not always – the latter three categories of *mens rea* that can theoretically be applied to corporations. This is because as we pointed out in Chapter 2, in the case of corporate crime, it is not always the case that individuals can be said to have clearly intended the consequences of their actions. In relation to corporate crimes, it is not often the case that an act or omission is intended to injure or kill. Often in those cases, risks to workers or the public might be taken without any clear intention to kill or maim, but rather are risks taken in the knowledge that harm is likely to occur. The distinction between intention and other categories of *mens rea* (knowledge; recklessness; or criminal negligence) is captured in the distinction between 'murder' and 'manslaughter'. The

offence of murder normally implies intent to kill, whereas manslaughter normally implies that a death has arisen from reckless or negligent conduct. This is significant to our discussion since crimes involving negligent or reckless behaviours are generally treated with a lower degree of social and legal opprobrium, they are attached to less harsh penalties, are more easily mitigated and so on, in comparison to crimes involving intent, such as murder. Ultimately this means that those corporate crimes – which typically involve recklessness or criminal negligence – are regarded as less serious than those involving clear intent (Reiman, 1995). Moreover, *mens rea* as an individualising concept, prioritises criminal *acts* rather than criminal *omissions*. Within a corporate boardroom, these each work to remove the potential for crime: as a collective entity, senior-level decisions that impel action or inaction are generally not reducible to any one individual; moreover, it is often harder to identify the lack of action on the part of boardroom – or a series of negligent or reckless acts occurring at different points in the hierarchy of the organisation – than it is to identify a particular *act* that led to a crime or a conspiracy to commit a series of criminal *acts* (Slapper and Tombs, 1999).

Yet the distinction between crimes of intent and crimes of negligence or recklessness does not, for us, imply that corporate crimes can be regarded as somehow less serious, or deserving of a differentiated treatment in law. As Reiman (1995) implies, indifference may be the cause of far greater actual or potential harm than crime (see also Pemberton, 2004). Thus, although in many cases there is no clear intent to harm victims directly, corporate crimes occur under conditions that require of greater pre-meditation and planning. It is therefore arguable that such crimes should, in the context of the corporation's own claims to rationality (Chapter 1),

involve a more heightened awareness of the consequences of actions than most serious violent offences that are processed in the criminal justice system. Typically, the causes of corporate crimes can often be linked directly to the demands of cost-driven managerial regimes. Workplace 'accidents' are rarely merely 'accidents', but commonly result from pressures upon employees through time or resource constraints, poorly designed or maintained equipment, the absence or lack of robustness of basic safety equipment, or the use of casualised, overworked or under-qualified staff. Each of those can be understood as consequences of profit-motivated decisions made, or cultures set, by managements (Tombs and Whyte, 2007). Similarly, the absence of checks on the quality and safety of food being used by food outlets and in supermarket products are generally not simply 'mistakes' or 'oversights' but result from management decisions not to impose rigorous checks on suppliers, or not to check the quality and safety of food as it enters the production chain. Again, those decisions are often the consequences of profit-motivated decisions made, or cultures set, by managements. In those terms, corporate crimes can very often be traced back to the carefully planned decisions of accountants and managers. Notwithstanding the stereotypes of crime fiction, most murders, on the one hand, do not tend to arise from premeditated, calculating plans, but are often the result of a pattern of violent interactions, commonly between individuals who know each other. Corporate crimes, on the other hand, are, by definition, committed in cold blood, are often committed in order to advance financial goals or maintain profitable systems of production, and involve circumstances that often unfold over a long period of time.

We would therefore argue that the centrality of *mens rea* to the process of attributing criminal liability is not merely a

function of the seriousness of the crime per se, but a function of a very particular historical development that located the individual as the principal legal subject of the criminal law.

In a famous attempt to understand how a corporate structure could be understood in law to have the 'guilty mind', or *mens rea*, necessary to commit crime, a leading British twentieth-century jurist Lord Denning (1975) famously made the following judgment:

> A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work. . . . Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and it is treated by the law as such.
>
> (H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons)

The concept of *corporate mens rea*, which evolved in the English courts and was followed by other common law jurisdictions throughout the 20th century, then, assumed that a corporation cannot be held liable unless an individual within the organisation can be identified with sufficient knowledge of the offence and with the necessary responsibility and authority in the organisation. In other words, *corporate mens rea* depends upon identifying a particular 'controlling mind' within the organisation that can be said to be responsible for the offence. Latterly in a key case, Viscount Dilhorne in the case of *Tesco Supermarkets Ltd. v. Nattrass* defined the controlling mind:

> [W]ho is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders.

The principles established in those judgments became known as the 'identification doctrine'. In other words, a real person with the necessary degree of knowledge and with sufficient authority over the acts or omissions that led to the offence must be identified before the corporation can be found liable. The identification doctrine was applied in the English courts in three cases in the 1940s, and then in one in the 1960s (Slapper, 1999). Since then very few cases have been able to apply those formulations of corporate criminal liability in any meaningful way. In the string of cases of the 1990s and early 2000s where the identification doctrine was applied, and corporate culpability was openly recognised by the court, there was a failure to apply the principle. Those cases included the sinking of the P&O ferry, the 'Spirit of Free Enterprise' at Zeebrugge and the Transco gas explosion that killed a family of four in Larkhall, Scotland.

The key problem that has been experienced in the practical application of the identification doctrine is the difficulty of actually identifying one individual who could be shown to be negligent or reckless and, at the same time, could be said to constitute the controlling mind of the organisation. We have argued elsewhere (Tombs and Whyte, 2007), the identification doctrine can be understood as an extension of the notion of 'corporate personality' since it establishes the corporation as a separate entity from the directors and managers who make decisions on behalf of the corporation. In criminal law, there is therefore a second 'de facto' corporate veil that shields directors from liability. This de facto criminal corporate veil is much

more clearly observed in the sections of the criminal law that have evolved to attribute liability for corporate violations: regulatory or administrative law (Whyte, 2015b). It is to a discussion of how the 'criminal corporate veil' works across a whole range of 'regulatory' offences that the following section of the chapter turns.

THE CRIMINAL CORPORATE VEIL

One of the first problems with talking about corporate *crimes* is that it is only rarely that we are encouraged to think about the criminal activities of corporations as real crimes. They are described in an anaesthetising language that talks of 'scandals' rather than crimes, of 'mis-selling' rather than theft or fraud, and of 'accidents' rather than murder or grievous bodily harm, no matter the degree of complicity, or the extent of injury involved (Wells, 2001: 10). A key way in which this social construction is sustained is in their policing. Corporate crimes are dealt with by specialist agencies that are not generally recognised as part of the criminal justice system. The regulation of corporate crime is normally the responsibility of quasi-autonomous, publicly funded agencies. Those agencies may be responsible for regulating particular types of offending (for example, the HSE and the Environment Agency are responsible for safety and pollution/waste offences respectively), they may be responsible for particular industries (for example, the Prudential Regulation Authority and the Financial Conduct Authority are responsible for regulating banking and finance conduct, and Ofgem is responsible for monitoring price and quality of service in electricity and gas supply).

Historically, business offences have tended to be recategorised as something other than 'crime'. Although those

crimes are prosecuted by the state in criminal courts, they are very often are described as 'regulatory' or administrative (Gobert and Punch, 2002; Tombs and Whyte, 2007). The term 'regulation' suggests the control of something other than real crime. Indeed, it is possible to find established texts on regulation that hardly mention the role of the criminal law at all, or seek to establish regulation as an entirely separate sphere of legal control (for example, Prosser, 1997: 4–6). This view endures, despite the fact that the key regulatory laws (for example the Health and Safety at Work Act 1974 and the Environmental Protection Act 1990) are criminal law statutes. None of this is meant to deny that there are important legal differences in the form of criminal law that applies to corporate crime.

In order to understand the origins of this process of legal differentiation, we can learn a great deal from the emergence of the early laws that were designed to control corporate crime. The Factory Acts of the nineteenth century were introduced in order to provide protections for factory workers against long hours and unsanitary conditions. The history of the Factory Acts uncovered by Carson (1979, 1980a and 1980b) showed how the test of *mens rea* was removed in 'factory crimes' (the crimes committed against the Acts by the factory masters) to produce a new principle of – 'strict' – liability. In law, strict liability is a legal standard that imputes liability to a person regardless of their culpability. In terms of our discussion, strict liability is important because, in offences to which it applies, it effectively removes the *mens rea* test. The form of criminal law in the case of factory crime was ultimately shaped by dominant class interests. Whilst the demands for strict enforcement of the law were strong, a mixture of the intransigence of the factory masters, the unwillingness of the judiciary to enforce the law – and impose sentences that could potentially mean imprisonment – against

'respectable' members of bourgeois society, and the difficulties faced by factory inspectors in enforcing the law ensured that 'factory crime' attained a wholly ambiguous status. The introduction of a different category of culpability, and therefore a secondary class of 'strict liability' offence, allowed the crimes of the factory-owning class to become conventionalised and understood as something other than 'real' crime (Carson, 1980b). In other words, the process of conventionalising factory crime represented a key moment at which corporate crime became re-imagined into a separate 'regulatory' domain.

If we take the argument made by Carson – that strict liability allowed factory crime to occupy a definitive territory in which it could be regarded as 'not real crime' – a step further, then we can see how in the case of factory crime, the effect of this legal invention of strict liability was to sidestep the thorny issue of attempting to assimilate the crimes by factory owners against their employees into the mainstream system of criminal rules. Thus, we could argue that a crucial addendum to Carson's work – and more generally to the legal scholarship that analyses this period – is to understand a rather separate effect that occurred when the concept of strict liability removed the 'mental element' of the offence. This effect was that this type of criminal law could eventually be applied relatively unproblematically to corporations (as well as to individuals). In other words, strict liability established the basis for the company – the corporate person – to be held liable for its crimes. Indeed, many of the factory owners in Carson's study operated under the title of a 'company'.[2] This economy of illegality that Carson, Norrie and others point to was, then, actually further entrenched as the corporate form grew in sophistication through the nineteenth century.

Slapper (1999) notes that a related principle of strict liability was used to impute criminal liability to 'the corporation'

in the mid-nineteenth century in cases where companies were prosecuted for their failure to satisfy statutory duties. The failure to build an important public work such as a bridge or a canal could be held to be a criminal breach of duty by the corporation: '[t]hus the courts were not taxed with the problems of finding any mental element . . . in a non-human entity' (ibid.: 51). Once we reach the early twentieth century, strict liability is a concept that features across regulatory offences and, crucially, is the mechanism that routinely enables the attribution of liability to corporations in the criminal courts.

This enabling of *corporate* rather than *individual* prosecutions provides the single most important mechanism for guaranteeing the impunity of individual managers or directors within the corporation. By the beginning of the twenty-first century, as we have shown elsewhere, convictions of individuals for offences that result in the killing and injuring of workers, represented less than 3 per cent of all health and safety prosecutions (Tombs and Whyte, 2007). We have reached the point that the criminal corporate veil has become part and parcel of regulatory law. The criminal corporate veil has undoubtedly had some cultural impact on how we conceptualise both the seriousness of corporate crime and the culprits. The way with which large-scale fraud in the banking sector is dealt with provides us with a key case. As Charles Ferguson (2012) has noted, many of the key events surrounding the financial crash in 2008 involved activities that are unambiguously crimes. His analysis focussed as it is upon the role of the banks in deliberately precipitating the collapse of bond markets, in money laundering and in a range of securities frauds, shows that, although many high street banks and investment houses have faced multi-billion dollar fines for their predation and corruption, the total of those fines amounts to far less than 1 per cent of the

financial sector profits since 2008. Although there has been an ongoing debate about the enforcement of the law against criminal individuals (for example, Treanor and Rankin, 2013; and see our discussion in Chapter 2) such activities in the banking sector have, however, generally been dealt with by fines against the banking corporations. Thus, for example, LIBOR rate fixing, the major money laundering charges against the banks in 2012 and 2013, were dealt with by multi-million pound fines levied on the corporate person, rather than its senior officers or indeed its shareholders. In summary, the de facto corporate veil has been held intact even through this remarkable period of exposure for the finance sector (Whyte, 2015b). Where there have been quasi-criminal sanctions, they have led to the prosecution of an insignificantly small number of individuals, or have led to large fines on corporations that are large enough to withstand those fines without damage to their operation.

Precisely the same principle is at work in Corporate Manslaughter and Corporate Homicide Act, introduced in the UK in 2008. In the first five years of its existence, the Act has generated just three convictions, all in fact against small companies that could have been successfully prosecuted under the old common law offence of manslaughter (Tombs, 2013a). The Act itself represents a key example of how a concept of corporate personhood is used in a way that is directly analogous to the corporate veil. The Act explicitly excludes the possibility of senior managers being held individually liable. Section 16 of the Bill specifically excludes offences that will apply to individuals and notes that: 'an individual cannot be found guilty of aiding, abetting, counselling or procuring an offence of corporate manslaughter'. This clause is particularly interesting since most criminal offences can be prosecuted if someone has been complicit in

the crime by aiding and abetting. It is significant in the context of this clause that the Institute of Directors moved from opposition to the government's reform proposals to vociferous support for a change in corporate manslaughter law (see, for example, *The Safety and Health Practitioner*, December 2002: 4) in 2002, just as it became clear that the Act would apply exclusively to 'corporate' – rather than 'real' – persons.

At the heart of the UK's Corporate Manslaughter Act, we find a de facto corporate veil (Tombs and Whyte, 2007), which protects both the owners and the senior officers of the company. In so far as it upholds this de facto form of the corporate veil in criminal law, it merely replicates the main impetus of corporate law that we can observe in its early development from the eighteenth century onwards.

CONCLUSION

The corporate entity in criminal law, as in corporate law, is envisaged as an artificial, or legal 'person', distinct from the various groups of real human persons that make up the various layers and branches of the corporation. As we have shown, and shall further develop in the chapter that follows, this corporate 'person' enjoys immeasurably enhanced rights in law as a subject in the criminal process. The criminal justice process takes some odd twists and turns in order to guarantee that individual directors and senior managers are unlikely to be held liable for corporate crimes. And yet this twisting, turning, almost tortuous legal complexity adds up to a very simple outcome: a form of criminal law that can barely mask its inherently structural class bias. This is not a class bias that is simply guaranteed by decisions in the courts (although at certain points in history it has been) but that is written into the fabric of the legal form of the corporation

and the form that criminal law has adopted. This process is in turn underlined by a clear preference for *corporate* as opposed to individual prosecutions in regulatory cases. Thus, the corporation can act as a convenient shield for the key decision makers in the corporation. The corporation can effectively absorb the punishment, normally in the form of a fine, while its directors and senior managers are relatively rarely exposed to sanction.

This contemporary fact has been placed in a broad and historical context, invoking the development of industrial capitalism in general and of an appropriate system of capitalist law in particular. In the seventeenth and eighteenth centuries, the criminal law, and its enforcement mechanisms, kept pace with the force of social change, and indeed the development of new legal concepts and categories were required to adapt to the new forms of work, of property ownership, of family structure and so on. If this is clear in the development of the criminal law, it is equally so in the development of corporate legal form. Certainly, the rise of the corporation was facilitated by the development of corporate legal concepts. Indeed, new legal categories and forms of regulation were necessary to boost the expansion of the corporation, particularly in the mid–late nineteenth century. Yet, when the corporate form collided with the criminal law, the path of development is not quite so clear. Max Weber, in *Economy and Society*, argued not that the form of economy determined the form of law, but, more subtly, that 'economic situations . . . merely provide the opportunity for the spread of legal technique if it is invented' (Weber, 1978: 687). This is an accurate characterisation of the development of the way that the criminal law meshed with the legal form of the corporation thorough the nineteenth and

twentieth centuries. For this is perhaps one of the most contradictory fields of law. It is the place where legal persons confront real people in courtrooms, and it is the place where, very often, legal persons provide a structure of impunity for real persons. As we have argued, such contradictions are temporarily resolved using the strangest of de facto mechanisms. And ultimately, the roads that lead us away from the contradictions often, if not always, lead to sanctuary and impunity for corporate offenders.

Ultimately the legal contradictions that we have looked at in historical detail are rooted in the failure of law to resolve the irresolvable problem of capitalism: how to plausibly claim that the law offers social protection whilst at the same time providing an infrastructure that enables a minority to profit and stay rich. Law, through seeking to resolve the contradictions embodied in the corporation, merely creates new ways of refining corporate power. In the criminal law, this is exemplified in the structural form of impunity that the corporation itself now represents: a de facto corporate veil. We turn in the next chapter to explore this contradiction further as we explore what this 'structure of impunity' means for ongoing debates about 'corporate social responsibility'.

