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White-Collar Crime: The Abuse of Corporate and Government Power

Ronald J. Berger

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1

The Problem of White-Collar Crime

ONE OF THE OPENING ACTS OF THE TWENTY-FIRST CENTURY was the fall of the mega-corporation, Enron. Under the leadership of Kenneth Lay, Enron was transformed from a relatively small gas pipeline operation into a powerful energy-trading business that was at one time "nominally" the eighth largest corporation in the United States (Kuttner 2003). Enron capitalized on its dominant market position to create an artificial energy shortage that enabled it to raise prices, most notably in California. As that state was experiencing energy blackouts and escalating prices, Enron's stock price soared. But Enron was not really making as much money as it appeared—it was "cooking the books." It did this by creating a myriad of corporate subsidiaries and using these subsidiaries and other accounting gimmicks to disguise debt and financial losses, aided and abetted by the onetime prestigious accounting firm Arthur Andersen (Toffler 2003). When the bubble finally burst in the latter part of 2001, Enron investors lost about $60 billion, which included the pensions and retirement savings of thousands of people, among them Enron employees who were prohibited by the company from selling their stock. In the meantime, just before the stock price collapsed, Enron executives collectively unloaded nearly $1 billion worth of stock for themselves (McLean and Elkind 2004; Reiman 2007; Rosoff, Pontell, and Tillman 2007; see Chapter 3).

Around the time the Enron scandal was in the news, there were also the September 11, 2001, terrorist attacks on the World Trade Center and Pentagon, and the subsequent US military invasion of Afghanistan, followed by the invasion of Iraq, the latter justified on the basis of misleading and partly fraudulent evidence. The surveillance capacity of the federal government was expanded, and a regime of warrantless electronic

surveillance was unleashed that was arguably in violation of the Foreign Surveillance Intelligence Act, passed in 1978, which requires surveillance requests to be reviewed by a panel of judges. There also was the torture of Muslims by US personnel, famously revealed to the world in the spring of 2004 through Internet dissemination of photos from Abu Ghraib prison in Iraq, but this torture also took place elsewhere, and in violation of US and international antitorture laws (Bamford 2008; Cole and Lobel 2007; Mayer 2009; McCoy 2006; see Chapter 6).

These types of corporate and government actions, which fall under the broad category of "white-collar crime," constitute the focus of this book. My emphasis is not on individual acts of occupational criminality but on the *organizational* varieties of white-collar crime—that is, those that are committed in the pursuit of corporate profits and government policies or involving a network of co-conspirators acting in concert. This focus dovetails with what others have called "elite deviance" or "corporate and governmental deviance" (Ermann and Lundman [1978] 2002; Simon [1982] 2006). In adopting this approach, we will also be engaging in a critique of economic and political power in the United States.

The costs of the crimes of the "higher circles," as C. Wright Mills (1957) called them, are arguably greater than the costs of conventional crimes of theft and violence. But because of the privileged status of the perpetrators, they remain relatively unchecked. Stephen Rosoff, Henry Pontell, and Robert Tillman note, for example, that the cost of the taxpayer bailout of a single corrupt, federally insured savings and loan in the late 1980s "surpassed the total losses of all the bank robberies" in US history (2007:201; see Chapter 3). Jeffrey Reiman (2007) estimates that the financial costs of white-collar crime now exceed $400 billion annually, to say nothing of the physical consequences of unsafe working conditions, defective consumer products, and environmental pollution (see Chapter 4).[1] He notes as well that far more people are now seriously harmed each year from occupational hazards than from ordinary street crime. After reviewing available data on deaths and injuries due to occupation-related diseases and other workplace hazards, he concludes that about 55,000 workers die and another 2.3 million get sick or are injured each year as a result of dangerous occupational conditions. This toll greatly exceeds the approximately 16,000 homicides and 860,000 aggravated assaults that are annually reported to law enforcement authorities (Berger, Free, and Searles 2009). Moreover, the ongoing corruption and criminal malfeasance of political officials who abuse their power has a corrosive impact on democracy in the United States, contributing to a growing cynicism and mistrust that Americans feel toward their government. Nowadays few would deny that the ties that once bound US citizens to their government

have been "broken," though hopefully not beyond repair (Dean 2007; Nye, Zelikow, and King 1997; see Chapters 5 and 6).

We begin our inquiry into the problem of white-collar crime with a review of the history of the concept, especially the groundbreaking work of Edwin H. Sutherland (1883–1950), who coined the term and introduced it into the vernacular of social science and the general public. My primary objective here is to delineate in broad terms the nature of the subject matter that constitutes the field of white-collar crime and to identify some of the controversies entailed in expanding that subject matter beyond what is statutorily defined as crime by the existing criminal law. The second part of the chapter provides additional introductory background on the emergence of the corporation as the driving economic force of contemporary society and on the attempts by the US government to rein in through regulatory reform the harmful conduct that is a consequence of unchecked corporate power. The chapter also considers the deregulatory movement that emerged in the last quarter of the twentieth century and the corrupting influence of corporate power on regulatory agencies, which illustrates the adage about "the fox guarding the hen house." Nevertheless, it remains fair to say that a social movement has been under way to change this disconcerting state of affairs and put the prevention and control of white-collar crime more squarely on the agenda of the American public (Cullen et al. 2006; Katz 1980).

Delineating the Subject Matter

The Legacy of Edwin Sutherland

In his 1939 presidential address to the American Sociological Society, at a conference held jointly with the American Economic Association, Edwin Sutherland gave a talk titled "The White Collar Criminal." He disparaged theories of crime that "blamed such factors as poverty, broken homes, and Freudian fixations for illegal behavior, noting that healthy upbringing and intact psyches had not served to deter monstrous amounts of lawbreaking by persons in positions of power" (Geis and Goff 1983:ix).[2] Sutherland defined **white-collar crime*** as a "crime committed by a person of respectability and high social status in the course of his occupation," and he urged his colleagues to focus more attention on such hitherto neglected acts ([1949] 1983:7).

