

REEVALUATING CORPORATE CRIMINAL RESPONSIBILITY: IT'S ALL ABOUT POWER

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I. INTRODUCTION

The question of corporate criminal liability is a question of corporate power. The notion that corporations, and derivatively, capital, should be exempt from punishment under the criminal law—which expresses societal standards and expectations—is inconsistent with the expectations of most members of the communities that corporations inhabit.¹

Nevertheless, advocates offer arguments ranging from doctrinal analysis to metaphysical exegesis to exempt the corporation from penal law requirements. Some of the arguments that have found academic acceptability are based on neoclassical economic theory and its progeny, neoliberalism.² This challenge against using the criminal law to control corporate behavior is a compo-

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1. For surveys reflecting these expectations, see *infra* pt. II.

2. For one neoliberal argument among many, see Richard A. Posner, *Economic Analysis of Law* (8th ed., Aspen Publishers 2010) (analyzing the law from a neoliberal perspective). Neoliberalism, a political adjunct of neoclassical economics, is based on the premise that power can be wrestled from the state and the working and middle classes and recaptured by corporations (in particular transnational corporations) and the wealthy. This power shift is achieved by, among other things, reduced social-welfare spending, privatization of state enterprises, reducing regulation of labor markets, curtailing the state's role in providing public housing, and advocating a market fundamentalism—consigning economic and other issues to the “judgment” of the market. See generally Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 Ind. L.J. 783 (2002) (discussing the effects of neoliberalism on society). It could be argued that the drive to exempt corporate conduct from the criminal law appears to have intensified with the advent of neoliberalism, the project adopted in the late 1970s and early 1980s by Margaret Thatcher and Ronald Reagan to shift power and resources from the working and middle classes to corporations and the wealthy. Despite using the trappings of neoclassical economic theory, neoliberalism is ideologically based. Thatcher acknowledges that the economic rationales for privatization were secondary to her ideologically based desire to injure British trade unionism. Margaret Thatcher, *The Downing Street Years 668–669* (HarperCollins 1993).

ment of a larger struggle—promoted by neoclassically based law and economics jurisprudence and the neoliberal political agenda—to determine which forces will control the shape of future society. It is a struggle about which institutions will structure the nature of the world we live in.

Will human societies be controlled by the institutions that have structured their existence for the last few thousand years—kinship, community, religion/philosophy, and social provisioning?³ Or will economic institutions, specifically the institutions of the corporation and capital, dominate society and subordinate its human members to the interests of its artificial citizens and their advocates? The question of the corporation's and capital's accountability to the criminal law is one of the frontlines in determining whether the structuration principles organizing human societies are designed to serve the interest of corporations or of people. Therefore, this question is central to whether human power will be supplanted by the power of artificial entities.

Since the corporation is an economic organization, a method of organizing commercial activity, and because much of the impetus to decriminalize corporate conduct is found in ostensibly economic arguments,⁴ this Article will approach the question of corporate criminal responsibility using the perspectives provided by economic theory. The economic thinking most often used to examine the corporation's relationship to the criminal law is based on the neoclassical economic paradigm,⁵ a theory notewor-

3. See *infra* pt. III (describing society's structure before the eighteenth century).

4. See *supra* n. 2 (discussing the effect neoliberalism has had on the decriminalization of corporate crime).

5. Generally:

Neoclassical economics describes the economy as a state of equilibrium, in which the forces of supply and demand interact to achieve optimal allocation of society's resources. The focus of neoclassical economics is on the decision-making activity of entrepreneurs, households[,] and firms. It assumes that economic decision-making is voluntary, informed[,] and rational (i.e., utility maximizing). The models used in neoclassical economics are based on transactions occurring in exchange (i.e., barter) markets, in which perfect competition prevails. In these markets, goods are exchanged for goods, with money serving only as a neutral intermediary in the exchange. Economic models based on exchange markets also assume gross substitution effects. The axiom of gross substitution states that the demand for good A will change only in response to a pricing differential between good A and a substitute product. Exchange transactions also are envisioned as being costlessly reversible, and as occurring in an ergodic environment, in which there are no financial institutions. The market becomes the instrument of allocation, and individual self-interested economic decisions collectively achieve an optimal societal equilibrium.

thy, among other things, for its reliance on markets as the mechanism to distribute society's assets, resources, and opportunities. When analyzing the relationship between the criminal law and corporations, neoclassical economics characterizes "using the criminal law to control harmful corporate behavior [as] inefficient."⁶ This is because corporate behavior is supposedly controlled by the self-regulating processes of so-called free markets.⁷ But markets do not punish. They merely set prices, i.e., assign costs to conduct. And for most people, the criminal law is much more than a price list.

Therefore, to interrogate the relationship between the criminal law and corporations (in an admittedly cursory manner), this Article relies upon the heterodox schools of economic thought. Using institutional economic theory as its primary analytical methodology, this Article also incorporates perspectives originating in post-Keynesian economics and anti-essentialist Marxian theory.⁸ Despite mainstream economic theory's prominence in contemporary economic thinking generally and its influence in deploying mechanisms to sanction undesirable corporate conduct, corporate criminality's persistence and the widespread existence of corporate recidivism calls into question both the effectiveness of market discipline and the real intent underlying reliance on market processes. The heterodox schools of economic thought generally, and institutional economics specifically, tend to be more sensitive to both market limitations and to the cycles of instability they generate. These economic theories are also sensitive to the influence of institutional factors—embedded, for example, in history and culture—that structure society's expectations concerning the role of criminal law in controlling corporate behavior.