NOTES

1 According to Companies House, in July 2014 there were '3 million limited companies registered in the UK, and more than 400,000 new companies are incorporated each year' (www.companieshouse.gov.uk/about/functionsHistory.shtml).

2 Personal correspondence with W.G. Carson, 4 March 2013.

4

THE CORPORATION AS STRUCTURED IRRESPONSIBILITY

INTRODUCTION

In the previous chapter we detailed how the corporate form was created in order to make it responsible to its shareholders and accountable for deviations from constitutional imperatives towards efficient business. In economic and fiduciary terms, then, this is quite a tightly drawn form of responsibility. But the series of legal adjustments that produced the structured responsibility of the legal corporate person was part of a double movement: the rise of the corporate person was accompanied by a process of *depersonalising* the corporation; that is, setting it free from, independent of, and indeed structurally separate to, the actions and decisions of its senior managers, directors and shareholders.

The corporation-as-legal-person produces a series of material and legal consequences, as we have seen, and as we shall further consider here. But it also has considerable ideological support and effects. The idea of the anthropomorphic corporation – the metaphorical person-writ-large who thinks,

decides, acts, innovates and so on – is one that holds considerable sway on the popular and, as we have seen, legal consciousness *and*, indeed, legal practice. But it is clear that in reality the corporation is not a person, and can neither think nor act as a person, while legal personhood is historically and contemporaneously deployed in ways that generally allow corporate entities to evade legal accountability at the very point at which legal reforms often seem on the threshold of facilitating such accountability. If, then, the corporation is a person in legal fiction only, it is worth enquiring into how corporations make decisions – and, indeed, how they *represent themselves* as decision makers. This chapter considers both the ways in which the corporation makes decisions, and how this necessarily generates a-social, irresponsible outcomes.

CORPORATE DECISION MAKING

A key issue here is the extent to which the corporate form, as opposed to senior individuals, directors and senior managers, represents corporate decision making and its relationship to corporate action. To preview our argument here: while corporations – through their directors and senior managers – make decisions and operationalise these in a myriad of ways that clearly fall far short of any standard of rational action, it is crucial to understand that that the corporation represents itself externally and internally as a rational, decision making, indeed relatively unified, entity (Keane, 1995).

It is certainly the case that we can ascribe the aspiration for rationality to the corporation – which is not to argue that this aspiration is always achieved, so that no particular corporation can or does in fact act entirely rationally at all times. Internally, a corporation generates inward and outward facing legitimacy through its efforts to act as a rational

entity: it has a formal structure, which includes formal divisions of labour, mechanisms of governance and lines of accountability within those mechanisms, and formal means of reporting; it has established mechanisms for distributing rewards, benefits and censures; it generates strategic plans and operates through a plethora of written documents, plans, procedures, policies and so on; it sets targets; it generates a mass of information. In all of these ways, one might argue, it continually seeks the future-oriented control of unpredictability and uncertainty (Box, 1983) through mechanisms based upon formal, calculative rationality. A key mechanism for achieving these goals is the development, use and/or access to often highly sophisticated information-gathering systems with which to make informed operational and strategic decisions. Both companies and their directors are in a position to – indeed are required to – make decisions that, if not based upon perfect knowledge, are based upon a range of knowledge resources available to them, which allow them to determine options in a calculative sense. Those resources include financial results and projections, market analyses, probability and risk calculations about future market conditions and so on. And, indeed, these resources are among the key characteristics used by, for example, ratings agencies, business analysts and journalists, and thus actual and potential investors, to make judgements about corporations. That is, their health and viability is measured against indices of rationality. And in turn, any corporation seeks at the very least *to present itself* to external environments as rational.

Now, there is no doubt that if corporations do seek to act on the basis of rational decision making, then at times they produce outcomes that are, in these terms, irrational – from the collapse of Enron through to the mass killings at Bhopal, these were clearly neither intended nor desirable outcomes

for the corporations and shareholders involved; 'the corporate entity' would have better avoided, and indeed suffered to some extent from not avoiding, these outcomes.[1] But this does not represent 'proof' that corporations had not struggled towards more rational decisions that would have preempted the deleterious outcome(s), merely that they failed in these efforts.

Thus, if corporations strive towards acting as rational entities, they do not always manage it. Corporations are not always capable of engaging in accurate forms of calculation; somewhat differently, even where they engage in accurate forms of rational calculation, they may not be able to act successfully upon such calculation. More generally, as we have noted throughout this text, corporations do not always act as *unified* rational entities (Pearce and Tombs, 1993; Reed, 1992; Silverman, 1970); there exist tensions and conflicts within and between various levels of management, these conflicts both reflecting and generating tensions between organisational 'goals' (Kreisberg, 1976; Mintzberg, 1979; Teulings, 1986); decision making tends to be characterised by bounded rationality, whereby 'deadlines, limited participation and the number of problems under consideration' lead to decisions based upon limited information (Vaughan, 1996: 37; Simon, 1976); and managements fail to act strategically in a variety of business areas (Marchington and Parker, 1990; Miller, 1987; Purcell, 1989). There is a wealth of empirical and conceptual evidence that attests to the fact that most corporations do not approximate this mode of rational calculation most of the time.

The question then remains, how exactly does the organisation function? Kreisberg (1976) has argued that, in practice, there are three 'ideal-typical' forms of corporate organisation. One is the 'rational actor model', in which the corporation

is controlled in a centralised, hierarchical, authoritarian way. There is an imperative specification and coordination of, at least, the key tasks of 'suitably' qualified employees. The control of the latter is facilitated by the exploitation of their 'bounded rationality' (shifting and unclear preferences, limited information, limited knowledge of cause and effect relations) and by 'premise setting' (i.e. by defining what are 'reasonable' goals and 'good' reasons for the 'normal' ways of dealing with situations; that is, the common sense organised by and imbricated in the dominant ideology).[2] The controllers of these corporate bureaucracies, however, are also subject to 'bounded rationality'. This can have positive consequences for those who control the organisation, since it can generate unexpected but constructive changes that they can capitalise upon by modifying their tactics to take advantage of these new situations (Palmer and Pearce, 1983).

They may also accept the impossibility of directly controlling all of a large organisation's many activities and therefore deliberately decentralise their organisation, and let it function according to the second of Kreisberg's models, the organisational process model. In this model, while central management establishes goals and standard operating procedures, a great deal of immediate decision making takes place at the more local level.[3]

Kreisberg's third model involves 'bureaucratic politics', where the organisation's structure, its goals, its criteria for success and for the selection of top management may be affected by internal conflict. These may be between the different professional groups within it – engineers, research scientists, lawyers, sales personnel, accountants and so on[4] – and/or between its different component divisions, whether functional, geographical or product based. Sometimes, these conflicts may be so pervasive and unresolved that the

organisation itself is characterised by a general, and potentially dangerous, disorder. A number of theoretical and empirical analyses of capitalist corporations certainly suggest that such conflicts are far from rare (Cutler et al., 1977; Thompson, 1982; Burns and Stalker, 1961), which, however, is not to say that they never get resolved. First, whilst senior management may have some flexibility and discretion, there is no evidence that they ever pursue anything but some combination of profits and growth; importantly, profit and growth are predicated upon successful control within corporations. Second, a key to how disputes about leadership within organisations are resolved is provided by turning to analyses of the problems posed for organisational priorities by changes in the external environment. These may raise questions about the competences required of the top executives in order to achieve these goals of growth and profits.

Further, with the emergence to dominance of financialisation as characteristic of economic (and, indeed, social and cultural) life (Epstein, 2005), the finance mode of control of the corporation is now firmly established. Chima and Langley define financialisation in terms of three processes: a 'finance-led growth regime'; politically enabled, increasing opportunities for financial speculation 'that liberalise and deregulate markets and individualise welfare provision'; and patterns in household saving, occupational pension provision and the revolution in so-called 'financial services' since the 1980s. Growing numbers of the population hold a stake, however meagre, in the 'mass investment culture' (Chima and Langley, 2012: 412–3). But the significance of financialisation is pervasive. The material realities of the dominance, spread and 'success' of finance are likely to lead to the logic of finance 'getting wired into a growing number of economic sectors' (Sassen, 2013: 27). Financialisation has international

dimensions and effects not least through distorting the flow of capital (Tabb, 2012), has (detrimental) effects upon corporate cultures and forms of corporate governance (Ireland, 2010), and may lead to a more generalised financialisation of culture, especially in the UK and US, the developed capitalist states where neo-liberal programmes (see Chapter 1) have been furthest pushed.

So, while there is no doubt that there exists 'a diversity of styles of organisational life' (Fisse and Braithwaite 1993: 122), or that these diverse styles do have real effects for the production and potential regulation of harm and crime (ibid.), once one examines a particular organisation, the corporation, then there are equally some essential features of that organisation that a focus upon complexity and difference tends to obscure. Thus even more important than organisational forms are organisational modes of control. The major corporate actors, especially in the US and the UK, have long been driven by a concern with short-term gains (Fligstein, 1990; Hutton, 1995; Williams et al., 1990) and a continuous obsession with 'the bottom line' – tendencies that are exacerbated by the finance conception of control. Moreover, major corporations are increasingly involved in diverse markets, often with no long-term commitment to staying in them.

In other words, while we do not dismiss the plausibility of diverse views of what actually happens within the hidden world of the corporate sanctum, the key point remains: *whether* corporations actually act rationally, or according to some 'organisational politics' or 'political citizen' rationale (Kreisberg, 1976), or muddle their way through in decision making terms via some 'garbage-can' model of decision making (Cohen et al., 1972), they represent themselves as thoroughly rational entities. This representation – whether it is

an aspiration or obfuscation – is essential to their outward facing existence also: it is the basis upon which, for example, analysts make crucial judgements about their share prices and upon which investors decide whether or not to commit or withdraw funds. Moreover, and crucially, this representation of at least the potential for corporate rationality is also central to claims made by them and for them as regards appropriate forms of regulation – specifically, regarding their capacities effectively to self-regulate. In other words, and to be clear: for us, *whether or not 'the corporation' engages in activities based upon decision making processes that approximate rational calculation, it consistently strives to do so and it consistently represents itself as capable of doing so*. These are integral aspects of corporate existence.

A further effect of this mode of operation and/or representation is also that corporations, as rational, calculating entities, are neither moral nor immoral 'actors' – even if the effects of their activities can appear as if possessing, variously, one or other of these characteristics. It therefore follows that claims that corporations act on some moral basis confuse contingent outcomes with the necessary form and function of the corporate entity. We address such claims below, where we consider corporate social responsibility (CSR) discourses. For now, it is worth recalling the argument of Box (1983), to the effect that the nature of the capitalist mode of production forces corporations to attempt to exert as much control as possible over their operating environments, which pushes them into violating those regulations that seek to prevent individual corporations from using their corporate power to exert certain forms of control over consumers, workers, governments, other corporations and so on (ibid.). Sutherland expressed this pithily when he referred to corporations as

'rationalistic, amoral and non-sentimental' (Sutherland, 1983: 236–8).

THE SPIRIT OF ORGANISED IRRESPONSIBILITY

Berle and Means argued in *The Modern Corporation and Private Property* (1968) that the new structure of the corporation represented the dawn of a major new form of property relations – a claim we discussed in detail, not least through the work of Ireland (1999, 2007, Ireland et al., 1987) in the previous chapter (Chapter 3). Whilst the factory system of the nineteenth century brought large numbers of people under the control of the new factory-owning elite, the corporation enabled wealth to be concentrated under the management of the new property-owning elite. As we have seen, the key dynamic in this new property form is the separation of those who have legal ownership of corporations from the other elements of the corporation (its senior managers and directors, its workers and the corporate 'person'). Berle and Means argued that the key separation was between the owners and the managers who control the corporation.

Their argument was that the corporate form, based upon this separation, was also based upon an unravelling of the 'unity' that is traditionally embodied in property. The traditional logic of property involved two principles. First, the investment of wealth in property is a risk that is borne by the owner; and second, the use to which property should be put is decided by its owner. In the modern corporation, only the former principle remains intact, since the owner becomes 'a supplier of capital, a risk-taker pure and simple' (Berle and Means, 1968: 297).

The segregation of ownership and control does not merely proceed on a formal, legal, basis, but also results in the

separation of the *interests* of shareholders and senior managers. The consequence is that shareholders resign their right to guide the fate of the corporation, and directors work primarily for their remuneration, rather than directly for the benefit of the corporation.

The key effect of separating ownership from control, then, has been to separate a general overview role, fulfilled by the owners of the corporation, and the day-to-day running of the corporation, fulfilled by the senior managers. Yet in practice, this separation means that owners are actually not very often involved in this general overview role at all. Where this occurs, then the separation of ownership and control is complete, and the role of the shareholder is reduced to that of a pure investor, or, as we have seen, simply a 'supplier of capital'.

The roles of shareholders and senior managers are very clearly proscribed in law: general strategic decisions about what the corporation does and how it operates are, by law, taken outside the boardroom and made in annual meetings of shareholders. It is shareholders' meetings that ratify decisions about how to distribute profits and losses and about key investment decisions. The directors of the corporation (those who are charged with its overall management at the most senior level) are given particular responsibilities in law, known as fiduciary duties. Those responsibilities ensure that their discretion to take decisions is ultimately limited by their primary duty to ensure the success of the corporation, which is effectively the same as acting primarily in the interests of the shareholders (Parkinson, 1993: 77). This means one thing: that whilst directors have some discretion to pursue policies that might benefit other groups (workers, consumers and so on), they can only do so if such policies can be regarded as being in the interests of shareholders.

It is this legally constituted space between shareholders and managements within which debates regarding both corporate governance and CSR have flourished. While varied and voluminous, such debates are effectively attempts to extend or limit the relative discretion of managers and shareholders respectively. Relatedly, and as we shall see below, CSR claims seek to impose upon managements some form of duty to other than that which maximises shareholder interests.

For now we should simply note that, if some demands for 'socially responsible' behavior creep into the overview function, then, generally the law ensures that those demands are subordinated to the long-term viability and profitability of the corporation. There have been some recent cases of shareholder rebellion over issues described using the language of CSR. In 2010 both BP and Shell faced shareholder rebellions over their plans to develop Canadian tar sands (Macalister, 2010; Williams, 2010). A close look at those debates prior to the annual general meetings of each of the companies reveals a complex picture. First, it appears that the institutional investors objecting to tar sands investments did so on the basis that this activity was likely to be fiercely opposed by climate protestors and NGOs, and would therefore involve significant reputational damage. Second, shareholders' objections were also made on the basis that BP and Shell had not shown investors that this activity could actually be profitable. On this basis, it is difficult to disentangle a concept of 'responsibility' from the principle of maximising profits for shareholders (Soederberg, 2010). The same goes for a spate of recent shareholder rebellions on executive pay in the US and in Europe. There appears to have been a rise in such rebellions following the financial crash of 2008, and the widely held perception that executives were being rewarded

with huge bonuses and remuneration packages even when their companies had failed (Saft, 2009).

If shareholder rebellions over executive pay have become relatively common, shareholder rebellions over employees' pay are almost unheard of. This is largely because remuneration packages for senior managers sometimes have implications for the reputational capital of corporations, whereas remuneration packages for workers remain generally outside the purview of shareholders meetings, and indeed very rarely feature in public debate. Generally, shareholders are happy to agree any remuneration package to their managers when the company is successful, and only challenge this when the company is not successful. When it comes to workers, even a basic awareness of employee remuneration amongst shareholders is rare.

Harry Glasbeek importantly contrasts the rights of investors with the rights of workers. Thus, on the one hand, within the corporation, 'citizenship' rights are given to those with property investments; workers, on the other hand, are not regarded as having rights since they don't own any property. Moreover, even within the property-owning group, citizenship rights are distributed unequally, with the largest owners having the largest entitlement to vote etc. (Glasbeek, 2002: 88). Indeed, in his 2002 book, *Wealth by Stealth*, Glasbeek shows clearly the overwhelming force of law against workers in the context of corporate law. In tort cases, for example, when recompense for the costs of corporate activities is sought by workers, consumers or communities, corporate law similarly confronts tort law and invariably acts as a shield for its owners (Glasbeek, 2013). When principles of corporate law and labour protection law confront each other in court hearings, corporate law principles generally take precedence over people.