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*Key terms are indicated in **boldface** the first time they appear in the book.

The son of a Baptist minister and educator, Sutherland was undoubtedly driven by a sense of moral outrage against those whose selfishness, greed, and cutthroat predatory behavior belied, in his view, Christian principles. During World War II, in a letter to the secretary-manager of the Hoosier Motor Club in Indianapolis, Sutherland expressed a degree of anger not found in his professional work. The secretary-manager had been encouraging Indiana residents to petition their congressional representatives to postpone implementation of gas rationing, which some deemed necessary to the war effort. Sutherland accused the man of putting "financial interest in promoting the driving of automobiles . . . ahead of the national interest." In a fiery tone, Sutherland went on to say: "This is an effort to interfere with the successful prosecution of the war and is subversive. I feel that the government is entirely justified in sending the FBI to investigate you. They may find that your action is directed from Berlin, or they may find that it is merely selfish interest in your own welfare; the effects are the same" (cited in Geis and Goff 1983:xv).

The secretary-manager replied by sending Sutherland a packet of literature defending his position and demanding an apology for "probably the most insulting . . . letter I have ever received." Sutherland forthrightly apologized for "the personal reference in my former letter," saying that he knew nothing about the secretary-manager "as a person and had no justification in making personal statements" about him. But he went on to "recant nothing . . . regarding the organized effort to delay the rationing program" and insisted that if rationing came to fruition, "all of the literature you are distributing will encourage the blackmarkets and crookedness which you so freely predict" (cited in Geis and Goff 1983:xvi).

Sutherland, of course, was not the first academician to consider the criminality of the privileged classes. Nineteenth-century French jurist and sociologist Gabriel Tarde, for instance, noted that the common people were moved to their transgressions through imitation of their social superiors. According to Tarde, as Piers Beirne and James Messerschmidt note: "Drunkenness, smoking, moral offenses, political assassination, arson, and even vagabondage are . . . crimes that originated with the feudal nobility. . . . Criminal propensities . . . typically travel downward and outward—from the powerful to the powerless" (1995:367). In the early twentieth century, Charles Henderson, a Baptist minister turned sociologist, also indicted the privileged classes:

> The social classes of the highest culture furnish few convicts, yet there are educated criminals. Advanced culture modifies the form of crime; tends to make it less coarse and violent, but more cunning; restricts it to quasi-legal forms. But education also opens up the way to new and

> colossal kinds of crime, as debauching of conventions, councils, legislatures, and bribery of the press and public officials. The egoistic impulses are masked and disguised in this way, the devil wearing the livery of heavenly charity for a cloak of wrong. (1901:250)

FURTHER EXPLORATION

Box 1.1 The Criminaloid

Sociologist Edward Alsworth Ross, who published an article called "The Criminaloid" in the *Atlantic Monthly* in 1907, was a noteworthy influence on Sutherland. In fact, prior to Sutherland's coinage of the term "white-collar crime," Sutherland used the term "white-collar criminaloid" in the 1934 edition of his *Criminology* textbook. Ross described the **criminaloid** as follows:

> The key to the criminaloid is not evil impulse, but moral insensibility. They are not degenerates tormented by monstrous cravings. They want nothing more than what we all want—money, power, consideration—in a word, success; but they are in a hurry and they are not particular as to the means. . . . The criminaloid prefers to prey on the anonymous public. . . . Too . . . prudent to practice treachery, brutality, and violence himself, he takes care to work through middlemen. Conscious of the antipodal difference between doing wrong and getting it done, he places out his dirty work. ([1907] 1977:31)

Ross also noted that "[t]he criminaloid practices the protective mimicry of the good. . . . [H]e is often to be found in the assemblies of the faithful. . . . Full well he knows that giving a fountain or a park or establishing a college chair . . . will more than outweigh the dodging of taxes . . . and the corrupting of city councils" (p. 34). Finally, Ross concluded:

> The criminaloid flourishes until the growth of morality overtakes the growth of opportunities to prey. . . . Fresh opportunities for illicit gain are continually appearing, and these are eagerly seized by the unscrupulous. The years between the advent of these new sins and the general recognition of their heinousness are few or many according to the alertness of the social mind. . . . The narrowing of this gap depends chiefly on the faithfulness of the vedettes that guard the march of humanity. If the editor, writer, educator, clergyman, or public man is zealous to reconnoiter and instant to cry aloud the dangers that present themselves, . . . our regulative opinion quickly forms and the new sins soon become odious. (pp. 36–37)

And in the 1930s, criminologist Albert Morris wrote about the "criminals of the upperworld . . . whose social position, intelligence, and criminal technique permit them to move among their fellow citizens virtually immune to recognition and prosecution as criminals" (1935:153).

Be that as it may, there is little doubt that Sutherland considered the corporate variety of white-collar crime to be the most consequential, agreeing with John Farley, who wrote: "The average politician is the merest amateur in the gentle art of graft compared with his brother in the field of business" (quoted in Sutherland [1940] 1977:41). Indeed, Sutherland's main contribution to empirical research on white-collar crime was devoted to documenting the extensive law violations of the largest corporations in the first four decades of the twentieth century.

In this research, Sutherland ([1949] 1983) reviewed 980 documented cases of law violation committed by the 70 largest US corporations of the time (the corporations had an average life-span of about 45 years). It is noteworthy that Dryden Press, the publisher of the original edition of Sutherland's book, forced him to omit the actual names of the corporations for fear of lawsuits. It was not until 1983, three decades after Sutherland's death, that a new, uncut version was published that included the names of the companies.

