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Book Review: The Corporate Criminal: Why Corporations Must Be Abolished by Steve Tombs and David Whyte

Abstract

This is a book review of *The Corporate Criminal: Why Corporations Must Be Abolished* by Steve Tombs and David Whyte

Keywords

Book Review

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***The Corporate Criminal: Why Corporations Must Be Abolished* by Steve Tombs and David Whyte¹**JOAN BROCKMAN²

STEVE TOMBS AND DAVID WHYTE provide an excellent indictment of the harms caused by corporate crime and call for the abolition of corporations. I will focus on three aspects of their argument: (1) Corporations are “a gross manipulation of the free market;”³ (2) the state is “bystander, facilitator and even conspirator in corporate crime;”⁴ and (3) borrowing from Frank Pearce (to whom the book is dedicated), corporations are a “form of structural irresponsibility.”⁵ This review then turns to some of the solutions proposed by the authors.

Corporations, governments, and the media often describe the corporation as the best means of distributing goods and services, and balancing economic progress with the demands of social welfare. However, proliferating oligopolies in all areas of production and distribution illustrate that corporations are “a gross manipulation of the free market.”⁶ According to the authors, mergers assist corporations in raising prices; if there are any efficiencies, they are not passed on to consumers. Claims of efficiency also ignore the fact that corporations are,

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1. (Oxford: Routledge, 2015).
 2. Professor, School of Criminology, Simon Fraser University.
 3. Tombs & White, *supra* note 1 at 12.
 4. *Ibid* at 54.
 5. *Ibid* at 114, citing Frank Pearce, “Corporate Rationality as Corporate Crime” (1993) 40 *Stud Pol Econ* 135.
 6. Tombs & Whyte, *supra* note 1 at 12.

borrowing from Joel Bakan's *The Corporation*,⁷ externalizing machines. According to Tombs and Whyte, costs are inflicted upon workers and the public (through death and disease) or socialized (left behind for the taxpayers to clean up). We see evidence of this in Canada with the numerous abandoned mining and oil extraction sites left to contaminate the air, water, and surrounding land.⁸ Even when corporations are required to pre-pay for their environmental harms, governments are still left picking up the costs when such funds are insufficient. For example, during the 2009 downturn in the oil and gas business, the Alberta government topped up the Orphan Well Association's⁹ fund by \$30 million.¹⁰ The fact that corporate pollution is usually conducted under regulatory permits supports Tombs and Whyte's assertion that the state is an active participant in corporate harms.

The authors provide examples of corporate-state collusion and crime, going back to the East India Company's use of torture, decapitation, and live burning of competitors to dominate international trade.¹¹ In 1935, Brigadier General Smedley S. Butler estimated that the First World War created 21,000 new American millionaires and billionaires, and this was probably an under-representation, as

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7. *Ibid* at 15, citing Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York: Free Press, 2004).
 8. See, for example, the environmental damage caused by the Giant Mine near Yellowknife and the estimated \$900 million clean-up cost which will be funded by the federal government; the estimated cost of cleaning up all of the abandoned mines is in the billions. See Staff, "16x9: Taxpayers will foot the bill for cleaning up contaminated sites" (22 November 2014), online: *Global News* <globalnews.ca/news/1687225/16x9-taxpayers-will-foot-the-bill-for-cleaning-up-contaminated-sites/>; Arn Keeling & John Sandlos, "The Toxic Legacies Project," online: <www.abandonedminesnc.com/?page_id=470>. The Treasury Board of Canada lists federal contaminated sites and plans (or not) to clean them. See Government of Canada, Treasury Board of Canada Secretariat, "Federal Contaminated Sites Inventory," online: <<http://www.tbs-sct.gc.ca/fcsi-rscf/home-accueil-eng.aspx>>.
 9. "List of Orphan Wells" (2003), online: <http://www.orphanwell.ca/pg_orphan_well_list.html>. The Orphan Well Association in Alberta is a delegated administrative organization that operates under the authority of the Alberta Energy Regulator to manage abandoned upstream oil and gas wells and pipelines in Alberta. As of 26 August 2015, it recorded a total of 695 orphan wells to be abandoned within the next six months and 503 reclamation sites. "Problem wells under long term care and custody are excluded" from these lists (*ibid*). The most expensive orphan expenditure was over \$21 million.
 10. Terry Reith & Briar Stewart, "Alberta faces growing backlog of abandoned oil and gas wells: Millions needed to clean up sites and mitigate environmental risk" (14 July 2015), online: CBC News <www.cbc.ca/news/canada/edmonton/alberta-faces-growing-backlog-of-abandoned-oil-and-gas-wells-1.3150012>.
 11. Tombs & Whyte, *supra* note 1 at 56.