Although they did not fully develop it, Berle and Means (1968), begin to set out a concept of 'depersonalization' as a governing principle in corporate organisation. They argued that once the interests of owners and managers are separated, ownership becomes less of a commitment, in which owners no longer see their investments as a personal commitment, and perhaps fragment their investments across a large number of corporations: 'the participation privileges of ownership are split into innumerable parts – "shares of stock" – which glide from hand to hand, irresponsible and impersonal' (ibid.: 250).

As Hall (1958: 27) pointed out, this new form of property

> can no longer be identified or personalised in the shape of the single industrial magnate, the 'robber baron' or even the entrepreneur family. This does not mean to say that there are no rich men left. But their riches – their pieces of property – are held largely in the form of pieces of corporate property, shares in the anonymous, complex, modern industrial firms which spawn their way across the face of modern business. 'Property' has gone under-ground, it has been institutionalised and incorporated, vested nominally in the person of an abstract company or firm. The maximisation of profit has passed from the personal responsibility of the businessman or financier, and is now established as the institutional motive of the firm.

Although formally there are lines of legal accountability and responsibility within the corporation, this does not mean either that those formal lines of accountability and responsibility are clear or actually work in practice. Indeed, one of the effects of the separation of ownership and control is that it raises some ambiguity about the centre of decision making power in the corporation. Spencer summarises the process as follows:

> [W]here is the core of the system? Here lies the true power and true vulnerability of the corporation, because at its centre is a power vacuum: the shareholders own, and supposedly have control, but they do not actually control: the board and CEO actually control, but theoretically owe their power to the shareholders. As a result, the buck doesn't stop – no-one has the ultimate duty to think about what the corporation should do and be: the only imperative is the directors' duty to act in the best interests of the company, which means the best interests of the shareholders, which means profit. If this leads the directors or managers to have to act against their conscience, well, that's their duty to shareholders. When shareholders see the company acting in ways their conscience would otherwise reject, well, the directors run the company, it's their responsibility.
>
> (Spencer, 2004: 17–18)

Indeed, there is considerable empirical evidence that the separation of ownership from control, as this principle intensified in the UK in late nineteenth century, reduced the accountability of directors who were trusted with very large amounts of shareholders' funds (Robb, 1992). In this period, underdeveloped accounting and auditing controls provided a cover for directors and encouraged the criminal exploitation of this emergent and relatively liminal sphere of corporate activity.

The depersonalisation of property relations in the corporation has an effect that radiates through the organisation; this is an effect that encourages the *removal of responsibilities* for the consequences of corporate decisions. For Hall (1958: 27), managers within the firm, both senior and middle managers, adapted their own motives and responsibilities to the motives and responsibilities of the corporation, thus being drawn into the general ideology of corporate business. The consequence of this depersonalisation process is their being

part of a general 'spirit of organized irresponsibility' that characterises corporate capitalism.

Frank Pearce (2001, 45–6) has developed this understanding of the impersonal nature of corporate property relations in order to understand what it means for how the various human elements of the corporation conceptualise and experience their corporate responsibilities:

> Shareholders invest in a wide range of companies, and since their only concern is with the return of investments they are indifferent to what occurs within different production processes and rarely live in the areas where these take place. They are legally protected from most of the negative consequences of company actions. Company executives are also fundamentally concerned with profitability and with 'wilful blindness' are again often distanced from (and legally protected from the consequences of) production, conceive of it abstractly and, in turn, pressure managers to produce as much and as cheaply as possible. This creates a form of structural irresponsibility where it is often difficult to identify how decisions are made and how well or poorly they relate together.

It is the separation of the various human elements of the corporation that is crucial in permitting what the company actually does – what it produces, the services it provides, its investment activities and so on – to become abstracted from the human actions that occur within the corporation itself. It is the complex bureaucratic structure of the corporation that creates particular modes of motivation and removes responsibility for particular actions taken by people within corporations. Corporations are structures that typically involve multiple layers of managements and a complex division of labour. The structural features of corporate hierarchies create distance vertically between managerial and various levels of employee in the organisation. Vertical distance is also

created where work is contracted out to subsidiary firms or sub-contractors. It is not uncommon for this process of vertical separation to be used to limit the liability of the parent company or principal agent in a sub-contracting relationship. Following the Bhopal disaster, Union Carbide Corporation (UCC) placed the blame on its subsidiary Union Carbide India Ltd (UCIL), claiming that the latter was an independent company responsible for its own affairs. Following the Piper Alpha disaster, which killed 167 workers in the North Sea in 1988, a civil claim was made by the owners of the oil platform, Occidental, against the contractor that was the direct employer of workers on the platform. In other words, the company that was ultimately responsible for killing 167 workers sought to pin the blame on its sub-contractor. In both cases, those attempts were sought to avoid legal liability for those deaths. Significantly, in the former case, the subordinate relationship between parent and subsidiary, and in the latter case, the relationship between the contractor and sub-contractor, were actually key elements in the aetiology of those catastrophic events. The vertical hierarchy that was imposed between UCC and UCIL meant that UCC was able to drive conditions in the Bhopal plant to an unacceptably dangerous level (Pearce and Tombs, 2012). The vertical hierarchy between operating companies and sub-contractors on the Piper Alpha platform encouraged a brutal work regime in which workers warnings of safety problems on the platform were actively ignored and discouraged (Whyte, 2006). In other words, the same hierarchal structures that partly led to those atrocities were then used by those at the top of the hierarchy in order to secure their impunity.

Within the corporation, structural irresponsibility is encouraged by the emergence of complex hierarchies and the diffusion of job functions within corporations makes it

more difficult to pin down the responsibility for a particular decision or failure to one individual, or even one department within the corporation. As Ross's classic sociological work on the 'remote evil' that is created by the division of labour in corporations (1907: 56) instructs us, corporate crimes are actually encouraged by a corporate veil that enables those who profit from particular 'evil' acts to remain remote from the consequences, never having to face them.

The relationship between parent and subsidiary is generally understood as another level of 'corporate veil', which ultimately shields the liability of shareholders. In law, as a general rule, the courts in most jurisdictions have been reluctant to impose liability on the parent and thus lift the corporate veil (Gobert and Punch, 2002: 51–3), although it is significant that in the English courts in recent years there have been some developments that allow this layer of the veil to be lifted in tort cases. One such case involved the asbestos victims of Cape Industries Plc who were, according to the Court of Appeal in the UK, entitled to sue the parent company for damages resulting from industrial illness and injury (*Chandler v. Cape Plc {2012} EWCA Civ 523*). Notwithstanding this type of case, which remains the exception rather than the rule, this *external* hierarchy and division of function between parent and subsidiary generally amounts to precisely the same process of structural irresponsibility that Pearce identifies *within* the corporation.

All of this being said, it remains to emphasise the most obvious point that links the above observations regarding corporate structures. These structures are put into place principally to maximise profitability or to minimise the costs of production, effectively two sides of one coin. They are neither market nor industry exigencies; they are neither products of complex technology nor operating across

national boundaries; nor, generally, are they the effects of national state regulation. They are established to minimise transaction costs, and/or environmental and organisational uncertainties, and if the products of such motivated structures may often appear irrational in form or effect, their creation and maintenance is precisely attempted to extend and secure capitalist rationality and accumulation.

CORPORATE SOCIAL RESPONSIBILITY?

Notwithstanding the argument developed in this book thus far, there remains, in some circles, not least some academic and political circles, optimism about the extent to which the corporation can at worst be tamed, and at best be a force for social good.

There has long existed an enormous literature on CSR – although, within that literature, there is little agreement on what it is, how it can be achieved or how it should be measured. As van Oosterhout and Heugens (2008: 198) have recently observed:

> The problem is that it is not clear what CSR is, that we do not understand its causes and consequences, and that the notion is not very helpful in understanding what is desirable or required at the business-society interface. We conclude, therefore, that the notion of CSR is better dispensed with altogether.

These points being made, most fundamentally CSR involves the claim that corporations can or do recognise a social responsibility, consisting of meeting legal and regulatory requirements that pertain to various spheres or aspects of their activities. Thus corporations may seek to respond to more general concerns, values or pressures in society; that is, to take on commitments over and above those placed upon them

by legal duties. Typically, this is viewed as a series of stages (Sethi, 1975) or a 'path' (Zadek, 2007) – a 'navigation through successive stages' (ibid.: 35), a journey that if at all begun seems nowhere in the literature or in reality to be capable of completion.

There is a variety of positions taken within the literature. Recently, for example, it has become rather modish to invoke the notion of the 'triple bottom line'. Thus CSR 'involves a shift . . . from profit maximisation for shareholders within the obligations of law to responsibility to a broader range of stakeholders, including communal concerns such as protection of the environment, and accountability on ethical as well as legal obligations'. This is the shift from the 'bottom line' to the 'triple bottom line' (McBarnet, 2007: 9) of economic, social and environmental performance. In other words, companies should operate in ways that secure long-term economic performance by avoiding short-term behaviour that is socially detrimental or environmentally wasteful. For Porter, doyen of the business strategy circuit, 'corporate success and social welfare' are not a zero-sum game (Porter and Kramer, 2006: 80). Rather, CSR is neither reactive nor defensive but strategic and proactive, part of a classic win–win game that is understood via a functionalist notion of a healthy organic entity: 'Successful corporations need a healthy society . . . At the same time, a healthy society needs successful companies' (ibid.: 83). Social health is thereby equated with corporate success.

A further dominant aspect of more contemporary 'CSR talk' is the explicit naming of the 'corporate citizen' (Fleming and Jones, 2013: 33–49). This has currency in several important respects, but two are worth noting here. First, of course, it is exactly paralleled by the legal construction of the corporation through which it is granted a legal personality, which we discussed at length in the previous chapter. Second, it involves a

blurring of the lines between business and politics, legitimating corporate involvement in the latter even as it espouses the need for governments not to 'interfere' in economic activity. At the same time, it grants the corporation the right to principled opposition to existing or prospective laws. It is to a consideration of this latter point that we now turn.

CSR as profit maximisation

In his influential article attacking the principle of CSR, the Chicagoan economist Friedman (1970) famously argued that it is meaningless – in fact, dangerous – to say that business has social responsibilities. Friedman bases his argument on an established principle of law that we have already noted in this chapter: that the primary responsibility of senior managers is generally, as he puts it, to 'make as much money as possible while conforming to the basic rules of the society' (ibid.: 123). Senior managers of corporations, as individuals, might feel they should have social responsibilities as they are, according to Friedman, free to do so, as long and they are spending their own money, not the money of their employer, the corporation. Corporate executives have no right to spend the corporation's – or in the case of joint-stock corporations, the shareholders' – money for a general social interest. To charge such a 'social levy' would, from this perspective, be tantamount to arbitrarily imposing a tax. Friedman argues: 'This is the basic reason why the doctrine of "social responsibility" involves the acceptance of the socialist view that political mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scarce resources to alternative uses' (ibid.: 122).

Of course, it was precisely fears about such commitments that fuelled the debate from the 1930s onwards regarding

the problems of managerial capitalism, which emerged as a result of the separation of ownership and control within capitalist enterprises. And this is precisely the motivation behind Friedman's searing critique of CSR. In other words, the owners of capital have consistently sought to develop checks upon the extent to which managers may exercise discretion.

To explore further the coherence and conditions of existence of CSR claims, it is worth considering in a little more detail some of the ways in which Friedman's exigency to 'make as much money as possible' may appear to be attenuated or obscured in pursuit of CSR. As a prefatory point, it should be noted that there is academic and some legal debate as to how to identify the best interests of the corporation – whether this means profit maximisation, for example, or some commitment to long-term prosperity for the corporation (Pearce and Tombs, 1997). These points made, whether managements' responsibilities to shareholders equate to responsibilities to 'the corporation', it is clear that these commitments must involve a commitment to profitability. As Glasbeek has carefully demonstrated, to claim that the pursuit of profitability can be subjugated 'to some extent' to another principle or priority is a logical incoherence upon which all CSR arguments founder (Glasbeek, 1988: 401, and passim).

That said, in some business sectors, a strategy of social responsibility may make more business sense than others. Those who operate in competitive markets where they deal directly with individual consumers for example – notably, high street stores – may seek to gain competitive advantage through CSR claims; more generally, then, CSR may represent a 'corporate social opportunity', to use the title of a widely used management handbook on the subject (Grayson and Hodges, 2004). Such a stance may have value in crude public relations terms, as well as in attempts to reposition external relationships with

customers, or a wider public audience (Fryzel, 2011). Indeed, in so far as CSR has become a routine technique for corporations seeking to project their socially beneficial impact, it has also become part and parcel of the synoptic effect of corporate power. Further, CSR claims may enable corporations to enter emergent markets. Mooney and Miller, for example, have documented how '[l]obbying, think tanks, elite networking and policy planning groups, corporate social responsibility (CSR) and corporate philanthropy' have all been crucial in the strategic colonisation by private corporations of formerly public-sector spheres of activity such as education, health and welfare (Mooney and Miller, 2010: 460), as well the plethora of new market opportunities afforded by the specific vehicle of the PFI (Ruane, 2010).

CSR has also been crucial in corporate efforts to enter or extend activities in markets that seek to build the allegiance of consumers, workers and publics and to create new forms of emotional ties to particular companies and brands (Klein, 2000), not least by embracing social entrepreneurship, community voluntarism (Sklair and Miller, 2010: 486–7) and even, in recent years, by adopting the language and symbolisms of resistance (Fleming and Jones, 2013: 76–8), most notably around environmentalism, so that '[w]ords and terminologies once used by environmental activists suddenly became corporate jargon' (Rowell, 1996: 103). In these senses, CSR opens up *new t*echniques of profit-maximisation. In other words, it is not useful to think of CSR *merely* as a propaganda exercise or a smoke screen (Hanlon and Fleming, 2009).

Finally, claims to social responsibility are also, of course, made with much more cynicism on the part of corporations. Thus the calculative orientation that is central to corporate activity informs actions that appear to have quite a different rationale. This may form an integral part of the strategy

of a business (Carr, 1985) as it assumes 'the cloak of social responsibility' for actions that 'are in the long-run interest of a corporation' (Friedman, 1970: 124). Thus, for example, in some contexts, such as the Organisation for Economic Co-operation and Development (OECD) process for upholding the conduct of multinational corporations, donations to local hospitals, schools and charities are offered – and accepted – as mitigation for corporate human rights violations (OECD Watch, 2010). After all, as we have argued, CSR is not something antithetical to profitability, but it is one of the strategic means by which profitability might be secured, protected, extended and maximised.

CSR, legal spaces and power

Nowhere has CSR's use as a means of enhancing corporate political leadership been brought to bear more effectively as it has in the sphere of legal regulation. If hardly stated explicitly, the principles of voluntarism and self-regulation that sit at the core of CSR strategies are always implicitly aimed at pre-empting, weakening or indeed displacing legal responsibilities – even if the prospect of law *enforcement* against corporations is slim and, in most contexts in the UK at least, getting slimmer (Tombs, 2015a). As Baars (2012) shows, firms' CSR documents and policies can and do serve the function of diverting legal processes or, if these cannot be diverted, of mitigating the impact of enforcement and punishment of legal violations. CSR is a strategy that dilutes or deflects law enforcement thus allowing 'corporations to continue being harmful in a more controlled manner' (ibid.: 298). An adjunct political function, as Shamir argues convincingly, is that CSR has been used as part of a more general political strategy to 'block the use of legal

methods' for taming corporations (Shamir, 2004a: 7). Thus, CSR is deployed as a strategy to dilute or ward off legal regulation (Shamir, 2004b), and, contemporaneously, provides arguments for the extension of market-based forms of self-regulation.

To be clear, then, CSR claims have a double function in relation to the law. These functions represent a means of protecting, extending and exploiting the spaces *within* the law and they, at the same time, obscure or mitigate the effects of exploiting spaces *between* laws. We shall examine these in turn.

