Still Dying for a Living:
Shaping Corporate Criminal Liability
After the Westray Mine Disaster

By

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A dissertation submitted to the Department of Sociology
in conformity with the requirements for
the degree of Doctor of Philosophy

Queen's University
Kingston, Ontario, Canada
January 2010

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Abstract

This dissertation critically interrogates the assumptions, agendas and relations of power that shaped Bill C-45, *An Act to Amend the Criminal Code (criminal liability of organizations)*, revisions to the *Criminal Code of Canada* aimed at strengthening corporate criminal liability. Colloquially referred to as the Westray bill, the legislation was passed in the fall of 2003 in response to the deaths of twenty-six workers at the Westray mine in 1992, a disaster caused by unsafe and illegal working conditions.

Using twenty-three semi-structured interviews with individuals with knowledge and insight into the evolution of Canada’s corporate criminal liability legislation, and transcripts from Canada’s Parliament regarding the enactment of this law, the dissertation critically explores the constitution of corporate criminal liability — the factors that *produce* legal categorizations of corporate harm and wrongdoing. Of particular interest are the official discourses that shaped conceptualizations of corporate crime and corporate criminal liability and how these discourses correspond to the broader social-political-economic context. Drawing theoretical inspiration from Foucauldian and neo-Marxist (Althusserian) literatures, the dissertation argues that particular legal, economic and cultural discourses shaped, but did not determine, corporate criminal liability in Canada. In turn, these discourses are constitutive of class struggles over the role of the corporate form in extracting surplus labour and accumulating capital, the results of which helped stabilize, reproduce and transform the class-based capitalist social formation.

Overall, the dissertation suggests that the assumptions that animated Canada’s corporate criminal liability legislation and the meanings inscribed in its provisions throw serious doubt on its ability to hold corporations legally accountable for their harmful, anti-social acts. There is little reason to believe that the Westray bill will produce a crackdown on safety crimes, or
seriously challenge corporations to address workplace injuries and death. While it will hold some corporations and corporate actors accountable and thus far it has been the smallest and weakest the primary causes of workplace injury and death (e.g., the tension between profit maximization and the costs of safety and the relative worth of workers/employees versus owners and investors) will continue.
Dedication

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

There are many people that I want to acknowledge for their invaluable contributions to this dissertation. I first want to thank everyone who took the time out of their busy schedules to be interviewed for this study. Their knowledge and insights were instrumental in helping me to understand the evolution of Canada’s corporate criminal liability legislation.

I also want to thank the staff in the Sociology department – Anne, Lynn and Wendy – for all of their assistance over the years. Special thanks to Michelle Ellis for her kind support and willingness to always find answers to my questions. Thank you also to Professors Rob Beamish and Vince Sacco for their support during their tenures as chair of the department.

I count myself extremely fortunate for having such a wonderful dissertation committee. Professor Steve Tombs was gracious enough to be the external examiner, let alone make the trek to Kingston from the United Kingdom for the defence. The intellectual influence of Professor Tombs' work for my own research is evident in the pages that follow. I would also like to thank Professor Paul Paton for his constructive comments and feedback on my dissertation proposal. Thank you to Professor Sergio Sismondo for graciously agreeing to join my committee and for providing such helpful feedback on my work.

Professor Fiona Kay went above and beyond the call of duty to offer much needed support and encouragement, providing extensive comments and suggestions on all stages and aspects of my work. Thank you, Fiona, for all of your time and consideration. I owe an enormous debt of thanks to Professor Frank Pearce for all of his support, encouragement and guidance. Frank’s unique and thoughtful insight helped stimulate and encourage my interest in issues of political economy. I benefited immensely from his many and incredible intellectual contributions to my research. It was a pleasure getting to know Frank and having him on my committee.
I struggle to find the words to express my gratitude to Professor Laureen Snider. Laureen was there at every stage of the process, both the highs and lows, never wavering in her commitment.Intellectually engaging and inspiring, she constantly challenged me to think critically and analytically about issues of corporate crime. Laureen is a kind and caring person who is always giving of her time and endlessly encouraging in her support of my work. It’s truly an honour to have Laureen as a friend, mentor and supervisor.

I am extremely fortunate to have such a great network of friends who provided incredible support, encouragement and, when necessary, distraction. Thanks to all of you! I am also extremely grateful for all the love and support that I have received from both my family and my partner’s family.

My mother is a constant source of encouragement. Thanks, mom, for always being there to offer your love and support. My father is constantly in my thoughts; I miss him always.

Finally, mere thanks are not enough to express the gratitude that I owe my partner, Ruth Code. Ruth first introduced me to critical thinking when we were students together at Simon Fraser University, and since then has provided an unbelievable wealth of intellectual guidance and inspiration. 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 been able to complete this dissertation without her love and encouragement.
# Table of Contents

Abstract ......................................................................................................................... i

Dedication ...................................................................................................................... iii

Acknowledgements ....................................................................................................... iv

Chapter 1: Introducing the Corporate Criminal .......................................................... 1

1.1 Introduction ........................................................................................................ 1

1.2 Contextualizing Corporate Harm ........................................................................ 3

1.3 Canada’s Corporate Criminal Liability Legislation ........................................... 5

1.4 Purpose and Objectives ..................................................................................... 9

1.5 Theoretical Framework ....................................................................................... 11

1.6 Methods and Sources ....................................................................................... 13

1.7 Summary and Outline of Chapters .................................................................... 14

Chapter 2: Background and Research Methods and Sources ..................................... 18

2.1 Introduction ........................................................................................................ 18

2.2 Criminal Liability and the Corporate Form ....................................................... 20

   Benefits and Drawbacks of Limited Liability ...................................................... 23

   The Emergence of Corporate Criminal Liability .............................................. 26

2.3 The Westray Bill’s Evolution ............................................................................. 29

2.4 The Westray Bill in Canada’s Parliament ............................................................ 32

   The New Democratic Party’s Private Members’ Bills ........................................ 34

   The Progressive Conservative Party’s Private Members’ Motion .................... 36

   The Standing Committee on Justice and Human Rights .................................. 39

   The Introduction of Bill C-45 ........................................................................... 40

   Bill C-45: The Final Steps .............................................................................. 42

2.5 The Westray Bill in Action ................................................................................ 45

   A Long and Protracted Route ......................................................................... 48

2.6 Research Methods and Sources ....................................................................... 48

   Data Sources .................................................................................................... 52

   Data Analysis .................................................................................................... 56

2.7 Chapter Summary .............................................................................................. 57

Chapter 3: Reviewing the Literature and Establishing Theoretical Influences ........... 59

3.1 Introduction ........................................................................................................ 59

3.2 Excluding the Corporate Criminal .................................................................. 61

   The Roots of Criminology and the Sociology of Deviance ............................... 62
4.7 The Culture of Political Reality .......................................................... 161
4.8 Law’s Privilege ..................................................................................... 164

Chapter 5: Visions of Economic Grandeur: The Influence of Corporate Capitalism .... 166
5.1 The Importance of Corporate Capitalism .................................................. 166
5.2 The World According to Neo-Liberalism .................................................. 169
5.3 Where are the Captains of Industry? ......................................................... 173
  Corporations Entered Through the Back Entrance ........................................ 176
  Corporations are Always on my Mind ......................................................... 179
5.4 Protecting Capital’s Interests: Avoiding Director Chill ................................ 180
5.5 Corporations will Leave if we’re not Careful ............................................. 185
5.6 Hesitant Resistance ................................................................................. 187
5.7 Responsibilization .................................................................................... 190
  Shared Responsibility .................................................................................. 193
  Union Responsibility ................................................................................... 195
  Objections to Shared Responsibility ............................................................ 199
5.8 The Definition of Organization ................................................................. 201
5.9 Conclusion: Economic Discourses at Work ............................................... 203

Chapter 6: Obscuring Corporate Crime and the Corporate Criminal ................. 207
6.1 They’re not Really Criminals, are they? .................................................... 207
6.2 What is a (Corporate) Criminal? ............................................................... 210
6.3 Illegal, yes, but not Criminal ..................................................................... 213
  Making Corporate Crime Saleable ............................................................... 216
6.4 The Westray Bill in Action ....................................................................... 217
  Enforcement in Context: The Regulatory Frame ......................................... 219
  Lack of Legal Education and Interest ......................................................... 222
  Not on Society’s Radar ................................................................................. 224
6.5 Law’s Symbolic Value: They’ve Changed, Honestly .................................... 226
  Symbolic of What? ....................................................................................... 228
6.6 The New Crime (Un)control Industry? ..................................................... 231
6.7 What’s the Westray Bill’s (Symbolic) Value? ............................................ 240
  Isn’t there still Reason for Optimism? ......................................................... 242
6.8 Conclusion ................................................................................................. 245

Chapter 7: Constituting the Corporate Criminal: More of the Same or Hope for the Future? ............................................................... 247
7.1 Visions of Law and Order ........................................................................... 247
7.2  The Making of Corporate Crime and the Corporate Criminal ........................................... 249
    *The Westray Bill’s Class Relevance* ................................................................. 253
7.3  Don’t Forget the Role of the State ................................................................. 256
7.4  Corporations beyond the Law? ........................................................................ 258

References .......................................................................................................................... 260

**Appendix A**  Ï Members of the Standing Committee on Justice and Human Rights .... 282

**Appendix B**  Ï Witnesses Appearing Before the Standing Committee on Justice and Human Rights .................................................................................................................. 283

**Appendix C**  Ï Interview Participants ........................................................................ 285

**Appendix D**  Ï Interview Schedule .......................................................................... 286
Chapter 1: Introducing the Corporate Criminal

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).

1.1 Introduction

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 (see, Christie 2004; Garland 2001; Taylor 1999). 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 (Christie 2004; 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; McMullan 2005). 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, in the fall of 2003, the Canadian government introduced stringent new anti-violence legislation 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 (Archibald, Jull and Roach 2004: 367), signalling a consensus for the need to better protect
Canadians from violent crime. The government characterized its legislative initiative as a significant step towards 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 single and violent 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 terms of holding offenders criminally responsible for their harmful acts (Bittle and Snider 2006). Also curious was 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, there have been only two charges laid; a particularly worrisome trend given that recent research reveals an increase in the forms of violence that the legislation was intended 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 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).
1.2 Contextualizing Corporate Harm

The preceding appears highly improbable given the predominance of contemporary law-and-order politics (Menzies, Chunn and Boyd 2001: 11). 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 is little public outcry, few media inquiries and a majority of politicians appear 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. In particular, it is a story about the Government of Canada’s introduction of corporate criminal liability legislation.¹

While political rhetoric would have us fear violent street crime, the truth is that most people have a much better chance of being 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 (ILO 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).²

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¹ An Act to Amend the Criminal Code (criminal liability of organizations), Statutes of Canada: 2003, c. 21.
² The authors attribute the increase over the two years to fatalities related to occupational disease, such as exposure to harmful substances and environments (for example, asbestos), which takes years to develop and detect (Sharpe and Hardt 2006: 43).
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 element of criminal culpability (Slapper and Tombs, 1999: 78; Tombs 2004: 164-65, 174-75; Tombs and Whyte 2007: 104). 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 (Pearce and Tombs 1998; Reiman 2004; Snider 1993).

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 their actors to legal account for injury and death in the workplace (Pearce and Snider 1995; Pearce and Tombs 1998; Snider 1993; Tombs and Whyte 2007; Tucker 2006). The record illustrates a general reluctance to equate harm and wrong-doing 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 does not suggest a total disregard for workers’ safety today a worker enjoys a much safer working environment than his or her counterpart did in previous generations (Snider 1987: 54) but reforms have been slow, hard fought and have rarely resulted in dramatic improvements in workplace health and safety (Pearce and Snider 1995; Slapper and Tombs 1999; Snider 1987; 1993). In this respect the Canadian Government’s introduction of corporate criminal liability legislation is an important, symbolic event. This dissertation undertakes to critically interrogate the emergence of this law.

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3 According to Statistics Canada, in 2004 police “solved” (charged someone) 75% of reported homicides, a conservative estimate given that many cases are not solved until a number of years after the incident is reported in official statistics (Dauvergne 2005: 12).
1.3 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)*. 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. The new law is a significant legal development in that it marks the first time in Canadian history that the federal government has introduced *Criminal Code* provisions relating to corporate criminal liability.

As is often the case (Braithwaite 2005: 61; Snider 1993: 89-113; Tucker 2006; also see Bliss 1974; Carson 1970; 1980; Hoberg 1998; Tucker 1990), it was a much-publicized disaster that piqued the government’s interest in corporate crime law reform. On 9 May 1992, twenty-six miners were killed following an underground explosion at the Westray Mine in Plymouth, Nova Scotia. 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 frantically searched for survivors, but the explosion’s devastating impact meant that death was probably immediate and certainly inevitable (McMullan 2005: 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, the conditions of the mine were deemed too dangerous to
recover the remaining eleven victims, whose bodies remain entombed underground to this day (Glasbeek 2002: 61; McMullan 2001; 2005).