Overall, Sutherland found that each of the 70 corporations had been cited for at least one violation. Two companies had been cited for as many as 50 (Armour & Company, Swift & Company), one for 40 (General Motors), and two for 39 (Montgomery Ward, Sears Roebuck). Over 90 percent of the corporations had four or more violations, perhaps qualifying them for prosecution as habitual or repeat offenders. The largest proportion of violations was for restraint of trade such as noncompetitive price-fixing (31 percent), infringement on patents, copyrights, and trademarks (23 percent), unfair labor practices (16 percent), and misrepresentation in advertising (10 percent). Other violations included commercial and political bribery, tax fraud, manipulation of the stock exchange, short weights and measures, misrepresentation of financial statements, and fraudulent bankruptcies. Importantly, Sutherland found that about half of the companies had engaged in law violations at their origin or in their early years of operation, making crime an essential part of their initial period of capital accumulation.

While collecting his data, Sutherland did not limit his research to violations of *criminal* law, but included violations of *civil* and *regulatory* law as well. All three systems of law—criminal, civil, and regulatory—are concerned with the social control of what has been deemed harmful or injurious conduct by a legislative body. These systems of law

all involve procedures set up to adjudicate competing claims and to ascertain responsibility for such conduct. Technically speaking, **criminal law** defines harmful conduct as a public matter and mandates the intervention of law enforcement authorities such as police and prosecutors. **Civil law** defines harm as a private matter to be settled by individuals (and their attorneys) as private parties in the courts. **Regulatory law** is concerned with the imposition of rules and standards for business-related activity, and at the federal level involves agencies like the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Securities and Exchange Commission (SEC). While the lines of demarcation between these three systems of law are not always clear, only criminal law allows for the imposition of jail or prison sanctions instead of or in addition to financial penalties, although failure to comply with civil or regulatory rulings may lead to such sanctions. Violation of criminal law carries the greatest moral condemnation, because of the stigma associated with crime (Friedrichs 2007).

Only 16 percent of the cases examined by Sutherland were, technically speaking, violations of criminal law, although about 60 percent of the corporations did have at least one criminal conviction, and among these the average was four apiece. Regardless, Sutherland believed it was appropriate to include the full range of offenses in his study, because corporate law violations, even if not enforced as "crime," were *potentially* punishable by criminal law, contained the essential elements of criminal intent, and caused considerable harm to society.

Paul Tappan (1947), a lawyer and sociologist, was arguably the most prominent critic of Sutherland's inclusive approach to white-collar crime. Tappan argued for a narrower, **legalistic approach** to crime, defining it as "an intentional action in violation of criminal law . . . committed without defense or justification, and sanctioned by the state as a felony or misdemeanor" (p. 100). Tappan believed that criminologists should confine their subject matter to behaviors that met this definition and not equate civil and regulatory violations with criminal violations (see also Caldwell 1958).

Sutherland, on the other hand, noted that corporations that engaged in harmful conduct were able to avoid the application of criminal law, and the consequent stigma associated with such application, because of their economic and political clout. He was unwilling to also allow corporations to exert such influence on criminological research.

Years later, Raymond Michalowski (1985) would advance an expansive definition of criminology's subject matter that was consistent with

FURTHER EXPLORATION

Box 1.2 The Clinard-Yeager Study

Since the 1930s the Federal Bureau of Investigation has published an annual tabulation of crime data from across the United States in the *Uniform Crime Reports.* White-collar crime is strikingly absent from these reports, with the exception of cases of embezzlement, fraud, and forgery, which generally are committed by less affluent offenders rather than high-status businesspeople or corporations. Researchers interested in documenting the overall prevalence of white-collar crime, therefore, cannot rely on conventional sources of crime data such as the *Uniform Crime Reports,* and few have taken on the daunting task of culling through the documents of disparate government agencies (Berger, Free, and Searles 2009).

In addition to Sutherland's study, Marshall Clinard and Peter Yeager's (1980) research on corporate law violations in the mid-1970s stands out as a seminal work of this nature. Clinard and Yeager collected data on legal actions initiated against the 477 largest US manufacturing corporations during 1975 and 1976. The researchers found that about 60 percent of the companies had at least one action against them, 50 percent had two or more, and 18 percent had five or more. Over 75 percent of the cases involved what Clinard and Yeager classified as manufacturing violations (consumer health and safety), labor violations (worker health and safety, wage and hour violations, employment discrimination), and environmental violations (pollution). The largest corporations were the chief offenders, with just 8 percent of the companies accounting for over half of all violations. The most frequent offenders were in the motor vehicle, oil refinery, and pharmaceutical industries. Less than 3 percent of the imposed legal sanctions were for criminal offenses, however, and less than 1 percent involved nonmonetary criminal penalties against an officer of the corporation.

this sentiment. Emphasizing social harm as the key element of crime, Michalowski argued that criminology's subject matter should include **analogous social injuries**—that is, "legally permissible acts or sets of conditions whose consequences are similar to those of illegal acts" (p. 317). In a more recent book with Ronald Kramer, Michalowski added: "Comparing the nature and origins of analogous social injuries with those of prohibited acts . . . [allows us] to examine the political and cultural forces that result in some harms being labeled crimes, others regulatory violations, others noncriminal deviance, and still others praiseworthy acts" (Michalowski and Kramer 2006:13). Michalowski and

Kramer also noted the importance of considering international law and standards of human rights as criteria in determining the illegality of white-collar crime, whether regarding the disposal of toxic hazardous waste around the globe or the invasion and occupation of foreign countries.[3] This is a perspective that informs this book.

Alternative Formulations

During Sutherland's lifetime, as James Coleman observes, the idea that "many of the fabled captains of industry should be considered criminals had a very un-American sound to it" (2006:2). Additionally, the rise of McCarthyism (named after Wisconsin senator Joseph McCarthy) at the height of the Cold War in the 1950s—which created a "witch hunt" atmosphere that overzealously charged too many reputable citizens with "Communist" sympathies—had a chilling effect on white-collar crime research (Brightman 2009). In its stead, for reasons not entirely political but conceptual as well, Sutherland's focus on corporate criminality gave way to alternative formulations of the subject matter.

