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CHAPTER 1

The social production of business offenses

On October 5, 1976, the U.S. government fined the large, multinational Allied Chemical Corporation $13.24 million for criminal discharges of the toxic pesticide Kepone and other chemicals into Virginia's James River. Although some observers decried the fact that the several corporate officials indicted for the offenses had been acquitted, the case nonetheless represented a high point in the growing effort to legally protect the natural environment from despoliation.[1] Not only was this single fine greater than the total fines and penalties imposed in *all* Environmental Protection Agency–initiated cases that had been previously concluded (through September 1976),[2] but merely seven years earlier neither criminal fines nor civil penalties were part of the federal government's general response to the increasingly threatening environmental degradation due to water pollution.

Seven years later the EPA's regulatory program was in disarray. Beset by deep budget cuts and overseen by a leadership eager to relieve industry of regulatory costs, the agency's enforcement efforts were in serious decline in all areas of environmental protection. This was clearly a consequence of the Reagan administration's wide-ranging policy to divest private enterprise of public regulation as part of a "supply-side" strategy to stimulate economic growth. The

[1] The court later reduced the fine to $5.24 million when Allied Chemical agreed to donate $8 million to a new, nonprofit corporation that would fund research projects and implement remedial activities to mitigate Kepone damage. This development had the effect of reducing the true, after-tax cost of the penalty by about $4 million, since Allied was able to claim the donation as a tax-deductible expense. The company also made a contribution to fund Kepone-related medical research and paid some of the cleanup costs, and in 1977 it faced more than twenty lawsuits for health-related damages, one of them a class action seeking more than $26 billion. For additional discussion of this noteworthy case, see Kelly (1977), Stone (1977), Reitze and Reitze (1976), and Sethi (1982).

[2] See, e.g., Environmental Protection Agency (1977a: 1).

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results of this policy, however, proved more dramatic at EPA than in any other regulatory arena. By early 1983 the agency was awash in public scandal amid charges that its rulemaking and enforcement had become corrupted by a pattern of secret negotiations with industry representatives, exclusion of public-interest voices from policy deliberations, and improper influence exerted from the upper reaches of the Executive Branch. By April most of the president's appointees to leadership positions in the agency, including top administrator Anne Burford, had resigned under fire as the administration sought to contain the political damage occasioned by the revelations.

If the relatively aggressive prosecution of the Allied Chemical case did not represent the government's typical enforcement vigor in the 1970s (criminal prosecutions were very uncommon, multimillion-dollar fines rare indeed), neither did the administration's efforts to deregulate the economy in the 1980s signal the end of environmental protection. Instead, these two episodes suggest the policy limits within which environmental protection law can vary under present conditions of U.S. political economy. Just as the state cannot ensure environmental health and safety at the cost of economic destabilization, so is it prevented from pursuing unfettered economic growth at the expense of environmental destabilization. The Reagan administration became familiar with the latter limit when it discovered that regulatory inattention to such matters can threaten the legitimacy of government itself. The 1983 backlash to the administration's policies peaked when a bipartisan Congress, public-interest groups, and powerful media organizations sought to expose and reverse the deregulatory efforts. Although subsequent implementation of environmental laws remained at levels less rigorous than those of previous administrations, the basic structure of the law survived as the administration was forced by increasing political pressure to embrace publicly the philosophy of environmental protection, if not its rigorous application.

With the legal apparatus and broad public support for its underlying philosophy in place, contending forces will continue to struggle over where to balance the dynamic tension between economy and environment. The remarkable developments in environmental law and their partial reversals in only fifteen years suggest the volatility of any particular resolution of this contradiction. Moreover, this history provides a ripe opportunity to investigate the conditions under which the reach of law extends to define a common business

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practice – discharging wastes into the environment – as wrongful, thereby placing new limits on economic activity, while simultaneously being itself constrained in its regulatory efforts by countervailing pressures in social organization.

My study of the federal government's evolving efforts to regulate industrial water pollution is an attempt to make sociological sense of the dialectical relationship between these limits and constraints. This pursuit is driven by my long-standing interest in two questions: What factors promote illegal business activity, and what are the political economic limits on the law's ability to control such behavior? As I attempt to demonstrate in the next section, these questions have much to do with each other. As it happens, the study of the legal control of business not only investigates important issues in public policy, but also contributes to the analysis of the systemic relations between state and economy.