This Article will start by examining society's view of the corporation and the criminal law. It then situates the interaction of the corporation and criminal law in the institutional structure of

Charles R.P. Pouncey, *Contemporary Financial Innovation: Orthodoxy and Alternatives*, 51 SMU L. Rev. 505, 540–541 (1998) (footnotes omitted).

6. James D. Unnever et al., *Public Support for Getting Tough on Corporate Crime: Racial and Political Divides*, 45 J. Research Crime & Delinquency 164, 164 (2008).

7. *Id.*

8. See Charles R.P. Pouncey, *Stock Markets in Sub-Saharan Africa: Western Legal Institutions as a Component of the Neo-Colonial Project*, 23 U. Pa. J. Int'l Econ. L. 85, 86 nn. 3–5 (2002) (discussing institutional, post-Keynesian, and anti-essentialist Marxian theories of heterodox economics).

society. Next, it will look at this interaction's relationship to corporate power, and finally to how advocates advance knowledge claims to remove corporate conduct from the ambit of the criminal law.

II. CORPORATE CRIME

In July 2002, ABC News and the Washington Post conducted telephone polls to assess public opinion about the second Bush Administration's efforts to curb corporate wrongdoing.⁹ The survey followed the turn-of-the-century scandals involving, among others, Enron, Arthur Anderson, and WorldCom. The survey indicated:

- (1) 88% distrusted corporate executives;
- (2) 88% believed that the major factor in the financial reporting scandals was greed among executives; and
- (3) 91% favored higher fines and longer prison terms for executives who conceal their companies' true financial condition.¹⁰

Another study found that only 6.5% of Americans "oppose strongly" or "oppose somewhat" more severe punishment for corporate criminals.¹¹

Although the ABC/Washington Post survey was largely structured from an individualist perspective, focusing the questions around roles of people functioning in organizations rather than the organizations themselves,¹² the results nonetheless indicate public views on corporate wrongdoing, whether the conduct is laid at the feet of corporate executives or the corporation itself.¹³ In

9. Gary Langer, *The Fraud Factor: Amid Broad Distrust of Corporations, Most Say Bush's Efforts Fall Short*, http://www.abcnews.go.com/sections/business/dailynews/corporatecrimes_poll020716.html (July 16, 2004).

10. *Id.*

11. Unnever et al., *supra* n. 6, at 177.

12. Levi argues that the media packages white-collar crimes as "infotainment" thereby encouraging the examination of corporate misconduct at the level of the individual actor or the "celebrity corporation." Michael Levi, *The Media Construction of Financial White-Collar Crimes*, 46 *Brit. J. Criminology* 1037, 1044, 1051 (2006). Absent a spate of events occurring in close proximity, i.e., the Dot.com crash, corporate crime as an incident of corporate culture as opposed to general moral decline is rarely examined. *Id.*

13. See Unnever et al., *supra* n. 6, at 179 (noting that "research conducted in the 1980s

2007, the Corporate Crime Reporter surveyed law partners practicing white-collar criminal defense at the nation's top one hundred law firms.¹⁴ The lawyers were asked, "Should corporate criminal liability be eliminated?"¹⁵ Twenty percent of the one hundred and fifty-seven lawyers responding agreed that it should be totally eliminated; however, eighty percent disagreed, although a majority of those disagreeing believed that it should be restricted or narrowed.¹⁶

Even though the early research on the public's assessment of corporate criminal liability concluded that the public has a negligible interest in white-collar crime,¹⁷ this result has been strongly refuted by later studies. Using a variety of methods to examine public opinion regarding corporate crime, "including rankings of crime seriousness, preferred sentencing recommendations, and assessment of vignettes,"¹⁸ the public supported the view that "white-collar offenses [are] relatively serious and worthy of punishment."¹⁹ Whether characterized as corporate crime, white-

found that Americans by and large agree that corporate crime is serious and that it warrants the attention of the criminal justice system").

14. *Eighty Percent of White Collar Criminal Defense Attorneys Would Preserve Corporate Criminal Liability*, 21 Corp. Crime Rptr. 3, 3 (Sept. 24, 2007) [hereinafter *Preserve Corporate Criminal Liability*].

15. *Id.*

16. *Id.*

17. See Unnever et al., *supra* n. 6, at 165 (quoting The Pres. Comm'n on L. Enforcement & Administration Just., *The Challenge of Crime in a Free Society* 48 (U.S. Gov't Prtg. Off. 1967)) ("[T]he public tends to be indifferent to business crime or even to sympathize with the offenders [when they] have been caught.").

18. *Id.* at 165–166.

