Abstract: The state-corporate crime literature has given momentum to a fundamentally important task: that of “bringing the state back in” to the study of the social harms caused by corporations. Yet as this article argues, we need to widen the theoretical scope of the concept of “state-corporate crime” if we are to grasp the full significance of state-corporate symbiosis in the production of corporate crime. The article argues for a historically and systemically sensitive analysis of the state-corporate relation that takes account of the a priori constitutional features of the relationship between states and corporations in contemporary capitalist democracies. The article therefore uses the state-corporate crime literature as a point of departure for understanding a deeper structural relation between organized capital and state institutions.

Keywords: state; corporation; state crime; corporate crime; corporate structures; regulation

Introduction

The state-corporate crime literature has given momentum to a fundamentally important task: that of “bringing the state back in” to the study of the social harms caused by corporations. The state-corporate crime framework allows us to place at the centre of our analysis an understanding of how the state, in various ways, produces corporate crime, or at the very least, assists in the production of corporate crime – corporate crime is not something that simply happens when states are not vigilant enough, nor is it simply the unintended consequence of normally benign functions of administration. Yet as this article will argue, the concept, as is currently formulated and presented in the literature, is both theoretically limited and limiting, in so far as it only captures the state-corporate relation as an immediately observable institutional phenomenon in what are described here as “moments of rupture”. This article argues for a historically and systemically sensitive analysis of this relation that takes account of the a priori constitutional features of the relationship between states and corporations in contemporary capitalist democracies and therefore captures the enduring and intensifying significance of state-corporate symbiosis in the production of corporate crime.

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The article uses the state-corporate crime literature as a point of departure for understanding a deeper structural relation between organized capital (the corporation) and state institutions (government and public administration). Certainly, the state-corporate literature can provide a crucial platform for understanding the aetiology of “crimes” and “harms” of the powerful, but, as this article will show, it is not a sufficiently broad enough concept to capture the material foundations of a criminogenic and profoundly harmful system of capital accumulation.

Moments of Rupture

Critical criminologists who are interested in state power normally tend to focus their attentions upon a small sub-set of, albeit powerful, formal institutions that we associate with the coercive capacities of states (criminal law, courts, police and so on; Coleman et al. 2009); in other words, on institutions that have a punitive, controlling or law enforcement function. And this narrow focus is replicated in the corporate crime literature: studies typically focus upon the role of regulators or on the conditions that undermine the prospects for effective regulation. Yet those conditions of control represent, as this article will argue, only part of the function of regulators, the coercive state function. Scholars concerned with the regulation of corporate crime are generally concerned with those coercive capacities of the state that Gramsci (1996: 261) described in his reference to the “state as policeman”. Most critical studies of the regulation of corporate crime are concerned with either the active collusion of state agencies, the failure of the coercive capacities of states or the structural weakness of the “state as policeman”.

The state-corporate crime literature focuses in a similar sense on those moments of rupture in the public-private relationship. On one hand, the literature explores the active involvement of state agencies in the production of particular criminal processes and events (state-initiated corporate crime) or on the failure of state agencies to control corporate crime (state-facilitated corporate crime). When corporate crime is produced from a “state-initiated” relationship, then it is the material of criminal conspiracy: that is, corporate crime occurs “at the direction of, or with the tacit approval of, the government” (Kramer et al. 2002: 271). When corporate crime is produced from a “state-facilitated” relationship, it is generally located in the failure “to restrain deviant business activities” or in states’ unwillingness to pursue “aggressive regulation” due to shared state-corporate goals (ibid.: 272).

There is, across the critical scholarship on corporate crime, a tendency to focus upon what might be called moments of rupture in the constitutional public/
private relation. In other words, we are typically impelled to look at where public authorities have either colluded in ways that breach the normal constraints of their “public” role or have failed to protect us, the public, from the harmful activities of the private (corporate) sector. In this sense, there is a tendency to follow classical liberal formulations of the public/private relation whereby public policy making is insulated from the corrupting influence of private interest; the political order is based upon the formal constitutional segregation between the public and the private spheres. Regulatory collusions and failures occur where this constitutional segregation is ruptured.