The analysis of business offenses

This study is rooted in a research tradition that, paradoxically, is long-standing but only recently developed. Social science interest in business wrongdoing dates back eighty years in the United States, to Edward A. Ross's (1907) concern with what he labeled "criminaloids" operating in the world of commerce. More than forty years would pass, however, before the sociologist Edwin H. Sutherland published his pioneering book, *White Collar Crime* (1949), which reported the first systematic analysis of large companies' violations of law. As curious as this four-decade lag may seem, even more noteworthy is that the quarter-century following Sutherland's provocative lead saw precious little research development in this area. Only a handful of studies were published in the 1950s and 1960s, and the subject had clearly failed to establish itself as a major field for research and analysis.[3]

The reasons for this failure are roughly suggested by Sutherland's experience. Although his investigation of seventy major U.S. corporations had revealed high violation rates and typically lenient federal law enforcement, it was criticized as an unjustified attack on business, and Sutherland himself was disparaged as a radical for

[3] Other contributions in the Sutherland era include Clinard (1946/1977, 1952), Hartung (1950/1977), Aubert (1952/1977), and Lane (1953/1977). Later analyses were published by Newman (1958/1977), Geis (1967/1977), and Leonard and Weber (1970/1977).

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having challenged the integrity of the corporate world.[4] Simply put, there was little support for such work in a society that, first, was both proud and protective of its leading institutions in the economically expansionary wake of World War II and in the face of the Cold War and, second, focused on the serious domestic conflict associated with race relations and the Vietnam War. As Nicolaus (1973) has suggested, the institutional acceptance of sociology as a discipline is dependent on its usefulness to the nation's political and economic leadership, a dependency secured in large part by government and foundation control of research funds and, therefore, of research priorities. The result was that sociological criminology continued to focus almost exclusively on the politically sanctioned concern with "street" crime, concentrated primarily in the disadvantaged classes (cf., Mills, 1943; Schwendinger and Schwendinger, 1975: 128).

By the mid-1970s, however, there had been dramatic changes in the social climate. Stimulated by such developments as the Watergate episode, widespread revelations of improper corporate payments at home and abroad, and the increasing risks posed by such hazards as environmental pollution, public and governmental attention increasingly focused on the "suite crimes" of the powerful. (Important, too, was the country's military disengagement from Vietnam, which eliminated the major focus of public and news media attention of the several preceding years.) Corporate illegalities such as price fixing and pollution often came to be considered at least as serious by the public as some of the more conventionally feared crimes such as burglary and robbery, according to survey data (see, e.g., Schrager and Short, 1980; Wolfgang, 1980; Cullen, Link, and Polanzi, 1982; Cullen and Dubeck, 1985; Frank, Cullen, Travis, and Borntrager, 1989). Not surprisingly, there was a corresponding increase in scientific interest in the topic, which has by now dwarfed the volume of work earlier produced.[5] For the first

[4] Sutherland (1949: 247) had this to say in his *White Collar Crime*: "The persons who define business practices as undesirable or illegal are customarily called 'communists' or 'socialists' and their definitions carry little weight." Thirty years later, this sort of reaction to such research was not customary, but neither was it quite extinct. For example, in a purported review of our study of corporate illegalities (Clinard and Yeager, 1980), a writer – expressing strong disdain for both the "regulatory state" and social science (dismissed as a pseudoscience concerned *only* with morality) – wrote that "a book entitled *Corporate Crime* automatically puts us on guard to defend the corporations. . . . such a book should never have been written in the first place" (Evans, 1981: 75–6).

[5] Arguably, this new research focus was also prompted by developments in the fields

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time, major federally funded research projects were begun in the generic area of "white-collar crime," most notably at the University of Wisconsin and Yale University, and a new wave of books and articles addressed many diverse questions in this fertile but vastly undercultivated field.[6]

of criminology and criminal justice. By the latter 1970s, the failure of liberal criminal justice reforms (e.g., prison rehabilitation programs, deinstitutionalization) to alleviate crime had resulted in a shift toward more punitive, "law-and-order" approaches to policy. Some leading academic criminologists became pessimistic about the discipline's contributions to social change. Simon Dinitz (1978: 234) pronounced the liberal impulse in criminology and corrections "spent," and Donald Cressey (1978: 177) charged that "the typical modern criminologist is a technical assistant to politicians bent on repressing crime, rather than a scientist seeking valid propositions stated in a causal framework."

