

Steven Bittle

STILL DYING FOR A LIVING

Corporate Criminal Liability after the
Westray Mine Disaster



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Law and Society Series

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The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and highlight scholarship emerging from the interdisciplinary engagement of law with fields such as politics, social theory, history, political economy, and gender studies.

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On 9 May 1992, twenty-six miners were killed
in an underground explosion at the
Westray coal mine in Pictou County, Nova Scotia.
This book is dedicated to their memory and the hope that
someday workers can finally stop dying for a living.

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Foreword: The Struggle for Corporate Accountability

In September 2008, in contrast to any other social catastrophe – global warming, widespread hunger, poverty, the routine deaths of millions of children, AIDS, and tuberculosis and malaria epidemics, about which “there always seemed to be time to reflect, to postpone decisions” (Žižek 2009, 80) – one issue presented itself as “an unconditional imperative which must be met with immediate action,” namely that the “banks,” for which read finance capital in particular and the global neo-liberal order in general, had to be saved (80). In the United States, this unconditional imperative spawned the “Paulson Plan.” Sketchier than many undergraduate essays, this three-page document was a gun pointed by three men at everybody else with the message “give us \$700 billion or else” (Harvey 2009). This “financial coup” – repeated in the United Kingdom to the tune of £850 billion – marked the beginning of a new “age of austerity,” characterized by sovereign debt, where the most vulnerable within and across societies were now targeted as the price worth paying for capitalist recovery (ibid). As Karl Marx (1976, cited in Dienst 2011, 29) had once remarked, “the only part of the so-called national wealth that actually enters into the collective possession of a modern nation is – their national debt.”

Thus, within the “age of austerity” – which reflected the price of “recovery” (recovery to what, one might ask) – the social wage across the Western world has been under attack. Government debt, re-cast as state over-spending rather than as the socialization of the effects of reckless, capitalist profit taking, has meant that unemployment insurance, the deferred wages that are pensions, public services, and the often still minimal protections offered by regulation are luxuries that can now be barely afforded. Moreover, if the nature and level

of regulation of finance capital had been a key factor in generating the crisis, one would not have noticed this from the state responses to it. The “free market” did not look quite so “free” when governments were forced to rescue banks and other financial institutions. The fact that it was only governments that *could* respond to the crisis – under the guise of creating “the conditions for a new expansion” – is not in itself at all remarkable (Gamble 2009, 97). What is remarkable, however, is that, in so doing, the idea of the necessity and desirability of regulatory retreat has persisted across mainstream political spectrums. In the United Kingdom, for example, all three major political parties that fought the general election in 2010 were committed to reducing regulation – regulation in general was inherently burdensome and only to be an option of last resort, a minimalist necessary evil, which, in any case, entailed costs for both the state and for business, costs that had to be restricted in the new “age of austerity.” Thus, regulatory costs had to be minimized, on the one hand, as part of the overall attempt to tackle the new fiscal crisis of the state and, on the other hand, to reduce the costs for the private sector, which was seen as the only vehicle for economic recovery. Absent from this political discourse was any sustained, critical consideration of the forms of state regulation that had fuelled the unsustainable levels of profit maximization on the part of financial services operating in the shadow-economy of derivatives and securities – a toxic process that had created the very crisis to which more of the same poison was to prove to be the necessary cure.

At the same time, it is worth emphasizing that in the United Kingdom, certainly, there has been no attempt to re-regulate the financial services sector, save for a belated proposal for a flimsy fence between retail and investment banking – not to be erected until 2019 (well beyond the life of the government) – no inclination to alter radically those parts of it that are now effectively under state ownership; no thoroughgoing inquiry into the potential illegalities involved in the near collapse of this sector; no significant prosecutions developed by the Serious Fraud Office or the Financial Services Authority; and certainly no ideological or material undermining of political faith in “light touch” regulation across all other areas that “affect” business life, even in the light of our current collective experience of its manifest failures. Specifically, we do not know, nor are we ever likely to know, to what extent criminal activity was implicated in the events leading up to the crisis. And with a few notable exceptions, criminologists on either side of the Atlantic have barely bothered to give the crisis a second glance (Burdis and Tombs 2012; McGurrian and Friedrichs 2010).

Of course, while different states are characterized by their own specificities, the lack of effective legislative response to the crisis is hardly confined to the United Kingdom. In the United States, for example, brief periods of optimism for advocates of regulation, engendered first by the wake-up calls that developed following the demise of Enron, WorldCom, and Tyco, followed by the introduction of the *Public Company Accounting Reform and Investor Protection Act of 2002 (Sarbanes-Oxley Act)*, and then encouraged, later in the decade, with the election of Barack Obama as the US president, were both short lived and ultimately of little import in responding to corporate crime and harm.¹ The *Sarbanes-Oxley Act* proved to be relatively ineffectual, at best seeking to address the symptomatic issues of corporate governance rather than the underlying structural issues of neo-liberal capitalism that systematically produce crime and harm (Soederberg 2008). Meanwhile, the approach of the Obama administration to corporate wrongdoing, not least in the wake of the economic crisis, is most pithily encapsulated in the classic Who line: “Meet the New Boss. Same as the Old Boss.”² Thus, the crisis has prompted little or no credible legislative response: “None of the key guilty parties have been sent to prison; rather, Wall Street almost immediately called for returning to ‘business as usual,’ has aggressively contested relatively modest new regulatory initiatives, and has altogether done well for itself while much of the balance of the economy and the American people continue to suffer” (Friedrichs 2011). Meanwhile, in Canada, if the first decade of the twenty-first century “witnessed renewed interest in the regulation of corporate crimes,” the two key pieces of legislation that the Canadian state was forced to enact – Bills C-45, which was ostensibly designed to address safety crimes (and the subject of this book), and C-13, aimed at tackling market fraud – were almost immediately to “fall into a state of virtual disuse” (Bittle and Snider 2011, 373 and 374).

