Edited by

Ellen Hochstedler

# CORPORATIONS AS CRIMINALS

Perspectives in Criminal Justice 6

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**Ellen Hochstedler**

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University of Wisconsin—Milwauke

# I.

## *Corporations: The Twentieth-Century Criminal*

### *INTRODUCTION*

**More than 75 years ago** a sociologist, Edward A. Ross, in an article written for public consumption and printed in *The Atlantic Monthly* (May, 1907), pricked the public conscience for its "perplexed" response to the "criminaloid" in our society. What Ross called the "criminaloid" might today be called a corporate criminal. Described as enjoying "immunity" for his "new sins," the criminaloid was protected from public condemnation because of his apparent respectability. "Fortified by his connections with 'legitimate business,' 'the regular party organization,' perhaps with orthodoxy and the *bon ton* [fine style], he may even bestride his community like a Colossus" (p. 44). The concerns noted by Ross have been recurring themes in the public policy debates and academic literature on nontraditional crime since that time. Whereas the popularity of particular perspectives and terms have waxed and waned over time, the underlying issues reflected in Ross's article persist today: (1) the search for a definitive criminological label (e.g., white-collar, corporate, occupational) to apply to the offender and to describe the nature of the offense; (2) the ambivalence of public sentiment concerning the harmfulness of and the appropriate societal response to such modern wrongs; (3) the fact of practical immunity from criminal prosecution, believed largely to be a result of public ambivalence; and (4) the social costs of the

symbolic message that some characters, particularly corpora executives and corporations, are above the reach of the criminal la Not surprisingly, then, these themes run throughout this book corporate crime. In addition to these basic themes, this volu addresses one not considered by Ross in his 1907 article and whi has only recently become a major theme in the academic literatu the theoretical and practical feasibility of holding the corpora entity—a nonperson—criminally responsible for certain condu The selections in this book reflect the continuing effort by both thc in academia and those in government to grapple with the ideologi and practical problems presented by the addition of this relati newcomer, corporate crime, to the list of traditional and more famil "street" crimes.

Kramer (Chapter 1) provides an introduction to the concept corporate crime through a review of the criminological literature that subject and a discussion of the evolution of the terms used describe the phenomenon. In tracing the development of the notion corporate blameworthiness, three major points of contention eme as the foundation of this review of the academic debate: (1) t seriousness of the harm done by corporations; (2) whether or r corporate wrongs and traditional "street" crimes are similar enou to be lumped in one category; and (3) public perception of and attitu toward corporate wrongdoing. Kramer concludes that both exp and lay sentiments now permit certain corporate wrongs to be view as crimes.

With this opening chapter serving as the foundation, the remainc of the book is divided into two major sections, one focusing on t theory and the other on the practice of treating corporations criminals. The section on theoretical perspectives is composed three chapters. The lead piece considers the theoretical suitability traditional criminal law theory as it is applied to corporate entiti The second chapter in this section elaborates on the theme of t corporate entity, claiming that there are instances in which it is mc appropriate to sanction the corporate entity than the individual involved. The third selection carries out the theme of criminal respc sibility by examining the history of one lawmaking body in its decisi to choose between criminal and civil sanctions for corpora wrongdoing.

Based on a review of more than a century of case law, Par (Chapter 2) identifies seven rationales, four now fallen into disu

employed by courts in determining whether to impose criminal sanctions against corporate entities. This approach highlights the history of legal thought on corporate criminal responsibility. Using the two currently most popular rationales, Parisi illustrates how they have been applied to hold corporations criminally responsible in cases of homicide and conspiracy. Parisi concludes that the fit between traditional criminal law theory and corporate wrongs is not an exact one, which leads her to comment that criminal law theory is sometimes stretched beyond the point of logic in an effort to apply it to some of the new situations posed by corporate activities.

Fisse (Chapter 3) presents a strong argument for the proposition that individual criminal liability cannot do the work of corporate criminal liability. Here Fisse discusses nine instances where attempts to prove individual criminal responsibility might fail to meet the burden of proof in a criminal case or might result in unjust hardship for a single person, but where proving corporate criminal responsibility might well be both morally justified and practically feasible. These nine instances reflect both traditional views of fairness and utility and pragmatic considerations of the difficulties of prosecuting individuals who have committed crimes on behalf of the corporate employer.

In Chapter 4, Frank examines the history of federal criminal code revisions as they were changed to alternately include and then exclude criminal penalties for corporations found to violate health and safety laws. Frank argues that both the popular legal and academic ideas of criminal responsibility and the practical self-interests of the affected industries informed and influenced the legislative process that forged the criminal code. The common suspicion that big business interests almost single-handedly thwarted attempts to include criminal penalties for corporate wrongs that impinge on health and safety is clearly challenged by this history of the federal criminal code revisions.