Spaces within law – that is, room for corporate manoeuvre within what appears to be legal coverage, overseen by enforcement – are created actually or potentially in several ways. First, there is the ubiquitous phenomenon that law vis-à-vis corporations, and especially larger ones, is under-enforced, so that under-enforcement is the norm (Snider, 1993). Second, anti-regulatory initiatives discursively and materially undermine the ability of those charged with enforcement in order always-already to tie the hands of the latter and to disempower them; this is, for example, a key element of the Better Regulation strategy which continues to unfold across the UK, the European Union and the OECD (Tombs and Whyte, 2013; Tombs, 2015a). A third space is potentially available in relation to the question of what constitutes compliance. This question is a far from unproblematic one. Much regulatory law sets out general duties or performance standards against which compliance is to be judged by external regulators or inspectorates. What constitutes compliance is thus subjective, ambiguous and, crucially, determined through negotiation and bargaining – so the outcome is always an *effect of power* – and a consequence of this is that corporations may adhere to minimalist interpretations of law yet still cast themselves as law-abiding. More generally, legal

ambiguity allows corporations to adhere to the letter, rather than the spirit, of the law, and there are very significant differences between these two forms of 'compliance' (Hargreaves, 1975: 2). Accepting the minimal 'satisfying' of legal requirements as consistent with being 'responsible' in fact allows – even encourages – corporate irresponsibility. As we write, this debate is most clearly evident in the highly porous line between tax avoidance and tax evasion. In any case, all of these techniques have the aim of jimmying open wider, effectively legalised, spaces for corporate freedoms.

To be clear, then, under-enforcement and re-regulation strategies are all either explicitly or implicitly justified on the assumption of CSR: namely, that most corporations can and should be trusted for most of the time effectively to self-regulate (Ayres and Braithwaite, 1992). This case is normally made on the basis that they are at best essentially moral actors (Braithwaite and Fisse, 1987: 121), or at worst determined to protect their reputation through abiding by law (ibid.). If there are considerable spaces *within* laws that are bolstered by CSR strategies, we also encounter the opportunities afforded for corporations by the spaces *between* laws (Michalowski and Kramer, 1987). In other words, major differences in legal standards across jurisdictions can provide considerable spaces for corporations to exploit. And this question is a particularly significant one in the case of multinational corporations – the largest, most powerful, and most visible corporations – which have been, as we have noted, in the forefront of both attacks over, and indeed claims to 'progress' concerning, CSR. Such corporations are, of course, subject to a variety of national regulations and legislation concerning their activities. There are significant differences between such regulations and legislation across different national contexts. These differences can throw into sharp relief claims by certain

corporations to be 'socially responsible', where these claims are founded upon their essentially law-abiding character. For example, in the context of social regulation, there have been documented numerous cases of multinational corporations adhering to 'home country' regulations while exporting hazardous production to countries seeking foreign investment (Castleman, 1979; Ives, 1985; Weir, 1986). This might involve flouting regulations in the host country; equally, yet perhaps more significantly, it might involve a negotiation of particular terms of entry to a host country that entail the relaxing of certain regulatory requirements.[5] Similarly, in relation to corporate taxation, for example, strategies of tax avoidance are facilitated by the ability legally to shift taxable wealth from higher to lower taxation regimes (Shaxson, 2012). In these senses, no laws are being broken – yet corporations are using their power to redefine the site and nature of the 'legal' in their own interests (Jones, 1984).

Thus many corporations might *appear* – indeed, on this criterion of compliance, many corporations *are* – 'responsible' in their home countries, while acting irresponsibly elsewhere. Indeed, the ability to act irresponsibly elsewhere, and in particular to redefine the nature of the 'legal' in host countries, can often increase the image/'fact' of responsibility at home; for example, wages and working conditions can be improved for employees in home countries on the basis of low-waged, 'dirty' and poorly protected labour elsewhere.[6]

Further, these spaces between the laws are not simply there to be exploited through the transfer of assets, harms or even production facilities, but they greatly augment the bargaining power of multinationals vis-à-vis host governments through the abilities to threaten to locate elsewhere, in more lax regulatory (and taxation) regimes. For Michalowski and Kramer, corporations can exert both direct and indirect

influences to exploit these spaces. Direct influences refer to the straightforward use by corporations of their economic power to influence government decisions. Indirect influences refer more to the ways in which what is considered to be politically feasible can be structured. Making an economy 'attractive' to global investment often means 'playing easy to get' and ensuring that social and environmental regulations are lax, corporate taxes are low and so on.

There is a further, and indeed more fundamental, point to be made concerning the 'socially responsible' corporation. For it is clear that many companies are actively engaged in shaping, re-shaping and indeed pre-empting law – through both legal and illegal means. Corporations have access to law makers, through political 'representatives', trade or industry associations or, in the case of the largest companies, in their own right, and within certain sectors of the economy this access and lobbying power is considerable. Thus corporations and their representative organisations (locally, nationally and internationally) can and do influence definitions of harm, crime, processes of criminalisation and the nature of regulation through: their direct and often highly organised interventions in the policy making process; various forms of more covert forms of intervention; their ability to shape policy agendas; their influence in terms of 'non-decision making'; their ability to help to create and maintain understandings about what is both desirable and feasible in terms of their regulation (Fooks et al., 2011, 2013). In short, the level of law, regulation and enforcement in any given society at any one time in relation to any specific issue can be understood in terms of an effect of the distribution of power. CSR presents a series of strategic means for utilising, extending and jimmying open new spaces within and between laws – providing ever-increasing terrain upon which untrammelled corporate activity can proceed (Tombs, 2015b).

CSR also, then, legitimates and empowers corporations. It enables corporations to present themselves as corporate citizens that engage positively in politics and in social development. CSR thus allows corporations to defend and extend the autonomy of their decision making, and allows them a plausible position from which to challenge the encumbrance of socially protective laws. There is no little irony in the obvious point that, in refusing to accept CSR at face value, Friedman failed to see its real significance, first as a core business strategy,[7] and second as a means of legitimating political interventions to challenge and undermine the corporation's legal responsibilities. Given these considerations regarding the emerging power of corporations and their representatives to affect the formulation, interpretation and enforcement of the law, what is more surprising is that many of them still manage to break it in such a consistent fashion!

CONCLUSION

We have seen how the formal separation of the various legally created elements of the corporation (the corporate person itself, owners, directors, managers and workers), set out at length in our previous chapter (Chapter 3), has two main effects. First, by specifying narrow terms of liability for owners and managers, the law establishes the boundaries of responsibility and impunity for corporate harms and crimes. And second, by establishing relationships within the corporation that act a 'structures of irresponsibility', the law ensures that the human consequences of corporate decisions are secondary considerations.

In this chapter, we have shown how the human consequences of corporate activities are obscured by a process of

structural depersonalisation. This is why we are impelled to talk about corporations as encapsulating the 'spirit of organized irresponsibility' or as 'structures of irresponsibility'. Whilst it is entirely plausible that some corporations – or their managers or shareholders – may at one time or another act with some social responsibilities in mind, and even prioritise them, there is nothing in the DNA of the corporation that can allow owners and managers to put workers or communities, or even the future of the planet, before the long-term interests of the corporation. Significant social problems and, very often, human catastrophes, arise from the depersonalisation that is embodied in the architecture of the corporation. If it has any function, CSR is not a practical aspiration towards which corporations can be reconfigured, cajoled, encouraged, nudged and so on. Rather, CSR discourses need to be understood in terms of law: as pre-empting law, and at the same time as a discursive plug that slots into the spaces created by law, both in terms of its coverage and its enforcement. That is, CSR, while a *corporate* strategy, is also a *legal* strategy, that always seeks to re-orient the conditions of state regulation and state legitimacy. And it is to discussions of these phenomena that we now turn.

NOTES

1 Clearly to refer to corporate and shareholder 'suffering' is relative, and there is no attempt to imply any equivalence between the fate of either Enron or Union Carbide with the employees and wider communities devastated, albeit in highly different ways, in these two 'cases'.

2 Perrow (1986) argues that those who control bureaucracies are not selected using bureaucratic kinds of impersonal criteria; the advancement of corporate executives to the higher levels is political. Barnard, for example, was quite clear that the 'functions of the executive', i.e. 'maintaining communications; securing services; and formulating

purpose', could only be fulfilled by an 'informal executive organization' that operated 'to select and promote executives' who fitted in (Barnard, 1947).

3 For an interesting discussion of how 'tactical responsibility' can be decentralised whilst 'strategic control' is simultaneously centralised, see Sewell and Wilkinson (1992).

4 Top management and shareholders do not automatically have the same interests; they have to be 'brought into alignment'. That top management does not automatically internalise all the values of capital is suggested by the fact that highly skilled men and women were willing to work for the British nationalised industries, and at roughly two-thirds of the rates that they came to be paid after privatisation (Meacher, 1991; Fine, 1990). Indeed, professionals are not inevitably motivated by narrow economic self-interest alone as so many conflict theorists argue.

5 The logical end point of this tendency is the proliferation of various forms of Export Processing Zones (see Tombs and Whyte, 2009).

6 It is precisely in this context that, in the absence of effective legal regulatory frameworks, pressures, not least from NGOs, have led to the development of international codes of conduct, to which corporate actors then subscribe, more or less willingly – a form of CSR, of course, since such decisions are ultimately voluntary.

7 Although he alluded to this oversight when he noted: 'Of course, in practice the doctrine of social responsibility is frequently a cloak for actions that are justified on other grounds rather than a reason for those actions' (Friedman, 1970: 123).

5

CONTROLLING THE CORPORATION?

INTRODUCTION

If the corporation as constructed through English law is structurally irresponsible, and if it cannot, in principle, as we have claimed, be effectively responsibilised, then what is to be done with it? In this chapter, we consider the extent to which and the ways in which the corporation can be controlled. We begin with an overview of the problems entailed in naming corporate harm as *crime*, before turning to one way in which the corporation has been problematised in criminological and socio-legal scholarship; that is, as an object of state regulation and enforcement of law. Thus we consider some of the general themes across this vast literature. This leads us, however, to a recognition that in order to think creatively and effectively about the corporation, we need to think more strategically and theoretically about the nature and dynamics of state–corporate relationships. We attempt this task in the following, concluding chapter. It is only through abandoning the 'tendency to fetishise those organisational forms through which class relations function' (Lasslett, 2013: 116) – and,

here, following Marx, the tendency to portray states and corporations as 'autonomous figures endowed with a life of their own' (ibid.) – that we can move beyond deceptive appearances and 'reconstruct organisations as expressive moments of changing relationships between people' (ibid.).

THE PROBLEM OF CORPORATE *CRIME*

One debate that has persisted within criminology is over the ways in which, and the extent to which, corporate crime is *crime*. While we do not wish to rehearse the details of this much-covered debate (see Slapper and Tombs, 1999), an introduction to some of its main features do lead usefully into a consideration of how the law, and the state through regulatory agencies, treats corporate harm and defines corporate crime. This has a wider political significance. In the socio-political formation within which we write and speak, 'crime' carries with it some moral imperative 'to do something' – albeit that the doing something is generally appropriated by the state, tends to be relatively ineffective and, indeed, often perpetuates rather than repairs harms.

The origins of the study of corporate crime are generally traced back to the pioneering work of Edwin Sutherland and his attempt to determine a concept of 'white-collar crime' as 'a crime committed by a person of respectability and high social status in the course of his occupation' (Sutherland, 1983: 7). Sutherland recognised that powerful business and professional 'men' routinely committed crimes. And just as Marx had documented in his study of the Factories Acts, Sutherland's study showed how business offenders are aided by the power of their class to influence the implementation and administration of the law. Thus, he argued, corporate crimes differed principally, not in the seriousness of the act or its consequences, but in the implementation of the criminal

laws that apply to them (Sutherland, 1940: 35–7). An immediate, systematic critique of Sutherland's work was set out by the legal scholar Paul Tappan (1947), who argued that the label 'crime' should be applied only to those acts successfully prosecuted as violations of criminal law. Tappan's critique raised at least three substantial points, which remain of significance: first, those offences typically committed by businesspeople are inherently different from criminal offences; second, that many of the actions that Sutherland's definition would criminalise are in fact 'within the framework of normal business practice' (ibid.: 99); and, third, that to extend the definition of crime beyond the fact of successful processing through the criminal courts is to enter the sphere of moralising or 'propaganda' (ibid.).

Sutherland countered that when it comes to 'white-collar' crimes, adopting a formal or 'black-letter' legal approach as Tappan did, would not make sense, since corporate and white-collar crime was not generally dealt with in the criminal courts. For corporate and white-collar offences, there exists a wide range of formal legal responses available to law enforcement officers other than criminal prosecution; in general, such crimes are dealt with using administrative or regulatory law and procedure. Sutherland therefore argued that it is necessary for social scientists to produce a more encompassing definition of crime than that delineated by criminal law. Sutherland's response was to retain a definition of 'crime' that made reference to law – in so far as he defined offences in terms of what was *punishable*, rather than those that had actually been *punished*, by law. That is, he recognised that a large number of offences that could be punished in law were not in fact punished – they went undetected or, if detected, were not acted upon or, if acted upon, were then subject to forms of enforcement action different from normal criminal processing. Whereas for

Tappan, Sutherland obscured the very real differences between 'criminal' and 'harmful' behaviour, for Sutherland these differences had to be understood as an effect of relations of power. Sutherland was quite clear that the differential interpretation and enforcement of law against 'white-collar' and 'corporate' crime is based partly on the fact that legislators, judges and administrators within the criminal justice system are either subject to the material and ideological influence of businesspeople, or share their ideological and/or cultural worldviews (Sutherland, 1945: 137–8).

Sutherland's analysis was, in many ways, ground-breaking. Over 70 years later, however, we know that power influences law and enforcement, we know that there are substantial 'hidden' figures of crime, and we know too that what gets recorded as crime is often more a measure of criminal justice activity as any ontological phenomenon. Certainly we know that the extent to which we define crime only in terms of a (successfully prosecuted) violation of criminal law radically affects the amount of crime we can identify. Thus, some basic arguments set out in Sutherland's work are the starting points of much analysis of corporate crime (let alone legalised forms of corporate *harm*): if much corporate conduct is subject to law other than criminal law, and is dealt with by bodies (not the police, of course, who deal with 'real crime') that prefer to use informal methods of responding to offences (without resorting to formal enforcement), then this will have significant effects on the volume of recorded corporate offending. In turn, as a result of the under-representation of those offences, this will also affect popular and political assessments of its seriousness.

The view one takes as to how to define a corporate crime has real consequences. Thus, the majority of corporate harms, even if they are punishable, remain largely unregulated in practice.

The term 'regulated' immediately indicates that those crimes are not policed in the usual sense of the word: corporate crimes are normally dealt with using different types of enforcement authorities ('regulatory agencies') and often with different types of ('administrative' or 'regulatory') law. As a result, they typically remain outside the ambit of mainstream criminal legal procedure. If they do become subject to law enforcement, they tend to be separated from the criminal law (and processed using administrative or informal disposals rather than prosecution). Even if they are subject to the formal processes of criminal law, corporate crimes are rarely viewed as equivalent to 'real' crimes. We return to these points later, but for now it is worth exploring how they have been instituted historically, and how they function contemporaneously. We begin with the latter task, by referring to some of the types of harms set out in Chapter 2 of this book.

Thus, of the various forms of financial services mis-selling to which we referred in Chapter 2, typically the legal response is to enforce programmes of compensation upon the companies – in other words, there tends to be no formal legal action against the company for the offence(s) itself, even if one is clearly recognised, rather (long-term) efforts to ensure restitution to victims. Thus, there is no record of crime.

Similarly, many food poisoning cases are, as we also noted in that chapter, likely to be a direct result of those who produce, process or supply foodstuffs failing to meet basic standards of food hygiene – standards that are in fact enshrined in food safety legislation. As we have shown, food poisoning cases are in the hundreds of thousands in the UK every year, so there is potentially a significant scale of illegality involved in these. However, prosecutions of any food regulation breaches, including those that lead to death, are rare. In 2010/11, the Food Standards Agency recorded a total of 495 establishments

being prosecuted, of which 472 were convicted. Those prosecutions followed 385,450 inspections of food establishments (production, packaging, distributions, retail and so on).