The ideological foundations upon which our economy is based have hardly been undermined, then. Rather, if somewhat paradoxically, these factors may in fact have been strengthened by the economic crisis – private capital has been trumpeted as the only feasible response to economic crisis. Of course, the pro-capitalist cheerleaders in government have not had, and will not have, it all their own way. Governmental efforts to re-cast a new, post-welfare capitalist settlement have met little popular resentment and resistance. State responses have followed similar patterns – a combination of ideological mystification backed by the often heavy hand of power, which has been flexed brutally on the streets of London, New York, Athens, Toronto, and numerous other cities and towns across the world.

If regulation remains a dirty word across much of the Western world, it is not homogenous, neither by state nor by sphere of regulation. In the United Kingdom, the one form of regulation that has been consistently and most vehemently singled out for “reform” is that which, formally, provides occupational health and safety protection. A slew of deregulatory reforms have been passed in the first eighteen months of the new Coalition government, while the United Kingdom’s record on workplace health and safety deteriorates on almost any indicator one might choose. In the world’s fifth largest economy, you are more likely to die or be hospitalized as a result of working in the United Kingdom than to be a victim of the kind of violent crime that attracts the interest of politicians, the police, the media, and, of course, academics. And the United Kingdom is not an exception. Work is a major killer across the globe. The International Labour Organization attributes some 2.3 million deaths per annum to work, meaning that there are more than 6,000 work-related deaths every day. For every fatality, there are another 500-2,000 injuries, depending on the type of job. Many millions more suffer long-term, debilitating, chronic illnesses through working for a living. This situation is routine, systematic corporate violence – albeit such deaths, injuries, and illnesses are rarely discussed in such terms. It is a violence comprehensible “not in the pathology of evil individuals but in the culture and structure of large-scale bureaucratic organisations within a particular political economy” (Hills 1987, 190).

This violence, and the systematic poverty of state efforts to respond adequately to it, not least through the legal system, is the subject of *Still Dying for a Living*. Steven Bittle’s text is remarkable for both being a forensic dissection of a specific piece of law – Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)* (Westray bill) – within the context of a specific social issue – corporate manslaughter – while at the same time offering a broader analysis of the ways in which power is exercised in contemporary capitalist economies.³ Drawing upon Foucauldian and Marxist literatures, *Still Dying for a Living* documents how material and ideological power have combined to produce a bill that will continue to isolate corporate violence from “real” crimes of violence. However, it is more than a study of law’s failure to challenge systematic, routine corporate violence. It also contributes to our understandings of the class-based nature and operation of a criminal justice system; of the significance of the state in understanding the contours of contemporary life; of the ways in which dominant legal, economic, and cultural discourses are created, sustained, and utilized; and, thus, of our sense of how moral *un*-panics (Davis 2000) are constructed – as opposed, of course, to the

fears over knives, illegal drugs, pedophiles, gangs, even dangerous dogs, which pervade the broadcast and print media, the sites of formal political debate, and, regrettably, texts and courses in criminology across the West.

Still Dying for a Living is a painstakingly researched and powerfully argued key to understanding our anti-regulatory times and a significant empirical, theoretical, and epistemological contribution to a literature that is still relatively marginal to criminology and socio-legal studies. Very much focused upon the politics of regulation in Canada, its analysis and conclusions span national borders and legal cultures. Moreover, and mercifully, it stands as a rare corrective to the overwhelming majority of the academic literature on regulation, a small industry that is a torrent of self-referential banality from which considerations of power, capital, class, and even crime are notable for their absences. Therein, regulation is viewed largely as a technical issue, a search for mechanisms to empower anthropomorphized, essentially responsible firms to comply with the law in a world of stakeholders and conversations, where those who might suggest resort to criminal law are simplistic, anachronistic embarrassments – a world where power is never concentrated but dispersed, where sources of influence are polycentric, and where the state is certainly decentred and relatively and increasingly impotent, just one among a range of actors, not least those that inhabit the private sector itself. So regulation might be responsive, better, smart, twin-tracked, and risk-based, but it is always so “realistic” that it is never about controlling pathological, calculating, profit-maximizing entities as one element of a broader struggle for social justice. Typically, then, in one of the rare treatments of the economic crisis from a criminological perspective, the editors of a special issue of *Criminology and Public Policy* were able to conclude thus:

There is currently a remarkably optimistic consensus in some academic quarters about how to reduce the harm caused by privileged predators. The heart of it lies in the presumed promise of pluralistic, cooperative approaches, and responsive regulation. These assumptions highlight the need for enhanced prevention, more diverse and more effective internal oversight and self-monitoring, and more efficient and effective external oversight. They have gained use throughout a variety of regulatory realms, many since their earliest, albeit embryonic, formulation nearly three decades ago ... They make sense theoretically, and we endorse them. We do so not because they have a record of demonstrable success but principally because sole or excessive reliance on state oversight and threat of criminal prosecution is difficult, costly,

and uncertain. Still, we are mindful, as others should be, that the onset of the Great Recession occurred during and despite the tight embrace of self-regulation, pluralistic oversight, and notions of self-regulating markets by policy makers and many academicians. (Grabosky and Shover 2010, 641-42)