Recall that Sutherland's definition of white-collar crime included two components: crime committed (1) in the course of an occupation and (2) by persons of respectability and high social status. Several sociologists and criminologists writing from the late 1950s to the early 1970s pointed out that there were a variety of crimes that met the first part of the definition but not necessarily the second—such as those committed by farmers, repairmen, and other non-white-collar workers (Bloch and Geis 1962; Newman 1958). In this vein, Marshall Clinard and Richard Quinney delineated an area of inquiry called **occupational crime**, noting that corporate crime was but one form of occupational crime and defining occupational crime as a violation of law "in the course of activity in a legitimate occupation" (1967:31). Years later, Gary Green similarly defined occupational crime as "any act punishable by law which is committed through opportunity created in the course of an occupation that is legal" (1990:12–13).

This occupational crime perspective is an example of an *offense-based* definition, as opposed to Sutherland's *offender-based* definition, which focused on the social status of the actor. In 1970, Herbert Edelhertz, a former head of the Fraud Section in the US Department of Justice, advanced an influential offense-based definition in a pamphlet of 70-plus pages published by the National Institute of Law Enforcement and Criminal Justice. Edelhertz adopted the term *white-collar crime,* but defined it as "an illegal act or series of illegal acts committed by non-

physical means and by concealment or guile to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage" (p. 3). He eschewed the term *occupational crime* because of the fact that many white-collar crimes occur outside of one's occupation, such as "personal and nonbusiness false income tax returns, fraudulent claims for social security benefits, concealing assets in a personal bankruptcy, and use of large-scale buying on credit with no intention or capability to ever pay for purchases" (p. 3).[4] At the same time, he argued, Sutherland's focus on crimes of the "upper class" was too narrow. Rather, the definition and enforcement of white-collar crime should be more "democratic," given that "it can be committed by a bank teller or the head of his institution" (p. 4).

As a former investigator himself, Edelhertz helped put white-collar crime on the law enforcement agenda of the US government, and his definition became the one favored by government investigators and applied criminal justice practitioners (Brightman 2009; Poveda 1994). His so-called democratic approach, however, eschewed important questions of economic and political power, leaving the "very people that Sutherland originally sought to bring to the attention of criminologists ignored" (Benson and Simpson 2009:12). Moreover, his emphasis on the *nonphysical* nature of white-collar crime diverted attention from physically harmful conduct. It is arguably true that the modus operandi of white-collar crime is most often nonphysical, but the consequences of such conduct can most assuredly be *physical*—as in the case of workplace hazards, defective consumer products, and environmental pollution, or if we turn our attention to government crime, in the case of torture and other state-sanctioned violence (Friedrichs 2007; Kramer and Michalowski 2005; Rosoff, Pontell, and Tillman 2007).

In response to issues such as these, analysts in the late 1970s and 1980s began delineating a criminological subject matter concerned with the *organizational* elements of white-collar crime, which they termed **organizational crime**. From this perspective, individual actors are of interest mainly insofar as they act in the pursuance of organizational goals that are advanced through law violation (Ermann and Lundman [1978] 2002; Gross 1978; Schrager and Short 1978; Vaughan 1983). Although organizations are composed of individuals, the collectivity is, in fact, a legal entity that can be held accountable for its "behavior under the law, without any of the individuals who took actions on behalf of the organization" being held legally liable (Reiss and Tonry 2001:32).

Within the organizational approach, **corporate crime** and **government crime** constitute the two main typologies of white-collar crime,

each with subcategories of its own. Corporate crime may be subdivided according to characteristics such as the nature of the harm (e.g., financial, physical), victim (e.g., workers, consumers, general public), or industry (e.g., automobile, pharmaceutical, banking). Government crime may be divided according to whether it is "carried out by the state or on behalf of some state agency" or by public officials and politicians for direct personal gain (Friedrichs 2007:116). The former may be called **state crime** and the latter **political corruption**; and Michalowski and Kramer (2006) also identify a hybrid category—**state-corporate crime**, which occurs in the nexus between the state and corporate institutions (Friedrichs 2007).[5]

The Deviance Frame

One way that sociologists have eluded the controversy surrounding an expansive extralegal definition of "crime" is by invoking the concept of **deviance**. Deviance as a sociological concept can be traced to Robert Merton's seminal work "Social Structure and Anomie" (1938), in which he discussed criminality, drug addiction, and political radicalism as antisocial, aberrant, or deviant behaviors that arose as a consequence of social dislocations in society. By the 1950s the deviance concept had taken shape as an identifiable sociological construct delineating social phenomena that were, statistically speaking, deviations from the norm (or deviations from assumptions about the norm). In general, sociologists studying deviance focused on four areas of inquiry: crime and delinquency, mental illness and medical/psychological problems, drug use and addiction, and homosexuality and other sexual behaviors (Best 2004).

In the 1960s, a conceptual shift in the sociology of deviance took place with the emergence of **labeling theory**, whereby deviance was viewed not as an objective condition but as a matter of social definition and the societal reaction to apparent rule-violating behavior. According to Howard Becker, a chief proponent of this view, "deviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender'" (1963:9). Sociologists working in the labeling tradition view crime as "a label attached to behavior and events by those who create and administer the criminal law," and they are concerned with the process of **criminalization**—that is, the process by which the criminal law is selectively applied to social behavior, making some individuals and groups more or less vulnerable or immune from legal control (Barlow 1996:10; Hartjen 1974; Quinney 1970).

By the early 1970s, however, labeling theory and the entire school of deviance were being criticized for a class bias that focused on powerless "nuts, sluts, and perverts," to the neglect of people in positions of economic and political power (Liazos 1972; Spitzer 1975; Thio 1973). The social turmoil of the 1960s, particularly over civil rights and the Vietnam War, facilitated the emergence of **conflict theory**, which views society as an arena of struggle between competing groups who attempt to use the law to advance their interests. Richard Quinney, one notable proponent of this view, defined crime as "human conduct that is created by authorized agents in a politically organized society. . . . Criminal definitions describe behaviors that conflict with the interests of the segments of society that have power to shape public policy. . . [and] the enforcement and administration of criminal law" (1970:15–16, 18; see also Best 2004; Chambliss and Seidman 1971; Quinney 1974, 1977).