Of the up-to-50,000 occupational fatalities in the UK each year, and the hundreds of thousands of major and other injuries, there are typically about 500 prosecutions *per annum*; indeed, a disproportionate number of these follow the subset of deaths, which are captured by what we referred to as HSE's 'headline' figure, with some 80–90 each year leading to successful prosecutions. Finally, in the case of environmental pollution-related deaths, it is highly unlikely that *any* will result in prosecution. This is partly because cases of deaths 'brought forward' (the term used by the Department of Health to describe premature death) by pollution are not generally subjected to any process of investigation, partly because of the complexities of investigating and prosecuting such cases. Thus, in the eight years between (and including) 2000 and 2007, the Environment Agency in the UK prosecuted only 99 industrial pollution offences.[1]

In the majority of cases, then, across the four broad types of corporate harm that we have reviewed, we have no definitive understanding about whether those deaths, injuries, illnesses and theft caused by corporate activity might have involved criminal breaches of the law. We have argued that this is largely because they are so rarely investigated, and prosecuted. It should also be noted that a further key contributory factor to this lack of knowledge is the fact that corporate victimisation generally appears to us, even as direct victims, in a relatively abstract form (Whyte, 2007a; Tombs and Williams, 2008; Tombs and Whyte, 2010b). We tend not to think about major harms – such as illness caused by work, pollution or food poisoning – as having been produced by corporate activity; rather, they are typically constructed as 'accidents' rather than as

harms that are preventable and avoidable. Corporate harms are highly unlikely to reveal themselves via self-reporting, a mechanism that has revealed other areas of hitherto 'hidden' crimes.

Thus, corporate crimes tend to have an ambiguous relationship to (il)legality. We stress that this ambiguity is not the result of any intrinsic characteristic; it has its origins, as we have argued in Chapter 3, in the development of the criminal law and the corporate form. So if efforts to reveal the 'true' nature of corporate criminal activity are virtually doomed to failure, thinking about the crime–harm relationship in the context of corporate activity should lead us back to a consideration of the state and, specifically, its regulatory functions, the formal places where state and corporate activity intersect. In this respect, most critical studies of the regulation of corporate activity lead us to a consideration of the failures of (law and) regulation (Whyte, 2014). Those conditions of failure raise some more fundamental questions about what regulation is, what it is meant to achieve and what it might achieve. It is to those questions that the next section turns.

THE STATE AS REGULATOR: PREVENTING AND RESPONDING TO CORPORATE CRIME AND HARM?

Force, fraud and the struggle over law

As we have documented in Chapter 2, corporations have a very murky history indeed, one that is intimately involved, for example, in some of the most notorious crimes against humanity. The role that regulation has played in this unfolding history cannot be under-stated. Indeed, as this section of the chapter will argue, the process of regulating social harms is in many ways key to understanding the present relationships between states and corporations. To concretise

this consideration, we here return briefly to the two of the areas discussed above and at length in Chapter 2 – namely occupational fatalities and corporate fraud, each of which historically, through law, has been granted an ambiguous legal status (Carson, 1980b) – in order to understand the necessarily contested and ambiguous nature of regulation that characterises contemporary capitalism.

Famously, in Volume 1 of *Capital*, Karl Marx (1887/1954) showed clearly how the carnage experienced in early industrial capitalism in eighteenth- and nineteenth-century Britain meant that those who sold their labour in the factory system were quite literally being worked to death. Reports presented to the Children's Employment Commissioners on the occupational health of workers in the potteries and the match-making and paper industries documented the vulnerability to disease and fatal injury faced by workers, low life expectancy (in the potteries, Marx noted, many operatives could not expect to live past their teens), and the mutilation of children, many suffering stunted growth and premature ageing. Locating the struggle for regulation within nascent class conflict and threats to state legitimacy, Marx was to argue that those conditions necessitated the emergence of a system of regulation that was to become enshrined in a series of laws introduced in the eighteenth century known as the Factory Acts:

> These Acts curb the passion of capital for a limitless draining of labour power, by forcibly limiting the working day by state regulations, made by a state that is ruled by capitalist and landlord. Apart from the working class movement which daily grew more threatening, the limiting of factory labour was dictated by the same necessity which spread guano over the English fields. The same blind eagerness for plunder that had in one case exhausted the soil, had, in the other, torn up by the roots the living force of the nation.
>
> (Marx, 1887/1954: 229)

Marx documents the efforts of domestic social reformers and the relationships of these efforts to upheavals in continental Europe, widespread employer opposition to the introduction of factory regulation, and clear conflicts amongst different groups of employers. He also shows that, in the very attempts to impose minimal conditions for workers, the state played a crucial role in forcing the qualitative leaps in the nature of capital investment and concentration of production that were crucial to the development of the factory system – this effecting the real rather than the formal subsumption of labour. Yet, 'for all that, capital never becomes reconciled to such changes – and this is admitted over and over again by its own representatives – except "under the pressure of a general Act of Parliament"' (Marx, 1867/1976: 610).

The legal protections for workers enshrined in Factory Acts originated in the need to resolve a contradiction inherent in capitalism, generated by a relentless demand for greater profit, which at the same time threatened to exhaust the capacity for sustaining profits in the long term. As Engels noted of the violent system of nineteenth-century production, 'measures had to be taken by the state to curb the manufacturers' utterly ruthless frenzy for exploitation, which was trampling all the requirements of civilised society underfoot' (Engels, 1850). The conditions of the factory threatened to eradicate the source of its profits: a compliant labour force. This contradiction between the need to accumulate and the need for some form of social protection echoes that which we identified in our discussion of CSR, above.

The Factory Acts can be understood as a form of mediation between social protection and the rampant profiteering that threatened the viability of the factory system. Given the social unrest provoked by workers' resistance and growing campaigns by middle-class social reformers, regulatory

intervention was necessary to ensure some measure of legitimacy for a very clearly grossly unequal and violent system of production. In short, regulation was necessary, in Carson's (1980a) words, in order to sustain a 'viable class society'.

Now, given that capitalism is based on fundamentally antagonistic social relations, the Factory Acts did not *resolve* the perennial contradiction between profit accumulation and social protection. Moreover, Marx documented an ongoing conspiracy to undermine the law after each of the Acts was introduced, describing the various dodges used by factory masters to maintain a 'relay system' and circumnavigate the legal limits on the working day by employing workers concurrently across different shifts, which Marx described as the manufacturers' 'revolt' against government (Marx, 1887/1954: 276). Indeed, this conspiracy was apparently strong enough to force changes in the development of legal principles applied to them. Prison sentences were amongst the tariffs available to the courts for breaching the early legislation, but this resort to punishment was never applied. At the same time the law needed to provide some basis for regulatory intervention for the reasons set out by Marx. For Carson, this meant that basic principles of law applied in the courts had to be jettisoned and replaced with new principles that allowed for a more acceptable form of punishment and criminalisation: hence the legal developments that resulted in the 'conventionalisation' of factory crime, as discussed in Chapter 3.

At the same time, the growth of profits from manufacturing – in the factories, mills, bakeries and meat-packing plants – as well as from colonial trading by corporations, led to a rapid growth in the production of surplus value that gathered pace in the nineteenth century. This growth in surplus value created an intensified demand for

new forms of capital investment. The expansion of the number of business incorporations described in Chapter 3 can therefore be partly understood as a result of the need to find a channel of investment for wealth newly acquired by the rising merchant and factory-owning class. In many industrialising nations, including the UK and the US, the joint-stock corporation model proliferated in the mid-nineteenth century, as we have seen.

The origins of the proliferation of the joint-stock corporation can be found in a manifestation of the same contradiction that we find as a thread running through the history of the corporation: that contradiction between the rapacious tendency of capital to accumulate and maximise profits to the point that its conditions of existence are threatened on the one hand and the state's need for some minimal form of social protection (to shore up the legitimacy of the state and ensure the steady progress of industry) on the other hand. It was in the 1820s that this tension came to the surface and forced the hand of the UK parliament. As Harris (2000) notes, there was a proliferation in new forms of joint-stock promotions, from 160 in February 1825 to over 600 by the end of the same year. Many of those promotions were challenged as illegal and were duly wound up. There then followed intense pressure on parliament to ensure that those 'promotions' remained viable as investors and promoters crowded its doors and halls. This political dissensus was given impetus by a movement of key industrialists pressing for reforms that sought to liberalise the laws on incorporation and ultimately to establish a principle of limited liability or 'limited responsibility' as it was called then, with no irony (ibid.: 260). The key figures involved in the repeal of the Bubble Act in 1825 were members of parliament

with close class ties to this movement of business promoters and investors. The same dynamic described above – the need to regulate in order to control the *criminogenic* character of the joint-stock company – was one that was recognised even at the heart of the British establishment as early as 1841 when a Parliamentary Select Committee was established to 'inquire into the state of the law respecting joint-stock companies with a view to the prevention of fraud'.[2] It was this Committee that played a key role in driving a compromise between those groups in government who sought to uphold controls on investment and the business movement for 'liberalisation' of laws on limited liability. The Committee gave impetus to the re-establishment of the joint-stock company, but opposed the principle of limited liability. What was at stake here was essentially a shift from government bonds to company shares and securities being the principal material of trade on the London Stock Exchange. This shift was not particularly supported by government or the large companies, but any hostility in ruling elites was gradually swept aside by the persistence and the scale of an alliance of middle-class investors, professionals and some manufacturers and aristocrats who were able to present corporate stocks and shares as a better yielding alternative to investing government stock (ibid.). This corporate revolution could therefore be promoted to government and the wider populace as being in the 'public interest'. This movement prevailed, and through the passing of the 1855 Limited Liability Act (see Chapter 3), the principle of limited liability was finally institutionalised. Thus the outcome in the nineteenth-century English legal system was one that was overwhelmingly oriented to ensuring the growth of the corporate economy, and one in which business interests ultimately forced the hand of parliament.

The combination of this legal movement along with a relative lack of accountability in the banking sector provided the formative conditions for widespread corporate fraud in nineteenth-century Britain. In Robb's account, *White-Collar Crime in Modern England*, the rise of the joint-stock/limited liability model not only facilitated British domination of the world economy but also created 'a climate favourable to fraud' (1992: 181). The growth of the banking sector under those conditions facilitated the expansion of a series of new investment opportunities, which enriched those who had money to invest. The directors of those banks were trusted with the savings of the growing middle class, and had considerable autonomy over the ways in which those funds could be invested. Thus, according to Robb, 'the temptation to misappropriate or misapply that money was at times irresistible' (ibid.: 181). And this is precisely what happened. The consequence of the relatively lax scrutiny of a burgeoning finance sector was widespread theft, embezzlement and fraud.

Just as we find in the case of the Factory Acts, maximum penalties for fraud carried severe penalties, including jail and transportation. Yet those punishments mainly fell on middle or lower status employees, rather than senior managers or directors:

> The harshest sentences in cases of white-collar crime were reserved for embezzling clerks. During the 1850s Walter Watts, William Robson and Leopold Redpath were all transported for their massive embezzlements, but even petty theft by an employee frequently resulted in transportation.
>
> (Ibid.: 164)

In the United States in the nineteenth century, also a key period in the rapid rise to power of the corporation (see Chapter 3), corporate fraud and criminal activities were similarly

widespread. Matthew Josephson's (1934/1962) dense history of the 'robber barons', a term first used by Mark Twain to describe the aggressive generation of early industrialists in the US who accumulated wealth and power by routinely breaking the law, provides a similar insight into capitalism's ruthless frenzy for exploitation. In *The Theory of the Leisure Class* (1899/1994), Thorstein Veblen argued that the robber barons were no different from barbarians – they used brute force, cunning and competitive skills to profit from the spoils of conquests; and their profits were not from socially productive, but from socially destructive, activities. Those powerful individuals such as Jay Gould (the Pullman Company), JP Morgan (banking and finance), Andrew Carnegie (Carnegie Steel Company) and John Rockefeller (Standard Oil) headed corporations that accumulated huge fortunes by plundering new markets, price fixing, and then using their industrial wealth and power to circumnavigate trust laws, to drive out competitors, to smash trade union organisations and impose brutal conditions on their workforces. Josephson's *The Robber Barons* shows how new social and moral values of capital accumulation and 'free enterprise' promoted by the new ruling business class were used to legitimise their barbarism. Government regulations and laws aimed at protecting consumers and workers were – just as we saw in Marx's account of the British factories – viewed by the most powerful members of the ruling elite as obstacles standing in the way of industrial progress. In the capitalist frontiers of America, just as in Victorian Britain, a rising class of industrialists felt little compunction to obey the few laws that sought to control the human consequences of profit accumulation. The shipping magnate Cornelius Vanderbilt summed up the spirit of the robber barons when he famously declared: 'What do I care about the law. Ain't I got the power?' (Josephson, 1934/1962: 15).

In other words, across historical and national contexts, crime and violence, either perpetrated or encouraged by mainstream corporations, are commonly part of their *modus operandi*. In our brief consideration of the rise of the corporation in this book, we can discern a clear pattern of a momentum, a pattern that shows how the rise of the corporation involved, on the one hand, the concentration of power of a new property-owning elite, and, on the other hand, the production of widespread social and criminal harms. The history of the corporation, is, therefore, inextricably linked to the production of harms that have violent consequences, both in terms of the physical violence experienced by workers and in terms of the financial violence resulting from frauds and thefts.

Understanding regulation

This history also requires us to ask further questions regarding the origins, nature and function of regulation. To address such questions, we turn to what is the now enormous literature on regulation, which, for heuristic purposes, we present here through four ideal-typical sets of claims regarding regulation that pervade criminology and socio-legal studies.

What we might call 'consensus theories of regulation' (Whyte, 2004) share a great deal with claims made for CSR, discussed previously. In general, these views see regulation as a phenomenon that arises as a protective or paternalistic state response to socially damaging economic activity (for discussions of this position see Campbell and Lee, 2003; French and Phillips, 2000; Baldwin and Cave, 1999; Ogus, 1994). In this distinctly pluralist vision, systems of regulation are conceived of as a 'public good', the outcome of dialogue between a range of diffuse competing interests. Regulation is conceived of as the outcome of an open and ultimately benevolent decision

making process involving relevant stakeholders: consumers, residents, workers and so on, employers and the government. A different body of work produced largely in the Oxford School of Socio-legal Studies supports a consensus perspective on regulation (Baldwin, 1995, 1997; Black, 1997; Hawkins, 1984, 1997, 2002; Hawkins and Thomas, 1984; Hutter, 1988, 1997, 2001). According to this 'compliance school of regulation', the most successful regulatory strategies are likely to be those involving persuasion, bargaining and compromise between regulator and regulated. 'Self-regulation' – a model of regulation where corporations are trusted to monitor and observe their own legal compliance as part of a minimalist regulatory framework – is to be encouraged and, in fact, constitutes the bulk of 'regulation'. Corporations do not respond particularly well to – indeed they are more likely to be alienated by – prosecution (see also Simpson, 2002). Corporations have the capacity to act as good corporate citizens, capable of responsible and moral decision making. Therefore regulators must appeal to the better nature of corporations by nurturing co-operative relationships with managements. Compliance writers argue that a pre-condition of effective regulation is the construction of a consensus around appropriate forms of corporate crime control. Regulatory flexibility and the use of discretion (as opposed to the rigid enforcement of the law) are appropriate fordetermining which rules to apply (Bardach and Kagan, 1982; Black, 1997; Hawkins, 1996a; Lange, 1999). The influential work of John Braithwaite and colleagues, whilst it recognises that there is a range of options along the regulatory continuum, often represented as a pyramid of enforcement (Ayres and Braithwaite, 1992; see also Grabosky, 1997), argues that 'monitored' or 'enforced' self-regulation is the most pragmatic regulatory outcome (Braithwaite, 1982;

Braithwaite and Fisse, 1987). Braithwaite and others are in favour of compliance strategies, but only when they are backed up by tough sanctions, since 'regulators will be able to speak softly when they carry big sticks' (Braithwaite, 2000: 99).

We have subjected the latter views to extensive empirical (and conceptual) critique elsewhere (Pearce and Tombs, 1990; Tombs and Whyte, 2013). In short, we would argue, first, that there is little empirical evidence for consensus theory's claims about the desirability of self-regulation (Dawson et al., 1988; Smith and Tombs, 1995). The case against strict enforcement regulation is always made hypothetically, since it has never been tried and tested over a sustained period (although see Alvesalo, 2003a, 2003b). Second, consensus views of regulation downplay conflict, viewing conflicts over regulation as a peripheral rather than central feature of regulation (Davis, 2000). Workers' movements and popular campaigns against corporate harm, for example, rarely warrant more than a passing mention in many of those texts. Moreover, where *corporate* resistance to regulation is recognised in this literature, it tends to be characterised as the vice of a few malicious deviants or 'bolshie types' (Hawkins, 1996b: 312). Third, and following the analysis of previous chapters in this book, the assumption that corporations can be made into responsible, moral decision makers underplays both the routine and pervasive nature of corporate offending. Moreover, this assumption obscures the techniques of 'creative compliance' and 'law avoidance' that corporations use systematically to undermine the letter or spirit of the law (McBarnet and Whelan, 1991; McBarnet, 1988; Marx, 1887/1954: 271–2). In fact, finally, this perspective obscures the social and legal foundations upon which corporations are built. Company directors are bound by law to pursue maximum levels of profit for shareholders and, in the final

instance, corporations as presently constituted must make a profit to survive (Glasbeek, 2002). It is those features of capitalist businesses that make it unlikely that they will voluntarily consider workers, consumers or the environment before they consider the bottom line.

