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Sally S. Simpson

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CHAPTER ONE

Criminalizing the Corporate Control Process

The modern tendency of the courts . . . has been widening the scope within which criminal proceedings can be brought against institutions which have become so prominent a feature of everyday affairs, and the point is being reached where what is called for is a comprehensive statement of principles formulated to meet the needs of modern life in granting the fullest possible protection of criminal law to persons exposed to the action of the many powerful associations which surround them.¹

IMAGES of crime in the United States at the end of the twentieth century increasingly coupled the illegal practices of business executives with those of America's underclass. These mirror images of crime and criminals have had real consequences for how crime is understood and responded to in our society today. Crime in the suites and on the streets has been indelibly linked in the public mind. It has not always been so.

Neither street nor business crime is a new social problem. In fact, quite the opposite is true. Illicit drugs and the violence they spawn have concerned moral entrepreneurs and policy makers in this country for the better part of this century;² legislative attempts to curb the market powers of "robber baron" industrialists stimulated antitrust laws over a century ago.³

¹ *Russell on Crime*, 12th ed., ed. F. W. Cecil Turner, vol. 1 (London: Stevens Publishing, 1964), pp. 96–97.

² See, for instance, James Inciardi, *The War on Drugs: Heroin, Cocaine, Crime, and Public Policy* (Palo Alto, Calif.: Mayfield, 1986); Joseph Gusfield, *Symbolic Crusade* (Urbana: University of Illinois, 1963); Howard S. Becker, *Outsiders* (New York: Free Press, 1963); and Troy Duster, *The Legislation of Morality* (New York: Free Press, 1970).

³ Corporations, until the early 1900s, were rarely subjected to criminal law. Strict liability was the preferred legal means to pursue acts of corporate malfeasance (William S. Laufer,

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Historically, however, these populations of criminals were seen as distinct. For the most part, drug addiction (including alcohol) and violence were deemed problems for ethnics (Mexican, Chinese, Italian, Irish, and blacks) and immigrants (predominantly Catholic working class). The “real” crime problem was thought to rest with the constitutionally inferior and morally lax. Corporate criminals, on the other hand, were drawn from America’s newly emerging capitalist Brahmins. Although perceived to be opportunistic and ruthless in their business practices, these entrepreneurs were part of the governing and newly emerging social elite. Consequently, popular definitions of and legal responses to crime and criminals were framed within divergent ideological and social-control orbits. Conventional crime was dealt with punitively, but corporate misbehavior was handled through administrative agencies or relatively lenient criminal statutes.⁴

Today, however, there is substantial overlap between conventional and white-collar crime control. Since the 1960s politicians and the general public have come to believe that the crime problem is pervasive and out of control. Citizens are bombarded with messages that create and reinforce this interpretation as media, politicians, and crime specialists document the illegal activities of business and street criminals. The crack-cocaine epidemic of the 1980s coupled with sensationalist reports of drug and school violence, rapes, robberies, and grisly serial murders comprises a large part of the cultural image of America’s crime problem. But white-collar cases involving Michael Milken, Lincoln Savings and Loan, Archer Daniels Midland – even congressional leaders such as Dan Rostenkowski and former president Clinton – have contributed increasingly to this conception.

Public opinion polls show that over the past two decades white-collar crimes have attained greater significance in the mind of the populace. For instance, on a ranking scale where 1 is the most serious, the mean seriousness ranking of corporate and other white-collar offenses by the public was 91.75 in an 1972 study. This average shrunk to 79.71 in another survey

“Corporate Bodies and Guilty Minds,” *Emory Law Journal* 43 [1994]: 647–730). The Sherman Act and Clayton Antitrust Act were passed into law in 1890 and 1914 respectively. There is some disagreement as to whether the legislation was truly populist or reflected the interests of the capitalist class; see Frank Pearce, *Crimes of the Powerful* (London: Pluto, 1976); and Gabriel Kolko, *The Triumph of Conservatism* (New York: Free Press, 1963).