Thus, with declining institutional support for traditional liberal concerns, the recently reidentified social problem of business lawbreaking provided an academic outlet for scientific reformers still concerned with broader issues of justice and bureaucratic wrongdoing. Indeed, this logic illuminates the liberal school's *apparently* contradictory positions on penal measures, traditionally advocating compassion and treatment for poor conventional offenders while demanding harsher penalties (more and longer periods of incarceration) for wealthy persons who violate business regulations. The latter position is in line with growing emphasis on increased control measures, while the application to elites satisfies liberal concerns for justice and fairness, and the elimination of upper level corruption. While this argument remains speculative, one could likely find supportive evidence both in the careers of many leading criminologists and in analyses of cohort differences in subfield specializations. In any event, I can attest that my own intellectual journey has passed rather in this way.

[6] The projects undertaken at the University of Wisconsin at Madison and at Yale University were both funded by the now defunct Law Enforcement Assistance Administration of the U.S. Department of Justice. Results of the former are reported in Clinard et al. (1979) and Clinard and Yeager (1980). The Yale studies include Rose-Ackerman (1978), Wheeler, Weisburd, and Bode (1982), and Shapiro (1984). Numerous other analyses of business offenses and of issues in controlling them have been published since the mid-1970s. Included are Farberman (1975), Stone (1975), Cressey (1976), Kriesberg (1976), Pearce (1976), Conklin (1977), Geis and Meier (1977), Ermann and Lundman (1978, 1982a, 1982b), Goff and Reasons (1978), Hopkins (1978, 1980), Johnson and Douglas (1978), Schrager and Short (1978, 1980), Sutton and Wild, (1978), Lauderdale, Grasmick, and Clark (1979), Needleman and Needleman (1979), Reisman (1979), Braithwaite (1980, 1982, 1984, 1985), Coffee (1980, 1981), Geis and Stotland (1980), I. Ross (1980), Barnett (1981, 1988), Fisse (1981, 1983), Cullen, Link, and Polanzi (1982), Donnelly (1982), Jones (1982), Kramer (1982, 1984), Simon and Eitzen (1982), Wickman and Dailey (1982), Calavita (1983), Clinard (1983), Fisse and Braithwaite (1983), Lynxwiler, Shover, and Clelland (1983), Vaughan (1983), Hochstedler (1984), Shapiro (1984), Curran (1984), Szasz (1984, 1986a), Coleman (1985), Szwajkowski (1985), Shover, Clelland, and Lynxwiler (1986), and Yeager (1986).

This research interest continues despite the decline in support for it at the highest levels of government and law. The interest is manifested in the many panel discussions of such topics as the "political economy of corporate crime" and "corporate crime and regulation" at professional meetings as diverse as those of the American Society of Criminology and the Academy of Management.

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The limits of causal research

In general, most of the empirical work on corporate offenses has concerned the economic and organizational conditions that foster lawbreaking. In these studies, such factors as profitability, company size, and management socialization processes have been examined as potential influences (see, e.g., Burton, 1966; Staw and Szwajkowski, 1975; Asch and Seneca, 1976; Perez, 1978; Sonnenfeld and Lawrence, 1978; Clinard, Yeager, Brissette, Petrashek, and Harries, 1979). While these have proved to be important explanatory factors, this body of work has paid scant attention to another set of conditions intimately tied to business illegalities, conditions associated with the creation and implementation of law. This lopsided focus on the behavior of the *regulated* comports with the predominant research trends in mainstream criminology. In criminological research, the nature of law is typically taken as nonproblematic, and criminologists are free to investigate violations as "pure" behavioral phenomena unconfounded by the form of law or processes of its enforcement.[7]

In the study of business violations, such a focus is curious for two reasons. First, the concern with a sociology of law – particularly with the relations of power and interest that underlie legal processes – especially commends itself in the study of corporate offenses. Because law typically represents the *crystallization of (often incipient) social conflict* – in the form of legal processes that limit one set of interests in order to promote another, often contradictory set (cf., Vold, 1958: 208–9; Platt, 1975: 103; Schwendinger and Schwendinger, 1975: 124) – attempts to control powerful economic entities in capitalist societies naturally direct attention to processes of lawmaking and enforcement.[8] The underlying question is whether such

[7] This traditional orientation of criminology continues despite the contributions in the 1960s of the labeling perspective (e.g., Goffman, 1961; Becker, 1963; Erikson, 1964; Scheff, 1966), which underscored the role of legal institutions in the explanations of crime and deviance. The isolation of mainstream criminological thinking from broader considerations of social structure – including law and relations of power – combined with the consistent failure to reduce the burgeoning crime rates of the 1970s helped produce a perception within the discipline that criminological theory had become stagnant, that it had been infused with precious little fresh insight in recent decades (see, e.g., Dinitz, 1979: 22; Meier, 1980; see also footnote 11).