19. *Id.* at 166. This finding is consistent with polling by Gallup which found in 2008 that sixty-eight percent of Americans would like to see major corporations have less influence in the United States. Gallup, *Big Business*, <http://www.gallup.com/poll/5248/Big-Business.aspx> (accessed Sept. 2, 2011). But see Jeffery M. Jones, Gallup, *Big Gov't Still Viewed as Greater Threat than Big Business*, <http://www.gallup.com/poll/117739/Big-Gov-Viewed-Greater-Threat-Big-Business.aspx> (Apr. 20, 2009) (showing that the majority of Americans still view Big Government as a greater threat than Big Business); Frank Newport, Gallup, *Americans Leary of Too Much Gov't Regulation of Business*, <http://www.gallup.com/poll/125468/Americans-Leary-Govt-Regulation-Business.aspx> (Feb. 2, 2010) (showing that Americans would rather see less government regulation of business). Nevertheless, Gallup reports that fifty-nine percent of Americans believe that British Petroleum (BP) should be responsible for all costs needed to clean up the Gulf of Mexico Oil Spill, even if the costs drive the firm out of business, and seventy-one percent of Americans believe that President Obama has not been tough enough with BP. Frank Newport, Gallup, *Americans Want BP to Pay All Losses, No Matter the Cost*, <http://www.gallup.com/poll/140744/Americans-Pay-Losses-No-Matter-Cost.aspx> (June 15, 2010). Interestingly, no questions were asked concerning criminal liability for BP.

collar crime, or economic crime, for-profit crime that results from the activities of businesses or their agents is a matter of public concern and usually subject to public condemnation.²⁰ Given the prominence of the BP oil spill disaster, it seems unlikely that current public opinion would be less supportive of criminal liability for corporate criminals.²¹

This view is understandable. Corporate securities fraud is estimated to cost Americans one million dollars per hour.²² Corporate crimes involve “price fixing[;] price gouging[;] deceptive advertising[;] fraud”; the sale of unsafe goods; breaches of health, safety, environmental, and consumer-protection laws; bribery; and the “domestic and international forms of violence.”²³ Moreover, it is argued that deaths resulting from occupational and safety cases alone exceed the toll of homicide in the U.K.²⁴ Corporate crime is often contrasted with street or confrontational crime in ways that suggest that street crime is of greater concern because of its impact on community safety or wellbeing. But:

Many things make a community unsafe. A community is unsafe whose citizens contract cholera through drinking water, food poisoning through salmonella in eggs, and whose children have their health compromised by heavy lorries passing

20. The definition is derived from Korsell as discussed by Hazel Croall, *Community Safety and Economic Crime*, 9 *Criminology & Crim. Just.* 165, 166–167 (2009) (citing Lars Emanuelsson Korsell, *Economic Crime*, in *Crime Trends in Sweden 1998–2000*, at 201, 201 (Nat'l Council Crime Prevention 2002)).

21. BP is a well known corporate criminal recidivist. According to the Project on Government Oversight's Federal Contractor Misconduct Database, BP currently ranks third in the number of instances of misconduct since 1995 with fifty-three instances and \$1.6 billion in collective fines and settlements. Project on Gov't Oversight, *Fed. Contractor Misconduct Database*, <http://www.contractormisconduct.org> (accessed Sept. 15, 2011). BP has a particularly egregious safety record, including fifteen worker deaths at the company's refinery in Texas City, Texas in 2005 and a \$500,000 criminal fine in 1999 for failing to report the illegal dumping of hazardous waste on Alaska's North Slope. Project on Gov't Oversight, *BP P.L.C.*, <http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=61&ranking=48> (accessed Sept. 15, 2011).

22. Ted C. Fishman, *Up in Smoke: The Suckers Bring the Money; Wall Street Supplies the Matches*, *Harper's Mag.* 37, 41 (Dec. 1998).

23. John F. Wozniak, *C. Wright Mills and Higher Immorality: Implications for Corporate Crimes, Ethics, and Peacemaking Criminology*, 51 *Crime L. & Soc. Change* 189, 195 (2009) (citing David R. Simon, *Elite Deviance* (8th ed., Allyn & Bacon 2006)).

24. Croall, *supra* n. 20, at 167. In the United States, workplace deaths averaged about six thousand per year during the period from 1992 through 2008. U.S. Bureau of Lab. Statistics, *Injuries, Illnesses, and Fatalities, Census of Fatal Occupational Injuries Charts 1992–2008*, at 1, <http://www.bls.gov/iif/oshwc/foi/cfch0007.pdf> (accessed Sept. 15, 2011).

through at high speed, leaving asthma-causing emissions in their wake.²⁵

Nevertheless, in academia and the legal profession, there appears to be significant support for removing corporate behavior from the ambit of the criminal law.²⁶

The existence of the divide between how academics and the public view corporate crime is interesting. The traditional research supports the view that in competitive environments the separation of ownership and control in business corporations creates incentives for short-term profits and short-term increases in share value; these short-term goals encourage firms to benefit themselves at the expense of others and to subvert social welfare by, e.g., producing unsafe products.²⁷ Despite this, the reasons to subject corporations to criminal process and impose criminal sanctions on them go far beyond the consequences of their actions or their characterization as legal beings. The need for the category “corporate crime” and for corporate crime to be viewed in the same way as crimes committed by individuals goes to the nature and function of the criminal law as an institutional component of societal organization. Additionally, the concept of corporate crime carries strong symbolic significance by indicating that despite ever increasing corporate power, the corporation remains subject to the full range of legal process.²⁸ Altering the institutional or

25. Ken Pease, *Crime Reduction*, in *The Oxford Handbook of Criminology* 947, 963 (Mike Maguire et al. eds., 3d ed., Oxford U. Press 2002). According to a European Commission study, “[a]ir pollution is responsible for 310,000 premature deaths in Europe each year.” BBC NEWS, *Air Pollution Causes Early Deaths*, <http://news.bbc.co.uk/2/hi/health/4283295.stm> (updated Feb. 21, 2005).