We have already provided an introduction to 'neo-liberal understandings of regulation' in Chapter 1. To recap, neo-liberal theorists argue that we are over-regulated, and that government-imposed rules on markets and on corporations obstruct economic efficiency and individual freedoms (Friedman, 1962/1982; Hayek, 1944/1972). Market mechanisms more efficiently allocate resources and exert control over participants in markets. Deaths and injuries at work, for example, can be adequately regulated by the balance of market forces. Neo-liberal market logic holds that workers only enter employment after freely agreeing contractual terms with employers. The risks that workers are exposed to will have a nominal value in this agreement, and employers will find an optimum level of safety provision that is necessary to attract workers on competitive wages (for a critical discussion, see Moore, 1991). Whenever possible, then, the market should be used to distribute the harmful effects of capitalist markets. Thus, for example, the World Bank had argued secretly for the expansion of markets in toxic waste to ensure that pollution produced in the US can be exported to relatively poor, less polluted developing countries, since 'their air quality is vastly inefficiently low compared to Los Angeles' (cited in Pearce and Tombs, 2002: 189).

As we have intimated in Chapter 1, a key element of the neo-liberal ideology that took hold in Western political systems in the 1970s and 1980s and post-Soviet societies in the 1990s was the institutionalisation of 'deregulation' as a centrepiece of economic policy. For the Reagan and Thatcher

governments, regulatory protections (particularly in the realm of 'social regulation') often created unnecessary 'red tape' or imposed 'burdens on business'. What followed in the US, the UK and in other prominent OECD countries was a twin-pronged attack upon the legislative safeguards governing some forms of anti-social business activity, perhaps most notably worker safety (Tombs, 1996), the environment (Blowers, 1984; Monbiot, 2000) and some forms of consumer protection (Palast, 2003: 215–31). Central to this strategy was the withdrawal of political support for, and at times resources from, some regulatory agencies (Tolchin and Tolchin, 1983; Woolfson, 1994).

Moreover, the economic models upon which such a view of regulation is based encourage intensive production and consumption regimes (which some commentators call 'turbo-capitalism'; see, for example, Luttwak, 1999). As we argued earlier, fail to take account of 'externalities'; that is, a more accurate accounting of the socialised costs of production, calculating external costs to the environment or to human health, albeit costs that are not required by law or by standard accounting practice to be included in profit/loss balance sheets. Further, the neo-liberal model of the market accelerates the concentration of power and resources in the hands of a small elite and by doing so redistributes the greatest risk of victimisation to the least well off (Chomsky, 1999). Finally, and most significantly for us, given the theme of this book, even what appear to be the 'freest' of markets do not and cannot operate without the active intervention of states (Jessop, 2002; Moran and Wright, 1991; Polanyi, 1944/1957: 139; Soros, 1998: 36–42). As we have argued, states establish the market conditions, rules and infrastructures within which businesses operate. Corporations themselves often recognise that regulation is

in their long-term interest, and large firms in particular are generally unwilling to subordinate themselves to the vagaries of the market (Pearce, 1976: 82–4).

Some neo-liberal theorists argue that government regulation, especially in monopoly industries, has a tendency to produce a corrupting influence between large companies and state regulators (Peltzman, 1976; Stigler, 1971). The argument here is that state regulation will only ever produce unequal and unfair competition in the market place, because it encourages a mutually reinforcing relationship between governments and *big* business. In this sense, this group of theorists, sometimes known as the 'law and economics' movement has influenced a rather different perspective on regulation known as 'capture theory'. Capture theory characterises governments and state regulatory agencies as vulnerable to 'capture' by big business. Marver Bernstein conceptualised the regulatory process as a 'life cycle' where regulatory agencies tended to go through various stages of maturity (Bernstein, 1955). His argument was that regulatory agencies are born out of a general concern about a regulatory problem, and in their early stages of development, although they tend to be outmanoeuvred by business, retain a certain regulatory zeal (or a strong political will in favour of regulatory control). This zeal ebbs away as the agency reaches maturity, and the agency is, in 'old age', debilitated by its final 'capture' by industry. Capture is achieved by a mixture of intense corporate lobbying, the consolidation of elite interests in public and private sectors, and a 'revolving door' of personnel between regulator and regulated. Capture theorists span a broad range of perspectives; other advocates of 'capture' depart from the 'law and economics' perspective and life cycle theory and use the capture perspective to critique capitalism. This version of capture theory tends to be

more empirically focused and observes that the state and its administrative apparatuses have, in advanced stages of capitalism, become colonised and ultimately controlled by large corporations. Capture theory has therefore been used widely to explain the corporate manipulation of government in a so-called 'globalised' world order (for example, Sklair, 2001). In *The Silent Takeover*, Hertz argues that corporate power has become unassailable since '[g]overnments are now like flies caught in the intricate web of the market' (2001: 140). One value of capture theories is that they are able to bring to light systematic bias in regulatory agencies (Tombs, 2002: 122). Moreover, this perspective seeks to explain how regulatory regimes can facilitate corporate crime production by establishing the framework for collusion between industry and government officials (Snider, 2003).

However, the value of 'capture' theory is undermined by its inability to explain why – at particular moments – stricter regulation that harms the immediate interests of corporations (even if in the long-term interests of capital as a whole) can be introduced (Alvesalo and Tombs, 2001; Carson, 1979; Marx, 1887/1954; Virta, 2000). Nor can it explain why over time, states/regulatory agencies can revert to more punitive strategies, even after the point that they appear to have been captured (for example, Calavita and Pontell, 1995) or indeed the fact that there may be conflicting policies inside 'captured agencies' (Hutter, 2001).

This is neither to deny the capture thesis any conceptual value nor to deny that 'capture' does happen to government agencies at particular moments (see, for example, Carson, 1980c, 1982). The current relationships between the 'Big Four' accountancy firms, the top five 'Magic Circle' law firms and the corporate elite in the UK appear effectively to combine to pre-empt any system of effective corporate taxation,

partly as a result of capture of the regulatory bodies to which Wilks (2014) points (see Chapter 1). Moreover, few would disagree that in capitalist societies state agencies tend to act in ways that promote organised business interests. Indeed, this point is recognised to some extent by each of the perspectives that we have reviewed so far. But what is missing from all of the perspectives considered so far in this chapter is a way of thinking about regulation that reconciles regulatory bias with some of the shifting and often contradictory dynamics in the politics of regulation: consensus, neo-liberal and capture and consensus theories lack sufficient attention to resistance, change and to the social forces through which regulation is produced and reproduced. If capitalist states are inherently biased towards organised business interests, then how do we explain the major expansion of regulatory regimes across capitalist social orders in the twentieth century? How can the current UK government's pro-business, anti-regulation agenda (see, for example, Better Regulation Task Force, 2000) be reconciled with its creation of a Financial Conduct Authority with what appears to be an arsenal of tough enforcement powers? Moreover, how do we explain the same government's willingness to support even the symbolic criminalisation of corporate killing (Almond, 2013; Tombs, 2013a; Tombs and Whyte, 2003b)?

A body of research produced by critical and neo-Marxist scholars emphasises the importance of *conflict* over corporate regulation in the formation, and in the implementation, of regulatory regimes. This literature notes that regulatory controls have often been established only after long and bitter struggles by organised groups of workers and other social movements (Kramer, 1989; Snider, 1991; Tucker, 1990). At the same time, historically, businesses and their representatives have fought bitterly in opposition to regulation

when it is not in their clear interest. They obfuscate, lie, cheat and make threats to disinvest, often fighting fierce public relations campaigns and behind the scenes political manoeuvres to avoid or to influence regulatory reform (Monbiot, 2000; Tombs and Whyte, 1998; Woolfson et al., 1996; Tweedale, 2000; Palast, 2003). Critical scholars and neo-Marxist commentators therefore argue that conflicts between pro- and anti-regulatory forces from outside the state are crucial to understanding the origins of regulation, and its subsequent level of enforcement (for example, Carson, 1979; Davis, 2000: 14–18; Harris and Milkis, 1989; Navarro, 1983; Pearce and Tombs, 1998) – even if such conflicts around the definition and enforcement of the law are not always visible (Grigg-Spall and Ireland, 1992; Lukes, 1974).

Regulatory agencies tend to emerge after periods of crisis and after sustained periods where conflicts over corporate activity are highly visible. They are formed by states in order to absorb and dissipate struggles between conflicting social groups and do this by claiming to represent the interests of pro-regulatory groups at the same time as protecting the general interests of society. This does not mean that regulatory agencies are neutral or balanced in the way that they deal with corporate crime; rather they are 'unequal structures of representation' (Mahon, 1979: 154). Regulatory bodies tend to subordinate the interests of non-hegemonic groups to the interests of business, but since their purpose is a stabilising one for capitalist social orders, they may subordinate the immediate interests of particular businesses to the long-term interests of capital as a whole. In turn, the likelihood that they may regulate in order to placate or dissipate movements of opposition makes regulatory agencies vulnerable to pressure (Shapiro, 1984; Snider, 1991). From this perspective,

the shape of regulatory regimes and strategies of enforcement also depend upon a range of external factors that shapes the confidence and the capacity of sub-dominant groups to fight back (Tombs, 1996). On this basis, the consensus perspective becomes less convincing. It is more accurate to think about *dissensus* rather than *consensus* as the driving force behind the politics of regulation (Snider, 1991: 211).

It is this notion of *dissensus* that helps us to grasp the complex and seemingly contradictory politics of regulatory reform. For example, the period of criminalisation of financial fraud in the UK in the 1980s and early 1990s coincided with a period in which other 'social' protections were decriminalised (Fooks, 2003a). This apparent inconsistency can, from a critical perspective, be understood as an attempt by the UK state to secure the long-term stability of capital. In the UK during the 1970s and early 1980s there was dissatisfaction across the political spectrum and from a variety of pro-regulatory forces, including some powerful 'City' interests, with the system for investigating and prosecuting serious fraud, leading to the establishment of the Serious Fraud Office by the Criminal Justice Act 1987. Confidence in markets had latterly been undermined by a series of high-profile frauds, some involving household names such as Robert Maxwell and Guinness, and regulation was essential to stabilise confidence in and legitimacy of the City of London. However, pro-regulatory forces concerned with other forms of social protection had been substantially weakened by the Thatcher governments, thus creating the conditions for ideological reconstruction of such regulation as a burden on the economy. But even here there are also contradictions. Some 20 years on, 2008 saw the Corporate Manslaughter and Corporate Homicide law come into force – a law that emerged in the midst of a

general deregulatory assault on health and safety law and its enforcement. One interpretation of this is to see regulation as 'an explicitly social act' (Almond, 2013: 77) with normative, symbolic and expressive functions. Thus, for Almond, the Corporate Manslaughter and Corporate Homicide Act 2007 steers a path between government's symbolic need to do something about 'companies that kill' (ibid.: 32) whilst not unduly harming business interests: a juxtaposition that points to a 'deeper set of tensions' regarding legal attempts to control corporate behaviour (ibid.: 33).

If Almond's interpretation is plausible, it is only a partial understanding of how the law emerged and took the shape as it did. Despite his reference to deeper tensions, his analysis typifies many studies of regulation, since it lacks any detailed sense of pro- and anti-regulatory forces engaged in struggle over the existence and shape of the new law (Snider, 1987; Bittle, 2012). All too often one encounters references to 'the public', alongside a sense that law emerges as if naturally or relatively spontaneously in relation to a political and legal problem that somehow – often autonomously – simply demanded resolution. Thus in Almond and Colover's (2012) discussion of the Corporate Manslaughter and Corporate Homicide Act 2007, there is reference to 'politicians and the public', but not to victims, campaigners, trades unions, divisions within political elites, branches of government or the state, business organisations or regulators themselves (though on the latter, see Almond, 2004). Written out of this brief, historical back-story is any sense of partisanship or struggle[3] – an observation that may seem tangential, but that is ultimately very revealing. The Act had in fact been the subject of a long (13-year) and intense struggle (Tombs and Whyte, 2003b; Tombs, 2013a). The consequence of this long period of contestation was that

many of those pro-regulatory organisations that had campaigned most vehemently for the law were highly critical of the form in which it was ultimately passed. As the 2007 Bill passed through to enactment in 2008, FACK[4] – a group of families bereaved by work-related death, established in 2006 – was scathing of it for its omission of directors' duties, its reference to 'senior management' and the limited range of penalties then envisaged to follow from convictions under it (FACK, 2006).

CONCLUSION

Regulation, then, is about much more than simply 'controlling' corporations. For us, regulation in capitalist societies is as much about social order maintenance as it is about control efforts per se. Regulation maintains the steady rate and function of the machinery of industry and commerce. And for this reason, regulation per se can never be a solution to corporate harm or crime.

The process of regulating corporate activity appears to us as a process that does much more than simply *controlling* corporate harms and illegalities. Rather, it is a means of ensuring that a burgeoning corporate economy does not self-destruct. We have seen how regulation emerged historically in response to occupational deaths and to corporate fraud. It represented a response to a social problem that threatened to undermine the conditions for accumulation, but did not respond 'naturally' or spontaneously – rather, regulation emerged historically, and should be understood contemporaneously, as a product of inter- *and intra*-class conflict, conflict often involving wider social movements (Snider, 1991). Moreover, the emergence of regulation is never in itself an 'end' to such conflict, not least because the nature, level

and actual enforcement of such law always remains open to contest.

State regulation of business can only be understood, both theoretically and practically in this context, as a process of meeting the 'requirements of a civilised society' – or what might be called more simply 'social order maintenance'. Regulation maintains the steady rate and function of the machinery of industry and commerce (Whyte, 2004). As such, its purpose is to seek a stable and uninterrupted system of production, distribution and consumption.

The consequence of looking at regulation from this perspective is that we have to accept that the regulation of corporate activity by government may seek to ameliorate the harms of corporations, but that this is by no means its primary purpose. And it is by pursuing its *primary* purpose – maintaining the current state of affairs – that regulation produces and reproduces corporate harm and, in a variety of ways, prevents such harms being identified, processed or formally recognised as *crimes*.

NOTES

1 Personal communication between authors and Environment Agency, 4 April 2008.

2 House of Commons Debate 2 April 1841, Hansard, vol. 57, c842.

3 In fact, there is passing reference to 'influential lobby groups' – though no sense of who these were – and to the 'trade union constituency' (Almond and Colover, 2012: 1000).

4 FACK seeks 'urgent government action to halt the complacency about deaths at work and decent laws which will bring dangerously negligent bosses to justice. fack wants a review of the way work-related deaths are investigated and the way families are treated. And it believes workers and safety reps must be given more rights to protect themselves against exposure to unacceptable risks to their lives and health' (www.hazardscampaign.org.uk/fack/about/index.htm).

6

CONCLUSION

What is to be done about the corporate criminal?

INTRODUCTION

If this book has attempted to achieve one thing, it has been to demonstrate, historically, empirically and theoretically, that neither corporations per se, nor corporate activities in particular, exist in any natural nor inevitable form. The corporation – and, crucially, the form of personhood endowed on it through law, which sits at the crux of the formal responsibilities, the freedom and structural irresponsibility with which it is endowed – is a relatively recent historical construction, crucially fashioned in the consolidation of contemporary capitalism as part of a wider system of individualising, class-based law.

Thus we have sought to demonstrate that the corporation, as currently and historically constructed, cannot be effectively reformed, not through CSR, not through regulation, not through tinkering with structures and functions

such as is the stuff of corporate governance. It is an *essentially* destructive, irresponsible phenomenon. In short, the goal of corporate opposition must be the abolition of the corporation. Just as Mathiesen (1990) furthered the academic rationale for, and the political programme of, prison abolitionism through placing the *Prison on Trial*, one way of reading this text is as the case against the corporation – in effect, *The Corporation on Trial*. And in that context, we have further argued that none of the stated rationales for the corporation, just like the rationales for systems of incarceration, withstands critical scrutiny.