Although the mine owners, Curragh Resources, were eventually charged criminally, no one was convicted. A combination of prosecutorial mishaps and difficulties determining legal responsibility conspired to ensure that no one was held to criminal account (McMullen 2001: 136; McMullan, 2005: 30; also see Glasbeek 2002).\(^4\) 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.\(^5\) Five years later, the Inquiry report, *The Westray Story: A Predictable Path to Disaster* (Richard 1997), characterized the tragedy as “foreseeable and preventable,” unearthing evidence that management had been warned over fifty times prior to the explosion about workplace health and safety violations, all of which were ignored (Glasbeek 2002: 62). Tragically, the final warning came just ten days prior to 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

\(^4\) The Royal Canadian Mounted Police (the provincial police in Nova Scotia) waited nearly two weeks before launching a criminal investigation and another three months before seizing company records and equipment as evidence (McMullen 2001: 135-36). From the outset the prosecution was under-funded and inadequately staffed, leading to the eventual resignation of the prosecution team and leaving the responsibility for assembling the case largely in the hands of the police, who were ill-equipped to deal with such legal complexities (McMullan 2005: 28). Although the case eventually proceeded under the guidance of a new team of prosecutors, it was once gain derailed after the defence successfully argued for a mistrial based on the non-disclosure of evidence. Upon appeal a new trial was ordered, but the Crown decided against renewing its efforts, citing considerable disagreement amongst experts as to the cause of the explosion and, therefore, the unlikelihood of securing a conviction (McMullan 2005: 30).

\(^5\) Despite this prompt announcement, it was five years later, after much legal wrangling about whether the inquiry could proceed while a criminal trial was pending, before the inquiry began hearing evidence from more than 71 witnesses, including miners, mine and labour experts, government representatives and elected officials. Conspicuously absent from the witness list was the CEO of Curragh Resources, Clifford Frame, who called the inquiry a “railroad job and a farce,” insisting the disaster was an “accident” (McMullan 2005: 31). Despite repeated legal attempts to compel Frame to appear before the Inquiry, he never testified.
did not have a chance to expire before inspectors could take further action (McMullan 2005: 26).\(^6\)

The Inquiry report contained 74 recommendations aimed at preventing similar incidents and improving workplace health and safety. The Nova Scotia government officially accepted them all, including that the federal government should change the *Criminal Code of Canada* to make corporate officials "properly accountable for workplace safety" (Richard 1997: 600-601). 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 recommendation 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 1994 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). Five years later, in 1999, the leader of Canada’s democratic socialist party, the New Democratic Party (NDP), sponsored a Private Members’ bill,\(^7\) which died on the Order Paper following Parliament’s dissolution.\(^8\) On 9 February 2000, the 15th Report of the Justice Committee was tabled, requesting that the government consider a program of corporate criminal

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\(^6\) In addition to exposing the ineffectiveness of the Department of Labour’s compliance-oriented approach to mine safety, which effectively encouraged a "culture of indifference" between mine management and inspectors, the disregard for workplace safety stood as a perilous reminder of what happens when the pursuit of profit takes priority over human life (McMullan 2005: 26).

\(^7\) According to the Parliament of Canada’s website, Private Members’ Bills are bills introduced in the House of Commons by individual Members who are not cabinet ministers and in the Senate by individual Senators who are not members of the Ministry (LEGISinfo FAQ: www2.parl.gc.ca, accessed 20 March 2009).

\(^8\) The order paper is the business agenda for the House of Commons.
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)*. This legislation was the forerunner to the Westray bill.

Bill C-284 was withdrawn at second reading and sent for study by the Justice Committee (Goetz 2003: 7). Two months later, hearings began. Thirty-four witnesses appeared before the Justice Committee, which like all House of Commons committees contains Members of Parliament (MPs) from all political parties. Witnesses either requested an audience or were invited to testify by the Committee because of their expertise or personal connection with the issue at hand (for example, family members who lost loved ones at Westray, union representatives and legal experts).

After the hearings, the Justice Committee was expected 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 November 2002). As its starting point, the government agreed with the Justice Committee’s position that reforms were necessary to reflect the reality of corporate decision-making and delegation of operational responsibility in complex organizations (Department of Justice Canada November 2002). Following an examination of the Committee’s evidence, and considering the strengths and limitations of various reform proposals, the government introduced the Westray bill.

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1.4 Purpose and Objectives

As the preceding discussion begins to reveal, the introduction of Canada’s corporate criminal liability legislation was fraught by protracted political discussion and debate, tensions, controversies, false starts and restarts. The circuitous route leading to the law’s introduction raises important questions regarding its enactment. Using the Westray bill as its empirical focus, this dissertation critically interrogates the evolution of corporate crime law reform in Canada — the production of corporate criminal liability. In addition to accounting for the broader context within which growing concerns with corporate malfeasance emerged, it explores the specific factors that gave rise to, and shaped, the Westray bill. In particular, it accounts for the transformations that occurred in the nature and scope of corporate criminal liability, beginning with the Westray Inquiry report recommendation 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 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 official discourses that shaped 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 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 that largely was absent from the neo-liberal political lexicon of the 1980s and early 1990s (McMullan 1992:
116; Pearce and Tombs 1998: 289 and passim). 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 the dissertation examines how various discourses coalesced within particular law-state-economy relations (Dupont and Pearce 2001: 150) to establish the parameters for criminalizing corporate malfeasance and effectively (re)producing dominant social formations. 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; Slapper and Tombs 1999; Snider 1993).

A series of questions framed the dissertation’s examination of the factors that animated the introduction of Canada’s corporate criminal liability legislation:

1) What contributed to the formulation and introduction of corporate criminal liability legislation?

2) What conditions enabled and shaped the introduction of this law?

3) What were the broader social-political-economic factors that dominated and characterized the law reform process?

4) How was corporate criminal liability conceptualized and constructed through the reform process?

5) Who were the “authorized knowers”, the individuals asked to testify before the Justice Committee that examined the issue of corporate criminal liability?
6) What knowledge claims helped constitute corporate crime and corporate criminal liability?

7) What are the implications of the reform process and resulting legislation for corporate crime control?

8) How has the law been enforced, and by whom? How has it been implemented alongside provincial regulations?

9) What is the likelihood that corporations and corporate actors will be held to account for their criminal acts? That is, as some observers (e.g., Archibald, Jull and Roach 2004) have noted, will it ‘revolutionize’ corporate criminal liability?

10) What are the implications for how we think about corporate harm and wrongdoing?

1.5 Theoretical Framework

The theoretical framework that guides the dissertation combines Michel Foucault’s (1972 [2001]) analysis of discursive formations with Louis Althusser’s (1968; 1969; 1971) anti-essentialist (re)reading of Marx. As chapter 3 outlines in greater detail, combining elements of Foucault and Althusser provides a rich analytical lens to examine the relationships between discourse and social structures, particularly in relation to 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 neo-Marxist concerns with the ‘why’ of capital accumulation and state power (Jessop 2007: 40; also see Dupont and Pearce 2001; 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 that class relations are implicated in the phenomenon under inquiry (Hunt 2004: 601-602).

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 (cf. Snider 2000) when it came to defining the nature and scope of corporate crime and corporate criminal liability? Althusser’s (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 dissertation builds from this theoretical integration to offer several key assertions regarding the productive nature of corporate criminal liability law reform. First, particular legal, economic and cultural discourses shaped, but did 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 coalesced within particular discursive and social conditions to produce specific characterizations of corporate crime and corporate criminal liability. Second, these discursive formations are constitutive of class struggles over the role of the corporate form in extracting surplus labour and accumulating capital. Finally, to underscore the productive nature of capitalist social relations, and to extend beyond essentialist or teleological characterizations of capitalism, these class antagonisms (re)created the conditions necessary for maintaining and advancing determinate social formations (Gibson-Graham,
Resnick and Wolff 2001; Resnick and Wolff 1987). Overall, the dissertation examines the relationships between the discursive and extra-discursive, particularly how certain discourses are taken up by and interpreted through law-state-economy processes.

1.6 Methods and Sources

To critically interrogate the constitution of Canada’s corporate criminal liability legislation the dissertation draws upon the qualitative tradition of discourse analysis (Fairclough 1992; Fairclough, Graham, Lemke and Wodak 2004; McKenna 2004). In general, this involves situating language within its broader social context, or what 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 are privileged because of the strategies that certain (powerful) agents or groups employ in the process of reproducing social relations. This should not be read as an automatic or determinative process but as an ongoing and fluid exchange of renewal and transformation (Fairclough, Jessop and Sayer 2002: 5-6). From this we can explore how discourse is imbricated in the (re)production of broader 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). The dissertation accomplishes this methodological endeavour by integrating 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 adopted by corporations in response to the legislation. The resulting information pool (Palys 1997: 225) helps to reveal the complex and contradictory factors that contributed to the constitution of corporate criminal liability.

1.7 Summary and Outline of Chapters

The emergence of corporate criminal liability legislation represents 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 have dominated the legal and political landscape for more than two decades. The dissertation therefore provides an important opportunity to critically explore the constitution of corporate criminal liability in contemporary society.

By pursuing this line of inquiry the dissertation offers several contributions to the corporate crime and broader sociological and socio-legal literatures. First, it provides an understanding of corporate crime law reform, thereby contributing to discussion and debate regarding the nature and extent of the regulation and control of corporate harm and wrongdoing (Snider 1993: 17). Second, it addresses the ideological bias of law and its enforcement, particularly in that these processes frequently underestimate the seriousness of corporate crime (Snider 1993: 18) and overlook the arbitrary distinction between regulatory and criminal offences, or between ‘real’ and ‘quasi’crimes (Wells 1993: 14). 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 Tombs and Whyte (2003: 4 ï emphasis original) 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." Third, it 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). This dissertation therefore helps to address the relative paucity of corporate crime research.

A fourth contribution relates to the fact that many studies of crime and its control overlook processes of law making in favour of examining law's effects.¹⁰ As a result, what largely remain 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 Cohen 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" (Cohen 1996: 492, as cited in South 1998: 444). The dissertation therefore takes Cohen's challenge seriously by critically examining the introduction of legal measures to address the abuses of power by one of the most dominant institutions in contemporary capitalist society.

The dissertation is organized in the following manner:

Chapter 2 outlines the history of corporate criminal liability, as well as the methods and sources used to critically interrogate the Westray bill's evolution. Chapter 3 situates the

¹⁰ For exceptions relating to corporate crime, see Doran 1996; Pearce and Tombs 1998; Snider 1990.
dissertation within the corporate crime literature and details the empirical and theoretical influences that inform the research.

Chapters 4 through 6 critically examine the reform process in Canada’s Parliament that lead to the Westray bill’s introduction and enactment. In particular, they interrogate the legal, economic and cultural discourses that in various, uneven and contradictory ways animated this legislation. Chapter 4 examines the factors that propelled corporate criminal liability onto the legislative agenda and interrogates the legal discourses that converged around discussion and debate regarding corporate criminal liability to limit the reform options that were given serious consideration. Chapter 5 considers the impact of economic discourses on the reform process, including that a commitment to neo-liberal common sense provided a dominant frame to evaluate, and speak about, corporate crime and corporate criminal liability. Chapter 6 explores the ways in which culturally-embedded notions of crime and its control animated (and continue to animate) the Westray bill’s introduction and enforcement. Dominant perspectives suggested that crime is about the street level violence that strikes fear in everyone, not about corporations who, but for the rogue few, are good, law abiding citizens.

Chapter 7 summarizes the main dissertation findings and considers some of their empirical and theoretical implications. It argues that a series of relatively autonomous, yet mutually reinforcing (Tombs and Whyte 2007: 69) discourses animated the evolution of Canada’s corporate criminal liability legislation. 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 were given 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.
Chapter 2: Background and Research Methods and Sources

Bill C-45 constitutes a fundamental change, if not a revolution in corporate criminal liability (Todd Arhibald, Kenneth Jull and Kent Roach 2004: 368).

É the history of the corporate criminal law is defined by only the pretense and rhetoric of a benign big gun (William Laufer 2006: 198).

2.1 Introduction

November 7, 2003 was an historic day in Canada’s Parliament. Assembled in the upper house were politicians from both the House of Commons and Senate, joined by union officials, former Westray miner Vern Theriault, and Allan and Debbie Martin, representing the families of the victims of the Westray mine disaster. Their purpose was to witness Her Excellency the Governor General of Canada give Royal Assent to Bill C-45, An Act to Amend the Criminal Code of Canada (criminal liability of organizations). Colloquially referred to as the Westray bill, after the deadly 1992 Westray mine disaster that killed twenty-six miners, the law’s introduction marked the first time the Canadian government had introduced specific Criminal Code provisions relating to corporate criminal liability.