[8] Despite its lack of development, the idea that both crime and law are outcomes of processes of social conflict is not new to criminology. For example, Sellin (1938) emphasized the role of normative group conflict over fifty years ago, and Sutherland similarly underscored normative variations between groups and the role of

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legal efforts are in fact constrained by the very interests they purport to regulate. As Donald Newman pointed out more than thirty years ago, "Whether he likes it or not, the criminologist finds himself involved in an analysis of prestige, power, and differential privilege when he studies upperworld crime. . . . He must be able to cast his analysis not only in the framework of those who *break* laws, but in the context of those who *make* laws as well" (1958/1977: 56; emphasis in the original).

Second, in his seminal contribution to the study of corporate offenses, Sutherland himself recognized the central importance of legal process, but failed to integrate it into his analysis. This is somewhat anomalous, because Sutherland's work in all other respects posed a head-on challenge to decades of criminological theory and research focused on the supposed personal and social pathologies of conventional offenders. It was also rooted in his philosophical opposition to perceived injustices in the "private collectivism" of big business (Cressey, 1976: 213) and to an inequitable system of law that jailed burglars and robbers while "coddling" corporate offenders with such lenient sanctions as administrative agency orders to comply and small fines. Indeed, in earlier arguing for an expanded definition of crime – to include business violations handled with civil and administrative sanctions like warnings and orders in addition to criminally punished offenses – Sutherland (1945) noted that formal legal distinctions are *politically* determined, with no necessarily logical link between the severity of the violation and the legal response. He attributed the "softer" legal definition of most corporate wrongdoing to the relative political influence of the business sector.

Nonetheless, Sutherland's classic book only suggested the importance of political and legal relations while lodging its analytic thrust in his concept of differential association. He argued that business violations, like all other types of lawbreaking, can best be explained by a learning theory: businesspeople learn the procrime or anticrime attitudes and behaviors of those with whom they most significantly associate. This social psychological explanation was premised on an underlying assumption about social organization: that normative orientations regarding law are structured in terms of competing social groups. But Sutherland only began to develop this important

conflict in legislative processes and determinations (see, e.g., Sutherland and Cressey, 1955: ch. 1). The labeling school's stream of research in the 1960s and 1970s also demonstrated the role of political power in the formulation and application of legal sanctions (see, e.g., Becker, 1963).

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idea. In a short discussion at the end of his book (1949: 255–6), he introduced the concept of *differential social organization*, through which he attempted to explain his findings of high rates of business violation coupled with generally lenient legal reactions. He argued that while the business sector had reached a consensual viewpoint regarding the acceptability of law violations,[9] the public and law enforcement agencies had not organized a consensual viewpoint against such offenses; thus social control of them was weak. Sutherland hinted that the lack of public opposition to business offenses was related to "the tentacles which business throws out into government and the public for the control of those portions of society" (1949: 255). But he did not develop an analysis of the role of social structure and social relations in limiting the legal response to these offenses. Sutherland himself pointed to major shortfalls in the analysis: Differential social organization fails to explain the content of infractions and the derivation of value (group) conflicts historically (1949: 256).

Research and the role of law

That the research on business offenses has not adequately concerned itself with the analysis of sociolegal relations does not imply that its findings have been irrelevant to them. For example, studies have found significant variations in offense patterns depending on the type of law being violated. In his early study of the New England shoe industry, Lane (1953/1977) found that economic decline (as indicated by the number of employees over time) was associated with companies committing unfair trade practices such as false advertising and price fixing. Yet he found no such relationship between financial performance and violations of the labor relations laws. Similarly, the University of Wisconsin study of violations of federal laws by the large *Fortune* 500 corporations found that these firms were substantially more likely to commit violations of product safety, labor, and environmental laws than they were to violate tax, securities, and other financial laws and unfair trade laws (Clinard et al., 1979; Clinard and Yeager, 1980).

Both studies suggest that the differences reflect variations in the degree of legitimacy granted to various laws by sectors of the busi-

[9] As I discuss later, the historic evidence indicates that Sutherland was naive in attributing an ideological consensus to the business sector. Instead, the business world is often divided on political and legal issues in ways important to the understanding of the political economy of law and lawbreaking.