Bittle's book should be compulsory reading for all those who persist in their "assumptions" regarding the "presumed promise of pluralistic, cooperative approaches, and responsive regulation" – albeit with the knowledge that the policy approaches they suggest have no "record of demonstrable success." Neither I nor Steven Bittle share these assumptions, this optimism, and this "remarkably optimistic consensus." For as Bittle documents, by contrast, regulation often only ever erupts onto any political agenda following large-scale loss of life and limb or other forms of serious economic, physical, or social harms. The regulatory "settlement" that is then reached is the outcome of an always incomplete struggle, the product of asymmetric power. And, thus, if the Westray bill – hoisted onto the statute books following twenty-six eminently preventable deaths – in its diluted form and its timid application, is hardly a challenge to the power of corporate capital and the daily carnage upon which its profits are based, it is also, as he documents here, not a mere irrelevance. As with its UK equivalent, the *Corporate Manslaughter and Corporate Homicide Act*, the very existence of the Westray bill offers "a new and symbolically important way to speak of corporate wrongdoing" (see Chapter 7 in this text).⁴ If it offers little in terms of corporate accountability, it is one material and discursive tool in the struggle for such accountability. It allows us to name, and to seek to process legally, one subset of corporate violence. It pierces the din of business-as-usual in order to scream that men and women are not just dying for a living – they are also being killed for a profit.

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Preface

Each year, hundreds of Canadians are killed on the job or die from work-related illnesses, while thousands more suffer debilitating injuries, including amputations, broken bones, and burns. Despite the frequency and seriousness of these incidences, they face little public, political, and academic scrutiny and are rarely treated as crimes worthy of criminal justice intervention. Defined away as unfortunate “accidents” – the regrettable but largely unavoidable risks that go along with the pursuit of profit – injury and death in the workplace is an invisible crime (Glasbeek 2002; Tombs and Whyte 2007). Crime is about the perils of guns, gangs, and drugs, or so we are told, not the harms that we experience while trying to earn a living.

Given the low priority accorded to workplace injury and death, it was thus significant when, in March 2004, the Canadian government introduced *Criminal Code* legislation aimed at strengthening corporate criminal liability.¹ Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)* (Westray bill), introduced a legal duty for “all persons directing work to take reasonable steps to ensure the safety of workers and the public,” attributed criminal liability to an “organization” if a senior officer knew, or ought to have known, about the offence, and introduced sentencing provisions specifically for the organizational setting.² Colloquially referred to as the Westray bill, the law’s enactment followed the deaths of twenty-six workers at the Westray mine in Pictou County, Nova Scotia, in 1992, a disaster caused by dangerous and illegal working conditions.

The federal government declared the Westray bill an important step toward ensuring the accountability of organizations for the actions taken by their

representatives. Pundits predicted that it would “revolutionize” corporate criminal liability (Archibald, Jull, and Roach 2004, 368), ending the lenient treatment of corporations through the introduction of “stricter penalties” and improved “enforcement tools” (Mann 2004, 29). However, peeling back the veneer of this so-called crackdown on corporate crime reveals a much different picture. To start, the law’s introduction was anything but expeditious, subject to a long and drawn-out process in Canada’s Parliament that raised questions about the need for reform. What is more, since the law took effect in 2004 there have been only a handful of charges and few convictions – not exactly a revolution in corporate accountability.

Still Dying for a Living critically examines the introduction of Canada’s corporate criminal liability legislation, exploring the factors leading to the law’s enactment and why, despite promises to the contrary, it is rarely enforced. The goal is to provide readers with a comprehensive and contemporary understanding of the constitution of corporate crime by interrogating the assumptions, agendas, and relations of power that informed the Westray bill’s development and enforcement – the factors that produce legal categorizations of corporate harm and wrongdoing. Of particular interest are the official discourses that animated the nature and scope of the Westray bill and the ways in which these discourses correspond to the broader social-political-economic context.

Drawing theoretical inspiration from Foucauldian and neo-Marxist literatures, and weaving together the results of in-depth interviews and a detailed examination of parliamentary transcripts, *Still Dying for a Living* argues that dominant legal, economic, and cultural discourses converged around the Westray bill to downplay the seriousness of workplace injury and death and effectively isolate “these crimes from ‘crime, law and order’ agendas” (Tombs and Whyte 2007, 69). In addition to helping (re)enforce and (re)produce the dominance of corporate capitalism, this production of corporate crime and corporate criminal liability throws serious doubt on the state’s ability to hold corporations accountable for their harmful, anti-social acts. There is little reason to believe the Westray bill will produce a crackdown on the most powerful economic actors or seriously challenge companies to reduce workplace injuries and death in industries where fixing these conditions is complex and expensive. Although it will hold some corporations and corporate actors accountable – thus far, the smallest and weakest – the primary causes of injury and death on the job continue unabated (for example, the tension between profit maximization and the costs of safety and the relative worth of workers/employees versus owners and investors).