The government argued that Bill C-45 represented fundamental reforms to the Criminal Code, significantly expanding the circumstances in which an organization can be held criminally responsible for the actions taken in its name by its representatives (Liberal Member of Parliament, Paul Harold Macklin, Hansard 27 October 2003).¹ New Democratic Member of Parliament (MP), Alexa McDonough, a vocal supporter of corporate criminal liability legislation, suggested that the new law, brings us one step closer to ensuring that corporations are held

¹ Hansard is the official recording (transcripts) of all proceedings in Parliament (see, Hansard Association of Canada, online: www.hansard.ca. Accessed: 15 August 2009). All Hansard recordings referenced throughout this dissertation were taken from the Parliament of Canada’s website: www.parl.gc.ca (Last Access: 15 November 2009). References include date of Parliamentary proceeding and, where appropriate, the individual speaker, his or her political party and the time at which they spoke.
liable for irresponsible working conditions that end up costing workers their lives (Hansard 7 November 2003). However, despite its legislative significance, the passing of the Westray bill was a slow, difficult and, at times, controversial process. It was almost thirteen years after the disaster occurred and more than six years after the Westray Inquiry was concluded before the law was enacted - not exactly record-breaking pace for what was portrayed as such important legislation!

This chapter outlines the history of corporate criminal liability legislation, as well as the methods and sources used in the dissertation research. Part one explores the evolution of corporate criminal liability law, including the history of criminal liability and the corporate form, the identification doctrine and the circuitous and protracted route that the Westray bill took through Canada’s Parliament to become law. It also describes the two charges and one conviction registered under the new law since it took effect more than five years ago. The reasons for the law’s introduction and subsequent lack of enforcement raise important questions about the constitution of corporate criminal liability and the ability to hold corporations to account for their harmful and illegal acts.

Part two details the research methods and sources. The research has its methodological roots in critical discourse studies, an approach chosen to situate dominant discourses of corporate crime and corporate criminal liability within their broader social-political-economic context (Fairclough 1992; Fairclough, Graham, Lemke and Wodak 2004; McKenna 2004). In addition, the research strategy draws upon the tradition of triangulation, which encourages the use of different methods and sources to study social phenomena. Fostering diversity within the research agenda helps guard against any particular biases that may emerge through a specific method or source (Creswell 1994: 174). It also recognizes that any piece of information is only an
imperfectly mirrored reflection of the phenomenon that it attempts to describe or explain (Palys 1997: 225).

Employing a range of methods and sources contributes to a diverse pool of information from which the researcher can develop an in-depth understanding of the phenomenon in question (Denzin and Lincoln 1994: 2). The information pool developed for this dissertation helps to reveal the complex and contradictory array of factors that contributed to the Westray bill. In addition to verbatim transcripts from Canada’s Parliament, this includes semi-structured interviews with twenty-three individuals with knowledge and insight into issues of corporate criminal liability. It also includes the limited case law that has surfaced since the law’s enactment, as well as Internet-based resources regarding its introduction.

2.2 Criminal Liability and the Corporate Form

Although the history of group liability dates back to twelfth-century England, when criminal sanctions were applied to collectives or groups, the predominant criminal law approach emerged during feudal times, and responsibility and sanctions were conceptualized as individualistic (Slapper and Tombs 1999: 22-23). As a result, historically, the corporation has been largely beyond the purview of criminal law. As the eighteenth-century Lord Thurlow is said to have infamously stated, the corporation had no soul to damn and no body to kick (cf. Tombs and Slapper 1999: 26). From a criminal law perspective it was an anathema that there was not one individual to hold to account for corporate wrongdoing, and that it was impossible for the corporation to defend itself in court (Glasbeek 2002: 128).  

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2 This despite the fact that the corporate form enjoyed all the privileges and rights of an individual (Glasbeek 2002: 128).
Despite a general reluctance to apply criminal law to corporate wrongdoing (Wells 1993: 1), most western democratic nations today have at their disposal various methods, either through legislation or case law, to hold corporations to account for their harmful and illegal acts. These strategies offer a range of options to impute the "intent, knowledge or willfulness" of individuals to the corporation (Geis and Dimento 1995: 72). In the late 19th century courts started assigning responsibility to corporations, albeit on a case-by-case basis and without any "conscious or overall direction," spelling out the parameters for attributing corporate criminal liability (Bernard 1984: 3; Department of Justice Canada November 2002).

The history of corporate criminal liability legislation has important links to the development of the corporate form (Bakan 2004; Snider 1993; Yalden et al. 2008). It was not until the mid-19th century that the corporation emerged as the dominant means to undertake significant entrepreneurial ventures (Glasbeek 2002: 32-33; Snider 1993: 21; Yalden et al. 2008: 216). The modern corporation in Canada is a "creature of statute" with its own "legal existence" that is separate from those who invest (Yalden et al. 2008: 133). In essence it is a natural, independent person, regardless of whether one or more individuals own shares in the company (Yalden et al. 2008: 135), with all the attendant legal "capacities and powers" (Glasbeek 2004: 8). As Nicholls notes:

[t]he corporation is an abstract concept. One cannot touch a corporation, photograph it, or draw a picture of it. We "see" a corporation only through the effects it has on the world in which it operates. In fact, the separate existence of a corporation is formally recognized in law in a way that the existence of a club or other unincorporated organization is not. A corporation can own property in its own name: it can enter into contracts; and it can sue, and be sued, too. It is, for legal purposes, a single, distinct, entity. Yet as a practical matter, there are living, breathing people behind the entity (Nicholls 2005: 3 and 5; as quoted in Yalden et al. 2008: 32).
A vital aspect of the corporation is limited liability. Despite some exceptions (discussed below), the primary risk for the individual investor is the money that he or she provides to the venture (Snider 1993: 22).

The forerunner to the limited liability corporation was the regulated company, which first emerged in the 13th century as a corporation formed by the grant of a charter from the Crown. The purpose of the regulated company was to facilitate the introduction of a grantee and repository of monopoly trading rights on behalf of merchants (Yalden et al. 2008: 217-218). It was from this basis that the joint stock company emerged during the 17th century, constituting the most common method of conducting business until the introduction of the limited liability corporation. The classic joint stock venture was the East India Company, first created as a monopoly to trade with the Indies, but eventually evolving into a company that permitted subscription members. Rules relating to partnerships were developed through common law and, later, through statutes that set out the parameters for business agreements between partners and third parties (Yalden et al. 2008: 216-218). The notion of limited liability was not part of these joint stock ventures (Yalden et al. 2008: 14).

The corporation’s separate legal personality developed gradually, culminating with the English Companies Act in 1862, as well as through the watershed English case, Salomon v. Salomon (1892) (Yalden et al. 2008: 135). Rapid economic development in the nineteenth century resulted in greater demands across the business world to pool economic resources (Clarke 2004: 2) to encourage new businesses and generate capital (Snider 1993: 22; also see Bernard 1984). For example, in the United Kingdom, during the late eighteenth and early

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3 Limited liability was not part of the English Joint Stock Companies Act (1844) (Yalden et al. 2008: 14).
4 Salomon v. Salomon and Co, Ltd; Salomon and Co, Ltd v. Salomon [1895-1899] All ER Rep 33; [1895-99] All ER 33 (HL) established the legal principle that any company adhering to the statutory requirements for incorporation is a legal entity separate and distinct from the individual members of the company (Yalden et al. 2008: 135).
nineteenth century, the development of transportation systems (canals and railways) required "massive amounts of capital" that far outstripped the capabilities of individual investors (MacPherson 2005: para 11). While the joint stock company enjoyed considerable success during this period, there was a general and growing hesitation on the part of investors who were concerned about what would happen with their "personal fortunes" in "unincorporated joint stock companies with unlimited liability" (Clarke 2004: 2). It was within this context that pressures mounted for the state to recognize the limited liability corporation.

**Benefits and Drawbacks of Limited Liability**

The limited liability corporation brought with it important economic and practical benefits for those involved in the process. In contemporary terms it facilitates the pooling of diverse resources for the creation of economically and (potentially) socially productive corporate ventures. At the same time, those who invest in the corporation have few risks beyond their monetary contribution, which in turn stimulates economic growth by encouraging as many investors as possible to participate in the marketplace. Although some investors risk more wealth than others (i.e., some individuals spend considerable resources in one corporation), there is an overall incentive to spread individual contributions across different firms to reduce risk levels (Easterbrook and Fischel 1985; Yalden et al. 2008: 149-151). In addition, investors do not have to monitor the day-to-day matters of the corporation (although this has shifted somewhat in the face of recent corporate scandals). Since most investors are involved in many different ventures,

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5 Yalden et al. (2008: 251-254) catalogue these benefits as: providing shareholders with limited liability; establishing the corporate form in perpetuity; permitting the transfer of shares between interested parties (a process that is limited only by certain securities laws or express limitations imposed by corporate bylaws); preventing individual shareholders from obligating the "body corporate" (corporate authority is commonly delegated to management); enabling the corporation to secure additional capital that is beyond the capacity of any particular shareholder; and ensuring particular tax advantages.
it is neither efficient nor desirable for them to be actively involved in monitoring the corporation, something that many trust is done by those with major investments in the firm and by creditors whose investments are integral to the bottom business line (Yalden et al. 2008: 153). In short, the limited liability corporation represents a tremendous outcome from a "market capitalism perspective" (Glasbeek 2004: 9).

Despite these benefits, some observers have questioned the divide within the limited liability corporation between owners (shareholders) and those charged with managing the enterprise, a process that first emerged with joint stock companies (Clarke 2004: 2). Historically, many economists, including Adam Smith (1937: 700), expressed concern with the potential for inefficiencies given that managers did not have the same economic interests as owners, and therefore lacked similar incentives to watch over the operation with the same "anxious vigilance" (cf. Clarke 2004: 2-3). Berle and Means (1967) labelled this development as a fundamental shift in the structure of corporate ownership, effectively surrendering the right to operate the organization solely with ownership's interests in mind (Berle and Means 1967: 312; also see Chandler 1977; Clarke 2004: 3-4). From this perspective the "visible hand of management" effectively replaced the invisible hand of market forces (Clarke 2004: 33).

For other observers this potential imbalance is mediated through contemporary laws that impose a fiduciary duty on the corporation to ensure that society generally benefits from its financial prosperity (Greenfield 2005; as it appears in Yalden et al. 2008: 51-54). For example,

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6 The courts have also imposed limits on the limited liability corporation by occasionally "piercing" or "lifting" the corporate veil in the interests of justice. For example, the courts have held shareholders responsible when principal investors have used the corporation for purely fraudulent reasons; when intentional torts have been committed; where the company avoids taxation; and when the court determines that equity or the interests of justice are better served by disregarding the corporate form (Yalden et al. 2008: 168). Limits also emerge in the context of small businesses. First, banks that finance these ventures will often require that the principals involved personally guarantee the company's indebtedness. Second, there is often considerable overlap between those who invest in the corporation and those who are involved in the firm's daily operations: a convergence between owners and workers (Yalden et al. 2008: 148/49).
according to Anand and Penley (2005: 942) the Canada Business Corporations Act states that corporate directors and officers must act in “good faith” and with the “care, diligence and skill” of a “reasonably prudent person.” In addition, in Peoples Department Store Inc. (Trustee of) v. Wise 2004 SCC 68, [2004] 3 SCR 461, the Supreme Court of Canada stated that the “best interests of the corporation” are not automatically nor necessarily the “best interests of shareholders.” At times, a board of directors may have to accommodate a broad range of perspectives in its decision-making process, including “shareholders, employees, suppliers, creditors, consumers, governments and the environment” (cf. Yalden et al. 2008: 57). However, Paul Paton (2006-2007: 236-237) suggests that the Peoples case produced considerable ambiguity in that the court also stated that the fiduciary responsibility of directors is to act in the best interests of the corporation ‒ not to be confused with the interests of other stakeholders ‒ signalling a “clear distinction between shareholders and stakeholders.”