⁴ To be clear, corporate sanctions often include a criminal component. However, research demonstrates that civil and administrative remedies have been the preferred method of pursuing corporate violators. For instance, between 1890 and 1969, the ratio of civil to criminal cases brought by the Department of Justice in the antitrust area is 1.23:1 (Richard Posner, “A Statistical Study of Antitrust Enforcement,” *Journal of Law and Economics* 13 [1970]: 385). See also Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* (New York: Free Press, 1980).

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conducted in 1979. Public ranking of the most serious corporate act, selling contaminated food that results in a death, decreased from a rank of twenty-sixth in 1972 to thirteenth in 1979.⁵ A survey conducted in 1984 found that environmental crime was ranked seventh, “after murder, but ahead of heroin smuggling.”⁶ The perceived severity of environmental crimes by the general public has remained high in the 1990s, according to results from a survey commissioned by Arthur D. Little. When asked to evaluate how seriously authorities should respond to four types of corporate crime, 84 percent of respondents perceived environmental damage to be a serious crime, with three out of four believing that executive officers ought to be held personally accountable (liable) for such offenses.⁷ In contrast, 74 percent of respondents ranked worker health and safety crimes to be serious, 60 percent felt that price fixing was a serious offense, and less than half (40 percent) held similar beliefs about insider trading.

Data from other Western nations also support the view that the general public is growing intolerant of certain types of white-collar crime. In Great Britain, for instance, respondents in a 1985 survey ranked murder with a weapon as the most serious offense but ranked fifth an example of mail-order fraud in which the offender set up a bogus mail-order company and fraudulently obtained £1,000 from private individuals.⁸ Similarly, replication of the crime seriousness surveys in Brisbane, Australia, suggests that greater media attention for the past twenty years has produced respondents who view white-collar offenses to be more serious than their U.S. counterparts. The mean seriousness score for the Brisbane sample – again with 1 being the “most serious” ranking – was 74.23. This average is considerably lower than what the first U.S. survey found (91.75) and 5 points lower than the 1979 survey’s average (79.71).⁹

Finally, the public may be more reactive toward corporate than non-corporate offenders. In their vignette survey, Miller, Rossi, and Simpson

⁵ Peter H. Rossi, Emily Waite, Christina E. Bose, and Richard E. Berk, “The Seriousness of Crimes: Normative Structure and Individual Differences,” *American Sociological Review* 39 (1974): 224–237; Francis T. Cullen, Bruce G. Link, and Craig W. Polznai, “The Seriousness of Crime Revisited,” *Criminology* 20 (1982): 83–102.

⁶ U.S. Department of Justice, *Bureau of Justice Statistics Bulletin*, January 1984, cited in Frederick W. Allison III and Elizabeth E. Mack, “Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time,” *Southwestern Law Journal* 44 (1991): 1429.

⁷ *The Corporate Board*, September–October 1991, 24–25.

⁸ Michael Levi and S. Jones, “Public and Police Perceptions of Crime Seriousness in England and Wales,” *British Journal of Criminology* 25 (1985): 234–250.

⁹ Robert C. Holland, “Public Perceptions of White Collar Crime Seriousness: A Survey of an Australian Sample,” *International Journal of Comparative and Applied Criminal Justice* 19 (1995): 91–105.

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show that respondents prefer more severe sanctions “when either the crime victim, or the criminal offender is a corporation, and not an individual.”¹⁰ However, punitive attitudes vary by the degree of harm and the culpability of the act.¹¹ Surveys of business executives and criminal justice authorities also show similar variations in perceptions of white-collar crime seriousness and appropriate punishment.¹² Benson and Cullen, for instance, found that local prosecutors’ perceptions of the corporate crime problem were a function of community characteristics. Local prosecutors in more populous jurisdictions, compared with those in suburban or rural areas, were more apt to regard corporate crime as a very or somewhat serious problem.¹³ Although Benson and Cullen are unable to determine, based on their cross-sectional data, whether prosecutor’s perceptions have changed over time, they cautiously interpret their data as suggestive that prosecutors become more concerned with corporate crime during their tenure in office. Specifically, prosecutors report that prosecutions have increased and that even more prosecutions are anticipated in the future.¹⁴

The criminal justice system is now playing a larger role in the war against corporate crime. Champions of this position claim that the criminal process offers a greater deterrent for corporations and managers than other control mechanisms.¹⁵ But the shift of criminal justice to center stage raises important questions about the capacity of criminal law to prevent and control corporate illegality.