26. See generally Albert W. Alschuler, *Two Ways to Think about the Punishment of Corporations*, 46 Am. Crim. L. Rev. 1359 (2009) (comparing corporate criminal liability to punishment of animals and inanimate objects); John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Enquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (discussing the problems associated with corporate criminal liability and proposing solutions); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 Harv. L. Rev. 1477 (1996) (arguing that corporate civil liability adequately handles corporate misconduct).

27. John L. Campbell, *Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility*, 32 Acad. Mgt. Rev. 946, 946–947 (2007). This view is supported by Williamson’s transaction-cost-based theory of the firm, which assumes that firms are not trustworthy because they will behave in a self-interested manner whenever possible. *Id.*

28. See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 Am. J. Crim. L. 1481, 1482–1485 (2009) (discussing the power corporations hold and the

symbolic significance of corporate crime would represent a reconfiguration of the relationship among societal institutions and a significant increase in the power of corporations.

III. INSTITUTIONAL ECONOMICS

Institutional economic theory, the original “economics” in law and economics jurisprudence,²⁹ is an American school of economic thought that studies the behavior of real economies in real time, and the ways in which economies engage in the social provisioning of their societies.³⁰ Institutional theory focuses on human needs and the resources available to meet them:

Power and habit rather than markets and competition are the fundamental forces that shape economic processes[;] and institutions, through their development and change impact the structure of the economy and society. Institutional economics is therefore an evolutionary paradigm neither seeking [nor] valuing equilibrium, but focused instead on the forces and processes of change.³¹

To assess the relationship between the criminal law and the corporation using institutional economic theory, it is necessary to situate the corporation in society’s institutional structure. This structure can be viewed graphically as having five levels that dialectically interact with each other.³² At the foundation is the

crimes that they commit).

29. See generally Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 Stan. L. Rev. 993, 1013–1031 (1990) (describing the role of institutional economic theory in American economics).

30. William M. Dugger, *Underground Economics: A Decade of Institutional Dissent* xix (M. E. Sharpe, Inc. 1992).

31. Pouncy, *supra* n. 8, at 85, 86 n. 3. Prominent institutional economists include Thorstein Veblen, who sought a holistic evolutionary approach to the economy rather than seeking to construct equilibria, and John Commons, whose research was used to develop labor and social welfare legislation under the New Deal. Charles R.P. Pouncy, *Institutional Economics and Critical Race/LatCrit Theory: The Need for a Critical “Raced” Economics*, 54 Rutgers L. Rev. 841, 843–844 (2002). “Gardiner Means, an institutionalist, in conjunction with Adolph Berle, wrote the seminal work on the modern corporation and the consequences of the separation of ownership from control.” *Id.* at 845. Many economists such as Gunnar Myrdal, Clarence Ayres, John Kenneth Galbraith, and Karl Polanyi have advanced and added to institutional economic thought. *Id.* Institutional economics is also responsible for developing the concepts of “business cycles, overhead costs, and transaction costs.” *Id.* at 844–845 (internal quotations omitted).

32. See Figure 1 *infra*. This analysis is based on the work of Hollingsworth. J. Rogers

institution: “An institution is a socially constructed belief system about the way things are and the way things should be that organizes human thought and action. An institution is not an objective physical phenomenon, but a human mental construct.”³³ Institutions are “norms, rules, conventions, habits[,] and values of a society.”³⁴ Thus, for example, institutions influence the way actors generally respond to the criminal law by mapping what is right and wrong. Institutions also influence the way actors respond to the opportunity to engage in specific crimes by expressing the social meaning of their potential infractions. Above the institutional level are institutional arrangements: the often overlapping mechanisms for coordinating actors’ behavior in a particular sector of the economy, such as governments, markets, communities, etc. Above the level of the institutional arrangements is the institutional sector, which includes all of the activities associated with performing a particular function, e.g., mining, education, law, and health. The formal actors in institutional sectors—e.g., corporations, colleges, law firms, and hospitals—form the level of organizational structures, which make and perform the goods and services that, in turn, populate the output level.³⁵

Hollingsworth, *Doing Institutional Analysis: Implications for the Study of Innovations*, 7 *Rev. Int’l Political Econ.* 595, 600–603 (2000).

33. Johan Stein, *How Institutions Learn: A Socio-Cognitive Perspective*, 31 *J. Econ. Issues* 729, 730 (1997).

34. Hollingsworth, *supra* n. 32, at 601 (emphasis omitted). This constitutes a blending of the perspective offered by traditional or old institutional economics and the one offered by new institutional economics. Old institutional economics views institutions primarily as patterns of thought. New institutional economics views institutions as “rules of the game in a society.” Douglass C. North, *Institutions, Institutional Change and Economic Performance* 3 (Cambridge U. Press 1991).