The 1960s was also the period in which Rachel Carson (1962) published *Silent Spring,* an exposé of the harmful effects of synthetic chemicals that spawned the contemporary environmental movement; and Ralph Nader ([1965] 1972) published *Unsafe at Any Speed,* a critique of the automobile industry that spawned the consumer movement. Moreover, the Watergate scandal of the early 1970s, which led to the resignation of President Richard Nixon and the criminal conviction of numerous White House officials, brought the deviance of government officials to public attention. The Watergate scandal takes its name from the burglary of the Democratic National Committee's headquarters at the Watergate hotel and office complex by a group of men under the employ of President Nixon's Committee for the Reelection of the President. It has come to refer not just to a single burglary but to a larger cluster of crimes and abuses of government power, including (but not limited to) other burglaries, illegal wiretappings, and obstruction of justice (Rosoff, Pontell, and Tillman 2007; see Chapter 6).

Additionally, in the aftermath of Watergate, the US Congress undertook investigations of the abuse of power by the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA). These abuses included the FBI's spying on political protesters, including Martin Luther King Jr., for the purpose of discrediting oppositional political movements, as well as the CIA's involvement in the violent overthrow of foreign governments and the assassination of foreign leaders (deHaven-Smith 2010; Kinser 2006; Mayer 2009; Rosoff, Pontell, and Tillman 2007). It was in this wider sociopolitical context that conflict theorists

called for a sociology of deviance that examined the malfeasance of the economic and politically powerful, what M. David Ermann and Richard Lundman ([1978] 2002) called "corporate and governmental deviance" and David Simon ([1982] 2006) called "elite deviance" (see also Douglas and Johnson 1977; Johnson and Douglas 1978).

One problem with the deviance construct, as David Friedrichs (2007) has observed, is that many actions that constitute white-collar crime do not, unfortunately, deviate from typical, institutionalized patterns of behavior in the United States. Nevertheless, the construct does offer a framework for addressing the question posed earlier about the difference between social injuries that are statutorily designated as crimes, and other noncriminal harms. Consideration of social factors that account for the disparate legal treatment of officially labeled crimes and other analogous social injuries should be part of the subject matter of white-collar crime. The field of inquiry must, by necessity, entail an expansive definition of the subject matter.

FURTHER EXPLORATION

Box 1.3 The Marketing of Infant Formula

The controversy over the marketing of infant formula (milk powder) by multinational corporations in underdeveloped countries is an example of the type of behavior that would fall within a broadened definition of white-collar crime or analogous social injury. Problems associated with the use of infant formula in the poverty-stricken and rural areas of these countries had been reported since the late 1950s. Corporations aggressively marketed the product as a modern alternative to breastfeeding, but illiteracy, lack of clean water, and inadequate refrigeration made infant formula more dangerous than mother's milk.

Moreover, the cost of infant formula unnecessarily consumed a large portion of a family's income, and parents often diluted the mixture to make it last longer. Thus, bottle-fed babies in these countries were more likely than breastfed babies to experience malnutrition, disease, brain damage, and even death. In the late 1970s, public attention to this issue focused on the Swiss-based Nestlé corporation, one of the largest food processors in the world. By the early 1980s, a worldwide protest and boycott finally forced Nestlé to abandon its aggressive marketing techniques, which had included the oversupplying of hospitals with free samples and the bribing of hospital staff to encourage pregnant women to purchase the product (Ermann and Clements 1984; Gerber and Short 1986).

The Corporate-Government Nexus

The second goal of this chapter is to provide background on the emergence of the corporation as a dominant mode of social organization in contemporary society and on the efforts of the US government to regulate the adverse effects of unchecked corporate power. This overview also considers the relationship between corporate and political elites, who all too often thwart the regulatory process in ways that many believe are antithetical to the interests of the American public.

The Origins of Business Concentration

The **industrial revolution**, which began in Great Britain and took hold in the United States in the nineteenth century, introduced both power-driven machinery and factory organization into the production process. In the post–Civil War United States, industrialization dovetailed with westward expansion to fuel unprecedented economic growth. The business **corporation** emerged as the capitalist economic unit most capable of coordinating and rationalizing large-scale economic activity and of providing a vehicle for the concentration of investment capital. Through the legal chartering of corporations, the government (mostly at the state level) granted these enterprises the right to own property, manufacture and buy and sell products, and bring lawsuits as if they were individual persons (Cullen et al. 2006; Inverarity, Lauderdale, and Feld 1983).

In the latter part of the nineteenth century, the railroads played a key role in the early expansion of corporations by providing a system of transportation that integrated the nation into a single marketplace. Thus companies like Montgomery Ward and Sears Roebuck were able to sell their products directly to consumers through mail-order catalogs. Similarly, national "chain" stores were able to integrate wholesaling, distributing, and retailing functions; guarantee sufficient supply and uniform products; and extend credit to subsidiaries.

The corporate mode of organization proved highly suitable to the national marketplace. Its militarylike, top-down organizational structure was capable of administering hundreds of subunits across a wide geographic territory. An expanded cadre of professional executives, middle-level managers, and functional and technical specialists worked together "to mobilize capital, equipment, technological talent, and labor over the extended periods associated with modern industrial production" (Inverarity, Lauderdale, and Feld 1983:223).

One of the problems facing corporations, however, was their inabili-

ty to rationalize or achieve predictability in the marketplace. Competition among firms threatened their profitability, even their survival. Businesspeople came to realize that cooperation might serve them better than competition. Railroads, for example, entered into pools or trade associations that fixed rates of profit and allocated business among competing lines. Some corporations entered into cooperative trusts or holding companies whereby a board of trustees would "coordinate the economic activities of the various member corporations, who voluntarily surrendered their individual autonomy to a centralized authority" (Inverarity, Lauderdale, and Feld 1983:225).