The goal of this book is to address, in detail, some of these concerns. A key premise of this investigation is that the criminal justice system will fail as a primary mechanism of corporate crime control, even though criminal law

¹⁰ Joann L. Miller, Peter H. Rossi, and Jon E. Simpson, “Felony Punishments: A Factorial Survey of Perceived Justice in Criminal Sentencing,” *Journal of Criminal Law and Criminology* 82 (1991): 396–415.

¹¹ Laura Schrager and James F. Short, “How Serious a Crime? Perceptions of Common and Organizational Crimes,” in Gil Geis and Ezra Stotland (eds.), *White-Collar Crime: Theory and Research* (Beverly Hills, Calif.: Sage, 1980), pp. 14–31; James Frank, Francis T. Cullen, Lawrence F. Travis III, and John L. Borntrager, “Sanctioning Corporate Crime: How Do Business Executives and the Public Compare?” *American Journal of Criminal Justice* 13 (1989): 139–169.

¹² Studies are reported and summarized in Michael Levi, *Regulating Fraud* (New York: Tavistock, 1987), pp. 69–70 and 136–144.

¹³ Michael L. Benson and Francis T. Cullen, *Combatting Corporate Crime: Local Prosecutors at Work* (Boston: Northeastern University Press, 1998), p. 51.

¹⁴ *Ibid.*

¹⁵ John Braithwaite, “The Limits of Economism in Controlling Harmful Corporate Conduct,” *Law and Society Review* 16 (1981–1982): 481–504; John Braithwaite and Gilbert Geis, “On Theory and Action for Corporate Crime Control,” *Crime and Delinquency* 28 (1982): 292–314; Francis T. Cullen and Paula J. Dubeck, “The Myth of Corporate Immunity to Deterrence,” *Federal Probation* 49 (1985): 3–9.

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offers the harshest formal sanction threat to corporate managers (and some claim the greatest deterrent) – namely, incarceration. The position against the use of criminal law to control corporate misconduct is, by no means, unique or unprecedented. In fact, more than two decades ago, Christopher Stone argued:

Those who trust to the law to bind corporations have failed to take into account a whole host of reasons why the threat of legal sanction is apt to lack the desired effects when corporate behavior is its target – for example, limited liability, the lack of congruence between the incentives of top executives and the incentives of “the corporation,” the organization’s proclivity to buffer itself against external, especially legal threats, and so on.¹⁶

Stone asserts that the law will fail because it lacks the necessary flexibility to adjust to and permeate dynamic business organizations. While sympathetic to Stone’s point, my view of criminal law is informed from a deterrence framework, a perspective that has been optimistically embraced by proponents of a punitive corporate control model but one that lacks supportive empirical evidence. To borrow a phrase from law professor John Coffee, “if such assertions could be cited as evidence, the case [for deterrence] . . . would be strong indeed. In general, however, little is cited in support of this contention beyond anecdotal experiences and personal beliefs.”¹⁷

Making a similar point, Charles Moore claims that the prospects for corporate deterrence are bleak because arguments in favor of corporate deterrence are founded on unrealistic views of the corporate actor and overly optimistic views of the legal system’s capacity to control corporate behavior.¹⁸ Moore’s critique deals exclusively with the problems associated with deterring the corporate entity via criminal law (his position on deterrence is summarized in the third chapter of this book). The position I advance is that deterrence is unlikely for both the corporation *and* its officers

¹⁶ Christopher D. Stone, *Where the Law Ends* (New York: Harper and Row, 1975), p. 93. See also John Braithwaite and Brent Fisse, “Self-Regulation and the Control of Corporate Crime” (pp. 194–220), and Michael Clarke, “Prosecutorial and Administrative Strategies to Control Business Crimes” (pp. 247–265), both in Clifford D. Shearing and Philip C. Stenning (eds.), *Private Policing* (Beverly Hills, Calif.: Sage, 1987).