While the concept of fiduciary responsibility reminds us that corporations do not always act in their own best (economic) interests, this does not mean that the bottom line continues to benefit financially from the corporation’s decisions and actions. For example, as part of the corporate social responsibility movement, corporations have attempted to include workers as stakeholders or partners in the organization. “Partnerships,” it is claimed, will help ensure the corporation remains competitive and viable. Unfortunately, according to Arthurs and Mumme (2007: 8), this commitment is more apparent than real: “the current north American “stakeholder” discourse seems to be designed largely to convince workers that their interests are fundamentally aligned with those of the corporation.” Whether or not it is expressly thought and articulated, the corporation, throughout its actors, continues to seek ways to improve its productivity and profitability, a process that ultimately benefits majority shareholders.
The Emergence of Corporate Criminal Liability

Notwithstanding the uneven contours of the limited liability corporation, what is clear is that its evolution is the result of “political choices” (Yalden et al. 2008: 16). Although the desire for economic prosperity was an essential catalyst behind the modern corporation, this does not make the choices that followed inevitable (MacPherson 2005: para 6; also see Micklethwait and Woolridge 2003). The emergence of the limited liability corporation during the late nineteenth and early twentieth century was to the economic benefit of everyone involved, including owners, managers and workers (MacPherson 2005: para 14; also see Micklethwait and Woolridge 2003). However, this progress came at a cost, benefiting some more than others, and harming many workers who were victim to the corporation’s success (Glasbeek 2004).

An important factor to consider is that, despite some historical variations in the general purposes of the corporation, its main motivation has been, and remains, profit maximization (Clarke 2004; also see Berle 1965; Glasbeek 2004). Except for some tinkering around the edges, the modern corporation has remained essentially unchanged for more than 150 years — “separate legal personality for the corporation, limited liability for shareholders, freedom for executives in making business decisions in the best interests of the corporation” (MacPherson 2005: para 28).⁷

For many observers it is noteworthy that the concept of limited liability was originally thought to be a privilege bestowed by the state, a vehicle from which corporations could serve the public interest (Snider 1993: 22; also see Bakan 2004; Glasbeek 2002). However, privilege soon turned into an unassailable right once governments realized the potential of corporations as

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⁷ For some observers, the question that must be asked is whether the modern corporate form has evolved from being a site of production to a vehicle for generating financial capital, making the venture inherently criminogenic (Tomisac 2002; also see Glasbeek 2004).
a significant revenue-generating mechanism (Snider 1993: 22). In Canada, for example, the
corporation gained such importance that it quickly evolved from an entity formed through acts of
Parliament to a process of incorporation through registration, an almost automatic approval
process that simply requires adherence to particular statutory processes (Yalden et al. 2008:
217). 8

The corporate form therefore expanded significantly, pushing the limits of production in
the pursuit of profit, bringing with it frequent and serious injury and death in the workplace
(Slapper and Tombs 1999: 25; also see Glasbeek 2002). For example, working conditions
deteriorated throughout the 1800s to the extent that it threatened the very survival of the
capitalist system (Snider 1993: 95) and thereby prompted legislators and the courts to consider
new rules to improve workplace safety (Carson 1980). In the United Kingdom, new laws soon
followed that limited the length of the working day, eliminated child labour and legislated meal
breaks (Snider 1993: 94-95).

Despite growing concerns with workplace safety, including recognition of its importance
by some of the privileged class, corporations were generally successful in lobbying against
reforms that they perceived as overly stringent. Underpinning this resistance was the notion that
corporations were private property, and therefore what went on within a company was the
owner's private business. In addition, workers were thought to be free to enter into working
arrangements, and by logic could leave any workplace that they believed to be dangerous (Snider
1993: 97). Regardless, as time passed there was a growing recognition of the social and

8 The development of the corporate form in Canada was not seamless in terms of adopting English law. For
example, until the 1970s Canada had both letters patent and memorandum jurisdictions governing the creation of
corporations. Letter patents systems were more prescriptive than memorandum jurisdictions in terms of the structure
of the corporation, and responsible ministers in letter patent systems had ultimate power to decide whether or not to
grant the letter patent. In comparison, memorandum jurisdictions were more akin to the process of modern
incorporation, including that the process of granting corporations took a less restrictive approach to paperwork and
approval. Today there is relative harmony across Canada as regards the legal formation of the corporate form
(Yalden et al. 2008: 221).
economic damages that corporations were capable of inflicting in the absence of accountability. It was from here that, in 1915, the British House of Lords found that a corporation could be civilly liable for damages, a ruling that paved the way for similar reasoning within the realm of criminal law (Glasbeek 2002: 127-28).  

A series of United Kingdom cases in 1944 provided further inroads to criminal law through the introduction of the identification doctrine, which effectively assigned responsibility to the corporation by equating the mens rea of certain employees with that of the company itself (Slapper and Tombs 1999: 29-30). The legal test that emerged from these cases assigned responsibility to the "controlling officer," the individual who effectively acted as the company. The problem, however, was figuring where responsibility lay in serious and complex matters. As Slapper and Tombs (1999: 31) note, for cases involving manslaughter, the courts found it difficult to convict corporations given the distribution of responsibility throughout the corporate body, rendering it difficult to single out one responsible individual.

Prior to the Westray bill, Canadian courts relied upon English common law to define corporate criminal liability. The standard-setting case is Canadian Dredge and Dock Co. v. The Queen [1985] 1 S.C.R. 662, in which the Supreme Court of Canada introduced the "identification doctrine." In that case the court argued that attributing liability involved tracing the crime to a senior employee(s), namely the "directing mind" of the corporation. A person was deemed to be a directing mind when he/she was responsible for a particular department or unit, and the crime benefited the corporation in some way (Department of Justice Canada March 2002). Since the identification doctrine only applied to "high-level managers with decision-

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9 It was in 1842 that a corporation was first dealt with via criminal law for "failure to satisfy absolute statutory duties" (Slapper and Tombs 1999: 27).

10 Anand and Penley (2005: 950) note that the introduction of Bill C-45 stands as the most recent example of the limits that are imposed upon corporations.
making authority (Department of Justice Canada, March 2002; also see Cahill and Cahill 1999), and since lower-level managers are often the people interpreting company policies, tracing responsibility up to senior management frequently proved impossible, particularly when criminal convictions were sought. Increasingly vocal critics argued that this legislation obviously failed to reflect the reality or complexity of corporate decision-making in large, modern companies (Cahill and Cahill 1999: 154).

Although the identification doctrine provided the legal groundwork that made it possible to hold corporations criminally accountable, it remained (and remains) commonplace for corporations to avoid responsibility for their social, environmental and economic wrongdoing (Glasbeek 2002: 130; Pearce and Tombs 1998; Snider 1993). For Glasbeek (2002: 130) this suggests that, the corporate hand may have been twisted into shape to fit inside the criminal glove, but it still seeks to revert to its original, ill-fitting shape. The Westray bill represents the most recent attempt by legislators to see if they can make the criminal glove fit. As Tombs and Whyte (2007: 110) would suggest, it constitutes an attempt to assimilate corporate wrongdoing into the realm of criminal law.

2.3 The Westray Bill’s Evolution

The contemporary underpinnings of Canada’s corporate criminal liability legislation surfaced shortly after the Westray disaster. In 1993 a Parliamentary Sub-committee of the Standing Committee on Justice and Human Rights recommended legal reforms to address the criminal liability of corporations.11 Similarly, a 1993 Department of Justice White Paper proposed that

11 The Committee’s proposal was modeled after the recommendations of the Law Reform Commission of Canada (LRCC). In 1987, as part of its proposed recodification of criminal law in Canada, the LRCC argued, the sort of harm prohibited by criminal law may well result from corporate activity involving negligence in the organizational process rather than in the conduct of any single individual(LRCC 1987: 26). Prior to this, the LRCC recommended
corporations be made liable for any "collective failure" to exercise reasonable care by any or all corporate representatives. Also in 1993, the Minister of Justice Canada released a white paper, "Proposal to Amend the Criminal Code (general provisions)", which included provision for offences by corporations, defined as a "public body, body corporate, society, company, partnership, limited partnership and trade union" (Minister of Justice Canada 1993: 7). Although these proposals were not in direct response to the Westray disaster, they nonetheless signalled a growing recognition of the need for improved legal measures to hold corporations to account for their harmful acts.

Corporate criminal liability law reform gained additional momentum four years later, in 1997, with the release of the Westray Inquiry report, *The Westray Story: A Predictable Path to Disaster* (Richard 1997). The report characterized the tragedy as "foreseeable and preventable," cataloguing a range of workplace health and safety violations that led to the disaster (Glasbeek 2002: 62). The Inquiry Chair, Justice Peter K. Richard, saved particular rebuke for the mine's management and labour officials for failing to ensure that the mine's operations complied with provincial safety regulations (Richard 1997: 605). Of particular concern was that mine management, who were unqualified, ignored input from workers regarding the mine's working changes to criminal law to include corporate responsibility for "acts and omissions of corporate agents and employees where it appeared that the acts or omissions were tied to policy choices made by someone to whom important decision-making functions had been delegated" (LRCC 1976: 21-22, emphasis original).

Changes to the Criminal Code were recommended to reflect the "collective failure" of corporate representatives to exercise reasonable care. For offences requiring proof of intent, a corporation commits an offence when one or more of its representatives committed the offence and one or more of the corporation's representatives knew that the offence would or could take place, directed the offence to take place, either explicitly or implicitly, and had the requisite state of mind for committing the offence. For cases requiring proof of negligence, the Minister recommended that a corporation commits an offence when one or more of its representatives had the requisite authority to commit the offence or contribute to its occurrence, and the representative(s) failed to exercise reasonable care to prevent the offence from occurring (Minister of Justice Canada 1993: 6-7). A representative was defined broadly as "director, officer, employee, member or agent" (Minister of Justice Canada 1993: 7).

The report also suggests that Westray disaster was set in motion from the point that Curragh became interested in the Pictou coal project, which was based on significant government support as opposed to the "merits of the project itself (Richard 1997: 610). In particular, it was only because of the provincial government's support and commitment, which included pre-purchasing a set amount of coal at above-market prices, that the project was even able to take root (Richard 1997: 610).
conditions and failed to ensure that workers received proper training in mine safety and operations (Richard 1997: 611). As the report notes of the working culture that permeated the Westray mine,

the many instances of hazardous and illegal practices encouraged or condoned by Westray management demonstrate its failure to fulfill its legislated responsibility to provide a safe work environment for its workforce. Management avoided any safety ethic and apparently did so out of concern for production imperatives (Richard 1997: 612).

Even in situations that required obvious and immediate safety measures, such as neutralizing the excessive build-up of explosive coal dust through its removal or by the spreading of stone dust, management chose not to respond (Richard 1997: 617).

Justice Richard’s report contained seventy-four recommendations aimed at improving mine safety and preventing similar tragedies. In addition to outlining safety measures for all mining operations, including better safety training for workers, management and operators, the report called for improved internal and external regulation of the mining industry (Richard 1997: 631-632). However, since the inquiry was a provincial government initiative, and criminal law is federal jurisdiction, issues of corporate criminal liability were largely beyond its mandate (Richard 1997: 600-601). Nevertheless, building from outrage over the fact that the mine’s owners had not been held to legal account for what happened at Westray, the United Steelworkers of America (Steelworkers) pressed the matter with Justice Richard. As the union representing the Westray workers—the workers unionized shortly after the disaster—the Steelworkers had gained intervener status in the Inquiry’s proceedings (Comish 1993; Jobb 1994; Richard 1997).

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14 As noted in the introduction, a combination of prosecutorial mishaps and difficulties determining legal responsibility conspired to ensure that no one was held to criminal account (McMullen 2001: 136; McMullan, 2005: 30; Glasbeek 2002: 65).
The Steelworkers corporate criminal liability lobby efforts contained three elements. First, they pressed Justice Richard to recommend a criminal offence that would impose criminal liability on directors or other responsible corporate agents for failing to ensure that their corporation maintained an appropriate standard of occupational health and safety in the workplace. Second, they argued that the Inquiry should recommend an offence of corporate killing. Third, they pushed for additions to the *Occupational Health and Safety Act* that would broaden the liability of directors and officers for offences under the act. In recognition of the weakness in our system to hold corporate executives to legal account (Richard 1997: 600-601), and straying slightly beyond his mandate, Justice Richard recommended that the Government of Canada introduce corporate criminal liability provisions. Recommendation 73 of the report read as follows:

The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety (Richard 1997: 600-601).

The seeds of reform were laid; it was now up to the federal government to decide whether to heed Justice Richard’s advice. As we shall see, however, despite the Westray bill’s eventual enactment, there was little sense of urgency on the part of the federal government to introduce changes to the law.