35. See Hollingsworth, *supra* n. 32, at 601 tbl. 1 (illustrating the interrelatedness between institutional sectors and organizations, and the outputs/performances produced from it).

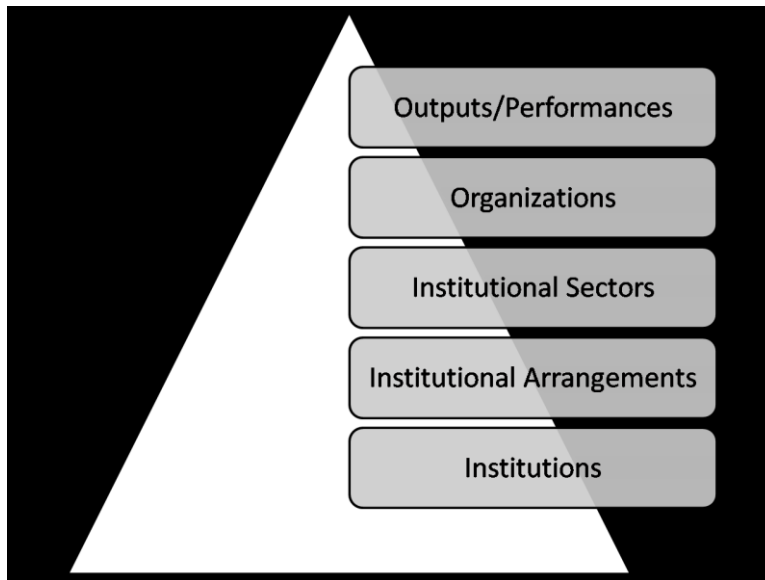


FIGURE 1—THE COMPONENTS OF INSTITUTIONAL ANALYSIS

The relational conflict between the criminal law and the corporation can be viewed as taking place at the institutions and institutional arrangements levels. At the institutions level, the issue is the social meaning of the conduct, which in turn helps determine the institutional arrangements that should be used to address that conduct. That is, should the processes addressing corporate misconduct be controlled by government through the criminal justice system or by markets?³⁶

Despite the acceptance of neoclassical market mythology, before the modern age, no society ever permitted itself to be controlled by markets.³⁷ According to Polanyi, markets have always been incidental to economic life.³⁸ It was not until the end of the eighteenth century that the possibility of the self-regulating market came into existence and with it “a complete transformation in the structure of society.”³⁹ Markets and market actors engage in mutually constitutive processes structured by the abil-

36. It is important to recognize, however, that these levels do not operate discretely, but function in constant interaction with each other.

37. Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* 73 (2d ed., Beacon Press 2001).

38. *Id.* at 59–62.

39. *Id.* at 74.

ity of market actors, i.e., their power to shape and control the market and its arrangements.⁴⁰ Therefore, the distributional decisions made by markets reflect the interests of market actors, which bear no necessary relationship to the interests of society because markets are oblivious to the existence of society.⁴¹

Although government and its criminal justice system are seriously flawed in many respects, ostensibly democratic governments are usually unable to ignore the existence of society, its values, and its members. A wide range of interests compose the criminal justice system, which forces it to reflect more than the decisions of buyers and sellers. Thus, the criminal justice system is animated by the social meanings embedded in the institutions that underlie it. This Article argues that the social meanings associated with the conduct in question, rather than corporate power, should determine which institutional arrangements should be used to address that conduct.

The expressive function of law has been long recognized.⁴² Law in general, and the criminal law in particular, is not merely a method of social control, but also strongly communicates a society's values, i.e., institutions, by the ways in which it constructs social meanings.⁴³ The decision to commit or refrain from committing a crime demonstrates the actor's assessment of the social meaning of the behavior, i.e., what that behavior means and how it will be interpreted in the actor's society.⁴⁴ The responses to the survey by the Corporate Crime Reporter are instructive on this question. For example:

“The belief that those who seriously game the system and abuse their positions of trust will be brought to justice is essential to the long-term health of our market system,” wrote Spencer Barasch, a partner at Andrews Kurth in Dallas, Texas.

40. Mitchel Y. Abolafia, *Making Markets: Opportunism and Restraint on Wall Street* 9–10 (Harv. U. Press 1996).

41. Polanyi, *supra* n. 37, at 265–267.

42. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024 n. 14 (1996) (providing references about the expressive function of legal and economic norms).

43. Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. Leg. Stud. 609, 611 (1998).

44. *Id.* (arguing that “[a]n account of deterrence that abstracts from meaning . . . is bound to prove unreliable . . .”).

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Scott Harshbarger, a partner at Proskauer Rose in Boston and former Attorney General of Massachusetts, made perhaps the strongest case for preserving corporate criminal liability.

“The law should apply equally to everyone,” Harshbarger wrote.

Corporate criminal liability preserves a level playing field “for [the] vast majority of corporations who compete fairly and play by the rules.”