only those that accurately reported their income were counted.¹² The Nazis could not have waged their aggressive war throughout Europe without the aid of US oil and gas companies; Swiss banks facilitated theft of property; General Motors manufactured German tanks; ITT ran Hitler's telecommunication system, operated air craft factories for the Nazis, and provided bombs; and Standard Oil (now Exxon) joined with a Nazi firm (IG Farben) to carve up the oil and chemical market.¹³ More recent examples include ITT in Chile, providing money to destabilize the government and \$1 million USD to the CIA to assist. Over 200 "western firms from 21 countries [were] implicated in the production of chemicals and missile parts sold to Iraq for illegal poison gas and nerve gas warfare."¹⁴ According to Tombs and Whyte, some of these crimes lack public exposure, but others are so over-exposed that they are normalized.

The state is also implicated in the laws it creates and how it does (or does not) enforce them. Sutherland introduced the concept of white-collar crime in the early 1940s to draw attention to the fact that corporate and other white-collar criminals are subject to differential enforcement through administrative segregation so that their crimes are treated as accidents and governed by administrative and regulatory actions, not the criminal law.¹⁵ When corporate criminals enter the criminal justice system, they are treated with leniency because judges and administrators are "either subject to the material ideological influence of business-people, or share their ideological and/or cultural world views."¹⁶ The authors also highlight Karl Marx's documentation of factory conditions in the 1800s and the need for legislation to offer some protection for mutilated and short-lived children (the compliant labour force), on whom factory owners relied for their profits.

The authors examine contemporary regulatory failures and dismiss three out of four models for understanding corporate regulation: consensus,

12. *Ibid* at 55.

13. *Ibid* at 61.

14. *Ibid* at 63. For a discussion of the use of private security firms in foreign wars and commerce, see e.g. Lindsey Cameron & Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public international Law* (New York: Cambridge University Press, 2013); Scott Fitzsimmons, *Private Security Companies in the Iraq War: Military Culture and the Use of Deadly Force* (New York: Routledge, 2016); Scott Fitzsimmons, "Wheeled Warriors: Explaining Variations in the use of Violence by Private Security Companies in Iraq" (2013) 22:4 *Sec Stud* 707; Craig Forcece, "Deterring 'Militarized Commerce': The Prospect of Liability for 'Privatized' Human Rights Abuses" (1999-2000) 31:2 *Ottawa L Rev* 171.

15. Tombs & Whyte, *supra* note 1 at 132.

16. *Ibid* at 133, citing Edwin Sutherland, "Is 'White-Collar Crime' Crime?" (1944) 10:2 *Am Soc Rev* 132 at 137.

neo-liberal, and captive theory. First, the consensus model of regulation (along with the compliance school of regulation and Braithwaite's flexible pyramid of enforcement) is dismissed because there is little evidence to support the claim that self-regulation works. The consensus model downplays inherent conflicts in regulation, ignores worker and public protests, and allows corporations to bypass the rules by creative compliance and law avoidance. The second model, the neo-liberal understanding of government regulation, states that there is too much regulation and that we ought to leave regulation to market forces. Corporations will have to pay whatever the market bears and provide enough safety so that workers are prepared to engage in dangerous employment. According to Tombs and Whyte, the institutionalization of deregulation, the elimination of red tape, and the removal of resources for worker safety and consumer protection fail to take into account the externalization of costs—that is, the costs of production in terms of lives, injuries, and pollution are all socialized. The workers and citizens pay with their health and their lives, the taxpayers pick up the costs, and corporations walk away with the profits. The third model, a spinoff from neo-liberalism, is the law and economics movement and its capture theory. According to this model, government regulators may start off as zealous, but they are later captured and manipulated by big business. The theory is useful in explaining how governments facilitate corporate crime, but fails, according to Tombs and Whyte, to explain why the government sometimes imposes stricter regulation that might harm corporate profits.