There is good reason to argue that the neo-liberal era has both materially intensified and made more visible the interconnectedness of “public” and “private” spheres. Because neo-liberal capitalism conceptualizes the main role of government as facilitating the profitability of business, it encourages closer collaboration between government and capital at both an institutional and an individual level. An increasingly visible manifestation of this process is the “revolving door” that often facilitates the movement of personnel between public and private sectors and provides the social networks that are ultimately used to concentrate power in social elites (Whyte 2013). In other words, there are clearly observable shifts in the public/private relation that the state-corporate crime perspective can take into account. Yet as this article will argue, in order to fully understand the formative conditions of state-corporate crime, it is no longer enough to look to those moments of rupture; it is not enough to limit our analysis to the immediately apparent empirical conditions of regulatory “collusion” and “failure”.

Certainly, the state-corporate crime literature provides us with a solid framework to explore the empirical detail of corporate crime (Tombs 2012). And there can be no doubt that either the willed direction of state agencies or a lack of adequate regulation (or both) can generally be observed empirically in examples of corporate offending in all capitalist states. The descriptive power of this framework is impressive: Every case of corporate crime reveals some element of state direction, tacit approval or failure along the lines projected in the state-corporate crime framework. Empirically, the framework is therefore crucial for exposing the conditions of moments of rupture. But therein lies its limits. In order to demonstrate those limits in a little more detail, it is argued here that the regulatory relationship is not simply based upon either the control or the production of crime and rather that we need to explore the a priori conditions of the regulatory relationship – the relationship as it exists outside the moments of rupture or outside the immediately observable empirical conditions that produce state-corporate crime. It is to how we might begin to set out those a priori conditions that the article now turns.
Beyond the State as Policeman

Gramsci’s (1996) antidote to the narrow view of the “state as policeman” was his stress upon “ethical” or “interventionist” state practices and institutions (p. 262), whereby states seek to intervene in economies to guarantee regimes of production and distribution, to protect workers and consumers from the harmful fallouts of capitalism and so on. In other words, Gramsci was clear that states must always intervene in formally “private” institutions to guarantee their smooth functioning, in ways that seek to stabilize the social order. In a similar counterbalance to the understanding of the state simply as a force of restraint, Michael Mann (1984) usefully distinguishes between the despotic and infrastructural capacities of states, whereby the former corresponds very broadly to the “state as policeman” and the latter to the “ethical” state and to the organization of the economy. Despotic powers are those powers to which elites have resorted to without routine, institutionalized negotiation with civil society groups. Infrastructural powers of the state, on the other hand, are those which enable the state to penetrate and centrally co-ordinate with the civil society. State power here is conceptualized not merely as a matter of crude domination of will, but is best understood as a complex disciplinary process that acts through the social body – through professional disciplines, discourses and so on as “the condensation, the crystallization” and “summation” of social relations (Mann 1984: 208).