Certainly corporations are not beneficent institutions. Their *sole* purpose, their *raison d'être*, is not any social good, but simply the accumulation, indeed maximisation, of profit, and it is for this reason that their growth and nurturing is coterminous with the consolidation of modern capitalism. Nor, we have argued, is it the case that their economic and social benefits make deleterious, even destructive, 'side-effects' a 'price worth paying'. We have emphasised here that harm and crime are not marginal but central to corporate activity, generated through corporate personhood, and the techniques and mindsets of 'externalities', the corporation's dehumanising structure of irresponsibility, and its necessarily a-moral, calculative rationality. Nor can it be claimed that, whatever its failings, the corporate form is the single best way of organising the production and distribution of goods and services in the contemporary world, and, relatedly, that this relative efficiency is also a motor of innovation, economic progress and, ultimately, social good. As we have shown, at national and even transnational levels, most sectors are at best oligopolised, with significant barriers to market entry, so that profits are generated by market power rather than corporate ingenuity.

Yet some still claim that, even if corporations appear to act illegally and irresponsibly, corporate activity might be refashioned along socially responsible lines, and that, in the minority of instances where autonomous CSR fails, the state can and will regulate, in order to bring recalcitrant corporations into compliance. It is further claimed that, even if such law enforcement efforts are often relatively inadequate, the potential for them effectively to balance economic progress with social welfare is always within our grasp. Neither set of claims is, we have argued, sustainable in either empirical or theoretical terms. Moreover, as the book has shown, the stakes are too high to make such glib and unsupported assumptions, even if they remain politically convenient, and therefore obdurate.

THE SHIFTING DYNAMICS OF STATE–CORPORATE RELATIONS

We have made clear how the corporate drive for profits kills, maims and steals from people as a matter of course. In turn, we have also demonstrated how, and in what ways, corporations (and thus, the corporate power to act and to produce harm) are in so many ways dependent upon their relationships with states, a dependence mediated crucially through law, not least through the apparent freedoms and legalities for which states create and maintain spaces. In short, this means that the corporation's ability to cause harm and crime with relative impunity is also underpinned by state and law. The corporation and the state, as we have argued at length in this text, stand in a symbiotic relationship – albeit that the specific nature of this symbiotic inter-dependence is a shifting one.

Although absent from most scholarly texts on the subject of the corporation or on the subject of 'crime', these latter

observations underscore a well-known truth of much political economy, namely that not only has a 'free' market never existed, but also that no economy accurately characterised by the term 'free market' actually could exist (Sayer, 1995). States help to constitute capital, commodity, commercial and residential property markets, help to produce different kinds of 'human capital', constitute labour markets, and regulate the employment contract; the state plays a key role in constituting economic enterprises through specifying rules of liability, not least the terms of incorporation. In other words, regulation is a necessary function of a state even in the quintessential 'free' market economy, even while advocates of global neo-liberalism consistently deny such a role for the state and regulation. While 'the ideological notion of latent or implicit markets which only need freeing figures strongly in neo-liberal rhetoric' (ibid.: 104), this contrasts with the overwhelming empirical and theoretical evidence attesting to markets as legal, political and ideological constructions. Now these claims carry with them several implications. For the purposes of the argument presented in this book, it is crucial to recognise that state–corporate relations are constantly constituted and reconstituted, dynamically, in forms that are not exhausted by – but which always have some – legal basis.

We have already noted in Chapter 1 of this book that the 2008 bank bail-outs constitute a crystal clear example of the myth of the 'autonomy' of corporations in a 'free' market. This moment is also crucially significant in terms of our understanding of the legal basis of state–corporate relations and how the new legal terrains upon which the profit-seeking corporation can operate are opened up in such moments of 'crisis'.

In the US, the Troubled Asset Relief Program (TARP), developed on the back of the 'Paulson Plan', effectively

bailed out the US financial services sector, representing what has been labelled a 'financial coup' (Harvey, 2009). Under TARP, the US Treasury committed up to $700billion to promote stability in financial markets through the purchase and guarantee of 'troubled assets' (Congressional Budget Office, 2012: 1), and by February 2012, $431billion of this had been disbursed (ibid.). The same act of fiat was repeated in the UK bail-outs, and in December 2009 the National Audit Office (2009) produced an 'overview of the government's response to the crisis', which showed that 'the purchases of shares by the public sector together with offers of guarantees, insurance and loans made to banks reached £850 billion, an unprecedented level of support'. The financial commitments made by UK governments since September 2008 have included purchasing shares in banks to enable re-capitalisation, indemnifying the Bank of England against losses incurred in providing liquidity support, underwriting borrowing by banks to strengthen liquidity, and providing insurance cover for assets. Moreover, these financial packages in both the US and the UK were accompanied by relatively unprecedented levels of state 'intervention' in parts of the corporate sector. Notably, for example, numerous governments, including the UK and US, provided various forms of assistance to the automobile industry, 'including subsidies to firms and direct involvement in industry restructuring plans', as well as varieties of car-scrapping schemes to increase sales (OECD, 2010: 88). During this period, many governments allowed the banks to ignore competition law – the supposed bedrock of neo-liberal markets; in the UK, for example, a merger between HBOS and Lloyds, two of the country's largest banks, was supported by the government.

As we have noted at different points in the book, mainstream commentators on corporate power have consistently

pointed to a decline of the power of 'the state' due to 30 years of a seemingly naturally unfolding globalisation. Yet this series of events is significant because it is clear from this that it was *only* the state that could respond to the crisis in 2008 (Gamble, 2009: 97). And so this was and remains a moment of exposure that reveals the poverty of this mainstream consensus that projected a zero-sum relationship between the rise of the corporation and the decline of the nation state. This series of events reveals that the relationship between states and corporations is not antagonistic: the power of one does not decline at the expense of the other. Rather, these events show the state–corporate relationship to be essentially *symbiotic*: the power of the corporation rests upon the power of states, and vice-versa. The symbiotic nature of the state–corporate relationship has been a key conclusion drawn throughout this book. As we have seen, in the history of the birth of the modern corporation (Chapter 3), in the history of conjoined activities such as war-making (Chapter 2), and in our detailed description of government collusion to maintain impunity for routine, normalised corporate harm and crime (Chapters 2 and 5), the corporation would not and cannot exist without a great deal of state work. In turn, the capitalist state has come to rely upon the corporate form to which it gave birth.

What *is* remarkable, however, is that, certainly in the UK, even in this most vulnerable political and ideological moment for the state–corporate nexus, the idea of the necessity and desirability of regulatory retreat – of recasting law to allow greater corporate freedom – has persisted and strengthened across the mainstream political spectrum. Thus, for example, going into the General Election of 2010, all three major UK political parties were committed to reducing the 'burdens' on business regulation in general, while each referred with

absolutely no specificity at all to the need to 'do something' about regulating banks and financial services – a remarkable contradiction that was not even mentioned in public debate. The key political terrain upon which approaches to regulation were set out comprised the following two elements: first, that regulation in general was inherently burdensome and only to be an option of last resort, a minimalist necessary evil; and, second, that in any case regulation entailed costs for both the state and for business, costs that had to be restricted in the new 'Age of Austerity'. Thus business regulation costs *had* to be minimised as part of the overall attempt, on the one hand, to tackle the new fiscal crisis of the state, and on the other hand to reduce the costs for the private sector, which was seen as the only vehicle for economic recovery.

Across nation states, and certainly in the UK, dominant political and policy responses to the current economic crisis have therefore been organised around ideological claims that promote the interests of private capital, seeking to increase its 'freedom' as the solution to 'our' debts: thus, across all the mainstream political and economic agendas concerned with economic recovery, the rhetoric of minimalising 'red tape', or the 'burdens' upon private capital is virtually the only game in town (see Tombs, 2015a). This highlights a central achievement of the neo-liberal period: namely that the key institutional form of capital, the corporation, has been reified as *the* quintessential agent of economic success, and that the law through the state must constantly be adapted to facilitate its achievement of such success. Absent from this discursive terrain was any consideration of – besides the never specified and never acted upon commitment to 'do something' about – the forms and levels of state regulation that had fuelled unsustainable levels of profit maximisation on

the part of financial services operating in a series of global web of opaque shadow-economies, a toxic process that created the very crisis to which more of the same poison was to prove the necessary cure, in the form of economic recovery.

Now, one clear strand amongst the voluminous literature on the crisis and responses to it is that what has re-emerged is, for capital, 'business-as-usual'. For the reductions in the social wage and the further reconstructions of welfare and social provision through complex alliances between what are still referred to as state, private and third sectors, the context of mass unemployment and increasing inequality, and of course austerity budgets that will retrench formally 'public' state activities, will all re-order the nature of the dominant form of state–corporate relationships. Indeed, it is likely that the post-2008 settlement will be interpreted by the historians of the future as a key moment in the final push towards the destruction of the Keynesian welfare settlement. The nature of this new settlement, established under the guise of austerity, the fiscal need to shrink the state, and promotion of the private corporation as the only motor of recovery, is creating vastly expanded terrains upon which private corporations can act – from welfare to workfare, from health to higher education. This reconstructed terrain is being pursued through law. Such reconstruction will create more, rather than less, harm. Yet these new terrains represent simultaneously a significant challenge and an opportunity upon which anti-corporate and re-regulatory struggles can and must proceed. What we are witnessing as the early post-crisis settlement unfolds, is not just business-as-usual: rather, we are witnessing the construction of a *legal* terrain within which corporate power has been more economically and socially entrenched.

For us, then, it is *increasingly* helpful to think in terms of *state–corporate relationships and inter-dependencies* as the

sites and mechanisms through which harms and crimes are produced – and may be resisted. Now this is not an entirely original insight, for this nexus is partially captured by an emergent literature on 'state–corporate' crime. Developed by corporate crime scholars in the US, the term state–corporate crime first appeared in 1990, when Kramer and Michalowski defined this phenomenon as 'illegal or socially injurious actions that occur when one or more institutions of political governance pursue a goal in direct co-operation with one or more institutions of economic production and distribution' (2006: 15). This, concept, they continued, 'directs attention toward the way in which deviant organizational outcomes are not discrete acts, but rather the outcome of relationships between different social institutions' (ibid.). Moreover, it highlights the ways in which 'relationships between economic and political institutions contain powerful potential for the production of socially injurious actions' (ibid.: 21). Thus, such crime can be *initiated* and/or *facilitated* by states.

At one level, the concept directs us to illegal or corrupt relationships between state servants and private companies – a classic example here being the storm that erupted at the start of this decade surrounding Rupert Murdoch's News International, its involvement in phone and email hacking, and the alleged implication of senior politicians, civil servants and Metropolitan Police officers, who may have 'turned a blind eye' to these practices – at worst in return for favours, at best to maintain good relations with a powerful media organisation and its influential UK tabloids such as the *Sun* and the *News of the World*. At a deeper level of analysis, the concept of state–corporate crime also allows us to capture some of the increasingly complex relationships between states and the private sector, where private providers increasingly work alongside public authorities. Such contexts are

diverse; they include the delivery of health-care or the running of railways systems, the building of large infrastructural projects (schools, hospitals) through the PFI, specific high-profile collaborative activities such as the winning of large, overseas defence contracts, and even the 'war on terror' and the ongoing conflicts in Iraq and Afghanistan.

Nevertheless, still embedded across academic literatures, a pluralist view of the relationship between states and corporations remains dominant. From a pluralist perspective, this relationship is seen as one of external opposition: that is, the state stands as an institution or ensemble of institutions that is ontologically separate and distinct from 'markets' and society. From this perspective, governments generally do things to protect the public interest; they 'regulate' to protect us all from harms and illegalities – indeed, as we have seen, for many, states do not have to do very much law enforcement work at all, since corporations are actually, or at least potentially, good citizens. But we have sought to indicate how this view of state–corporate relations as one of externality is useful neither as a practical nor theoretical guide to dealing with corporate crime and harm.

One of the central themes of this book is that we need to abandon, once and for all, the tendency to view 'states' and 'corporations' via a kind of crude oppositional duality, a view that arises from a narrow understanding of what Gramsci calls the 'state as policeman' (Coleman et al., 2009). By this he means that what is normally understood in a formal sense as the 'state' – the 'safeguarding of public order and of respect for the laws' – subordinates our understanding of the centrality of 'private forces' in the historical development of states. For Gramsci, the 'state as policeman' approach is a 'limiting hypothesis' (Gramsci, 1996: 261). Gramsci counter-posed the 'state as policeman' with the 'ethical' or 'interventionist'

state and argued that 'the concept of the interventionist state is of economic origin, and is connected on one hand with tendencies supporting protection and economic nationalism and on the other . . . the protection of the working classes from the excesses of capitalism' (ibid.: 262).

In a counterbalance to the dominant understanding of the state as a force of restraint upon impulsive and 'free' markets, Michael Mann (1984) usefully distinguishes between the despotic and infrastructural capacities of states, whereby the former correspond very broadly to the 'state as policeman' and the latter to the 'ethical' state and to the organisation of the economy. On the one hand, despotic powers are those powers to which elites have resort without routine, institutionalised negotiation with civil society groups. Infrastructural powers of the state, on the other hand, are those that enable the state to penetrate and centrally co-ordinate civil society. There are important similarities here with the Foucauldian concept of 'power through' (as opposed to 'power over'), so that state power in infrastructural terms is not merely a matter of crude domination of will, but is best understood as a complex disciplinary process that acts through the social body – through professional disciplines, discourses and so on. Mann's analysis also has something in common with the Gramscian approach to the state, for he views the state not merely as a set of government institutional assemblages that 'negotiate' or seek the approval of civil society, but also as an arena in which we find the 'condensation, the crystallisation and the summation of social relations' (ibid.: 208).

In this respect, corporate crime and harm are nothing more or less than a power relationship that is guaranteed, under-written, and indeed often partly also enjoined, by states. Thus the intensification and concentration of

corporate power is a manifestation of the infrastructural power of states; and a major aspect of this form of state–corporate power-mongering is the production of corporate crime. Corporate crime and harm are contexts where we can see in a very real sense, to invoke Mann's phraseology from above, the 'condensation, the crystallisation and the summation of social relations'. Through a variety of political, legal and ideological processes – processes that are always ongoing, requiring a great deal of state work – corporations have been and are more or less empowered *within states* in ways that allow them to cause large-scale social harms with relative impunity. These processes, in total, constitute the key source of corporate power. And it is for this reason that capitalist states can never provide a lasting solution to corporate power, crime and harm, but will always in the long-term enable corporate profit-seeking to prevail over human needs and social protection.

THE VULNERABLE CORPORATION?

But this symbiosis, despite all of the historical, legal and political foundations, is never settled and is far from secure. The bank bail-outs that we have referred to – and the increasingly obvious imbrication of states and corporations in the still-unfolding post-crisis settlement – certainly remain a moment of exposure for states and corporations, not least for the tales of their independence, indeed antagonism, tales so skilfully and feverishly spun over decades as part of the wider construction of a neo-liberal reason (Peck, 2010). The reassembling of the international capitalist economy has seen widespread state rhetoric regarding the essential role of private capital in 'recovery', calls for a reduced state and the handing over of 'public' functions to 'private actors' as a consequence of a claimed fiscal crisis. But this game is far from over.

The essential role of the state in responding to the crisis of private capital raises to the surface the inherent contradiction within neo-liberalism, intellectually, economically and politically, to the extent that it is a key point of vulnerability for neo-liberal ideology and practice. For all the discursive depth to and power of the idea (and ideas) of neo-liberalism, it remains fundamentally cursed, in Peck's terms: both discursively and in practice, neo-liberalism can neither live with, nor without, the state (ibid.: 65).

More generally, 'the market' – and private capital as the dominant force within this – has found itself again in need of reconstructed narratives to insist upon the promise that it 'can always be perfected even if a particular example may not have functioned perfectly' so that 'the market' always has the potential to create 'more wealth, more goods, more results, more possibilities' – albeit at some *future*, usually unspecified, point (Clarke, 2010: 377). Yet it is precisely in these cracks, or in fact the growing chasm, between the future but never quite attained and indeed unattainable (Peck, 2010: 7) promise and the current, ongoing, very real experiences of most people in most nation states, that state and corporate power remains vulnerable. If cynicism, mistrust and resignation may at times act as bulwarks against popularised discontent, these are hardly reliable defences for power.

Thus it may be the case that challenging a nexus of state–corporate relations appears to make the 'job' of resistance much more difficult than 'merely' taking on corporate wrongdoing.[1] But at the same time, it also makes that task easier, since often, and increasingly, to oppose the corporation is to oppose the state, and vice-versa. Indeed, this observation is clearly illustrated in UK Uncut's action against multinational efforts to avoid and evade taxation in the UK, which at the same time must necessarily be an opposition to the

priorities of HM Revenue and Customs, to the Exchequer, to the government and indeed the whole foundation of assumptions and claims upon which systems of personal and corporate taxation are based and acted upon.