¹⁷ John Collins Coffee Jr. “Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions,” *American Criminal Law Review* 17 (1980): 425. In making his point, Coffee was contrasting the deterrent value of fines with imprisonment and noting that commentators explicitly claim that only the latter can deter the businessman. Given the paucity of empirical evidence on the deterrent effects of any legal sanction brought against a firm or a manager, his words are equally apt here.

¹⁸ Charles A. Moore, “Taming the Giant Corporation? Some Cautionary Remarks on the Deterrability of Corporate Crime,” *Crime and Delinquency* 33 (1987): 379–402.

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or managers. Punitiveness, as a strategy for corporate crime control, is not well grounded in the empirical literature and, in fact, is somewhat antithetical to the limited amount of research that has been conducted in this area. Research by Diane Vaughan, for instance, explicitly challenges the rational-choice foundation upon which corporate deterrence rests.¹⁹

For most corporate crime scholars, especially those of us who understand corporate crime as an abuse of power by capital,²⁰ an antideterrence position is an ironic one to assume²¹ but one informed by both theory and scientific evidence. To lay the groundwork for the arguments and evidence against deterrence, we first need to identify the kinds of acts that corporations and their managers commit that are subject to criminal sanction and the characteristics that make these acts distinct from other kinds of crimes. Ironically, many of the uncommon features of corporate crime contribute to the belief that it is amenable to deterrence. Yet these same attributes suggest that corporate crime control will be more successfully achieved through processes other than the application of criminal sanctions to violators. Second, it makes little sense to argue that criminalization is a flawed policy unless it can be demonstrated that a trend toward criminalization actually is occurring. Thus, the latter part of this chapter is devoted to substantiating this position while attempting to explain why this change is happening now.

Definitions

What Is Corporate Crime?

Corporate crime is a type of white-collar crime. Edwin Sutherland introduced the latter concept to describe criminal activity by persons of high social status and respectability who use their occupational position as a means to violate the law.²² As a subcategory of white-collar crime, corporate crime has been defined in many ways. Perhaps the simplest definition is that offered by Braithwaite: corporate crime is the “conduct of a corporation, or

¹⁹ Diane Vaughan, *The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA* (Chicago: University of Chicago Press, 1996); Diane Vaughan, “Rational Choice, Situated Action, and the Social Control of Organizations,” *Law and Society Review* 32 (1998): 23–61.

²⁰ See, e.g., Frank Pearce and Laureen Snider, “Regulating Capitalism,” in F. Pearce and L. Snider, *Corporate Crime: Contemporary Debates* (Toronto: University of Toronto Press, 1985), pp. 19–47.

²¹ For a position counter to mine, see Laureen Snider, “The Corporate Counter-Revolution and the Disappearance of Corporate Crime” (paper presented at the annual meeting of the American Society of Criminology, Washington, D.C., 1998).

²² Edwin Sutherland, *White-Collar Crime* (New York: Dryden Press, 1949).

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of employees acting on behalf of a corporation, which is proscribed and punishable by law.”²³

Three key ideas are captured in this definition. First, by not specifying the kind of law that proscribes and punishes, Braithwaite accepts Sutherland’s argument that illegality by corporations and their agents “differs from the criminal behavior of the lower socio-economic class principally in the administrative procedures which are used in dealing with the offenders.”²⁴ Thus, corporate crime not only includes acts in violation of criminal law, but civil and administrative violations as well. Second, both corporations (as “legal persons”) and their representatives are recognized as illegal actors. Which or whether each is selected as a sanction target will depend on the kind of act committed, rules and quality of evidence, prosecutory preference, and offending history, among other factors.

Finally, Braithwaite’s definition specifies the underlying motivation for corporate offending: on the whole, illegality is not pursued for individual benefits but rather for *organizational* ends. Thus, in order to maintain profits, manage an uncertain market, lower company costs, or put a rival out of business, corporations may pollute the environment, engage in financial frauds and manipulations, fix prices, create and maintain hazardous work conditions, knowingly produce unsafe products, and so forth. Managers’ decisions to commit such acts (or to order or tacitly support others doing so) may be supported by operational norms and organizational subcultures.²⁵

Perceptions of organizational needs have been empirically shown to influence the corporate offending decision. Strains and pressures associated with decline *and* growth are linked to corporate illegality.²⁶ Interviews with middle and top managers at a steel manufacturing company conducted by this author, for instance, reveal how managers confront different realities under conditions of munificence and scarcity. In his description of how

²³ John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London: Routledge and Kegan Paul, 1984), p. 6.