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I owe an enormous debt of gratitude to Steve Tombs for providing invaluable feedback and suggestions on an earlier version of the text and for graciously taking the time out of his busy schedule to write the foreword. The influence of Steve's work on my own thinking about the regulation of corporate crime is evident in the pages that follow. Frank Pearce provided incredible support

and encouragement along the way, offering unique and thoughtful insights that helped stimulate my interest in issues of corporate crime control and political economy. I benefited in immeasurable ways from the many conversations that I had with Frank about the nature and scope of my research.

I struggle to find the words to express my gratitude to Lauren Snider. Lauren provided incisive comments on all stages of my work, never wavering in her commitment to seeing me complete this book. Intellectually engaging and inspiring, she constantly challenged me to think critically about issues of corporate crime. Lauren is a kind and caring person who is always giving of her time and endlessly encouraging in her support of my research and writing. I am very fortunate to have Lauren as a mentor, friend, and colleague.

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Revised sections of my research findings (Chapters 4-6) were used in the following articles, for which I thank the publishers for their permissions to use in this book: (with L. Snider) “From Manslaughter to Preventable Accident: Shaping Corporate Criminal Liability,” *Law and Policy* (October 2006) 28(4): 470-96; (with L. Snider) “Moral Panics’ Deflected: The Failed Legislative Response to Canada’s Safety Crimes and Markets Fraud Legislation,” *Crime, Law and Social Change* (2011) 56: 373-87. Some of the study’s results also inform a chapter on state-corporate crime that appears in the following publication: “Corporate Crime and the Neo-Liberal State,” in K. Gorkoff and R. Jochelson, eds., *Thinking about Justice: A Book of Readings* (Halifax, NS: Fernwood, 2012).

Finally, and certainly not least, mere thanks are not enough to express the gratitude that I owe my partner, Ruth Code. Ruth’s kindness, caring, and

support helped me stick with it in moments of doubt, and she was an unbelievable source of hope and strength when life presented us with a few bumps along the road. Quite simply, I would not have completed this book without her love and encouragement.

Abbreviations

CBA	Canadian Bar Association
PC	Progressive Conservative
ILO	International Labour Organization
LRCC	Law Reform Commission of Canada
MP	Member of Parliament
NDP	New Democratic Party
NGO	non-governmental organization
QFL	Quebec Federation of Labour
SHARE	Shareholder Association for Research and Education

STILL DYING FOR A LIVING

1

Introduction: What Is Crime?

I abhor what happened to the twenty-six men and their families, the hell all of us have gone through because of this, and the possibility that maybe, just maybe, nothing will ever be done about it. It worries me to think about how many other businesses might be protected by dirty politicians, making safety rules and regulations only words written on paper. I can only hope that a government with backbone will make company officials like Westray's straighten up and run responsible and safe businesses or close their doors.

– Shaun Comish (1993, 52)

In contemporary Western society, it is difficult to escape the constant bombardment of political, media, and popular culture chatter about the perils of crime and disorder. Politicians frequently decry the need for greater crime control to deter those who purportedly make it unsafe for us to carry out our daily routines (Garland 2001). Media commonly report sensationalistic crimes – the street-level violent offences committed by strangers – giving meaning to the familiar media adage: “If it bleeds, let it lead” (Ericson, Baranek, and Chan 1991). Similar ominous messages emerge through popular culture – particularly movies and television – underscoring the prevailing assumption that menacing and dangerous individuals await us around every street corner (Menzies, Chunn, and Boyd 2001, 11). Fear of crime sells in contemporary capitalist society and there appears to be a limitless supply of consumers willing to purchase its key messages and concomitant law-and-order strategies (Taylor 1999).

Consistent with the cultural obsession over crime control, the Canadian government introduced stringent anti-violence legislation in the fall of 2003 aimed at some of Canada's worst offenders – those with a well-documented track record of reckless behaviour and responsibility for multiple and egregious acts of violence. The legislation had all-party support, signalling a consensus for the need to better protect Canadians from violent crime (Archibald, Jull, and Roach 2004, 367). The government characterized its legislative initiative as a significant step toward ensuring that offenders are held criminally responsible for their harmful behaviour (Department of Justice Canada 2003). Legal observers suggested that it represented a fundamental change, perhaps even a revolution, in assigning criminal liability (Archibald, Jull, and Roach 2004, 368). News items cautioned would-be criminals that they were in for a wake-up call once the new law took effect (Mann 2004, 29). It thus appeared that if violent crime was the problem, then harsh new penalties were the solution.

However, peeling back the veneer of the federal government's so-called crackdown on violent crime reveals a much different story. To start, it took more than ten years to introduce a new law in response to a violent and mass killing in which twenty-six Canadians died. What is more, despite widespread political support, many politicians – particularly those with an affinity for law-and-order policies – cautioned against going too far in trying to hold offenders criminally responsible for their actions (Bittle and Snider 2006). Also curious was the fact that both the media and general public expressed little interest in the new law, hardly the status quo for issues of violent crime. Moreover, since its enactment, only a handful of charges have been laid – a particularly worrisome trend given that research reveals an increase in the forms of violence that the law purports to address (Sharpe and Hardt 2006). In fact, it would appear that the most significant development associated with the new legislation is the emergence of a crime (*un*)control industry, one in which lawyers and consultants offer for-fee courses that potential offenders can take to learn about the new law and the steps they must follow to avoid criminal responsibility (for example, see Gonzalez 2005; Guthrie 2004).