States have re-packaged private debt into national debt, reframed private corporate recklessness into public profligacy and lassitude, and recast the corporation from a potential problem to the only hope of economic recovery. Thus, on the back of a fairy-tale construction of a fiscal crisis of the state, governments, not least the UK government, now claim to further 'free' markets, opening up ever greater terrain for private capital to take on ever more formerly public functions; but these are overseen by national and local states, albeit through a complex myriad of contractual and inter-organisational relationships – so that if scratched, the surface appearance of private delivery reveals increasingly and only too clearly the essential imbrication of corporate and state structures. This creates risks for state and capital.

First, the mystification of private efficiency risks being increasingly exposed as corporations are seen to fail to deliver goods and services in new markets. From the delivery of 'fitness for work' social security programmes by Atos to Capita's contract to regulate the private sector in the name of worker and environmental health in the Borough of Barnet, and from G4S's role in providing security at the 2012 London Olympics to Serco's consistent inabilities to provide suitable GP services, the private corporation, as always through state activity and state support, becomes more vulnerable. Its claims to be more efficient are consistently undermined as evidence mounts that it *cannot* deliver –and, indeed, cannot deliver to the *extent* that previous publically owned services did, even without a misty-eyed view of the latter.

Second, if inefficient and benefitting from economies of scale coupled with market power – rather than any competitive superiority – the extending reach of these corporations increases the opportunity structures for and likely incidence of crime, and so renders them, again, vulnerable. Thus, following the death of Jimmy Mubenga on his deportation from the UK, the decision by the CPS to prosecute three low-level employees of G4S, one of the state's go-to private security firms, but not the company itself, was clearly 'perverse, not just in a moral but in a strictly legal sense' (Webber, 2012). A renewed focus on A4e, central to the Government's Work Programme,[2] followed criticism of poor performance – and ended up exposing fraud, resulting in the resignation of the Company's Chair Emma Harrison, who one day before had also resigned as Cameron's 'families champion' (Peacock, 2013). In July 2004, the *Daily Telegraph* ran the headline, 'Serco profits from crime', detailing how the marketisation of criminal justice delivery was the basis for the expansion of it and other private security firms (Simpkins, 2004); the headline took on a rather less welcome hue almost ten years later when Serco and G4S were fined for charging the Ministry of Justice for tagging offenders who were either in prison or dead. These types of incidents are frequent, usually involving the same well-known '"big four" contractors' (National Audit Office, 2013: 46), and they will proliferate.

Third, even if the 'willingness' on the part of state institutions to control corporations exists, the ability effectively to respond to these crimes and harms is limited. Having relinquished functions to private capital, states become more dependent upon them. Thus, for example, the obvious and perhaps most effective response of the government to the fraudulent way in which G4S secured the contract to provide security at the London Olympics – based upon expertise and

staffing it simply did not have – or the inflated numbers of tagged offenders for which Serco billed the Ministry of Justice – might lead to a legal sanction, but it should at least lead to governments refusing to contract the same companies for other services, a form of post-hoc contract compliance. But this is less and less possible as state institutions relinquish ever more service delivery to a sector that is more evidently concentrated in a small number of private hands. The irony of this is that companies such as Atos, Capita, G4S and Serco are increasingly reliant upon local and national/state contracts as a proportion of their income. These 'big four' contractors are unique in the range of services across which they operate, and they have oligopolistic control of some sectors, for example:

> [T]here are some public services that are only provided by a few large providers. For instance, there are three providers of private prisons (Serco, G4S, Sodexo), two providers of child custody (Serco and G4S), and two providers for medical assessments (Atos and now Capita).
>
> (National Audit Office, 2013: 26)

Thus we have an increasing inter-dependence between states and private capital, from which each is less and less able to break away.

In short: we may be witnessing a period of increasing corporate vulnerability – and as this increases, it does so hand-in-hand with an increasing exposure for the state, the institutions of which paved the way for, maintain and pronounce the superiority of, the 'private sector'.

BEING PRAGMATIC AND BEING UTOPIAN

Of course, the state–corporate nexus will not simply unravel spontaneously. The relationships to which we have pointed

need consistently to be exposed, the vulnerabilities that become manifest need to be exploited, the cracks forced open, the mask slowly drawn down. It is an under-statement to note, of course, that these are hardly easy tasks. But the emerging state–corporate configuration provides greater points of potential resistance. If challenging the corporation increasingly means challenging the state, and vice-versa, this makes the job of resistance simultaneously more daunting and more possible.

If we focus specifically, as we have in this text, upon the corporation, then one point needs to be emphasised. If the corporation is inherently, essentially destructive, then eradicating the harms it produces means eradicating the very form itself. The mitigation of corporate crime and harm can, ultimately and effectively, only be furthered through the abolition of the corporation per se. This, of course, sounds wildly utopian. But as a matter of political strategy here, we should note the well-worn analytical and practical distinction between reforms that are merely reformist and those that have the potential to be transformative.

On the latter, the key task must be to attack the legal basis upon which corporate power and irresponsibility is constituted – legal personhood, from which follows so many of the features of the corporate form. It is no coincidence, then, that ending legal personhood was one of the original demands of Occupy Wall Street.[3] Although those proposals are hardly likely to be adopted in any meaningful form, they are visible on mainstream political agendas and they are beginning to be visible in some academic work that has engaged politically with the possibility of reforming or abolishing limited liability protections (Plesch and Blankenburg, 2008; Blankenburg et al., 2010). The debate on the privileges afforded by the legal construction of

corporations as 'persons' also reached the US Congress when Bernie Sanders, Senator for Vermont, introduced a Bill to abolish the recognition of corporate persons in the US constitution in December 2011.[4] The Bill sought to overturn a decision made by the US Supreme Court in January 2010. In this case, *Citizens United v. Federal Election Commission*, the Court ruled that corporations are persons, entitled by the US Constitution to fund parties standing in elections. Although the Bill fell, similar Bills have been supported in several state legislatures.[5] The Bill also gave impetus to a wider movement based around the umbrella organisation Move to Amend that has developed a popular basis for the campaign against corporate personhood.[6]

But there are other non-reformist reforms that might appear more within our grasp. These take the form of attacking the legal separation between the corporate person and those who own, control and direct the corporate entity. A key instance of this was the possibility that, during the tortuous passage of the Corporate Manslaughter and Corporate Homicide Act, positive duties as regards health and safety might be placed upon directors; thus an early Home Office consultation document on the law proposed that alongside a corporation being convicted for manslaughter, company directors should be able to be disqualified if it was found that their conduct had 'contributed' to the company committing the offence, while the government also stated that it 'would welcome comments' on whether company directors should be able to be prosecuted for such conduct (Home Office, 2000). Ultimately organised lobbying from employers organisations, and notably the Institute of Directors, saw the potential criminalisation of directors removed from the law (see Chapter 3). Yet this debate represented a sustained period in which there was a genuine possibility to pierce

what we have described here as the de facto corporate veil. A further reform that seeks to attack the integrity of the corporate veil is Coffee's (1981) argument for a system of 'equity' fines against owners of corporations on conviction. This proposal for 'equity fines' entails offending companies being ordered by a court or regulatory authority to issue a set number of new shares in the firm. The shares would then be controlled by a state-controlled compensation fund. More radically, these could be handed over to a victims' or campaigning organisation, or a (relevant) trade union. This process, which effectively dilutes the value of shares held by the owners of the company, prevents the corporation simply passing on the costs of a sanction to customers through price increases or to workers through job or wage cuts, since the funds for investment would not be depleted, merely reallocated from existing shareholders to the compensation fund. Similar proposals have been debated – though rejected – by the Scottish parliament in 2010.[7]

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

Moreover, corporate harm is resisted on a daily basis by communities, workers and publics, in ways that impinge upon capital's tendency towards maximising profitability. Thus, for example, there is overwhelming empirical evidence that shows that safest workplaces are those workplaces that have active and well-organised collective representation (James and Walters, 2002; Reilly et al., 1995; Walters et al., 2005). This suggests that the relative strength of workers

in the workplace is the key factor in the amelioration of harms to which they may be exposed, and in upholding the laws that are ostensibly in place to protect them. The role of organised workers here is also a challenge to managements' expropriated rights to manage – and hence generate a surplus as freely as they wish. This is a challenge that state regulation is unlikely to pose or maintain.

We can also point to numerous instances of community movements in exposing and challenging corporate harms and crimes. In the US, legislation from the 1970s onwards to mitigate corporate impact upon the environment, for example, would have never emerged without the rise of community environmentalist movements and a gradual undermining of the legitimacy of the Federal government for its apparent failure to protect air and water quality from corporate activity (Lindstrom and Smith, 2008). As we wrote this book, a number of campaigns against shale oil 'fracking' in the UK have had some success in revealing the potentially catastrophic effects of this industrial process, and have even forced some operations to be abandoned. And yet, at the same time, the big issue that those campaigners have been challenging since the 1970s is not remedied by the form of regulation that has been put in place following moments and periods of 'dissensus' (see Chapter 5). This big issue is climate change, and the totality of a corporate economy based upon unhindered economic growth. But the challenge to this corporate economy has, by necessity, been fragmented into particular 'single-issue' campaigns, and campaigns for the regulation of particular activities.

Challenges to corporate and state power require social forces as bearers and agents of struggle and resistance. Consistent with this analysis, some analysts have highlighted the centrality of 'pro-regulatory forces' in securing demands

for tighter regulation, and in ensuring the effective enforcement of the law. Thus, for Snider (1991) for example, regulation is best understood as a dialectical process; one that is shaped by the outcome of struggles within nation-states. Thus, the key factors in identifying regulatory outcomes are: the interests and strength of various forces within capital; the nature and strength of various 'pro-regulatory' groups; and the interests within and strength of local and national states (Snider, 1991).

More generally, we should note that if regulation can never tame private capital, as we have argued (Chapter 5), attempts to more effectively regulate the private corporation are always worth pursuing, and indeed such attempts necessarily expose the *class*-based character of corporate capitalism in at least two respects. First, they achieve this because regulation can and does at times involve efforts to disrupt capital, ostensibly on behalf of the non-capitalist class – be this in the role of workers, consumers, local residents and so on.[8] To the extent that regulation entails intervention in the management and control of the production process, it undermines the absolute rights to manage of, and involves increased costs for, capital (see, for example, Snider, 1991; Tombs, 1995) – so that some regulation itself is an element of struggle over the level (and subsequent distribution) of the surplus expropriated through the process of production. Second, regulation has the potential to mitigate the systematically unequal distribution of various social goods and 'bads'. For the production of harm or crime by corporations also has a significant class dimension: such harm or crime usually involves some redistribution of wealth, income, longevity and quality of life from the poorer to the richer members of societies. In this respect, Tweedale's work on the asbestos industry is instructive, as he charts the extent to

which the asbestos story is one of the consistent (and largely successful) efforts of one company to externalise the actual costs of its productive activity, costs that were borne in financial terms by taxpayers in general, and in financial and physical terms by affected workers, their families and local communities (Tweedale, 2000: 75–7).[9]

In general, we would argue that challenging existent forms of regulation, and arguments for reforms of regulation, can at the same time bolster more utopian aims. Crucial here are reforms that empower the oversight and controlling capacities of civil society – be these organised labour, local communities, campaigning and activist groups, and even whistle-blowers, however limited and individualising such forms of challenge can be (Pemberton et al., 2012). Empowering any or all of these organisations and functions would place some limits on corporate freedom to act, an imposition of some degree of control that can function and develop beyond or at the margins of states and state acceptability.

The idea that there is a mutual exclusivity between 'reform' and 'revolution' or 'practical' and 'utopian' is not the concrete experience of either workers' movements or environmental movements. And there is a different lesson here for academics, since neither utopianism nor radical imagination can emanate from an atomised realm of 'mere' thought. As Haiven has put it:

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

The first thing we have to do is reject the idea that being idealistic can never be pragmatic or useful in winning concessions or influencing policy. Second, and following this, a reformist discourse and agenda can, under some circumstances, bolster more radical movements for fundamental social change. Third, it is possible to remain outside the ideological terrain of the state and at the same time to engage on the terrain of the policy world or with the current political system. In fact, there are a number of counter-hegemonic groups that stand firmly and unapologetically in opposition to the state's criminal justice agenda but still remains engaged with government in consultations, lobbying and policy work. Those groups (which in the UK include INQUEST, FACK, No Borders, Women Against Rape, and others) have shown us that idealism does not necessarily constrain the effectiveness or political impact of counter-hegemonic struggle. Therefore, the question remains: how best we might develop a pragmatic idealism that revolves around making connections between, and interventions across, state, economy, politics, history and 'culture', and that stands in direct opposition to 'principled pluralism' with its 'tendencies towards fragmentary problems and scattered causation' (Wright-Mills, 1970: 104).

We need to emphasise that avoiding these tendencies is dependent upon us retaining an element of utopianism – our demands and our actions must be achievable yet at the same time unashamedly utopian. And, following Jacoby, we would argue that these should be utopian in an 'iconoclastic' rather than 'blueprint' sense (Jacoby, 2005). Thus, while this is a book inspired by and imbued with politics, it is not a political manifesto, and we eschew the tendency to set out a blueprint that lays down an image of a future utopia in any detail. Yet, at the same time, this book demonstrates the necessity of imagining

a future without corporations; and a 'radical imagination' requires not just a future but it also has a present and a past (Haiven, 2014). Thus we began this book by detailing how, in the present, life without the seemingly natural, immutable corporation is virtually unimaginable. And if we are finding it more and more difficult to imagine a present without the corporation, then maintaining an imagination of a world beyond the corporation is now a more and more *pressing* task. But we have also detailed a past, a recent period in which the corporate entity was constructed, tortuously through law and the state, a history that makes an imagination beyond the corporation a *possible* task. Such iconoclastic utopianism is 'essential to any effort to escape the spell of the quotidian. That effort is the *sine qua non* of any serious thinking about the future – the prerequisite of any thinking' (Jacoby, 2005: Preface). Utopian thinking is not the opposite of seeking reform. Reforms not only co-exist with, but are often sustained by, utopian thinking. Indeed, reforms without a utopian spirit are likely to lapse into reform*ism*, not just with relatively few positive effects, but indeed are likely to be counter-productive, bolstering the corporation as it seems to have been somewhat tamed. If we cannot even imagine a world without the corporation, then we will never inhabit a world without the corporation – and the devastation that this form wreaks on human life will simply continue to be a fact of life.

As we have argued, *in essence* the corporation is rapacious, violent, thirsty for profit and systematically criminal. For those reasons the corporation cannot be tamed. In our search for a genuinely transformative and re-humanising strategy, we are impelled to pursue the reforms that attack and limit the legal basis for corporate power, at the same time always seeking to envisage the conditions necessary for a future without corporations.

NOTES

1 To paraphrase the words of an anonymous reviewer of the first draft of this manuscript.

2 A 'payment-for-results welfare-to-work programme' rolled out by government in the summer of 2011; 'central to the Coalition Government's ambitious programme of welfare reform', it is 'delivered by a range of private, public and voluntary sector organisations' (Department for Work and Pensions, 2012: 2).

3 See *Detailed List of Demands & Overview of Tactics for DC Protest*, at http://occupywallst.org/forum/detailed-list-of-demands-overview-of-tactics-for-d/.

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

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

6 See https://movetoamend.org/.

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

8 There are caveats to include here. Regulation is also aimed at one-person firms, for example, with an ambiguous place in the class structure, not least where risks are forced down onto such firms through large and complex chains of sub-contracting. Indeed, in practice, there are constant tendencies and pressures to enforce more vigorously at the lower end of such chains (Alvesalo and Tombs, 2001).

9 Both Kelman (1992) and Gorman (2000b) document how governments continue to refuse to accept such costs, ensuring that they remain borne directly by the victims of asbestos poisoning. The more general point here about the redistributive effect of corporate crime is not to be

overly reductionist: as we have indicated in Chapter 2, corporate crime disproportionately victimises the already vulnerable (see Slapper and Tombs, 1999: 79–84). Thus, in the case of asbestos, it should be noted that this substance has a clear class, gender and racial focus (Tweedale, 2000: 286–8; see also Gorman, 2000a, and, more generally, Gorman, 2000b).

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