²⁴ Sutherland, *White-Collar Crime*, p. 9.

²⁵ James W. Coleman, *The Criminal Elite* (New York: St. Martin’s Press, 1989).

²⁶ Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* (New York: Free Press, 1980); Katherine M. Jamieson, *The Organization of Corporate Crime* (Thousand Oaks, Calif.: Sage, 1994); Melissa S. Buucus and J. P. Near, “Can Illegal Corporate Behavior Be Predicted? An Event History Analysis,” *Academy Management Journal* 34 (1991): 9–36; Sally S. Simpson, “The Decomposition of Antitrust,” *American Sociological Review* 51 (1986): 859–879; Barry M. Staw and Eugene Swajkowski, “The Scarcity Munificence Component of Organizational Environments and the Commission of Illegal Acts,” *Administrative Science Quarterly* 20 (1975): 345–354.

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health and safety violations might occur, one manager said:

There are no purists in a survival mode. . . . as soon as you're on the threshold [of economic constraints], then all of the shortcuts come out of the woodwork and we give them titles like "entrepreneur of risk," "risk analysis." We give them all kinds of fancy things to accommodate and legitimize the decision process.²⁷

Such decisions have little to do with an individual employee's personal needs but a lot to do with organizational contingencies, priorities, and needs. In contrast, embezzlement – another type of white-collar crime – occurs when persons accept a position of trust within an organization but, by stealing from it, violate the financial trust placed in them.²⁸ Both this act and the conditions just described resulting in health and safety violations occur within a work setting. Each falls within the parameters of Sutherland's original definition. The difference between them lies in motivation and victim. Unlike corporate crime, embezzlement is motivated by an individual's needs (e.g., his or her debt, family considerations, perception of an unsharable problem, greed, revenge).²⁹ The primary victim of embezzlement is the firm itself.³⁰ Corporate crime, on the other hand, counts many victims, among them employees, other companies, the government, the environment, and consumers; however, because the act is undertaken in the pursuit of organizational goals, the company itself is not directly victimized.

Corporate offending occurs within an organizational context. This fact sets it apart from most other kinds of illegality. The organization comprises hierarchical, diverse, and often highly specialized positions. Work is autonomous, but it is also interactive and team-dependent. Organizations themselves are complex entities. Large corporations are divisible into subsidiaries; subunits such as sales and marketing, production, and finance; and smaller task groups. Like the organization as a whole, these units develop

²⁷ Sally S. Simpson, "Corporate Crime Deterrence and Corporate Control Policies: Views from the Inside," in Kip Schlegel and David Weisburd (eds.), *White-Collar Crime Reconsidered* (Boston: Northeastern University Press, 1992), pp. 296–297.

²⁸ Donald Cressey, *Other People's Money* (Glencoe, Ill.: Free Press, 1953), p. 12.

²⁹ Donald R. Cressey, *Other People's Money: A Study in the Social Psychology of Embezzlement* (1953; reprint, Montclair, N.J.: Patterson Smith, 1973); Dorothy Zeitz, *Women Who Embezzle or Defraud: A Study of Convicted Felons* (New York: Praeger, 1981); Kathleen Daly, "Gender and Varieties of White-Collar Crime," *Criminology* 27 (1989): 769–794.

³⁰ Certain types of white-collar crime, such as the recent savings-and-loan frauds, share elements of both embezzlement and corporate crime. Calvita and Pontell describe situations of "collective embezzlement" in which bank officers use institutional resources to enrich themselves at the expense of the bank, depositors, and the general public. See Kitty Calavita and Henry N. Pontell, "'Other People's Money' Revisited: Collective Embezzlement in the Savings and Loan and Insurance Industries," *Social Problems* 38 (1991): 94–112.

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cultures and subcultures. It is here that most managers are socialized into organizational goals and subgoals. Here, too, employees learn the appropriate means and unique opportunities to achieve defined objectives and to respond to pressures – including criminal options. To understand corporate crime and to determine whether it is amenable to deterrence, one needs to examine how managers experience and express the moral imperatives of their work environment and how organizational needs are formulated and inculcated into managerial decisions.³¹

What Is Deterrence?