At the same time, corporations remained unaccountable to the public, despite the fact that their concentrated wealth and cooperative arrangements seemed antithetical to many Americans' belief in a "free market" competitive economy. Small farmers in particular blamed the exploitative profit-making of railroad and grain elevator operators for a

FURTHER EXPLORATION

Box 1.4 The Credit Mobilier Scandal

The **Credit Mobilier scandal**, which came to light in 1872, is a classic historical case of the corruption that can occur at the nexus of corporate and political power. Credit Mobilier was a construction and finance company, and a subsidiary of the Union Pacific Railroad. Both Credit Mobilier and Union Pacific Railroad were essentially owned by the same individuals, and when Union Pacific Railroad was awarded a multimillion-dollar federal government contract to build a transcontinental railroad to the western United States, Credit Mobilier was given the job. It submitted inflated bills to Union Pacific Railroad, and Credit Mobilier officials pocketed millions of dollars.

All this was made possible, in part, because of Oak Ames, who was not only the director of Union Pacific Railroad but also a Republican member of the US House of Representatives. Ames had secured the compliance of a number of key congressmen by selling them Credit Mobilier stock at far below market value and allowing them to finance their investment with expected future dividends they had not yet earned. A congressional investigation of the scandal resulted in little more than censure (official condemnation) of the participants, including Republican congressman James Garfield, who later became president, and two Republicans who served as vice president under President Ulysses Grant, Congressman Schuyler Colfax and Senator Henry Wilson (Dickenson 1977).

series of agricultural depressions that occurred in the latter third of the nineteenth century. They attributed "falling prices, rising costs, increased debts, and massive foreclosures [to] the monopolistic control of corporations and trusts," and they organized opposition political groups and parties to press for regulatory reform (McCormick 1977:31).

Antitrust Law and the Decline of Moral Indignation

As state laws proved inadequate to regulate corporations that were national in scope, the US Supreme Court gave the federal government the exclusive right to regulate interstate commerce. In 1890 the US Congress also passed the landmark **Sherman Antitrust Act** (SAA), which contained both criminal and civil provisions. For the first time in history, business combinations that resulted in a *restraint of trade* (including cooperative agreements to fix prices) or the *monopolization* of an industry could be prosecuted as federal criminal offenses, with maximum penalties initially set at one year in prison and a $5,000 fine (currently set at three years in prison and a $350,000 fine for individuals and $10 million for corporations). In addition, any private person who claimed to be adversely affected was now allowed to initiate a civil lawsuit and try to recover treble damages for any injuries suffered (Inverarity, Lauderdale, and Feld 1983; McCormick 1977).

The SAA defined as crimes business activities that were previously legitimate. The moral stigma associated with these new crimes, however, was relatively weak, for although the large corporation was perceived as a threat to the traditional American way of life, it was also viewed as a source of economic efficiency, employment, and improved living standards. Some regulation of corporations was deemed necessary, but not regulation "so stringent as to curtail seriously the desirable" benefits of corporate capitalism (Inverarity, Lauderdale, and Feld 1983:227).

Albert McCormick (1977) argued that the most critical period for establishing a new law as an effective mechanism of social control occurs immediately following the law's enactment. Failure to enforce the SAA was thus a key factor in the neutralization of the moral stigma associated with antitrust violations. McCormick noted that no extra funds were allocated by Congress for antitrust enforcement, and a separate antitrust division in the Department of Justice (DOJ) was not created for another 13 years. Up until then the DOJ had initiated just six criminal cases and sixteen civil cases. Among these, only one criminal case and three civil cases were successfully prosecuted, and no one was incarcerated.

Although the US Supreme Court upheld the constitutionality of the

SAA, laying the groundwork for future expansion of regulatory law, the Court narrowed the scope of the SAA's authority. In an 1895 case the Court ruled that the law did not apply to companies that manufactured their products within a single state. Thus the American Sugar Refining Company, for instance, which accounted for 98 percent of the country's sugar manufacturing, was not considered an illegal monopoly. And in a 1911 case involving the Standard Oil and American Tobacco corporations, the Court ruled that the SAA applied only to "unreasonable" and not "reasonable" business combinations. The SAA, therefore, had relatively little impact on the growth and consolidation of corporations in the United States throughout the twentieth century (Cullen et al. 2006; Inverarity, Lauderdale, and Feld 1983; Neuman 1998).

McCormick (1977) examined data on the 1,551 antitrust cases that were brought by the DOJ between 1890 and 1969. Less than half of these cases (45 percent) were brought as criminal violations, and only a third (35 percent) resulted in conviction. Moreover, nearly three-quarters of the criminal cases (73 percent) were brought between 1940 and 1944, during a time when monopolistic practices were deemed threatening to the US war effort. It was not until 1961, in an electrical equipment price-fixing case that netted the industry millions of dollars in illegal profits, that any corporate officials were actually imprisoned, and these men served just 25 days in jail (Geis 1967; see Chapter 2). In fact, the first 11 individuals to be imprisoned for antitrust violations were *labor* and *union* defendants.