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ness community. Lane (1953/1977: 105) suggested that financial strain may better explain violations of those laws held in higher regard by the business community, such as antitrust laws. For laws that do not accord so well with central business values, such as labor relations laws, strain may not be a necessary inducement for contravention. Impressions gathered from business journalism as well as the Wisconsin study results suggest substantial business support in principle for many of the laws established to protect the integrity of the marketplace. The antitrust and securities laws, established several decades ago as corporate capitalism asserted its control over the American economy, define the limits of acceptable behavior in competitive and ownership relations, and thereby provide relatively stable and predictable rules for what otherwise would become an unacceptably ruthless, Darwinian struggle.

There is however, more business opposition to the so-called social legislation (in contrast to the "economic" legislation mentioned previously) passed largely during the 1970s (see, e.g., P. H. Weaver, 1978; Weidenbaum, 1979). Laws designed to protect consumers, the environment, and employees restrict management autonomy at the point of production rather than simply in market relations, and can impose costly regulatory and liability requirements on companies. As Herman (1981: 185) notes, "These burdens have been especially painful to business because of their imposition at a time of accelerating international competition and structural maladjustments besetting important U.S. industries." Finally, these newer laws have often defined as illegal what had been accepted business practices and risks; the environmental laws are illustrative. As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant.

But other factors are rarely constant, and two important considerations qualify these conclusions.[10] First, holding constant such

[10] A third consideration is the *detectability* of different offense types. Securities and antitrust offenses are often highly secret ruses in which there are no *knowing* victims; in addition, the violations are often buried in the arcane technicalities of high finance, as in the accounting concealments of improper corporate payments (see, e.g., Clinard and Yeager, 1980: chs. 7 and 8). To the extent that such offenses are more difficult and costly for government enforcement agents to detect, it is to be expected that a substantial number of them will go undetected. While such factors also hinder the enforcement of environmental-, consumer-, and employee-protection laws, they are less salient in these areas as citizens, consumers, and workers have become increasingly aware of both short- and long-term risks and their legal rights. Thus differences in *officially identified* offense levels, such as those compiled in the Wisconsin study, are to some unknown extent determined by vari-

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matters as the legitimacy of law and the presumed *benefits* of infraction, offense rates are also shaped by the severity of the legal response. According to the tenets of deterrence theory, where penalties (legal *costs*) are higher, violation rates are expected to be lower. This relation appears to hold for businesses' violations of law. The Wisconsin study found that the federal government is substantially more likely to impose harsher penalties (criminal fines, sentences) for violations of the long-standing financial and unfair trade laws than for the more frequent violations of the newer environmental, product safety, and employee-protection laws (Clinard et al., 1979: 134–6).

However, while some measure of deterrence may indeed be operating to produce these results (and the reader will note that the cross-sectional data are inadequate for testing the possibility), the situation is complicated by the political economic nexus linking regulated companies and legal administration in ways typically foreign to the state's handling of conventional criminality. For example, when the state is confronted with strong opposition to legal controls from a powerful regulated constituency, as in the case of much social legislation, regulators typically proceed gingerly in order to avoid potentially disastrous (to the regulatory agency) legislative challenge or costly court battles. In this case, then, it becomes imperative to examine not simply the effects of legal sanction on compliance behavior (as suggested by the deterrence perspective), but also the "reciprocal effects" of private-sector influence on the behavior of law. Deterrence is especially likely to fail when the regulated not only question the legitimacy of law but also possess the ability to influence its administration. In sum, legal legitimacy, enforcement, and infraction are interwoven in the complex fabric of social relations that characterize the contemporary United States, as I shall attempt to demonstrate in the chapters to follow.

The second consideration complicating the regulatory scenario is that the business world is not all of a piece in these matters. Analysts from Sutherland onward have often treated commercial interests as

ations in detectability. The problem of estimating this effect is complicated by its contradictory relationship to identified levels of lawbreaking. On the one hand, some proportion of offenses go undetected; on the other hand, the logic of deterrence theory suggests that violation types that are difficult to detect will occur more frequently owing to the decreased *certainty* of punishment.

Although the analytic web is tangled, it seems most reasonable to conclude that variations in officially identified offense levels are the joint product of conceptions of legal legitimacy, deterrence, and detectability.

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