And it protects “innocent, vulnerable consumers and investors who depend on [the] integrity of markets and honest, open disclosure for choices, and corporations can afford to retain competent counsel to represent and advocate for them in all three branches.”

Steven Molo of Shearman & Sterling in New York agreed. “Society benefits when the essential purposes of the criminal law—deterrence, punishment, retribution, rehabilitation—apply to corporations as well as individuals,” Molo wrote. “We need to promote ethical and law[-]abiding behavior and enterprise liability allow[s] another means of doing so.”

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James Robinson, a partner at Cadwalader, and former chief of the Justice Department’s Criminal Division, strongly defended corporate criminal liability.

“It would be a serious mistake to eliminate all corporate criminal liability,” Robinson wrote. “A major incentive for corporate compliance with the law would be eliminated. This may well result in some corporations encouraging their employees to achieve ‘at any cost’ results, knowing that if the message results in illegal conduct by employees in furtherance of the interests of the corporation, the ‘costs’ to the corporation will not include . . . a potential criminal investigation, indictment[,] and conviction of it. Removing the risk of criminal investigation and prosecution of the corporation

from the cost/benefit analysis is highly likely to result in more criminal activity in the corporate context—it will certainly not help deter such activity.”⁴⁵

Although the consequences of crime can be ameliorated by financial compensation, money alone does not satisfy society’s need to condemn the behaviors it finds damaging to its interests. Society’s capacity to label an actor a “criminal” constrains the behaviors of those actors for whom that designation has significant consequences. Markets, administrative procedures, and civil actions primarily price misconduct. By paying the price, the actor may regain its status in society. If the potential rewards of the conduct are significant enough then the actor is willing to risk the possibility of a fine, should it be unlucky enough to be caught. If in addition to a financial cost, the actor faces the prospect of having to endure moral condemnation, the criminal law is likely to be a more effective constraint—at least until the actor gains sufficient power that public opinion becomes irrelevant.

The survey also highlights some of the arguments against corporate criminal liability, which demonstrate the value of institutional economic theory in deconstructing these claims:

“Fictitious persons don’t commit crimes,” wrote Roger Magnuson, a partner at Dorsey & Whitney in Minneapolis. “People do. Punish criminals, not stakeholders.”

Ditto Harold Ruvoldt, a partner at Nixon Peabody in New York.

“Corporate crime is a fiction, as is the corporation itself,” Ruvoldt said. “Those that are punished the most? The stockholders.”

“Why punish shareholders?” asked Michael Barta, a partner at Baker Botts in Washington, D.C. “Criminal liability is a personal matter, appropriate—if at all—only for human beings.”

45. *Preserve Corporate Criminal Liability*, *supra* n. 14, at 3–4 (reporting that eighty percent of partners at the nation’s top one hundred white-collar criminal defense firms would preserve corporate criminal liability, but such liability should be restricted or narrowed).

Mark Flessner, a partner at Sonnenschein Nath in Chicago believes there is “a strong case for eliminating corporate criminal liability.”

“While a corporation is legally a separate entity, it can take action only through its officers, agents[,] and employees,” Flessner wrote. “A corporation does not commit crime, its agents—officers and employees—commit crimes. Corporate criminal liability is akin to agency law, which is not a legal theory commonly applied to criminal law. Individuals who commit corporate crimes can and should be charged, but to punish the corporation is draconian and perhaps unconstitutional. Few people today argue that justice was served by destroying Arthur Anderson. Thousands of people were put out of work, and it was a huge disruption to the business community. Millions of dollars were lost by innocent partners and employees. All of this because of a few people [who] were dishonest. Ninety-nine [percent] of those who suffered from the indictment of Arthur Anderson did nothing more than work for a company that had a handful of people who committed some crimes. This is not justice.”⁴⁶

The claim—that crime emanating from corporations is the result of the behavior of individual bad actors or rogues—ignores the institutional processes taking place at the level of the organization within corporations. Individual corporations, and the corporate sector as a whole, have cultures.⁴⁷ In its focus on the individual as an individual (rather than on the corporation as sets of interacting groups and individuals), neoclassical theory blinds itself to group processes and group dynamics whose thoughtways are expressed in organizational culture. Organizational cultures articulate values to guide and inform the decision-making of organizational actors, making the organization directly responsible for its agents’ actions. Organizational culture can be modeled as a three-tiered structure consisting of (1) beliefs and assumptions, (2) values and norms, and (3) artifacts.⁴⁸

46. *Id.* at 5 (arguing that imposing criminal liability upon corporations negatively impacts shareholders while leaving culpable officers and employees, who commit the crimes, unscathed).

47. Charles R.P. Pouncy, *The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional*, 26 *Vt. L. Rev.* 263, 271 (2002).