Contextualizing Corporate Harm

The preceding scenario appears highly improbable given the predominance of contemporary law-and-order politics (Menzies, Chunn, and Boyd 2001). Politicians would fear for their political lives for perceived inaction against comparable increases in street crime, youth offending, gang activity, or official homicide rates, all of which frequently serve as barometers to the efficacy of

the criminal justice system (Garland 2001; Taylor 1999). However, in this instance, the reality is much different. Despite legislative condemnation and continued violence, there has been little public outcry and few media inquiries, and a majority of politicians have appeared content to leave the issue off the political radar. So what accounts for this seemingly improbable chain of events? The short answer is that it is not a story about traditional street crime but, instead, about legislation relating to culpable injury and death in the workplace. It is a story about the government of Canada's enactment of corporate criminal liability legislation.

Although political rhetoric generates fear of violent street crime, the truth is that most people are much more likely to be victimized on the job than on the street (Snider 1993; Tombs and Whyte 2007). In 2001, the International Labour Organization (ILO) estimated that there were 268 million workplace accidents worldwide that caused an employee to miss three or more workdays. During the same year, 351,000 people suffered fatal workplace injuries, a number that skyrockets to 2.2 million when including work-related deaths due to illnesses such as cancers and respiratory and circulatory diseases (International Labour Organization 2005, 1; Tombs and Whyte 2007, 37).

In Canada, there were 928 workplace fatalities in 2004 (Association of Workers' Compensation Boards of Canada 2006) and 1,097 in 2005 (Sharpe and Hardt 2006).¹ In comparison, there were 622 reported homicides in Canada in 2004 (Dauvergne 2005, 1) and 658 in 2005 (Statistics Canada 2006). Furthermore, while police investigate and lay criminal charges in a majority of homicides, the same cannot be said for workplace fatalities, despite research suggesting that at least two-thirds of these incidences include some form of criminal culpability (Tombs 2004, 164-65, 174-75).² In cases where individuals or a company do face criminal charges for workplace fatalities, convictions are few and far between, and, even if found guilty, punishments pale in comparison to those meted out for street-level crimes (Glasbeek 2002).

The history of occupational health and safety law and its enforcement reveals striking inconsistencies and, at times, apathy when it comes to developing effective strategies for holding corporations and executives to legal account for injury and death in the workplace (Pearce and Snider 1995; Pearce and Tombs 1998). The record illustrates a general reluctance to equate harm and wrongdoing by corporations with serious crimes – that is, they are deemed *mala prohibita* (wrong because prohibited) as opposed to *malum in se* (inherently wrong or evil) (Snider 2000, 184). This apathy, however, does not suggest a total disregard for workers' safety. Today's worker enjoys a much safer working environment than his or her counterpart did in previous generations (Snider

1987, 54). At the same time, reforms are typically slow, hard fought, and rarely result in dramatic improvements to workplace health and safety (Snider 1987; 1993). In this respect, the Canadian government's introduction of corporate criminal liability legislation is an important, symbolic event. This book undertakes to critically examine the development of this law.

Canada's Corporate Criminal Liability Legislation

On 7 November 2003, following a period of protracted political discussion and debate, the Canadian government introduced Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)* (Westray bill). Bill C-45 attributes criminal liability to organizations for acts or omissions by their representatives, introduces a legal duty for "all persons directing work to take reasonable steps to ensure the safety of workers and the public," and outlines factors for courts to consider when sentencing corporations, including probation orders specifically crafted for organizational settings.³ This legal development marked the first time that the Canadian government had introduced *Criminal Code* provisions relating to corporate criminal liability.⁴

As is often the case, it was a much-publicized disaster that piqued the government's interest in corporate crime law reform (Braithwaite 2005, 61; Snider 1993, 89-113). On 9 May 1992, an underground explosion at the Westray mine in Plymouth, Nova Scotia, killed twenty-six miners. The blast, apparently caused when sparks from a continuous mining machine ignited methane gas, was so intense that "it blew the top off the mine entrance, more than a mile above the blast centre" (McMullan 2001, 135), shaking houses and breaking windows in nearby communities (McMullan 2005, 24). Rescue workers searched frantically for survivors, but the explosion's devastating impact meant that death was probably immediate and certainly inevitable (24). Workers were crushed by falling debris, burned from the intense heat of the methane gas explosion, or succumbed to carbon monoxide poisoning. Although rescuers eventually recovered fifteen bodies, officials deemed the conditions of the mine to be too dangerous to recover the remaining eleven victims, whose bodies remain entombed underground to this day (Glasbeek 2002, 61).

Although the mine owners, Curragh Resources, eventually were charged criminally, no one was ever convicted. A combination of prosecutorial mishaps and difficulties determining legal responsibility conspired to ensure that nobody was held to criminal account (McMullan 2001, 136; 2005, 30).⁵ Despite these problems, within five days of the explosion the Nova Scotia government announced a public inquiry to investigate how and why the miners died.⁶ Five

years later, the inquiry's report, *The Westray Story: A Predictable Path to Disaster* (Richard 1997), characterized the tragedy as "foreseeable and preventable," unearthing evidence that, prior to the explosion, management received more than fifty warnings about workplace health and safety violations, all of which they ignored (Glasbeek 2002, 62). Tragically, the final warning came just ten days before the explosion, when a Department of Labour inspector issued mine management with a written order to clean up the site to prevent a coal dust explosion or face prosecution. Unfortunately, the order's fourteen-day waiting period did not have a chance to expire before inspectors could take further action (McMullan 2005, 26).⁷