None of the above models account for resistance and the various social forces at work when regulations are produced and enforced, or not enforced. A fourth perspective, which emerges from critical and neo-Marxist research, examines conflict ("dissensus"), not consensus in the development and enforcement of legislation. The authors look at the thirteen-year campaign that resulted in the UK *Corporate Manslaughter and Corporate Homicide Act* in 2008 during a time of de-regulation. Given that the Institute of Directors was successful in lobbying the government of the United Kingdom to protect managers from prosecution, it is easy to see why the lobbyists for the legislation were critical of it. It is more difficult to understand why Tombs and Whyte view it as a success. The authors cite Steven Bittle's book, *Still Dying for a Living: Corporate Criminal Liability After the Westray Mine Disaster*,¹⁷ as another example of the dissensus that goes into legislation aimed at prohibiting corporate crime. At least in this Canadian example, the legislation allowed for the prosecution of managers. According to Tombs and Whyte, regulation is more about making sure the corporate

17. (Vancouver: UBC Press, 2012).

economy does not self-destruct (maintaining the existing social order) than about controlling corporate power. Therefore, regulation can never be a solution to corporate crime. Once regulations are in place, their enforcement is open to negotiation and neglect.

In agreement with Paddy Ireland,¹⁸ the authors assert that the driving force behind the modern corporation was not economic efficiency but demands for investment opportunities by the growing British bourgeois class who had accumulated enormous surplus wealth. Limited liability (initially referred to as “limited responsibility”¹⁹) shielded investors from any losses over and above their investment. Corporations created subsidiaries so they too could take advantage of limited liability. Corporations also benefitted from the requirement of *mens rea* to establish criminal liability, as most corporate crime was the result of indifference to safety, not intentional harm. Judges were often unable or unwilling to find a directing mind (a requirement of the “identification doctrine”) in order to convict a corporation. The introduction of strict liability and a regulatory regime further removed the corporation from the realm of “real” crime, and the harm it caused was socially constructed as accidents or mistakes.²⁰

The separation of ownership (shareholders) from management results in shareholders blaming managers, and managers justifying their actions on the basis of what is good for the corporation (minimizing costs and making profits). Shares depersonalize ownership, and owners have less of a commitment to the company. As Berle and Means wrote in 1932, the shares “glide from hand to hand, irresponsible and impersonal.”²¹ Shareholders expect to participate in the profit of a corporation but feel no responsibility for the harms caused to make that profit. Frank Pearce called this a “form of structural irresponsibility”²²—shareholders come and go, simply interested in their investments. Corporations contract out their work and create subsidiaries which further isolate them from responsibility and liability. The authors provide the example of Union Carbide blaming its subsidiary Union Carbide India for the Bhopal disaster. And it was

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18. Paddy Ireland, “Capitalism without the Capitalist: The Joint Stock Company share and the Emergence of the Modern Doctrine of Separate Corporate Personality” (1996) 17:1 J Leg Hist 4.
 19. Tombs & Whyte, *supra* note 1 at 140.
 20. *Ibid* at 92.
 21. *Ibid* at 112, citing Adolf A Berle, Jr & Gardiner C Means, *The Modern Corporation and Private Property* (New York: The Macmillan Company, 1932).
 22. *Ibid* at 72, citing Frank Pearce, “Crime and Capitalist Business Organisations” in N Shover and JP Wright, eds, *Crimes of Privilege: Readings in White Collar Crime* (Oxford: Oxford University Press, 2001) 35 at 45-46.

this very arrangement that allowed the subsidiary to “drive conditions at the Bhopal plant to an unacceptably dangerous level.”²³ Accordingly, the corporate veil, a term used to describe the law that limits shareholder liability to the shares they have bought in the corporation, allows those who engage in evil to avoid the consequences.