### 2.4 The Westray Bill in Canada’s Parliament

Several overlapping and notable events in Canada’s Parliament preceded the enactment of corporate criminal liability legislation—the six years between the Westray Inquiry Report and
the Westray bill.\textsuperscript{15} First, in February 1999, two years after the Westray Inquiry report, the New Democratic Party (NDP) tabled the first of four Private Members’ bills aimed at holding corporations, directors and officers to account for unsafe working conditions.\textsuperscript{16} Second, in April 1999, Progressive Conservative (PC), Peter MacKay, the Member of Parliament (MP) for the riding in which the Westray disaster occurred, tabled a Private Members’ motion requesting that the government amend the \textit{Criminal Code} \textsuperscript{17} for other appropriate statutes to ensure that corporate executives and directors are held properly accountable for workplace safety.\textsuperscript{17} Third, in February 2002, Bill C-284, \textit{An Act to amend the Criminal Code (offences by corporations, directors and officers)}, the NDP’s third Private Members’ bill, reached second stage reading in the House of Commons and was subsequently withdrawn from the order paper and referred to the Standing Committee on Justice and Human Rights (Justice Committee) for its study and review (Hansard 19 February 2002: 17:55).\textsuperscript{18} Throughout spring 2002 the Justice Committee received briefs, heard testimony and asked questions of thirty-four witnesses representing a range of opinions about corporate criminal liability legislation. The Justice Committee’s final report, tabled on 10 June 2002, recommended that the federal government introduce corporate criminal liability legislation (House of Commons Standing Committee on Justice and Human

\textsuperscript{15} The main political parties in Canada’s Parliament at the time were the Liberal Party (the government, centrist in orientation), the Canadian Alliance (right-wing/conservative), the Progressive Conservatives (centre-right), the Bloc-Québécois (independence movement/centre-right), and the New Democratic Party (left-wing).

\textsuperscript{16} The NDP tabled Private Members’ bills on four occasions: February 5, 1999, October 21, 1999 and March 20, 2003 (tabled by Alexa McDonough) and February 26, 2001 (tabled by Bev Desjarlais).

\textsuperscript{17} The Parliament of Canada’s website notes that Private Members’ motions are used to introduce a wide range of issues and are framed either as orders or resolutions. Even if adopted by Members of the House of Commons, a motion is non-binding given that it is only stating its opinion or making a declaration of purpose (House of Commons Procedure Online: www.parl.gc.ca, accessed 20 March 2009).

\textsuperscript{18} Bills must pass through a number of stages in Canada’s Parliament before becoming law. Stage 1 is when a Member of Parliament (MP) introduces a bill in the House of Commons, usually offering a brief overview of the proposed legislation. Stage 2 provides MPs with an opportunity to discuss and debate the bill, the results of which may lead to amendments. Stage 2 also involves sending the bill to a Parliamentary Committee for study and to approve it or make modifications. At stage 3 the bill is returned to the House of Commons where MPs decide whether it should be passed. If passed, the bill is then sent to the Senate where it proceeds through a process that is similar to stages 1 and 2. Once a bill is passed in the Senate it receives Royal Assent and officially becomes an Act of Parliament (House of Commons Procedure Online: www.parl.gc.ca, accessed 20 March 2009).
Rights, Fifteenth Report, First Session, 37th Parliament). Finally, on 12 June 2003, in response to the Justice Committee\textsuperscript{a} work and in the face of continued pressure from the NDP to introduce corporate criminal liability legislation, the Minister of Justice Martin Couchon introduced Bill C-45, *An Act to amend the Criminal Code (criminal liability of organizations)* (Hansard 12 June 2003: 10:10).

These developments contribute to the empirical focus of the dissertation research and are discussed in further detail below. For the purpose of this chapter, discussion is limited mainly to a description of the different events and processes that preceded the Westray bill\textsuperscript{a} enactment in order to provide information about how the bill became law. The ways in which these activities helped characterize and animate the law are explored further in the chapters that follow.

*The New Democratic Party’s Private Members’ Bills*

The NDP was a key advocate in Canada’s Parliament for the introduction of corporate criminal liability legislation, tabling a series of Private Members\textsuperscript{a} bills aimed at holding corporations and corporate executives to legal account. The first two efforts (in 1999 and 2000) failed when the bills died on the order paper.\textsuperscript{19} However, when the House of Commons resumed in late January 2001, NDP MPs continued questioning the government about its intention to table new legislation (for example, see Pat Martin, New Democrat, Hansard 2 February 2001: 11:05). Soon thereafter, on 7 February 2001, New Democrat Alexa McDonough introduced *Bill C-418, An Act to Amend the Criminal Code (criminal liability of corporations, directors and officers)*. As with previous versions of the NDP\textsuperscript{a} legislation, the bill aimed to establish the criminal liability of corporations and of their executives and officers with respect to health and safety practices, of

\textsuperscript{19} All bills are considered to have died on the order paper when a session of Parliament is prorogued. For a bill to get back on the order paper (to be reconsidered), it must be reintroduced when Parliament resumes sitting (Parliament of Canada Online: www.parl.gc.ca, accessed: 20 March 2008).
which they were aware or should have been aware, that put their workers at risk (Hansard 7 February 2001: 15:05).

A little more than two weeks later, New Democrat Bev Desjarlais introduced Bill C-284, an act to amend the Criminal Code (offences by corporations, directors and officers), arguing that it was necessary to table a second Private Members' bill given that the government had yet to table its own legislation, despite promises otherwise (Hansard 26 February 2001: 15:10). On 20 September 2001, Desjarlais brought her bill forward for second-stage reading in the House of Commons and, as per normal Parliamentary procedure, to be referred to a Parliamentary Committee for study and review (Hansard 20 September 2001: 17:30). On 19 February 2002, in agreement with the governing Liberal Party, Bill C-284 was withdrawn from the order paper and referred to the Justice Committee (Hansard 19 February 2002: 17:55).

The NDP-sponsored Private Members' bills marked a significant departure from the common law identification doctrine. First, they proposed criminal offences for directors and officers when staff of a corporation committed an offence and corporate management knew or should have known of the act or omission or condoned or was wilfully blind to it. No longer would the directing mind test be the sole or primary means of proving management accountability. Second, the burden of proving that the act or omission was unauthorized or not tolerated was put to the corporation, not the Crown. Third, they would have criminalized the failure to provide safe working conditions. Fourth, they incorporated the concept of corporate culture, an initiative pioneered by the federal government of Australia in 1995, wherein senior

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20 Although both bills were virtually identical, Desjarlais' version provided for larger fines (Hansard 20 September 2001: 17:35). The difference was necessary because Parliamentary rules and procedures stipulate that a Private Members' bill can only be tabled by one MP at a time. Providing for different sentences therefore rendered the bills to be separate Private Members' initiatives.
21 Still unsure whether the government would introduce corporate criminal liability legislation, the NDP tabled one more version of their Private Members' bill on 20 March 2003 (Hansard 20 March 2003: 15:10).
management could be held criminally liable if a corporate culture allowed or encouraged law violation or facilitated law avoidance. The Australian legislation defined corporate culture as an "attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place" (Department of Justice Canada, March 2002). In addition to implying a collective responsibility for corporate crime, for allowing criminogenic conditions to become dominant (Department of Justice Canada, March 2002), the concept of corporate culture also signifies official recognition that in any profit-making business there is always ample motivation to justify or ignore unsafe working conditions. As we shall see, however, the government's legislation differed significantly, the reasons for which constitute an important focus of this dissertation.

The Progressive Conservative Party's Private Members' Motion

Around the same time the NDP tabled its first Private Members' bill, the PC Party launched its own corporate criminal liability initiative in the House of Commons. On 23 April 1999, PC Peter MacKay tabled a Private Members' motion requesting that the federal government respond to the Westray Inquiry report by amending the Criminal Code for other appropriate statutes to ensure that corporate executives and directors are held properly accountable for workplace safety (Hansard 23 April 1999: 12:15). MacKay's motion read as follows,

that in the opinion of the House, the Criminal Code or other appropriate federal statutes should be amended in accordance with recommendation 73 of the Province of Nova Scotia’s public inquiry into the Westray disaster, specifically with the goal of ensuring that corporate executives and directors are held properly accountable for workplace safety (Justice Committee 6 June 2000: 10:12).
The motion was debated in the House of Commons on a number of occasions, ultimately being voted on and accepted by MPs on 21 March 2000, and as a matter of Parliamentary procedure sent to the Justice Committee for its consideration.\(^{24}\)

On 6 June 2000 the Justice Committee met to examine MacKay’s motion. The meeting started with a presentation from MacKay, who noted the difficulty of lifting the corporate veil to hold directors and managers to account for workplace injury and death (Justice Committee 6 June 2000: 10:20). In reference to broad support for enacting corporate criminal liability law, MacKay cited a poll commissioned by the Steelworkers in which eight-five percent of Canadians surveyed favoured changes to the law to ensure that corporate executives are held to account for criminal wrongdoing (Justice Committee 6 June 2000: 10:25). MacKay also noted a suggestion from other MPs that his motion be merged with the NDP’s Private Members’ bill given that together they would provide a significant contribution to the legislative agenda (Justice Committee 6 June 2000: 10:30; 11:00).

Despite some questions and concerns regarding the concept of corporate criminal liability, the Justice Committee agreed with the motion and amended it to include reference to the NDP’s proposed legislation. The Justice Committee’s recommendation, which was tabled in the House of Commons the following day, stated, “the Minister of Justice and the Department of Justice bring forward proposed legislation in accordance with the said motion and the principles underlying ... [the first NDP’s bill] ... for consideration by the Standing Committee on Justice

\(^{24}\) For House of Commons debates concerning MacKay’s motion, see the following Hansard: 23 April 1999; 18 February 2000; 3 March 2000; 13 March 2000; 21 March 2000; 7 June 200; 5 October 2000. The Justice Committee did not hear from any witnesses during its consideration of the motion (the meeting lasted approximately 2.5 hours). However, representatives of the United Steelworkers of America, who were on Parliament Hill at the time lobbying for the introduction of corporate criminal liability legislation, spoke to the Committee near the end of the meeting. The comments they provided underscored the importance of introducing new legislation; however, they did not factor into the Committee’s discussion or vote concerning the motion (see Justice Committee 6 June 2000).
and Human Rights (Justice Committee 6 June 2000: 12:40; also see House of Commons Standing Committee on Justice and Human Rights, Fifth Report, 7 June 2000).

As per Parliamentary standing orders, the government had 150 days to respond to the Justice Committee’s recommendation, although the Committee encouraged the government to respond as quickly as possible (Justice Committee 6 June 2000: 11:35). However, by October 2000, just days before the end of the 150-day period, and with a federal election looming, the government had yet to respond. The government’s inaction prompted New Democrat Peter Mancini to request in the House of Commons to move concurrence on the Justice Committee report (Hansard 5 October 2000: 10:10). Mancini expressed concern that the bipartisan work by the Justice Committee would be lost if the House were to prorogue for an election, therein bringing the administration of justice into disrepute (Hansard 5 October 2000: 10:20). As Mancini argued in the House of Commons,

> [a]ccidents can happen as a matter of chance, but when they happen because a corporation has determined that the lives of its workers are not a factor in determining the balance sheet, then it is time for us to say that it is a crime. It is time for us to say that when a corporation knowingly determines to send men and women possibly to their deaths and it has the means to prevent that and does not, it is time for us to say that it is a crime. I rise today on this motion because we said that in the justice committee. We sent it to the minister and asked for a bill to be brought back that would make it a crime for those directors and corporations to kill their workers (Hansard 8 October 2000: 10:25).

Mancini’s move for concurrence was subsequently passed by MPs (Hansard 8 October 2000: 11:05). However, the House of Commons was soon thereafter dissolved for a federal election, leaving the Private Members’ motion and the Justice Committee’s report to die on the order paper.

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25 The 37th General Election was held on 27 November 2000. The Liberal Party was returned to power with 41 percent of the vote, equating to 57 percent of the seats in the House of Commons (for election results, see Elections Canada online: www.elections.ca. Accessed 20 February 2009).
The Standing Committee on Justice and Human Rights

As previously noted, Bill C-284, the NDP’s Private Members’ bill, was withdrawn at second stage reading and sent for study by the Justice Committee (Goetz 2003: 7). The Justice Committee began hearing from witnesses on 2 May 2002, tabling its final report on 10 June 2002. Thirty-four witnesses representing a range of viewpoints appeared before the Committee (see appendix A for a list of Justice Committee members at that time). Witnesses either requested an audience or were invited by the Committee to testify because of their particular expertise or personal connection with the issue at hand (for example, family members who lost loved ones at Westray, union representatives and legal experts).

The Justice Committee was expected to draw up a consensus-based report based on the conclusions of its work. However members could not agree on the appropriate model of corporate criminal liability to recommend. As a result, the report simply requested that, “the Government table in the House legislation to deal with the criminal liability of corporations, directors, and officers” (Fifteenth Report of the Standing Committee on Justice and Human Rights). 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 November 2002). The government agreed with the Justice Committee’s position

26 Committees are comprised of Members of the House or Senate (or both) who are asked by the House of Commons to study specific matters (e.g., proposed legislation). Committees typically have twelve members, the distribution of which is determined by each party’s distribution in the House of Commons. There are a variety of Committees in Canada’s Parliament (legislative, special, standing, joint, subcommittees, Committees of the Whole and the Liaison Committee). Standing committees are permanent committees that may study matters referred to it by special order or, within its area of responsibility in the Standing Orders, may undertake studies on its own initiative. Once a Committee has completed its work, they may issue a report with findings to the House of Commons (see, Parliament of Canada website: www2.parl.gc.ca, accessed 20 March 2009).