The idea of deterrence has its roots in utilitarian philosophy where individuals are seen as rational, pleasure-seeking, and self-interested. In accordance with hedonistic principles, individuals will maximize pleasurable experiences and avoid painful ones.³² The traditional deterrence model assumes that fear of legal sanctions keeps persons law-abiding.³³ To the extent that formal punishment risk and consequence are assessed to be greater than the benefits of the criminal act, legality will prevail. The greater the certainty, severity, and celerity of punishment, the greater the putative deterrent effects for both offending individuals (specific deterrence) and the general public (general deterrence).

Deterrence theory emphasizes the formal legal system as the essential element in the crime inhibition process. Thus, fear of detection, arrest, and punishment resulting from conviction forms the core of a deterrence model.³⁴ For deterrence theorists, there is a straightforward answer to the question, Why do corporations obey the law? They do so because the threat of criminal sanctions is salient to the organization and its key managers. Yet managers and corporations may be inhibited from misconduct by other kinds of fears. For instance, threats to reputation, current or future employment, access to competitive resources (e.g., bids, contracts), friendship networks or associations, and family attachments can curb illegal conduct independent of legal sanctions. Managers and employees may not contemplate criminality because of moral habituation or a strong belief in the morality of the law. Traditional deterrence neglects these kinds of controls,

³¹ Robert Jackall, *Moral Mazes: The World of Corporate Managers* (New York: Oxford University Press, 1988).

³² Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. Laurence J. Lafleur (New York: Hafner, 1948).

³³ Jack Gibbs, *Crime, Punishment, and Deterrence* (New York: Elsevier, 1975).

³⁴ Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974).

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which are arguably more important in corporate crime control (as they are in conventional crime control) for the majority of offenders. More than two centuries ago, Jeremy Bentham noted that punishment is unnecessary when other kinds of controls or interventions are successful.³⁵ Later in this work, I assert that greater enforcement effort should be centered on such informal controls and interventions.

Criminalization of Corporate Crime in the Post-Watergate Era

A “get tough on crime” rhetoric for criminals of all types is currently in vogue. On a practical level, this position has translated into mandatory and longer sentences for some kinds of offenders (e.g., drug offenders, recidivists, weapons offenses), a preference for prison time over less punitive alternatives, three-strikes legislation, and a return to the death penalty – with some advocates suggesting expansion of the circumstances under which a death sentence can be imposed (e.g., former president Bush’s push to make drug trafficking a capital crime). For corporate offenders, it has meant more criminal instead of civil or regulatory cases brought against them; a push toward sentencing parity between white-collar and street criminals; and an increase in maximum penalty levels for a variety of organizational offenses (e.g., the Insider Trading and Securities Fraud Enforcement Act of 1988; Major Fraud Act of 1988; Money Laundering Control Act of 1986; Sherman Act).³⁶

The punitive model of corporate crime control has support from both sides of the ideological spectrum. The reasoning behind this confluence, however, differs from side to side.³⁷ Several interpretations are offered to account for this punitive shift.

The Fairness Issue

The perceived inadequacies of the criminal justice process are at least partially responsible for both conservatives and radicals supporting a harsher

³⁵ Bentham, *Introduction*.

³⁶ Ilene H. Nagel and Winthrop M. Swenson, “The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about Their Future,” *Washington University Law Quarterly* 71 (1993): 224–225.

³⁷ Zimring and Hawkins have commented on how political ideology affects conservative and liberal images of crime causation. I extend their perspective to images of corporate crime control. Franklin E. Zimring and Gordon Hawkins, “Ideology and Euphoria in Crime Control,” *University of Toledo Law Review* 10 (1979): 370–388. In a similar vein, the authors analyze the savings-and-loan crisis. See Franklin E. Zimring and Gordon Hawkins, “Crime, Justice, and the Savings and Loan Crisis,” in Michael Tonry and Albert J. Reiss Jr. (eds.), *Beyond the Law: Crime in Complex Organizations* (Chicago: University of Chicago Press, 1993), pp. 247–292.