The Corporate Social Responsibility (CSR)²⁴ drive and the publicity surrounding the good corporate citizen blur the line between corporations and politics, presenting the notion that governments do not need to intervene. These images provide corporations with a platform for their opposition to, and sabotage of, any proposed legislation that might reign them in. According to Tombs and Whyte, the rhetoric of CSR empowers corporations to take over what were once public functions—education, transportation, health, and welfare—and allows corporations to build consumer allegiance to secure and extend profit-maximization. Corporations act in spaces within the law: under-enforcement, negotiated penalties, minimalistic law-abiding behaviour, and so on. Corporations also act in spaces between the law. They may follow the rules in their own country, but they may also, for example, export hazardous material and exploit workers in other countries. In this vein, one might ask why we allow the importation of goods that are manufactured under conditions that would be considered criminal in our country. In addition, the export of jobs to lower bidding economies is having an impact on the economic well-being of countries that facilitate such exportation.²⁵

In their final chapter, Tombs and Whyte address the question, “What is to be done about the corporate criminal?” In contrast to abolition, the government solution is to reduce the “burden” on corporations. The authors provide an example from the 2010 election in the United Kingdom—all three parties were committed to reducing the cost of doing business and to entering the age of austerity. The private sector would lead the way to recovery. The poison was now the cure. Along with austerity budgets came further privatization of, and

23. *Tombs & Whyte, ibid* at 115.

24. The Government of Canada defines CSR as “the voluntary activities undertaken by a company to operate in an economic, social and environmentally sustainable manner.” See Global Affairs Canada, “Corporate Social Responsibility” (1 December 2015), online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>>.

25. Mexican car manufacturing workers are paid 10% of what Canadian workers are paid, draining jobs from Canada. See CBC News, News Release, “Carmakers say adios to Canada as Mexico shifts into higher gear” (15 June 2015), online: <<http://www.cbc.ca/news/business/carmakers-say-adios-to-canada-as-mexico-shifts-into-higher-gear-1.3108148>>.

cutbacks to, public services, as well as mass unemployment, wage reduction, workfare instead of welfare, and increasing inequality. According to Tombs and Whyte, the privatization of government assets and services in England coincided with re-regulation—often in the form of opaque contracts. The illusion is free enterprise. The reality is “a complex web of (re) regulation.”²⁶ Deregulation fails to capture the fact that “corporate activity is always regulated by the state”²⁷ in a non-antagonistic relationship of interdependence. Although delegating public services to private corporations empowers corporations to cause further harm (supported and underwritten by the state), the authors believe that these state-supported harms create a risk to both the state and corporations. The evidence shows that the private sector cannot deliver public services more efficiently than public servants. Privatization provides tremendous opportunities for corporate fraud on the government. For example, G4S and Serco, two large private security firms, were fined for charging the government for electronically “tagging offenders who were either in prison or dead.”²⁸

Tombs and Whyte believe that these incidents of corporate crime subsidized by the state (*e.g.*, the 2008 bank bail-outs) result in increased corporate vulnerability and state exposure, which can in turn lead to public demand for change. On the transformative front (with the ultimate goal of abolishing the corporation), they provide a number of examples: Occupy Wall Street and other organizations’ call to end legal personhood for the corporation in the United States and the movement (*i.e.*, Move to Amend) to remove corporations from constitutional protection.²⁹

In terms of ‘non-reformist reforms’ that do not call for abolition, they suggest increased liability on those who own and direct corporations, and they return to Coffee’s³⁰ 1981 recommendation for equity fines (reiterated by Pearce in 1993³¹) whereby corporations are required to issue new shares to victims, trade unions, or a state-controlled compensation fund. Tombs and Whyte report that a proposal for equity fines was debated and rejected in Scotland in 2010.³²

As an example of success, Tombs and Whyte identify campaigns against shale oil fracking in the United Kingdom. Unfortunately, such success has not

26. *Supra* note 1 at 23.

27. *Ibid* at 26.

28. *Ibid* at 171.

29. *Ibid* at 174.

30. John C. Coffee, Jr. “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry Into the Problem of Corporate Punishment” (1981) 79 *Mich L Rev* 386 at 413-24.

31. *Supra* note 5 at 149.