How else might we understand regulatory agencies, but as state institutions that are caught somewhere between the despotic and the infrastructural, the coercive and the creative functions of states? After all, regulatory agencies are only ever partially concerned with the “control” of crime or illegalities. Regulatory agencies are typically institutions that are caught between their law enforcement functions and the imperative to ensure that the wheels of industry keep on turning. Regulatory agencies either emerge from a particular moment of social crisis (such as a crises in environmental sustainability or financial instability) or emerge out of sustained periods of struggle (as labour standards and workplace safety regulators generally have) (Mahon 1979; Snider 1991). Because regulatory agencies hold out the possibility of challenging corporate power, they typically dissipate – or even replace – conflicts between workers or publics and organized capital. By offering concrete routes to address corporate harms, regulatory agencies thus offer state-controlled solutions to problems over which the state had previously lost control. Now in most contexts, regulatory agencies are ultimately unable to resolve conflicts and crises, but can merely repackage them in ways that allow governments to, temporarily at least, retain some control over the amelioration of corporate harms (Tombs 2012; Tombs and Whyte 2009). Regulation thus maintains the steady rate and function of the machinery of industry and commerce.
and, as such, its purpose is to seek a stable and uninterrupted system of production, distribution and consumption (Whyte 2004). In this sense, the term “regulation” should be understood pace the “regulation school”; that is, as a matter of how the capitalist social orders are governed and normalized (Aglietta 2000). As the history of corporate regulation shows us, regulation and its enforcement provide a concrete basis for the advancement of technology or for a “level playing field” that enables capital accumulation to develop more sustainably. And very often, even the most punitive and invasive regulatory agencies do little more than marginally re-distribute the burdens of cost and responsibility for corporate harms.

If we do not view regulation as part of the catalytic and creative core of state power, and we remain focused on the negative, controlling functions of regulation, then we will be restricted to an endless questioning of why government regulation fails so often. Or, we limit our argument to whether regulatory deficiencies are unintended or not (Hayden Griffin and Lee Miller 2011). Expanding our view of regulation also means necessarily understanding the state-corporate relation as a symbiosis, moving beyond “an abstracted focus on events and collaborations” (Tombs 2012: 170). Just as state-corporate crime does not merely emanate from particular events, collaborations or what I describe here as “moments of rupture” in the relationship between the regulator and the regulated, state-corporate structures of power do not emanate from particular institutional or environmental relationships. Rather they emanate from a much deeper architecture of power in which states guarantee corporations various privileges and infrastructural capacities. It is to a brief exploration of this architecture of power that the article now turns.

**Regimes of Permission**

How, then, should we think about the deeper architecture of corporate power in order to take us beyond the immediately observable conditions of those moments of rupture? One useful starting point is to take seriously one of the fundamental precepts of the state-corporate crime literature: that the intersection of history and political economy should shape the scholarly investigation of crime (Kramer et al. 2002).

States, as the previous section has argued, play creative and enabling roles for regimes of capital accumulation; corporations are the key institutions in realizing capital accumulation. Governments establish the juridical and administrative framework for corporations, transport and communication infrastructures and organize diplomatic relationships with states to enhance opportunities for import, export, investment and so on. States help to constitute capital, commodity, commercial and residential property markets; help to produce different kinds of
“human capital”; constitute labour markets; regulate the employment contract; constitute economic enterprises through specifying rules of liability, often specifying the rules of incorporation and so on (Tombs and Whyte 2009). And those roles can be pinpointed, to paraphrase Kramer et al. (2002), precisely at the intersection of history and political economy.

The law and practice of combining “private” wealth as a means of generating capital has a long history which stretches back at least as far as the thirteenth century. In British history, the first corporations were organizations acting under charters issued by governments or monarchs to fulfil a particular task, such as the administration of hospitals or universities or large public building projects. Amongst the first recognized companies to be chartered for commercial purposes were the colonial corporations, established to open new trade routes and to settle new lands for the English, and latterly, British, Crown. One of the earliest was the Company of Merchant Adventurers to New Lands, chartered in 1553 to open up a new trade route to China and Indonesia. The East India Company, chartered in 1600, probably the most infamous of the colonial companies, was granted exclusive rights to trade and to establish trading posts in the Indian sub-continent and South East Asia. As such, the East India Company played a crucial role in establishing the forms of trade routes that were the foundation of the British Empire. Other colonial corporations, such as the London Company and the Plymouth Company, were established to open up trading routes to the Americas. Similar companies established new states in colonial America (Pencak 2011).