The third section of this book contains three chapters which highlight the practical difficulties of enforcing corporate compliance. Two of the chapters are case studies of criminal prosecutions of corporations—one successful and the other not. In contrast, the final chapter in this section is a study of civil enforcement of regulations against corporations. This contrast is presented to accentuate both the similarities and the differences in enforcement problems of the two types of sanctions.

Cullen, Maakestad, and Cavender (Chapter 5) review the Ford Pinto case, which was an unsuccessful attempt by a local county

prosecutor to criminally prosecute the Ford Motor Company for reckless homicide. In addition to retelling the story of the fatal wreck, the prosecution, the judge's rulings, and the jury's verdict, the authors place the prosecution in the larger social context. They make the point that public perception of corporate responsibility and blameworthiness has developed to the degree that public sentiment can support, if not demand, such an unusual prosecution, as it did in this case.

Schudson, Onellion, and Hochstedler (Chapter 6) present a second case study of a criminal prosecution of a corporate entity for reckless homicide. Unlike the Ford Pinto case, this case involved multiple prosecutions, including prosecutions of corporate officers and top-level employees. This case, which was successfully prosecuted (by Schudson, who was at that time an Assistant District Attorney), is used to illustrate the practical difficulties of such a criminal prosecution. Suggestions are offered for maximizing the probability of successful prosecutions in corporate crime cases.

The final chapter in this section (Chapter 7), by Lynxwiler, Shover, and Clelland, is one of the very few existing sociological studies of enforcement of civil regulations against corporations. Their research suggests that many of the practical problems of criminal prosecution, which have been used to argue against corporate criminal liability, persist in the enforcement of civil regulations. They provide qualitative and quantitative evidence that indicates that the degree of sanction severity is affected by variables other than the seriousness of the harm done and the assessed responsibility. The parallel between this finding and sentencing disparities in the criminal justice system—as they pertain to both traditional and corporate crime—cannot be overlooked.

As a collection, these seven pieces offer some of the latest legal, historical, and sociological research on the subject of sanctioning corporate wrongs. In addition, they offer examples of, recommendations for, and cautions against the application of criminal sanctions against corporations.

# 1.

## *CORPORATE CRIMINALITY: The Development of an Idea*

***Ronald C. Kramer***
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**It has been over 40 years** now since Edwin Sutherland (1940) developed the concept of white-collar crime and carried out the first empirical study of illegal corporate behavior (Sutherland, 1949). Following his pioneering efforts, however, little theoretical or empirical work was done on the topic of corporate crime. Despite the widespread acceptance and popularity of the term "white-collar crime," public concern with the specific issue of corporate criminality was minimal. Throughout the decades of the 1940s, 1950s, and 1960s, the crime problem in the United States continued to be defined solely in terms of traditional "street crimes," institutionalized by the index offense categories of the FBI's Uniform Crime Reports.

Over the past decade, however, the situation has started to change. While concern over street crime remains high, white-collar crime has emerged as an important social problem in its own right. More importantly, there has been an upsurge of interest in the specific topic of corporate crime on the part of the public (Clinard and Yeager, 1980: 5-6), the popular media,[1] and law enforcement officials (Pauly, 1979). Along with the increasing awareness of the extent and seriousness of illegal corporate behavior, there are increasing demands for the criminal justice system to attempt to control these crimes (Anderson, 1979). As one commentator recently argued, "The social good now demands the use of all available means to control corporate power, including the use of criminal sanctions" (Elkins, 1976: 129).

Academic criminologists have also begun to turn their attention to the topic of corporate crime and, in fact, are partially responsible for

the current public interest in the issue. There now exists a burgeoning body of literature devoted to the theoretical and empirical study of illegal corporate behavior.[2] This new criminological interest in corporate crime will surely aid legal policymakers in their attempts to devise more adequate social controls over corporate misconduct.

As we attempt to bring corporate crime under empirical scrutiny and more effective legal control, however, we will encounter various obstacles—obstacles that have hindered the study and control of corporate crime in the past as well. Foremost among these is the confusion that exists over basic concepts in this area. What is really meant by such terms as "white-collar crime," "corporate crime," "occupational crime," "organizational crime," and related terms? If we are to proceed in a systematic fashion, we need to carefully distinguish among these terms and produce a clear and valid definition of the particular phenomenon in which we are interested: corporate crime.