The inquiry's report contained seventy-four recommendations aimed at preventing similar incidents and improving workplace health and safety. The Nova Scotia government officially accepted them all, including recommending that the federal government change the Canadian *Criminal Code* to make corporate officials "properly accountable for workplace safety" (Richard 1997, 600-1). This recommendation provided the impetus for what eventually became Bill C-45, colloquially referred to as the Westray bill. The process of translating the inquiry's recommendations into *Criminal Code* legislation was anything but expeditious. In 1993, a year after the disaster, a parliamentary sub-committee of the Standing Committee on Justice and Human Rights (Justice Committee) recommended legal changes modelled on a 1987 Law Reform Commission of Canada report, which suggested that corporations (including directors, officers, or employees) be accountable for negligent or reckless behaviour resulting in injury or death to workers or consumers. In November 1993, a federal government white paper proposed that corporations be made liable for any "collective failure" to exercise reasonable care by any corporate "representatives" (Minister of Justice Canada 1993). Six years later, in 1999, the leader of Canada's democratic socialist party, the New Democratic Party (NDP), sponsored a private members' bill, which died on the order paper following Parliament's dissolution.⁸ On 9 February 2000, the Justice Committee tabled its fifteenth report, requesting that the government consider a program of corporate criminal liability law reform.⁹ A year and a half later, upset by the federal government's continued inaction, the NDP tabled another private members' bill, Bill C-284, *An Act to Amend the Criminal Code (Offences by Corporations, Directors and Officers)*.¹⁰ This legislation was the forerunner to the Westray bill.

Bill C-284 was withdrawn at second reading and sent to the Justice Committee for study and review (Goetz 2003, 7). Two months later, hearings began. Thirty-four witnesses appeared before the Justice Committee, which

like all House of Commons committees includes members of parliament from all political parties. Witnesses either requested an audience or the committee invited them to testify because of their expertise or personal connection with the issues at hand (for example, family members of Westray victims, union representatives, and legal experts). After the hearings, the Justice Committee was to draw up a consensus-based report; however, members could not agree on the appropriate model of corporate criminal liability to recommend. This impasse allowed the government's law writers (the legislative drafters at the federal Department of Justice) to "draw [their] own conclusions" from the hearings (Department of Justice Canada 2002b). As its starting point, the government agreed with the Justice Committee's position that reforms were needed to reflect the "reality of corporate decision-making and delegation of operational responsibility in complex organizations" (ibid). Following an examination of the committee's evidence, and considering the strengths and limitations of various reform proposals, the government introduced the Westray bill.

The Focus of *Still Dying for a Living*

As the preceding discussion begins to reveal, protracted political discussion and debate, tensions, controversies, false starts, and restarts characterized the introduction of Canada's corporate criminal liability legislation. The circuitous route leading to the law's enactment raises important questions regarding its development. Using the Westray bill as its empirical focus, *Still Dying for a Living* critically interrogates the evolution of corporate criminal liability in Canada – the production of corporate crime. In addition to accounting for the broader context within which growing concerns over corporate malfeasance emerged, it explores the specific factors that gave rise to, and shaped, the Westray bill. It accounts for the transformations that occurred in the nature and scope of corporate criminal liability, beginning with the recommendation by the Westray inquiry's report to introduce specific *Criminal Code* provisions, through the parliamentary process that brought the legislation to fruition, including the tabling of different iterations of the bill, and ending with the Justice Committee hearings that helped establish the law's parameters.

The goal is to understand and explain the constitution of corporate criminal liability, the factors that contribute to legal categorizations of corporate harm and wrongdoing. Of particular interest are the discourses that shaped the conceptualizations of corporate crime and corporate criminal liability and, in

turn, how these discourses correspond to the broader social-political-economic context. Language matters – it does not determine but, rather, shapes our thinking and actions (Ericson and Haggerty 1997). In many Western democratic nations, it is increasingly commonplace to debate the merits of corporate crime-related legislation, something largely absent from the neo-liberal political lexicon of the 1980s and early 1990s (McMullan 1992, 116; Pearce and Tombs 1998, 289). Canada’s corporate criminal liability legislation therefore represents a new way to speak of corporate harm and wrongdoing.

At the same time, however, language does not emerge in a vacuum. In many complex and contradictory ways, discourses about corporate crime shape, and are shaped by, the broader context (Tombs and Whyte 2007, 69). For this reason, *Still Dying for a Living* examines how various discourses have coalesced within particular “law-state-economy” relations to establish the parameters for criminalizing corporate malfeasance and effectively (re)produce the dominant social formation (Dupont and Pearce 2001, 150). In this respect, it endeavours to develop a political economy of corporate criminal liability law reform that accounts for the links between various discursive formations and dominant notions of corporate capitalism, the primary vehicle for structuring the workplace within the capitalist mode of production (Pearce and Tombs 1998).

A series of questions frame the analysis and help illuminate the factors that inform the development of Canada’s corporate criminal liability legislation:

- What contributed to the formulation and introduction of corporate criminal liability legislation?
- What social-political-economic factors dominated and characterized the law reform process?
- How was corporate criminal liability conceptualized and constructed through the reform process?
- Who were the “authorized knowers,” the individuals asked to testify before the Justice Committee that examined the issue of corporate criminal liability?
- What knowledge claims helped constitute corporate crime and corporate criminal liability?
- What are the implications of the reform process and resulting legislation for corporate crime control?
- How has the law been enforced? How has it been implemented alongside provincial occupational health and safety regulations?