The East India Company is often referred to as the most developed model of “joint-stock” company. This was a model that enabled investors to fully combine their wealth by transferring ownership of their stock from the “partnership” to the company, which was given legal status as a separate entity. Each member of the partnership, therefore, received shares in the “joint stock” of the company. The corporation thus had a legal identity separate from the investors. This separate legal identity gave investors some major advantages. On one hand, it allowed some legal liabilities that investors would previously have been responsible for to be held by the “company”, and on the other hand, the “company” was exempt from some of the taxes that individuals paid. At first, the East India Company was regarded as a maverick corporation and was routinely involved in rampant bribery and illegal trade that by the end of the seventeenth century reached “epic proportions” (Lawson 1993: 71). Yet the East India Company was left largely unchallenged by the British government.

The reason for this reluctance on the part of the government to demand legal compliance arose directly from the central function the East India Company played in the economic and colonial affairs of the British state. The corporation – based upon a joint-stock model – was a phenomenon that arose not only
from those advantages to individuals, but was created out of a common interest between the Crown and a small wealthy elite. The combination of wealth in the company offered the chance to investors to profit from a monopoly in a new field of commercial activity and at the same time provided the state with a means of extending its sphere of influence into the colonial territories. The company played a key role in the exercise of military and administrative control in India, acting as a proxy for English, latterly British, foreign policy for more than 250 years. In the late eighteenth century, so keen was the Crown to ensure the survival of the company that it offset a series of bankruptcy threats with a combination of bailouts and other regulatory interventions (Litvin 2003).

The history of a deeper architecture of the “limited liability” corporation in Britain can be traced from the rapid growth and collapse of the South Sea Company in the early 1700s and the subsequent Bubble Act of 1720, which led to the temporary banning of the buying and selling of shares by people who were not involved in the management or direction of the company and saw corporate charters limited to large-scale public works and building projects. The Bubble Act was eventually repealed in 1825, and a series of Acts re-established joint-stock companies, limited the liability of investors and eradicated the requirement for the Crown to issue a charter to corporations. The early nineteenth century represented a key period in which a new regime of permission for commercial corporate activity emerged. In the mid-late nineteenth century, the joint-stock corporation, as a particular form of property, became established as the principal means of investing the capital accumulating from domestic industrialization and foreign colonial expansion. Between 1866 and 1874, 6,660 new corporations had been registered; by the beginning of the twentieth century, there were 40,000 incorporated companies, and by the late 1930s, there were more than 1,00,000 (Nelson 1959).

There is a relatively hidden, parallel regime of permission that emerges in the late nineteenth century. The history of the Factory Acts uncovered by Carson showed how the test of *mens rea* was removed in “factory crimes” (the crimes committed against the Acts by the factory masters) to produce a new principle of strict liability which effectively removed the *mens rea* test. Whilst the demands for strict enforcement of the law were strong, a mixture of the intransigence of the factory masters, the unwillingness of the judiciary to enforce the law against respectable members of bourgeois society and the difficulties faced by factory inspectors in enforcing the law ensured that “factory crime” attained a wholly ambiguous status. It became conventionalized and understood as something other than “real” crime (Carson 1980).

A related principle of strict liability was used to impute criminal liability to “the corporation” in the mid-nineteenth century in cases where companies were prosecuted for their failure to satisfy statutory duties (Slapper 1999). The failure
to build an important public work such as a bridge or a canal could be held to be a criminal breach of duty by the corporation: “[t]hus the courts were not taxed with the problems of finding any mental element ... in a non-human entity” (ibid.: 51). By the early twentieth century, strict liability was a concept that featured across regulatory offences and routinely enabled the attribution of liability to corporations in the criminal courts. In other words, a concept emerged in criminal law that could be applied relatively un-problematically to corporations (as well as to individuals). The concept of strict liability established the basis for the company – the corporate person – to be held liable for its crimes – a legal principle that established a de facto corporate veil in criminal law and shielded owners or corporate officers from prosecution (Tombs and Whyte, forthcoming).