27 All sessions began with presentations from the witness(es), lasting approximately 10 minutes each, followed by comments and questions from Committee members. Witnesses could also provide written briefs for the Committee’s consideration.
that reforms were necessary in order to determine responsibility within modern, complex organizations (Department of Justice Canada, November 2002).

**The Introduction of Bill C-45**

It would be another year before corporate criminal liability law would progress further in Canada’s Parliament. On 10 June 2003, expressing increasing frustration with the government’s inaction, New Democrat MP, Bev Desjarlais, asked in the House of Commons when the government would finally table new legislation (Hansard 10 June 2003: 14:15). Two days later, the Minister of Justice, Martin Couchon, introduced Bill C-45, An Act to amend the Criminal Code (criminal liability of organizations) (Hansard 12 June 2003: 10:10). The following day Parliament recessed for the summer, retuning on 15 September 2003, at which time Bill C-45 was read for the second time in the House of Commons.

The House debated Bill C-45 at second reading on 15 and 20 September 2003. In launching the debate, the Parliamentary Secretary to the Minister of Justice and Attorney General, Paul Harold Macklin (Liberal), noted the unanimous consensus over the need for "fundamental reform" in this area.28 At the debate’s conclusion, MPs moved to refer the legislation to the Justice Committee, as per Parliamentary procedures. The Justice Committee met only on one occasion (22 October 2003) to examine the bill, tabling its report in the House of Commons the following day, with minor amendments to the bill (Hansard 23 October 2003: 10:50).

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28 The government also had recently introduced changes to the Canada Labour Code, which strengthened the role of workplace health and safety committees, established the right to know about workplace hazards and the right to refuse unsafe working conditions (Hansard 15 September 2003: 13:35-13:40). The Canada Labour Code only applies to federal government employees, which constitutes approximately 10 percent of the Canadian workforce.
Bill C-45 was returned to the House of Commons for further consideration on 27 October 2003. Liberal MP Paul Harold Macklin once again spoke of the broad-based, non-partisan support for legislation, and added that its mere introduction had already encouraged many organizations to re-think their health and safety strategies. As Macklin argued,

I understand that officials of the Department of Justice have met with the Canadian Chamber of Commerce and with the occupational health and safety committee of the Canadian Manufacturers and Exporters to explain the potential impact of Bill C-45. They have also participated in a panel on Bill C-45 and the implications of proposed amendments to the Criminal Code as part of the Health and Safety Law Conference 2003 held in Toronto. All members should be encouraged by these signs that corporations and other organizations are considering their policies in the light of this new duty (Hansard 27 October 2003: 17:25).

New Democrat Alexa McDonough noted the hard work and dedication of the Steelworkers in pushing for the law’s enactment. As she submitted, the union “... poured their heart and soul, blood and guts into pressing for the kind of changes in law, the changes in health and safety practices in Nova Scotia and across the country, that would ensure never again would there be an occurrence permitted in this country such as what happened at Westray” (Hansard 27 October 2003: 17:45).

Bill C-45 was then read for the third time, passed, and then sent to the Senate, where it was read for the first time on 27 October 2003 and passed after the third reading on 30 October 2003. Senate members generally supported the legislation and wanted it passed as expeditiously as possible (Senate Committee Hansard 29 October 2003: passim). As per Senate procedures, the bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs for its consideration (Senate Committee Hansard 29 October 2003: 16:50). The Senate Committee heard only from representatives of the Department of Justice Canada, who provided members with an overview of the legislation. Donald Piragoff, Senior General Council with the Department of Justice, noted the difficulties of establishing mens rea and actus reus in the
context of a corporation, as well as the general difficulty of reforming the criminal law. As Piragoff stated, '[i]t is always difficult to make changes in the criminal law. The stakes are very high, and many will fear that the changes will expose them to the stigma of a criminal conviction for actions that were legitimate under the existing Criminal Code’ (Senate Committee Hansard 30 October 2003: 16:50). After further discussion, the Senate Committee moved directly to a clause-by-clause consideration of the bill. Although some members expressed concern that they had not followed normal procedure and heard evidence from witnesses, the decision was made to proceed based on assurances from the Department of Justice representatives that they had consulted various stakeholders and that any of their concerns had been addressed in the bill (Senate Committee 30 October 2003: 16:69-16:72). The Senate Committee therefore adopted Bill C-45 without amendment (Senate Committee Hansard 30 October 2003: 16:72).

**Bill C-45: The Final Steps**

After following a protracted and circuitous route through Canada’s Parliament, the Westray bill received Royal Assent on 7 November 2003. The new law differs from the NDPs proposed legislation in several significant ways. First, it substitutes organizations for corporations, defining the organization as a “public body, body corporate, society, company, firm, partnership, trade union or municipality” (Department of Justice Canada 2003: 4). This substitution paves the way for charges against trade unions, charitable organizations or NGOs. As Archibald et al. (2004: 375) state: “the explicit reference to [these bodies] in this legislation sends a green light to policing bodies and private complainants that they may now become potential targets.”

Second, it shies away from corporate culture in favour of individual liability, better reflecting the individualistic aspects of the common law directing mind standard. In comparison
to the NDP’s corporate culture approach, the Westray bill affixes culpability on the senior
doctor, defined as individual(s) who have important roles setting policy or managing an
important part of the organization’s activities. It also introduces the concept of representative,
which refers to a director, partner, employee, member, agent or contractor (Criminal Code, s.2;
also see, Department of Justice Canada 2003: 5). Although these definitions widen the scope of
the law and increase its flexibility — prosecutors can go beyond a particular job title to establish
corporate criminal liability (Archibald et al. 2004: 368) — it remains focused on establishing
individual fault.

Third, the Westray bill creates different methods for holding organizations criminally
accountable. For offences based on negligence, an organization can be found guilty if the Crown
can prove that employees of the organization committed the act and that a senior officer
should have taken reasonable steps to prevent them from doing so (Department of Justice
Canada 2003: 6). What is essential is that the senior officer must have departed markedly from
standards that could reasonably be expected to be followed to prevent the employee from
committing the offence (Criminal Code, s.22.1; Archibald et al. 2004: 385). For subjective intent
offences — offences requiring intent, knowledge or proof of fault — there must be evidence that
the harmful actions of senior officers somehow benefited the organization (Criminal Code,
s.22.2; Department of Justice Canada 2003: 70). A corporation can therefore be held accountable
for the actions of someone (namely, a senior officer) who is not necessarily the directing mind of
the corporation. While this is not pure vicarious liability (as it only applies to senior officers), it
borders on that principle (Archibald et al. 2004: 381).

The notion of vicarious liability is commonly associated with corporate criminal liability
standards in the United States. Under this doctrine, a corporation can be held criminally liable for
the acts of its officers, agents or servants who are acting within the scope of their employment and for the benefit of the corporation (Department of Justice Canada March 2002). Once mens rea is established, responsibility is imputed to the corporation itself (Department of Justice Canada, March 2002). For many commentators this minimizes the principle of mens rea by transferring the guilt of the individual too easily onto the company (Department of Justice Canada 2003: 5). The term senior officer represents a classic Canadian compromise—broader than the directing mind but narrower than vicarious liability.

Finally, the Westray bill provides a new sentencing regime for organizations. In addition to outlining factors for courts to consider during sentencing (issues such as moral blameworthiness, public interest and prospects of rehabilitation) (Criminal Code s.718.21; Department of Justice Canada, 2003: 9), it introduces fines of up to one hundred thousand dollars for summary conviction offences (Criminal Code s.735), (maximum fines for indictable offences already are unrestricted in the Criminal Code) and outlines probation orders for organizations—for example, restitution, new policies to prevent further offending, notification of the offence to the public, and any other reasonable condition that the court deems necessary (Criminal Code s.732.1; also see Archibald et al. 2004: 389-392; Department of Justice Canada 2003: 9).

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29 Another approach is specific legislation relating to corporate manslaughter. Recently enacted in the United Kingdom, the Corporate Manslaughter and Corporate Homicide Act 2007 Chapter 19 introduces the offence of corporate manslaughter (corporate homicide in Scotland) when senior management grossly departs from a duty of care owed to an individual, and that departure causes a person's death. In Canada, this approach has been criticized for creating a specific offence when laws already exist to deal with this type of behaviour, and for narrowly focusing on death only at the expense of workplace accidents (Department of Justice Canada, March 2002).

30 Individuals found guilty will be subject to penalties already prescribed by the Criminal Code.
2.5 The Westray Bill in Action

In the more than five years since the Westray bill became law there have been only two charges and one conviction. The first charge was laid on 19 April 2004. Domenico Fantini, a sixty-eight-year-old owner/supervisor of a small construction company was charged with one count of criminal negligence causing death after a trench collapsed at the site of a private house renovation, killing an employee, Ameth Garrido (Brown 2004; York Regional Police 26 August 2004). Mr. Fantini had been supervising Mr. Garrido, who was working in the trench when the ground gave way, crushing him to death (Saint-Cyr 2005). According to Ontario’s Occupational Health and Safety Act, the trench should have been properly sloped or shored to prevent the collapse. What is more, the homeowner, who worked in construction, had “specifically directed the defendant to slope the excavation of the trench at a 45 degree angle slope to prevent the collapse” (R. v. Fantini [2005] O.J. No. 2361: para. 20). Criminal charges against Mr. Fantini were eventually dropped when he agreed to plead guilty to provincial regulatory offences (Saint-Cyr 2005). He was fined $50,000 and ordered to pay a $10,000 victim surcharge (R. v. Fantini [2005] O.J. No. 2361; Keith 2005).

Reference to the Westray bill is also found in R. v. Ontario Power Generation [2006] O.J. No. 4659 (also see R. v. Tammadge [2006] O.J. No. 5103). Two Ontario Power Generation (OPG) employees were charged with criminal negligence causing death after two people were killed and seven seriously injured when the employees opened the sluice gates for a hydro dam at Barrett Chute (near Calabogie, Ontario), immediately flooding a spillway known to be frequented by swimmers. In a motion from the co-accused for a direct verdict of acquittal (which was dismissed), the judge noted that the law had changed “significantly” with the introduction of Bill C-45. Although the judge could not apply the new law retroactively, he nonetheless stated that its introduction meant that the corporation could now be held responsible for the aggregated results of the actions of its key officials and their delegates (R. v. Ontario Power Generation [2006] O.J. No. 4659 at para 6 and 7). The judge also noted that, although one of the accused could not be considered a “directing mind” of OPG under the identification doctrine, the situation would be different if Bill C-45 was in effect. As the judge stated, “[t]his case illustrates vividly why the law changed in 2003. Clearly the same result would not obtain today but I am bound to apply the law as it existed at the time of the incident (R. v. Ontario Power Generation [2006] O.J. No. 4659 at para. 36). The two accused were eventually acquitted of all charges when the judge ruled that their actions were not criminal, even if they were negligent in not taking all necessary steps to address the hazards associated with opening the sluice gates (R. v. Tammadge [2006] O.J. No. 5103).
The second charge, and only conviction, was laid against Transpavé, a manufacturer of concrete patio blocks, after a worker was crushed to death by a machine that stacks concrete stones onto wooden pallets (Edwards and Conlin 2006; Keith and Walsh 2008; Milan 2008). On 11 October 2005, Steve LÉcuyer, who was not performing his regular job and was acting as a replacement for an employee who was on break (Edwards and Conlin: 2006: 1), entered the machine's stacking area to remove a jam when he was grabbed by a mechanical arm and crushed (Hamilton 2008). An investigation by the Commission de la santé et de la sécurité du travail (CSST), the province's occupational health and safety authority, revealed that the machine's light curtain system, a safety device that stops the machine from operating when someone enters the stacking area, had been purposely disabled (Hamilton 2008; Edwards and Conlin 2006). The investigation also revealed that the company had not instituted appropriate training procedures and that they had not inspected the machine to ensure its proper functioning (Edwards and Conlin 2006: 1).