32. *Supra* note 1 at 175.

been imported into British Columbia. While I read this book in July 2015, the BC government met at a special session in Victoria to pass legislation that would bind the province to a twenty-five year liquid natural gas (LNG) contract with a consortium led by Petronas, a Malaysian company. The contract would require the BC government to compensate the consortium if future governments raised income tax rates or carbon tax on the industry, reduced natural gas tax credits, or changed laws regarding greenhouse emissions that financially harmed the industry.³³ The harms caused by fracking to water, land, livestock, and people, as well as the reduction in the land's availability for more sustainable uses, were not highly visible in the media. Neither was the scientific link between fracking for LNG and earthquakes. In fact, most of the students in my Summer 2015 seminar on Corporate Financial Crimes and Misconduct were unfamiliar with fracking.

Even though regulations can never “tame private capital,”³⁴ Tombs and Whyte believe that the regulation of corporations is worth pursuing because at times it successfully disrupts capital and benefits workers, consumers, and local residents. Regulation can also undermine the absolute power of managers to do as they please and can sometimes mitigate the unequal distribution of harm. Empowering organized labour, local communities, activist groups, and whistle-blowers can put limits on corporate power and alleviate corporate harm. What they appear to be saying is, effectively, if you do not like what is happening, then you will have to do something about it; you cannot rely on government to act without very loud and decisive direction by the public, organized workers, community groups, parents, students, environmental groups, whistle-blowers, and so on. The book is a call for action.

Although the authors do an excellent job of indicting the corporation, they fall short on where we go from here. Their claim that they are not providing a “blue print for a future utopia” or a “political manifesto”³⁵ does not fit well with the expectation that those who start a revolution should provide an action plan. If limited liability (*i.e.*, responsibility) is the essence of the problem and serves no useful purpose other than to shield those who enter the casino world of

33. Jason Proctor, “B.C. Legislature debates law on 25-year LNG deal: Unprecedented agreement would give industry relief from LNG-targeted tax increases” (13 July 2015), online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/b-c-legislature-debates-law-on-25-year-lng-deal-1.3147535>>.

34. Tombs & Whyte, *supra* note 1 at 177.

35. *Ibid* at 179.

the stock market, why not start with double liability,³⁶ then triple liability, until limited responsibility is removed?³⁷ Such liability could easily be imposed in the same manner as the often proposed, but rejected, equity fine. If, for example, the clean-up cost of an oil spill is \$1 billion, the corporation would be required to issue \$1 billion worth of shares to an entity such as an independent administrative agency. A \$1 billion equity fine could be imposed in a similar manner—by payment in shares. In addition, a social reconstruction of limited liability that returns us to the concept of limited responsibility might also assist in redirecting the public's attention to the essence of what is wrong with the corporation.

The Corporate Criminal is reminiscent of Frank Pearce's 1993 article "Corporate Rationality as Corporate Crime."³⁸ The authors provide examples of devastating corporate crime and harm, followed by the role that law plays, the lack of enforcement, privileging investors with limited liability, out-of-control managers, a replication of Kreisberg's ideal types of how the corporation operates, the role of the state, and sites for struggles to control the corporation. Pearce laid much of the groundwork for implicating the corporation. Others (*e.g.*, Bakan,³⁹ Bittle,⁴⁰ Glasbeek,⁴¹ Hutchinson,⁴² and Slapper and Tombs⁴³) have done the same, with varying solutions. It is time to take the next step. I look forward to a sequel that provides a road map for *how* corporations can be abolished.

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36. For a discussion of double liability in 19th century (where shareholders were liable for a share's unpaid value plus the value of the share), see RCB Risk, "The Nineteenth-Century Foundations of the Business Corporation in Ontario" (1973) 23:3 UTLJ 270 at 295-97.
37. A number of writers have suggested a return to unlimited liability in various forms. See *e.g.* Paddy Ireland, "Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility" (2010) 34:5 Cambridge J Econ 837. Indeed, unlimited liability corporations do exist. See *e.g.* Mohamed F. Khimji, "Shareholder Liability in Nova Scotia Unlimited Companies" (2014) 37:2 Dal LJ 787. In addition, some provinces allow lawyers and other professionals to incorporate unlimited liability corporations.
38. *Supra* note 5.
39. *Supra* note 7.
40. *Supra* note 17.
41. Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002).
42. Allan C Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Toronto: Irwin Law, 2005).
43. Gary Slapper & Steve Tombs, *Corporate Crime* (Essex, UK: Pearson Education, 1999).