The architecture of corporate power sketched out here shows that the lines of separation across state power and corporate power are not easily drawn. Corporate power in this sense is wholly reliant upon a series of regimes of permission, including the permission to trade as a separate entity, investment regimes which permit limited liability, the application of the separate entity in criminal law, the permission for corporations to act as holders of “rights” and so on. Crucially, within those regimes of permission we also find the co-ordinates of impunity – a corporate veil which shields owners from civil liability and a de facto corporate veil which shields both owners and managers from criminal liability. The power to employ workers, to buy and sell goods and services, to deal in financial markets and to transform future surplus value into capital on stock markets is also only possible as a result of a broader complex of regimes of permission. Together, those regimes allow us to see how an understanding of the state-corporate relationship at the level of “moments of rupture” clearly has its limits. It does not allow us to break down the formal (liberal) separation between the “state” and the “corporation” and move towards an understanding of the relation as a symbiotic one. Indeed, as Tombs has argued comprehensively in an earlier “soft” critique of state-corporate crime concept, the “post”-crisis period has produced an intensified symbiosis through which the unprecedented levels of economic burden and social harm flourish. Moreover, “[t]hese deeper, intensified relationships, and the systematic crimes and harms thereby generated, are even less amenable to capture through the lens of state-corporate crime” (Tombs 2012: 188). A broader understanding of state institutions must therefore take account of the ways in which the infrastructural power of states themselves renew the formative conditions of corporate crime – described here as “regimes of permission”.

Conclusion

Regulatory agencies do not merely seek to uphold capitalist social orders by way of law enforcement or standard setting. In this respect, the ostensible focus
of regulatory activity – the mitigation of corporate crime and harm – always involves a mediation of, or intervention in, a power relationship. As this article has argued, this power relationship cannot be understood as an outcome of a particular set of circumstances or events, but is one that is at every turn guaranteed and under-written by an infrastructure that is creatively maintained as part of the “state”. In other words, regulatory agencies are, by definition, state institutions that, as we have begun to explore in the previous section, intervene to mitigate problems that are always the product of state regimes of permission.

Kramer and colleagues (2002) consistently note that analyses of structural relations between corporate and governmental organizations have been relatively peripheral to the study of corporate crime. Without doubt, their work represents a concerted effort to bring structural power to the forefront of our understandings of corporate crime. This aspect of their work has certainly inspired colleagues, particularly in the US, to do so. However, this article has argued, following Tombs (2012), that there are deeper structural excursions that this literature needs to make. It is proposed here that the corporate crime literature must take a seminal, discipline-breaking turn: Studies on corporate crime must bring to the centre the fundamental, a priori, questions about the role of states vis-à-vis corporations.

If we begin to look at the constitutive relationship between states and corporations, then we begin to glimpse something much more fundamental than simply the production of crime and harm. If accusations of “crime” – and the odd prosecution – sometimes get in the way of governments and corporations in their daily business, they rarely disrupt this symbiosis of power.

In order to tackle the a priori structural roots of state-corporate crime, we are therefore compelled to ask how we might alter those regimes of permission. Otherwise, no matter how important it may be to expose the collusion or complicity of states, we risk engaging in endless circular questioning of the reasons for regulatory failure. There have been sporadic but limited attempts that suggest structural reform to the legal structure of the corporate form – see for example, Coffee’s (1981) argument for a system of “equity” fines against owners of corporations. One of the less well-publicized demands of the Occupy Wall Street movement was the abolition of corporate personhood (Picket 2011). Indeed, the debate on the privileges afforded by the legal construction of corporations as “persons” reached the US Congress when Bernie Sanders, Senator for Vermont, introduced a bill to abolish the recognition of corporate persons in the US constitution in December 2011. If the state-corporate crime literature is to move towards exploring the deeper structural relation between corporations and states, then it must ask similarly fundamental questions about the regimes of permission that authorize corporate killing, theft and fraud and disassemble the architecture of power that produces state-corporate crime.
References


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