In December 2007, as part of a plea agreement between the Crown and defence lawyers, Transpavé pled guilty to criminal negligence causing death. The sentencing hearing took place on 17 March 2008, at which the judge accepted the joint sentencing submission of the Crown and defence and ordered the company to pay a fine of $100,000, plus a $10,000 victim surcharge (Canadian HR Reporter 2008; Keith and Walsh 2008). Factors in the judge's decision included the company's size (he described it as a small, family run business, not a large multinational) and that they had spent more than $500,000 since the incident to improve workplace safety (Keith and Walsh 2008; Cherry 2008: A8; Emond Harnden 2008).\footnote{Also see R. c. Transpavé inc. [2008] J.Q. no 1857.}

The victim's family and union representatives were outraged with the plea bargain and punishment. LÉcuyer's mother expected the fine to be \( \text{in the millions} \) (Canadian Press 2008).
Newswire 2008) and that someone would be sent to prison (Cherry 2008: A8). The Quebec Federation of Labour (QFL), who had lobbied for criminal charges in the case (Edwards and Conlin 2006: 1), argued the Crown “botched the case” in describing the company’s health and safety record as “exemplary.” According to the QFL, health and safety had been an issue of concern at Transpavé for years (Daily Commercial News and Construction Record 2008). The President of the Canadian Labour Congress, Ken Georgetti, suggested that the ruling, “sends the wrong message to employers and corporations that nothing’s changed and they can still afford to put their workers’ lives at risk without any personal consequences” (Canadian Labour Congress 2008).

Meanwhile, in response to suggestions that the fine was insufficient, legal observers noted that occupational health and safety fines are typically much lower in Quebec than in other provinces, such as Ontario and Alberta (Millan 2008; Emond and Harnden 2008).

Neither case looks to be a precedent setting matter that will have corporate moguls quaking in their boots, much less usher in a new era of corporate criminal liability. First, both cases are hardly what critics had in mind when pointing to the limits of the identification doctrine in tracing the chain of responsibility throughout large and complex corporate structures (Cahill and Cahill 1999). On the contrary, the Fantini case involved a small, independent contractor (R. v. Fantini [2005] O.J. No. 2361), while Transpavé was a small family owned company with less than 100 employees (Conlin 2008). Second, given that Fantini pled guilty to provincial occupational health and safety offences, and Transpavé pled guilty to criminal negligence causing death, there is still little case law to indicate how and under what circumstances the courts will interpret the new law. As a result, the question remains whether these cases will ultimately be seen as harbingers or anomalies.
A Long and Protracted Route

As the preceding illustrates, the passing of the Westray bill was anything but expeditious. It took several iterations of the NDP’s Private Members’ bills, a Private Members’ Motion from the PC Party, Parliamentary Committee hearings and much political discussion and debate before the government introduced corporate criminal liability legislation. And despite political rhetoric about the importance of the new law, there have been only two charges and one conviction since it was introduced more than five years ago. This dissertation will delve further into the evolution of corporate criminal liability legislation in Canada, asking questions about the law’s constitution (including the factors that contributed to the final version of the legislation) and its potential for holding corporations to legal account for their wrongful acts. In this respect, it takes Cohen’s point seriously that a primary goal of socio-legal research should be the examination of law-making processes (Cohen 1996: 492), which, for the current research, includes relationships between the dominant conceptualizations of corporate crime and the resulting legislation introduced to respond to such harms. The next section outlines the methods and sources that will be used to interrogate the introduction of the Westray bill.

2.6 Research Methods and Sources

The purpose of the dissertation is to critically interrogate the constitution of Canada’s corporate criminal liability legislation. In undertaking this endeavour, it draws from the qualitative tradition of discourse analysis. Qualitative research involves the study of particular phenomenon to understand their meaning, to make sense of, or interpret, the object of study (Denzin and Lincoln 1994: 2-3). As Denzin and Lincoln (1994: 4) note, qualitative researchers stress the socially constructed nature of reality, the intimate relationship between the researcher and what
is studied, and the situational constraints that shape inquiry. This does not suggest that qualitative research speaks from one voice; on the contrary, there are multiple methods for collecting qualitative data (e.g., document analysis, interviews, direct observation), as well as a range of interpretive paradigms from which to conduct qualitative research. In this respect, whether the researcher is guided by perspectives from constructivism, feminism, Marxism or cultural studies (or a combination therein), the interpretation of qualitative research is based upon particular epistemological and ontological premises (Denzin and Lincoln 1994: 12-13).

The decision to employ discourse analysis stems from the goal of the dissertation to critically analyse the discourses that animated the introduction of the Westray bill, the ways in which they simultaneously sustain, legitimize and change (Fairclough et al. 2004: 2) the nature and scope of the law. As part of this I subscribe to the argument that one approach to data collection is intricately related to broader issues of theory and methodology to how we conceptualize the object of inquiry (Frauley and Pearce 2007). As such, the next chapter details the analytical lens that informs my approach to discourse analysis; one that draws from both Foucauldian and neo-Marxist perspectives. Foucault’s notion of discursive formations helps to determine the dominant voices that characterize corporate crime and corporate criminal liability the knowledge claims that are taken for granted, treated as natural, logical ways to describe corporate crime. Neo-Marxism (Althusser) helps to situate these discourses within their broader social-economic-political context. In this respect the research considers how discourse and discursive relations are inculcated in the capitalist mode of production, albeit in non-linear, unpredictable and often contradictory ways.

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33 It is almost impossible to speak of discourse analysis without reference to the work of Michel Foucault (Mills 1997: 10).
Discourse analysis grew from linguistic studies which examined the structure and meaning of sentences. Constrained by this narrow focus, discourse analysts branched out to explore how sentences form texts and the meaning that language has within larger units and structures which are implicitly recognized by speakers and hearers (Mills 1997: 135). As Fairclough (1992: 3) suggests, discourse analysis focuses upon high-level organizational properties of dialogue ... or of written texts. Beyond this, however, the concepts of discourse and discourse analysis have been subject to considerable discussion and debate, considered as vague and highly contestable terms (Fairclough, Graham, Lemke and Wodak 2004: 3; Mills 1997). Helping fuel the debate has been the variety of approaches to discourse analysis that researchers have used over the years (Fairclough 1992: 3), and that there is no blueprint for doing discourse analysis (Fairclough 1992: 225). As Fairclough (1992: 225) notes, people approach it in different ways according to the specific nature of the project, as well as their own views of discourse. For example, at the more quantitative end of the spectrum, discourse analysis involves content analysing documents based on a series of standardized measures. In comparison, researchers interested in semiotics, or the science of signs, will explore the symbolic systems (e.g., language or non-verbal signs) that constitute a particular phenomenon (Manning and Cullum-Swan 1994: 464-466).

Consistent with my theoretical and methodological understanding of corporate crime and corporate criminal liability (the full parameters of which are outlined in the next chapter), the methodological framework for the dissertation draws inspiration from a growing cadre of critical discourse scholars interested in the links between post-structuralism and neo-Marxism. In recent years, researchers interested in discourse analysis have started to explore more systematic and detailed methods of collecting and analysing discourse. As part of this transition they have turned to more developed frameworks, such as critical discourse analysis, conversation analysis and discursive psychology, to guide their work (Fairclough, Graham, Lemke and Wodak 2004: 3). In the process, discourse analysis has become an established field within social theory and research (Fairclough et al. 2004).
general, this involves examining language within its broader social context, or what McKenna (2004: 10) suggests is the intersection of language, discourse and social structure. For example, Fairclough, Jessop and Sayer (2002; see also Jessop 2004) put semiotic processes into context by interrogating how semiosis interacts within the social and material world. Of particular interest is the mutual implication of critical realism and semiosis, or how critical realism concern with the reproduction and transformation of social relations can benefit from the analysis of intersubjective production of meaning within critical discourse studies (Fairclough, Jessop and Sayer 2002: 2). As they argue:

semiosis—the making of meaning—is a crucial part of social life but it does not exhaust the latter. Thus, because texts are both socially-structuring and socially-structured, we must examine not only how texts generate meaning and thereby help to generate social structure but also how the production of meaning is itself constrained by emergent, non-semiotic features of social structure (Fairclough et al. 2002: 3-4; also see Jessop 2004: 163).

Semiosis informs the social structure in that certain discourses represent, or give meaning to, and therein maintain or transform, social phenomena. Certain discourses are retained, passing through different filters to become privileged ways of referring to, or representing, social phenomena. Vide Foucault (1972 [2001]), discourse and discursive formations provide the possibilities from which particular statements are made. As McKenna (2004: 14) suggests, this is the constructedness of discourse.

A key element of contextualizing discourse is determining what gives certain discourses their truthfulness or appropriateness. Particular discourses are privileged because of the

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35 The authors use semiosis in reference to language and discourse (Fairclough, Jessop and Sayer 2002).
36 The roots of critical discourse studies trace back to various strands of Marxism and neo-Marxist approaches, a tradition that concerned itself with the intersections between discourse and social structure. Over the past twenty years, this critical theory of discourse was thrown into disrepute by the Foucaultian revolution as well as feminist perspectives that questioned the Marxist understanding of power and commitment to structuralism (McKenna 2004: 10-11). Recently, however, there are indications that this hostility has run its course and that it is time to consider the complementary nature of Foucauldian poststructuralism with neo-Marxism (see, for example, Fairclough 1995, Fairclough, Jessop and Sayer 2002).
strategies that certain (powerful) agents or groups employ in the process of reproducing social relations. This should not be read as an automatic or determinative process — semiotic processes can both secure and militate against social reproduction but as an ongoing and fluid exchange of renewal and transformation (Fairclough, Jessop and Sayer 2002: 5-6). From this we can explore how discourse is imbricated in the (re)production of broader social relations, how discourse reconstructs and maintains relations of power in society (McKenna 2004: 15).

Contextualizing discourses of corporate crime and corporate criminal liability will help 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). In addition, by exploring how discourses work in conjunction with the extra-discursive, the dissertation will guard against rationalist or ideologist views of social relations that conceptualize discourse qua discourse, thereby ignoring the importance of extra-discursive factors (Fairclough, Jessop and Sayer 2002: 9). The goal is to eschew pure social constructionism which claims that individuals create social reality — they can will anything into existence — in favour of exploring the materiality of social relations and the constraints or limits of various social processes that operate behind the backs of the relevant agents (Jessop 2004: 161). In this respect, as Jessop (2004: 164) reminds us, it is important to consider the dialectic of discursivity and materiality in the (re)production of political economies.

Data Sources

The dissertation research relies on several key data sources to critically examine Canada’s corporate criminal liability law. The first information source includes approximately thirty-five
hours of Hansard documents, verbatim transcripts of various proceedings from Canada’s Parliament.\(^{37}\) The timeline of these documents range from discussion and debate regarding the first version of the NDP’s Private Members’ legislation tabled in February 1999 to the Westray bill’s Royal Assent in November 2003. They fall into two categories. The first category contains statements and debates regarding various iterations of the NDP’s Private Members’ bill, the PC’s Private Members’ motion and the government’s legislation, including questions posed to the government in the House of Commons (e.g., Question Period), statements from MPs on the anniversary of the Westray disaster and general comments concerning the importance of corporate criminal liability law reform. A total of thirty documents were located and examined, twelve of which included significant statements from, and exchanges between, MPs in the House of Commons and Senate. These exchanges produced approximately fourteen and one-half (14.5) hours of verbatim transcripts.\(^{38}\)

The second category includes verbatim transcripts from the Justice Committee’s study of corporate criminal liability. A total of ten meetings were held during the spring of 2002, during which the Committee received briefs, heard testimony and asked questions of thirty witnesses representing a range of opinions and positions. These witnesses included lawyers and legal experts, union representatives, sociologists, criminologists, family members of victims of corporate disasters and non-governmental organizations (see appendix B for a list of witnesses who appeared before the Justice Committee).\(^{39}\) The Justice Committee’s hearings produced

\(^{37}\) These documents were obtained from the Parliament of Canada’s website using key word searches of “corporate criminal liability,” “Bill C-45,” “Westray bill” and “Westray” (Parliament of Canada website: www.parl.gc.ca, accessed: 20 March 2008).

\(^{38}\) Although the remaining documents contained information relating to Bill C-45, particularly in determining the timelines of various events, they represented brief interventions only (e.g., short statements by a single MP) and therefore did not produce significant data for analysis.