James Inverarity, Pat Lauderdale, and Barry Feld conclude that the SAA "symbolically affirmed a legal commitment to free competition while institutionalizing consolidation and regulation" (1983:231). For the most part, successful corporations could "have their cake and eat it too." Some federal involvement would help stabilize the economy and achieve greater market predictability. And a centralized regulatory authority made it easier for corporations to lobby the government on their behalf. At the same time, failure to establish an identifiable group of corporate offenders (and victims) neutralized the already tenuous moral stigma associated with antitrust violations and gave rise to a dual or contradictory economic value system. As McCormick observed, American society "officially recognizes and pays lip service to the ideals of free competition but practices private . . . collectivism" (1977:36)—what Sutherland ([1949] 1983) described as **corporate socialism**, or what others have called **corporatism**: the fusion of big business and big government to serve the interest of private profit-making (Hayes 2010; Klein 2007).[6]

Regulatory Law and the Deregulation Movement

Federal regulatory agencies have the primary responsibility for dealing with corporate law violations in the United States. For the most part these agencies evolved during three periods of regulatory enactment (Friedrichs 2007). The first wave of regulation came in the early twentieth century in the wake of the social movement that had led to antitrust reform. Upton Sinclair's *The Jungle* (1906), an exposé of the horribly unsanitary conditions in the meatpacking industry, was especially instrumental in generating public support for passage of the Pure Food and Drug Act and the Meat Inspection Act in 1906. And as Sinclair's book triggered a dramatic drop in sales due to the loss of public confidence in meat products, the larger corporations also supported this legislation, for government inspection of meat served to restore public confidence. Smaller companies, however, were unable to absorb the additional cost of regulatory compliance. Hence some regulatory reform actually helped large corporations consolidate their control of the market.

A second wave of regulatory initiatives was associated with President Franklin Roosevelt's New Deal policies of the 1930s. This period of reform was motivated in large part by the 1929 stock market crash and the ensuing economic depression. Many people lost their life savings to failed banks. The government hoped that public confidence could be restored through greater regulatory protection afforded by newly established agencies such as the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the National Labor Relations Board.

A third wave of regulatory reform occurred during the period of social protest and liberal reform in the 1960s and early 1970s. The Consumer Protection Agency, the Environmental Protection Agency, and the Occupational Safety and Health Administration are among the regulatory bodies that were created during this era. The Food and Drug Administration (FDA), established by the Pure Food and Drug Act in 1906, was also given expanded regulatory powers at this time. At the outset, FDA regulatory activity had been limited to spot-checks designed to detect adulterated or mislabeled food and drugs. But over the years, well-publicized scandals involving harmful products prompted legislation to broaden its role in consumer protection (Clinard and Yeager 1980).

Friedrichs notes that the relatively "high level of consensus on the desirability of government regulation" began to erode in the late 1970s, especially among Republicans (2007:256). An economic downturn coupled with high inflation was crippling the economy. Corporate officials and their political supporters blamed federal government regulation (and

high taxes) for much of the nation's economic woes. They felt that regulation had been carried too far, that there were too many rules, and that the rules were too costly, complex, and unfair. They thus called for the **deregulation** of the economy.

The movement toward deregulation emerged full blown with the 1980 election of President Ronald Reagan. James Coleman (2006) believes that the Reagan administration would have liked to dismantle the federal regulatory structure almost entirely, but the public did not support such a radical approach. Instead the administration began a three-pronged effort to debilitate regulatory agencies: (1) the Office of Management and Budget, a federal agency that assists the president in preparing the federal budget and evaluating government agencies and programs, was authorized to review all new regulatory proposals, subject them to cost-benefit analysis, and reject them if deemed appropriate; (2) the budgets and staff of regulatory agencies were dramatically cut; and (3) new administrators sympathetic to deregulation were appointed to head the regulatory agencies.

Kitty Calavita (1983) observed that curtailment of the Occupational Safety and Health Administration was an especially high priority of the Reagan administration, which was hoping to undermine the influence of the trade union movement. OSHA had been established in 1970, Calavita argued, as a symbolic concession to organized labor, whose support President Nixon had sought for his reelection campaign. At that time it was estimated that harmful workplace conditions in the United States resulted in the death of at least 100,000 workers and the disablement of 390,000 others annually. From the very beginning, however, OSHA was underfunded and understaffed. Although it was supposed to promulgate new standards, in its first four years of operation it adopted only one, a maximum legal level of asbestos exposure. In the meantime, workers at that time were exposed to nearly 600 new toxic substances generated by corporate industrial production each year.

As OSHA is housed in the Department of Labor, it came under the supervision of Raymond Donovan, Reagan's first secretary of labor. Prior to his appointment, Donovan was one of two principal owners of Shiavone Construction, a New Jersey firm that had been accused several times of making illegal payoffs and bribes to union officials and local politicians. Shiavone also had a lengthy history of OSHA violations. In the six years prior to Donovan's appointment, Shiavone had been cited for 135 violations, 57 of which were for workplace conditions involving "a substantial probability that death or physical harm could result." In addition, the National Labor Relations Board had filed six charges

against Shiavone for unfair labor practices (violating federal wage standards), and the Department of Labor's Employment Standards Administration had investigated a dozen complaints of race and sex discrimination. In 1985 Donovan became the first cabinet officer in US history to be criminally indicted while in office. Charged with criminal fraud associated with the operation of Shiavone, he was forced to resign, even though a jury eventually found him not guilty. Such was the record of the man President Reagan appointed to protect the workers of the United States (Brownstein and Easton 1982).

Anne Gorsuch, an antiregulatory state legislator from Colorado, was Reagan's choice to head the Environmental Protection Agency.[7] Gorsuch's appointment was sponsored by Joseph Coors, the archconservative Coors brewery mogul, who had founded the Mountain States Legal Foundation, a group dedicated to eviscerating environmental regulations. During Gorsuch's term in office, she increasingly staffed the EPA with people who had once worked for the very corporations they were supposed to be regulating. In 1982 the so-called **Sewergate scandal** erupted, involving the EPA's rather cozy relationship with regulated firms, which included assurances of nonenforcement of environmental laws, "sweetheart" deals allowing polluting companies to avoid full payment of environmental cleanup costs, and delays in waste-site cleanup timetables. The scandal forced Gorsuch to resign. And Rita Lavelle, who had been appointed to head the EPA's Superfund environmental cleanup program, was convicted on criminal charges of perjury for lying under oath about her antiregulatory activities. The negative publicity associated with Sewergate forced Reagan to appoint a more moderate EPA director (Kennedy 2004; Szasz 1986b).