48. *Id.* at 348–350. The three-tiered structure of organizational culture includes assumptions and beliefs, values and norms, and artifacts, which together illustrate corporate

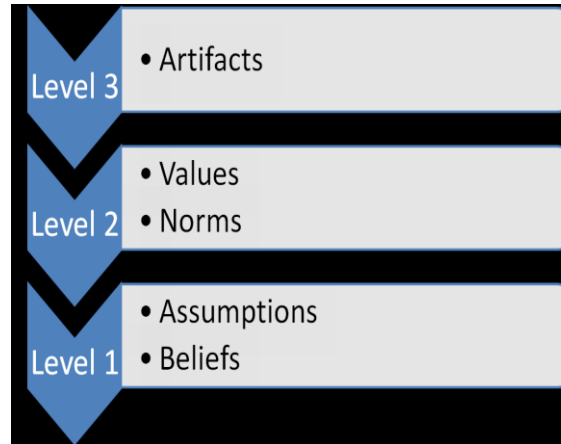


FIGURE 2—STRUCTURE OF ORGANIZATIONAL CULTURE

Assumptions are tacitly communicated ideas about the organization’s unquestioned truths, while beliefs are conscious thoughts about the organization.⁴⁹ Values and norms express the organization’s conclusions about what is and is not important and establish the parameters of acceptable conduct.⁵⁰ Artifacts are the visible expressions of the “organization’s assumptions, beliefs, values[,] and norms.”⁵¹ The existence of norms and values at multiple levels of organizational culture creates the possibility of dissonance between unarticulated assumptions and enunciated values and norms. Thus, organizational cultures frequently have quietly communicated or tacit assumptions (the broker dealer whose employees understand that their goal is to insure that client money coming into the firm never leaves) that express the organization’s values-in-use, and its articulated values of commitment to “high ethical and moral values.”⁵² Thus, individual bad actors are often functioning in a manner consistent with the

accountability for its agents’ actions. *Id.*

49. J. Steven Ott, *The Organizational Culture Perspective* 42 (Brooks/Cole Publ’g Co. 1989) (contrasting beliefs, which are conscious thoughts that can be readily enunciated by members of the culture, and assumptions, which are unconscious thoughts and ideas).

50. Mary Jo Hatch, *Organization Theory: Modern, Symbolic, and Postmodern Perspectives* 214–215 (Oxford U. Press 1997).

51. Pouncy, *supra* n. 47, at 349. Artifacts include office geography, slogans, and products; they are not subject to uniform interpretation. *Id.* at 349–350.

52. *Id.* at 350.

organization's values-in-place, which may clearly oppose the organization's articulated values.⁵³ The crime originates not in the mind of the bad actor, but in the organization's values-in-place, and therefore the responsibility should as well.

Similarly, these statements seek to shift the focus from the misconduct of corporations and the injury that misconduct works on society as a whole, to the consequences corporate misconduct imposes on corporate constituents. These arguments depend on viewing the corporation and its constituents as victims of criminal processes, as if the corporation's decision to engage in the criminal behaviors—with full knowledge of or reckless disregard for the potential consequences—is a reason to exempt corporations from the criminal law's operation. It also assumes that corporate constituents are more “worthy” or important victims than people who are directly injured by corporate behavior.

Thus, applying the criminal law to corporations is consistent with societal expectations as well as the social meaning of the criminal and corporate criminality. The corporation should be held accountable under the criminal law if the corporation, by establishing organizational cultures that tacitly countenance crime, is the real party-in-interest rather than the so-called “bad apple.”

When the criminal law—despite societal awareness and public condemnation of corporations' commission of acts that the public views as criminal—fails to subject such actors to the criminal process, the criminal law risks losing its legitimacy.⁵⁴ The criminal justice system will be perceived as violating the societal institutions of fairness, consistency, and equality. The corporation is freed from the moral censure associated with criminal conduct, even if it is “punished” by the market or by civil process. Its victims are devalued and the victims' injuries become mere costs of doing business. But most importantly, the corporation and capital will have made another important intervention into the institutional structure of society to their benefit and the injury of everyone else.

53. *Id.* at 350–351 (attributing differentiations between values-in-use and articulated values as consistencies in such circumstances).

54. Unnever et al., *supra* n. 6, at 165. “This can be particularly true if these crimes occur when the public is expressing sentiments that something should be done to stop an emerging crime wave of corporate offending.” *Id.*

IV. POWER

The corporation has become the dominant institution in society. It did not, however, obtain this position because of societal recognition of the corporation's value. Instead, it has usurped the roles of other societal institutions to suit its needs and increase its institutional power. The corporation has colonized other institutional sectors such as education, whose institutional goal has shifted from pursuing and disseminating knowledge to producing workers and pursuing research with commercial applications.⁵⁵ These sectors have become means to the ends of the corporation. Religion has been infected with the corporate-growth imperative, with churches the size of towns and profitability, i.e., prosperity serving as a proxy for spirituality.⁵⁶ Politicians campaign on platforms to bring business practices to government affairs, or they use their wealth to buy political office as they would any other investment. Families view themselves as in need of business managers. And corporations, using what institutional economics refers to as mystification, have distorted our traditional symbols so "free enterprise" becomes the corporation's right to operate without regard to social values, "private property" becomes a talisman to ward off socialism or other attempts to coordinate the economy, and "individual initiative" becomes an excuse for union busting.⁵⁷

Acquiring power using these institutional processes to distort and corrupt society's symbols, and the redeployment of this power to further increase the corporate stranglehold on societal institu-