- What is the likelihood that corporations and corporate actors will be held to account for their criminal acts? Will it “revolutionize” corporate criminal liability, as some observers have suggested (for example, Archibald, Jull, and Roach 2004)?
- What are the implications for how we “think” about corporate harm and wrongdoing?

Theoretical Lens

Informing these lines of inquiry is a theoretical framework that combines Michel Foucault’s ([1972] 2001) notion of discursive formations with neo-Marxism (Althusser 1969, [1971] 2001; Althusser and Balibar 1968; Resnick and Wolff 1985, 1987, 2006). As we shall see, this theoretical integration provides a rich analytical lens to examine the relationships between discourse and social structures, particularly regarding discourse and the class relations that are integral to the capitalist mode of production. It brings together Foucault’s interest in the “how” of “economic exploitation and political domination” with Marxist concerns with the “why” of “capital accumulation and state power” (Jessop 2007, 40; see also Hunt 2004). Undertaking this endeavour entails moving beyond conceptions of the social as invariably and inevitably determined by the economic to consider how social and political relations correspond to the mode of production – the extent to which class relations are “implicated in the phenomenon under inquiry” (Hunt 2004, 601-2).

Foucault’s ([1972] 2001) insights help to explore the legal, economic, and cultural discourses that constitute the dominant knowledge claims in relation to corporate crime and corporate criminal liability. Whose knowledge claims had legs when it came to defining the nature and scope of corporate crime and corporate criminal liability (Snider 2000)? Neo-Marxist contributions are useful for exploring the ways in which these discourses are inculcated in the capitalist mode of production. What are the various discourses that run through these relations that help to characterize corporate crime and corporate criminal liability? How do these characterizations support or challenge dominant notions of corporate capitalism? How do they reflect class struggles to define and control the means of production?

The goal is to illuminate the productive nature of corporate criminal liability law reform – how particular legal, economic, and cultural discourses shape, but do not determine, corporate criminal liability in Canada. Although these discourses have their own genesis – they are developed through varying and relatively unrelated historical contexts and, therefore, do not influence each

other in any predetermined ways – they nevertheless have coalesced within particular discursive and social conditions to produce specific characterizations of corporate crime and corporate criminal liability. Of interest is how these discursive formations are constitutive of class struggles over the role of the corporate form in extracting surplus labour and accumulating capital. To underscore the productive nature of capitalist social relations, and to extend beyond essentialist or teleological characterizations of capitalism, what follows examines the ways in which these class antagonisms have (re)created the conditions necessary for maintaining and advancing determinate social formations (Gibson-Graham, Resnick, and Wolff 2001; Resnick and Wolff 1987). Overall, *Still Dying for a Living* explores the relationships between the discursive and extra-discursive, particularly how certain discourses are taken up by, and interpreted through, law-state-economy processes.

Methods and Sources

To critically examine the constitution of Canada's corporate criminal liability legislation, the study draws upon the qualitative tradition of discourse analysis (Fairclough 1992; Fairclough et al. 2004). In general, this investigation involves situating language within its broader social context or what Bernard McKenna (2004, 10) suggests is the "intersection of language, discourse and social structure." A key element of contextualizing discourse is determining what gives certain discourses their "truthfulness" or "appropriateness." Particular discourses become privileged because of the strategies that certain (powerful) agents or groups employ in the process of reproducing social relations. This privileging should not be read as an automatic or determinative process but, rather, as an ongoing and fluid exchange of renewal and transformation (Fairclough, Jessop, and Sayer 2002, 5-6). From this point, we can explore the imbrications of discourse in the (re)production of social relations, how discourse "constructs and maintains relations of power in society" (McKenna 2004, 15).

Contextualizing discourses of corporate crime and corporate criminal liability will help to illuminate the extra-discursive factors that inform the selection and retention of particular discourses as well as how these discourses help stabilize, reproduce, and transform the capitalist social formation (Jessop 2004, 159). *Still Dying for a Living* accomplishes this methodological endeavour by examining a range of data sources, including verbatim transcripts from Canada's Parliament, semi-structured interviews with individuals with insight into issues of corporate criminal liability, and a sample of Internet-based

materials in relation to the Westray bill. It also includes information about what has happened since the introduction of Canada's corporate criminal liability provisions, including any charges laid, emerging case law, and new safety measures developed for corporations in response to the legislation.

Outline of Chapters

The emergence of corporate criminal liability legislation offers a new and symbolically important way to speak of corporate wrongdoing. Its mere introduction represents a departure from previous regulatory approaches to corporate offences that, in recent decades, have dominated the legal and political landscape. *Still Dying for a Living* therefore provides an important opportunity to critically explore the constitution of corporate criminal liability in contemporary society. The story begins in Chapter 2 with the history of corporate criminal liability, including the development of criminal liability and the corporate form, the identification doctrine, and the circuitous route that the Westray bill took through Canada's Parliament to become law. It also describes some of the charges and convictions registered under the law since it took effect in 2004 as well as the methods and sources used to critically examine the Westray bill's evolution. The reasons for the law's introduction and subsequent lack of enforcement raise important questions about the constitution of corporate criminal liability and the capacity to hold corporations to account for their harmful and illegal acts.