Another obstacle consists of a series of objections which have often been raised by conservative criminologists and politicians concerning the study and control of corporate criminality. One objection is that corporate crime is not as serious as street crime and, therefore, does not warrant the attention of criminologists and legal policymakers. Another objection is that offenses included under the concept of corporate crime are not "really crimes" in a strictly technical, legal sense and, therefore, fall outside the purview of criminological theory and the jurisdiction of the criminal justice system. A final objection is that the public is not sufficiently concerned about corporate crime to justify any greater criminological attention or criminal justice resources. These objections must be closely scrutinized and subjected to logical and empirical challenge.

While there are numerous other obstacles to the study and control of corporate crime (such as lack of research funds, inadequate funding of regulatory and criminal justice agencies, absence of official statistics, problems of research access, and lack of an adequate theoretical framework), the problems identified above represent the most important preliminary issues and questions concerning corporate crime as a criminological topic. If we are to launch a systematic and sustained effort to study and control corporate criminality, we must address ourselves to these issues and questions. It seems especially important at this time to counter the various objections which are raised to the study and control of illegal corporate behavior given the undisguised hostility of the Reagan Administration to the federal regulation of

corporations and the political movement to free business (once again) from responsibility for its byproducts (however harmful to workers, consumers, or the environment).

The purpose of this chapter, then, is to address the preliminary issues and questions which were raised above concerning corporate crime. First, we will attempt to deal with the definitional question and clear up the conceptual confusion surrounding the concept of corporate crime. Second, we will assess the seriousness of corporate criminal acts. Then we will discuss the boundary dispute which revolves around the question, "Is corporate crime really crime?" Finally, we will explore public attitudes toward corporate crime. It will become evident that the objections to viewing corporate wrongs as crimes fail because they rest on tautologies or beliefs that do not enjoy empirical support. As the notion of corporate crime, which is at bottom a moral and political judgment of behavior, becomes more familiar to all—the public, lawmakers, scholars—these remnant objections will surely wane in light of evidence to the contrary.

## WHAT IS CORPORATE CRIME?

The most troublesome issue with regard to the study of corporate crime concerns the very definition of the concept. As Jackall (1980: 354-355) has recently noted, "Perhaps the most fundamental dispute is the definitional one over what actually constitutes the purview of the field." Definitions, of course, are neither right nor wrong. But a definition of corporate crime is important because of the types of questions it directs attention to and the order of phenomena it leads one to investigate. Thus, if criminologists are to move toward the study of corporate crime, a clear and valid initial definition of the phenomenon of study must be developed.

In order to formulate such a definition, it is imperative that the controversial history of the concept "white-collar crime" be reviewed and the confusion surrounding its use be understood. As Geis and Meier (1977: 25) have pointed out, "The definition of white collar crime . . . has always represented something of an intellectual nightmare." If our intention is to focus theoretical and empirical attention on corporate crime, we must first attempt to clear the semantic waters muddied by Sutherland and his followers with regard to the concept of white-collar crime.

It is surprising that Sutherland did not provide a formal definition of the concept "white-collar crime" in his 1939 presidential address to the American Sociological Society. He noted simply that he was "concerned with crime in relation to business." Later, in *White Collar Crime,* Sutherland (1949: 9) provided the following definition: "White collar crime may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation." In a footnote, Sutherland (1949: 9) goes on to say, "The term 'white collar' is used here to refer principally to business managers and executives." When this statement is combined with the fact that almost all of the data presented in *White Collar Crime* refers to corporate violations and legal decisions made against corporations, it is easy to conclude that by "white-collar crime" Sutherland meant corporate crime. In fact, Clinard and Yeager (1980: 13) argue that *White Collar Crime* should have been entitled *Corporate Crime.*

Sutherland, however, was not consistent in his use of the term "white-collar crime." At various points in the book he mentions frauds in different repair businesses, white-collar crime in politics, fee splitting by physicians, fraud in income tax returns, and fraud by a shoe salesman. Thus, there is considerable confusion as to what Sutherland actually meant by the concept of "white-collar crime." As Geis and Meier (1977: 254) note:

> This confusion was built into the concept of white collar crime by Sutherland when he introduced the term into the literature. By failing to specify precisely and fully what it was that he was concerned with, Sutherland left the door wide open for a barrage of speculative attempts to refine and redefine white collar crime.

Following Sutherland's death, the term "white-collar crime" passed into popular usage and came to refer to almost any form of illegal behavior other than conventional street crimes. There were also several influential attempts by criminologists to expand the concept beyond a narrower focus on the crimes of corporate officials or other high-status individuals. Newman (1958: 737), for example, suggested that "farmers, repairmen, and others in essentially non-white collar occupations could, through such illegalities as watering milk for public consumption, making unnecessary repairs on television sets, and so forth, be classified as white collar violators." This idea was followed up by Quinney (1964: 209), who argued, "Such an expan-