55. This discussion of the institutional processes of subreption, contamination/emulation, and mystification follows the analysis provided by William Dugger, perhaps the foremost proponent of radical institutional economics, in *Underground Economics*. Dugger, *supra* n. 30, at 129. The processes by which one institution so influences other societal institutions that the latter become means for the goals of the former is referred to in traditional institutional economics as subreption. *Id.* Institutional theory argues that society's institutional structure functions best, i.e., in the interests of the widest range of people, when the institutions are balanced—coordinating with one another rather than one or more dominating the others. Subreption allows previously autonomous institutions to be dominated. *Id.*

56. *Id.* The process by which the motives of one institution spread to others is referred to as contamination and is indicative of the relative power of institutions. *Id.*

57. *Id.* at 130. "Mystification is the emulation and distortion of symbols." *Id.* (emphasis omitted). When one institution creates a symbol central to society, such as "free enterprise," "private property," and "individual initiative," other institutions will attempt to copy or support them. *Id.*

tions is consistent with what C. Wright Mills characterized as “higher immorality,” which is the “systemic violation of laws and ethics of business and politics.”⁵⁸ It would, however, appear that this concept can be appropriately extended to the systematic distortion of societal institutional processes to serve the ends of a particular set of institutional actors. Institutional theory recognizes the role of technology and innovation in generating what Mills referred to as “main drift”: the evolution of historical and structural processes in ways that reconfigure institutions and institutional processes without being directly recognized by society.⁵⁹ Instead, over time, dramatic changes begin to be thought of simply “as the way things are.” Although society may not recognize the changes as they occur, the corporations who instigate these changes are consciously using technology, psychology, and even neurology to reconfigure institutional structure to reinforce their institutional dominance.⁶⁰ So it is to be expected that this higher immorality would also view criminal sanctions as an institution to be obviated in its efforts to increase corporate power. The symbolic messages sent by the concept of corporate criminality are one of the few institutional forces in place to confront these processes.

V. KNOWLEDGE

Finally, if there is public support for subjecting corporations to the criminal law, then why are the advocates of decriminalization taken so seriously? Snider attributes it to the differential value of knowledge claims. She argues that the notion of corporate crime has been marginalized by the use of specialized knowledge claims advanced by powerful elites. The claims, based on neoclassical economic ideology and neoliberal politics, are taken seriously because they are consistent with the interests of the contemporary hegemon—the corporation. Counter-hegemonic claims become more difficult to hear and are less likely to be sup-

58. Wozniak, *supra* n. 23, at 197 (emphasis omitted) (arguing that when corporations are corrupt, many of the actors within the institution tend to be corrupt as well).

59. *Id.* at 194.

60. See e.g. Stephanie Clifford, *Frito-Lay Tries to Enter the Minds (and Lunch Bags) of Women*, N.Y. Times B3 (Feb. 25, 2009) (discussing neuromarketing).

ported by resources comparable to those provided to corporate power advocates.⁶¹

Thus, the hegemonic arguments for allowing market processes to address corporate misconduct are viewed as more legitimate and persuasive than the counter-hegemonic arguments for subjecting corporations to the criminal law. The hegemonic arguments are viewed as being based on “science” while the counter-hegemonic arguments are viewed as being based on ideology. The fact that the “science” claim is specious and that the ideology characterization applies equally to both positions rarely makes it into the public discourse. Even so, the corporation has so dominated the institutions of government, education, and the media that the corporation’s self-interested conception of itself is largely accepted by policy actors with the ability to challenge corporate power. So, the truth claims of the corporation and capital are valorized, corporate ascendancy is viewed as inevitable if not traditional, and all contrary positions are derided as irrelevant. Therefore, the question of the applicability, or more accurately, the inapplicability of the criminal law to corporations becomes important because of the elite status of the people who make the arguments, rather than the genuine value of the arguments themselves.⁶²

To some extent it could be argued that these elites are victims of the ascendancy of neoclassical theory. They have been educated and indoctrinated into the ideologies of self-interest and as a result believe that self-interest trumps all else and a societal hierarchy headed by corporations and capital represent the natural order.⁶³ As educators, we have to do better.

VI. CONCLUSION

The existence or nonexistence of corporate criminal liability ultimately is a proxy for corporate power. The criminal law sends strong signals about societal values, and the concept of corporate crime symbolically supports the perspective that society controls corporations. Eliminating corporate criminal responsibility, like

61. Lauren Snider, *The Sociology of Corporate Crime: An Obituary (or: Whose Knowledge Claims Have Legs?)*, 4 *Theoretical Criminology* 169, 171 (2000).

62. *Id.* at 180–181.

63. Pouncey, *supra* n. 47, at 322–323.

deregulation, privatization, dismantling the welfare state, and unrestrained capital mobility, takes power (or at least the perception of power) away from ordinary people and places it in the hands of the rich—whether natural or artificial beings. It further unbalances society's institutional structure by removing official condemnation from the range of constraints on corporate power and subverting the public's view of the appropriate reach of the criminal law. It further exceptionalizes the corporation and leaves the corporation free to test the limits of its power. Events like the Gulf of Mexico Oil Spill, Enron, and WorldCom have forcefully demonstrated how corporate amorality can devastate the lives of thousands. It is difficult to imagine how eliminating corporate criminal responsibility will benefit anyone other than the corporate criminals.