Chapter 3 situates the book within the corporate crime scholarship and details the empirical and theoretical influences that inform the research. First, it explores how traditional studies of crime and deviance gloss over the corporate criminal in favour of individualistic accounts of crime and disorder. Second, it examines the corporate crime scholarship that attempts to overcome this myopic view of crime, sketching out some of the key debates regarding the "proper" definition of corporate crime and the best way to regulate the corporate form. Finally, it outlines the book's main theoretical influences, building from the corporate crime scholarship with roots in critical socio-legal studies (for example, Pearce and Tombs 1998; Snider 2000; Tombs and Whyte 2007). A key focus is how this literature situates the constitution of corporate crime within its broader social, political, and economic context.

Chapters 4 through 6 critically examine the reform process in Canada's Parliament that has led to the Westray bill's enactment. These chapters interrogate the legal, economic, and cultural discourses that in various uneven and contradictory ways have animated the development of this legislation.

Chapter 4 examines the factors that propelled corporate criminal liability onto the legislative agenda and examines the legal discourses that converged around discussion and debate regarding corporate criminal liability to limit the reform options that received serious consideration. It demonstrates the special status accorded to law throughout the reform process – the privileging of legal discourses, traditions, and rules – when it comes to contemplating measures to hold corporations to legal account (Comack 1999).

Chapter 5 considers the impact of economic discourses on the reform process, including the commitment to neo-liberal common sense that provided a dominant frame to evaluate and speak about corporate crime and corporate criminal liability. As we shall see, despite the absence of corporate actors from the reform process (at least in terms of making public pronouncements about the law), dominant corporate perspectives were well represented in Canada's Parliament, raising questions about the negative impact of corporate criminal liability legislation for both corporations and the economic well-being of the nation. Chapter 5 also explores how neo-liberal perspectives of workplace safety – that is, the dominant notion that workers are responsible for their own safety and protection – permeated the reform process.

Chapter 6 explores the ways in which culturally embedded notions of crime and its control animated the Westray bill's development and enforcement. Dominant voices argued that crime is about the street-level violence that strikes fear in everyone, not about corporations that, but for the rogue few, are comprised of good, law-abiding citizens. However, even if corporations provide a social benefit (at least theoretically) that street criminals do not, this benefit should not deny the arbitrary and socially constructed distinctions between these offences – distinctions with roots in a dominant ideology that downplays the seriousness of corporate harm and wrongdoing in favour of punishing the most marginalized and disadvantaged members of society (Pearce and Tombs 1990). Chapter 6 also reveals that, despite a lack of charges and convictions, many respondents suggested that the Westray bill has encouraged corporations to improve their safety policies and practices. However, a closer look at some of the training and education offered in response to the new law suggests that these initiatives are more about making money to keep corporations and corporate actors out of the criminal justice system than about embracing the value of protecting workers' safety. In this respect, the Westray bill has produced what I refer to as a crime (*un*)control industry, whereby lawyers and consultants stand ready to help corporations (at least those who can afford their services) avoid getting caught and convicted for workplace injury and death.

Chapter 7 summarizes the book's main findings and considers some of their empirical and theoretical implications. It argues that a series of relatively autonomous, yet "mutually reinforcing," discourses have animated the evolution of Canada's corporate criminal liability legislation (Tombs and Whyte 2007, 69). Although these discourses were not part of a consciously orchestrated campaign against the introduction of corporate criminal liability legislation, they nevertheless converged to downplay the seriousness of safety crimes and limit the reform options that received serious consideration. In addition to raising questions about the potential of holding corporations to criminal account for workplace injury and death, it argues that the production of corporate crime and corporate criminal liability effectively (re)enforced and (re)produced the capitalist social formation.

Overall, *Still Dying for a Living* aims to provide an in-depth understanding of corporate crime law reform, therein contributing to discussion and debate regarding the nature and extent of the regulation and control of corporate harm and wrongdoing. It also addresses the ideological bias of law and its enforcement, particularly in that these processes frequently underestimate the seriousness of corporate crime and overlook the arbitrary distinction between regulatory and criminal offences or between "real" and "quasi" crimes (Snider 1993, 17-18). It is a troubling reality that we rarely question why we have laws to punish "murderers," while questions of this nature are the norm when discussing the appropriateness of corporate crime law reform (Wells 1993, 14). As Steve Tombs and Dave Whyte (2003, 4) argue, researching corporate crime lays bare the ability of those in positions of power to avoid the crime control web: "*One of the key features and effects of power is the ability to operate beyond public scrutiny and thus accountability*" [emphasis in original]. It also challenges mainstream examinations of crime and deviance that focus predominantly on crimes of the powerless (Snider 1993, 18). Although there is an important and critical body of literature that examines issues of corporate crime, it pales in comparison to the veritable mountain of research concerning traditional street crimes (Reiman 2004).

Finally, *Still Dying for a Living* attempts to address the fact that many studies of crime and its control overlook processes of law making in favour of examining law's effects.¹¹ As a result, what remain largely untouched are questions about the constitution of particular laws, the reasons why they are drafted, and the ways they are subsequently enforced or not. As Stanley Cohen (1996, 492, as cited in South 1998, 444) observes, "a major part of criminology is supposed to be the study of law making – criminalization – but we pay little

attention to the driving forces behind so many new laws: the demand for protection from abuses of ‘power.’” What follows, therefore, takes Cohen’s challenge seriously by critically examining the development of legal measures to address the abuses of power by the most dominant institution in contemporary capitalist society.

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