Another Coors protégé, James Watt, was appointed by Reagan to head the Department of Interior, which houses the Bureau of Mines. Watt was an advocate of **dominion theology**, which Robert Kennedy Jr. describes as "an authoritarian Christian heresy that advocates man's duty to 'subdue' nature" (2004:24). During a Senate hearing, "Watt tried to explain why he was selling off protected public lands and water and mineral rights at what the General Accounting Office called 'fire-sale prices' . . . rather than preserving them for future generations," asserting, in his words, "I do not know how many future generations we can count on before the Lord returns" (p. 25). Like Gorsuch, Watt was forced to resign because of public backlash and Democratic opposition to his radical deregulatory agenda.

President Bill Clinton was considerably more favorable toward environmental regulation than were his predecessors, but when President George W. Bush took office in 2001, the deregulatory move-

ment returned full throttle. Gale Norton, for example, was appointed to head the Department of Interior. Previously, Norton had been a member of an antiregulatory group deceptively called "Wise Use," whose founder, Ron Arnold, once said, "Our goal is to destroy, to eradicate the environmental movement. We want . . . to be able to exploit the environment for private gain, absolutely" (quoted in Kennedy 2004:27). Additionally, J. Steven Griles, a lobbyist for the mining industry, was appointed to head the Bureau of Mines. Government scientists and inspectors responsible for evaluating risks and enforcing law violations reported being thwarted in their efforts to protect the public from corporate practices that savaged and polluted the environment. Former interior secretary James Watt happily remarked that the Bush administration was "saying exactly what we were saying 20 years ago, precisely. Twenty years later, it sounds like they've just dusted off the old work" (quoted in Kennedy 2004:44).[8]

Regardless of the regulatory policies of particular administrations, larger corporations are always better able than smaller firms to withstand the constraints of regulatory controls. Their greater financial resources and market share enable them to absorb costs or pass them on to customers, and they are more likely to have the technical and legal expertise to challenge regulations effectively and negotiate favorable terms with regulators (Coleman 2006; Yeager 1987). Typically, the regulatory response of first resort is for a federal agency to enter into negotiations with the corporation and/or issue an official warning that further action will be forthcoming unless the company takes measures to remedy the activity in question. Successful negotiations between regulators and corporations may involve a consensual agreement to "cease and desist" from further violations and/or recall the product, make necessary repairs, or take other ameliorative action. In doing so, the company admits to no legal culpability that can be used against it in subsequent civil or criminal cases. If a settlement cannot be reached, then the regulatory agency may decide to pursue further regulatory, civil, or even criminal actions that carry heavier sanctions. Marshall Clinard and Peter Yeager (1980), however, found that no penalties were issued in over three-quarters of the cases they documented in their study (see Box 1.2).

Summary

In this opening chapter of the book, we have begun our investigation of white-collar crime with a review of the history of the concept, including the groundbreaking work of Edwin Sutherland. We delineated the nature

of the subject matter that constitutes the field and identified some of the issues involved in expanding our notions of corporate and government crime beyond what is statutorily defined as crime by existing criminal law, to include not only civil and regulatory law violations, but also analogous social injuries—that is, "legally permissible acts or sets of conditions whose consequences are similar to those of illegal acts" (Michalowski 1985:317). As noted, this book will focus on the organizational elements of corporate and government crime—that is, those crimes that are committed in the pursuit of corporate profits and government policies or that involve a network of co-conspirators acting in concert.

The chapter also provided background on the corporate-government nexus, including the emergence of the corporation as a dominant force in society and the government policies that aim to regulate the adverse effects of unchecked corporate power. We considered the emergence and failed promise of antitrust law, and reviewed three stages of regulatory reform (the 1900s, the 1930s, and the 1960s to early 1970s), which were followed in the last quarter of the twentieth century with the rise of the deregulation movement, most notably during the administration of Ronald Reagan in the 1980s. Finally, we considered the interrelationship between corporate and political elites and the corrupting influence of corporate power on regulatory agencies, an influence that can negate efforts to prevent and control white-collar crime.

Notes

1. Reiman extrapolates this estimate, adjusting for inflation and population growth, from an earlier study published by the Chamber of Commerce of the United States in 1974.

2. Sutherland is also noteworthy for his development of differential association theory, which, he noted, is a general sociological explanation that applies to the criminality that occurs in all social classes. We will consider this theory in more detail in Chapter 2.

3. Similarly, Herman Schwendinger and Julia Schwendinger advanced an alternative definition of crime as a violation of "human rights," arguing that egalitarian principles of social justice mandate that all individuals should be entitled to certain inalienable rights that are "the fundamental prerequisites of well-being" (1970:145). From this perspective, economic or political systems of injustice that deny these rights or that promote racism, sexism, economic exploitation, or environmental degradation are proper topics of criminological investigation.

4. David Friedrichs (2007) calls these "avocational crimes."

5. Friedrichs (2007) also identifies other categories of white-collar crime: "enterprise crime," more commonly associated with "organized crime" syndi-

cates; "contrepreneurial crime," more commonly associated with "professional" or "career" criminals; and "technocrime," more commonly associated with "computer" criminals.

6. In terms of numbers, small businesses dominate the US economy; in terms of scope, influence, and financial assets, corporations dominate (Inverarity, Lauderdale, and Feld 1983).

7. Gorsuch later married and became Anne Gorsuch Burford.

8. In 2008, federal investigators uncovered a scandal involving over a dozen Department of Interior officials who engaged in illicit sex and drug use with representatives of oil companies who contract with the government to drill offshore and on government land (Savage 2008). And in 2009, the Justice Department opened a criminal investigation into whether Norton had abused her position as secretary of interior to benefit Royal Dutch Shell, a company she went to work for after she left government. The investigation centers on whether Norton misused her office "to award three lucrative oil shale leases on federal land in Colorado to a Shell subsidiary, . . . [a] deal that could net the company hundreds of billions of dollars" (Tankersley and Meyer 2009:1).