\(^{39}\) The transcripts from these meetings were available on the Parliament of Canada’s website. www.parl.gc.ca (accessed 10 January 2006). Nine of the meetings were held from 2-30 May 2003, while the final meeting was held
approximately twenty-one and one-half (21.5) hours of verbatim transcripts. In addition, some
witnesses provided written submissions to the Committee in support of their appearance. These
documents also inform the dissertation.\textsuperscript{40}

The second information source includes the results of twenty-three (23) semi-structured
interviews. The goal of the interviews was to gain insight into the various ways that corporate
criminal liability was constituted throughout the reform process, the knowledge claims that
helped frame the Westray bill. Participants were purposively selected for their knowledge of
corporate criminal liability law reform and related issues.\textsuperscript{41} In addition to individuals who
appeared before the Justice Committee — the voices that helped constitute the law — interviews
were conducted with individuals familiar with the law’s introduction and enforcement. The list
of participants includes union and labour representatives, corporate and private sector lawyers,
legal academics, government employees, politicians, non-governmental organization workers
and private sector representatives (see Appendix C for a list of research participants).\textsuperscript{42}

The decision to employ a semi-structured interview format was based on the ability of
this technique to accommodate flexibility (Palys 1997). The interview schedule was designed to
address a range of opinions and issues relating to the Westray bill, including the factors that
helped constitute the law, the expectations that individuals had for the legislation and insights
about the law’s enforcement (see Appendix D for the interview schedule). Although the

\textsuperscript{40} Hard and electronic copies of these submissions were provided by the Clerk of the Justice Committee. A majority
of these documents represented the speaking notes that witnesses used in support of their appearance.

\textsuperscript{41} Participants were asked at the end of each interview for suggestions for additional interview participants. The goal
was to ensure that I interviewed a broad cross-section of individuals with a range of opinions.

\textsuperscript{42} Of the 27 people that I contacted to participate in this research, three declined. One labour representative had
retired and believed that he no longer understood the issues well enough to participate (he referred me to a
colleague). Another individual declined as the organization that he worked for was now defunct and he was not
comfortable speaking to the issue given his new work responsibilities. An academic agreed to participate, but
scheduling conflicts made it difficult to conduct the interview (I eventually interviewed another academic instead).
In addition, I also had some difficulties finding individuals from the private sector who were willing to participate in
the research. This issue is discussed further in Chapter 6.
interviews covered as many of the interview questions as possible, situations arose in which an individual’s insights lent themselves to a particular aspect of the reform process (for example, some best understood the politics of reform, while others were more comfortable speaking to issues of law or the challenges of enforcing the Westray bill). In these situations it was prudent to omit particular questions from the interview schedule. A semi-structured format also allowed participants some flexibility to raise issues and questions that they believed were germane to the discussion. This provided for unanticipated questions and lines of inquiry, a process that was relevant for uncovering the marginalized voices that were not included in mainstream discussions of corporate criminal liability law reform.

The interviews were conducted from early September to mid-December 2008. The average interview length was one hour and the median length was fifty-seven minutes. The longest interview lasted almost ninety minutes, while the shortest was just over thirty minutes. In all but two cases respondents agreed to have the interviews audio-recorded. For the unrecorded interviews, extensive notes were taken both during and immediately following the interviews to ensure the greatest possible accuracy of the information collected. For recorded interviews, notes were taken during the interviews (for backup purposes) and a majority of each interview was transcribed from the audio recording as soon as possible afterwards. These recordings produced approximately 136 single-spaced pages of transcription.

The third information source includes Internet searchers to glean additional details regarding the Westray bill. The Internet was useful for tracking any charges and convictions

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43 One interview, with a private sector representative, was conducted in March 2009.
44 The two shortest interviews lasted 31 and 33 minutes, respectively (an academic and a corporate lawyer). In both cases the respondents had limited time due to previous commitments.
45 For each interview I transcribed verbatim any information that was directly related to the dissertation research. For information that was tangentially related, such as background information about the individual, I noted the time of the discussion on the tape and the topic(s) that were being discussed. After the interviews were completed I reviewed the notes from all recordings to determine if any of the non-transcribed information presented unanticipated lines of inquiry.
following the law’s introduction, a strategy made necessary by the fact that no government body is responsible for this task. In addition, the Internet provided an opportunity to explore some of the reaction to the Westray bill, including education and training programs in relation to the new law. For example, in March 2009, a Google Internet search of the terms “Bill C-45” and “Westray bill” (the two most commonly used terms to refer to Canada’s corporate criminal liability legislation) yielded 12,500 and 1,100 hits, respectively. The majority of these sites offered general information on the law and its implications for employers and employees, and originated from law firms, occupational health and safety consultants, unions and labour groups, industry associations and online magazines. Although this does not constitute an overwhelming volume of Internet activity, it is nevertheless significant given the Westray bill’s virtual non-enforcement.

*Data Analysis*

Analysing the resulting information pool involved taking detailed notes to determine the main issues and themes from each source, as well as to compare and contrast information across the different data elements. For example, I read through both sets of Parliamentary transcripts several times, taking notes of the main issues and themes, including the dominant discourses and any dissenting voices (i.e., counter perspectives). A similar process was followed in relation to the interview transcripts. I then compared and contrasted the findings from the different information sources. In addition to helping establish the main research findings, this process allowed me to ensure that there were no biases within any particular data source. The overall

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46 The term “hit” is used here to indicate either a webpage or a document from a particular webpage that includes reference to “Bill C-45” or the “Westray bill.”
goal was to better understand the various discourses that helped constitute the Westray bill, the interpretation of which was aided by my methodological and theoretical framework.

2.7 Chapter Summary

This chapter provided details regarding the introduction of Canada’s corporate liability legislation, including the methods and sources that will be used to critically examine this legal development. Part one sketched-out the evolution of corporate criminal liability. Of particular note was that the emergence of the corporate form, with its limited liability and profit-making mentality, necessitated the introduction of laws to hold corporations accountable for their harmful acts (Slapper and Tombs 1999). As Glasbeek (2002: 142 ï emphasis original) suggests, the modern corporation is ïlegally constructed so as to become a site of irresponsibility and, thereby, criminogenic... Part one also provided background information concerning the introduction of the Westray bill ï the object of inquiry for the dissertation. Despite the blatant negligence associated with the Westray disaster, and regardless of persistent calls for the introduction of corporate criminal liability legislation, the Westray bill had to follow a protracted and circuitous route through Canada’s Parliament to become law. In addition, there have been only two charges and one conviction since the federal government introduced this legislation more than five years ago.

Part two detailed the methods and sources that the dissertation research will use to interrogate the introduction of Canada’s corporate criminal liability legislation. Drawing from critical discourse studies (for example, Fairclough, Jessop and Sayer 2002; Jessop 2004), the goal is to situate the dominant discourses that helped animate the Westray bill ï the language that shaped the law’s nature and scope ï within their broader social-political-economic context.
Doing so will help illuminate the extra-discursive factors that inform the selection and retention of particular discourses and how these discourses help stabilize, reproduce and transform the capitalist social formation (Jessop 2004: 159). The dissertation draws from a diverse information pool to help achieve this objective. In addition to verbatim transcripts from Canada’s Parliament, this includes the results of twenty-three semi-structured interviews, as well as Internet-based information regarding the Westray bill.

The next chapter situates the dissertation within the corporate crime literature, as well as outlines the empirical and theoretical influences that inform the research. As we shall see, my approach to discourse analysis is grounded in the theoretical integration of Foucauldian and neo-Marxist perspectives.
Chapter 3: Reviewing the Literature and Establishing Theoretical Influences

One measure of the growing ideological and structural influence of the dominant corporation is that when corporate actors commit crimes they are rarely charged; if charged, they are rarely convicted; and if convicted they are rarely punished severely (Harry Glasbeek 2002: 118).

In our view, capitalism as a class structure is itself a moral and ethical outrage. Beyond that it contributes to a host of social ills (inequality of wealth, political power, health, ecological sustainability, and access to culture) (Stephen Resnick and Richard Wolff 2006: 4).

3.1 Introduction

There has been much written in recent decades about the immense, virtually inconceivable, social and economic harm caused by corporations (see Friedrichs 2010; Glasbeek 2002; Snider 1993). The recent and massive corporate frauds of companies like Enron, Worldcom and Parmalat (Tillman and Indergaard 2005), the deadly chemical explosion in Bhopal, India that killed ŕat least 1700 and as many as 10,000 people ŕ immediately after the disaster (Pearce and Tombs 1998: 197) and the foreseeable and preventable killing of twenty-six miners at the Westray mine (Glasbeek 2002; Richard 1997) are just a few tragic reminders of the damaging effects of corporate wrongdoing. And although a significant number of these harms contain a criminal element (Slapper and Tombs 1999), they are rarely treated as such (Glasbeek 2002: 118), effectively ignored by those in position of authority, dealt with outside of the formal criminal justice system (Carson 1994) and defined away as mere accidents or the necessary by-product of capital ŕ march to success (Snider 2008). As Carson (1994: 41) notes in his examination of early corporate crime-related legislation,

[p]roscribed by law, it is often substantially tolerated in practice, although commentators never tire of pointing to the extremely high social price which it exacts. While it is statutorily defined as crime, moreover, it is frequently dealt with through administrative agencies that are discontinuous in origin and far from the normal machinery of criminal justice.
What is more, as both a concept and in law (Snider 1998; 2008), the priority accorded corporate crime, harm and wrongdoing pales in comparison to the long-standing preoccupation with traditional street crimes.

Slapper and Tombs suggest that the invisibility of corporate crime in law and order-speak—what Box (1983: 16) refers to as a "collective ignorance"—has its roots in a series of mutually reinforcing social and economic ideologies that reproduce dominant notions of crime and disorder (Slapper and Tombs 1999: 85-108). An important element of this equation is academic studies of crime and deviance; examinations that fixate on the transgressions of individuals, helping fuel the belief that what constitutes 'real' crime is the street-level criminal activity that is reflected in the priorities of contemporary law and its enforcement. As Foucault (1977: 254) notes, the study of crime provides these acts with an ontological reality: 'the act scientifically qua offence and above all the individual qua delinquent.' This does not suggest that corporate crime is totally absent from the academic agenda—as we shall see there is an established tradition of exposing crimes by the privileged and powerful (Friederichs 1992: 6; as cited in Pearce and Tombs 1998: 83)—but that it has, at best, occupied a marginal position within crime and deviance research. How we study (or do not study) corporate crime matters; it shapes how we understand and respond to such acts, both in law and as a social priority.

This chapter situates the dissertation within the corporate crime literature, as well as outlines the empirical and theoretical influences that inform the research. Part one considers how traditional studies of crime and deviance have glossed over the corporate criminal in favour of individualistic accounts of crime and disorder. Part two examines the scholarship that has attempted to overcome this myopic view of crime by defining and researching corporate crime. It
also considers some key debates within the corporate crime literature, including those regarding the *proper* way to regulate the corporation.\(^1\)

Part three builds from the corporate crime scholarship to outline the main theoretical bases of the dissertation. The influence here is from the corporate crime scholarship with its roots in critical socio-legal studies (for example, Pearce and Tombs 1998; Slapper and Tombs 1999; Snider 1993 and 2000; Tombs and Whyte 2007). Of particular interest is how this literature transcends traditional criminological and sociology of deviance literatures with their attendant focus on individualistic and positivistic accounts of crime to situate the constitution of corporate crime within its broader social, political and economic context. With this literature as its reference point, the dissertation draws theoretical inspiration from Foucauldian and political economy studies to interrogate the constitution of corporate criminal liability.

### 3.2 Excluding the Corporate Criminal

Before delving into the corporate crime scholarship, it is important to situate this body of work within broader examinations of crime and deviance. Although it is beyond the scope of this dissertation to examine the complete range of academic studies within the disciplines of criminology and sociology of deviance, some of their general contours are outlined herein to highlight two issues. First, contemporary examinations of crime and deviance are "bound up with modernity" (Sumner 1994: 3). Although modern culture shapes how we understand and respond to crime and deviance, these dominant conceptualizations also shape the world in which we live (Sumner, 1994: 3-4; also see, Foucault 1977). As Sumner (1994: x) argues,

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\(^1\) There also is a range of literature that is beyond this dissertation which theorizes about the causes of corporate malfeasance (for a summary of these see Snider 1993: 59-87). Snider (1993) outlines the various theories that attempt to explain the causes of corporate crime, including social-psychological, organizational and macro-level perspectives.
... in the social sciences, the world we study changes, partly because of the knowledge we provide about it and because of our scientific interventions within its politics; and that, in turn, transforms the way we look at the world. In our case, that is certainly what has happened. We have changed the world that gave rise to the sociology of deviance and those changes have altered the way we look at the old world. The sociology of deviance no longer expresses our vision in the very new world ... In that sense, it is dead. Its voice cannot speak.

In this respect there are important links between the broader social context and the criminological and sociology of deviance literatures, a relationship that has produced a historical preoccupation with the individual transgressions of traditional street criminals (Reiman 2004; Sumner 1994; Tombs and Whyte 2007).

A second and related point is that criminology and the sociology of deviance have been, and continue to be, relatively inhospitable to studies of corporate crime (Tombs and Whyte 2007) and more generally to crimes of the powerful (Pearce 1976). As Liazos (1972) suggested more than thirty-five years ago, the dominant trajectory of most crime and deviance studies has been the sociology of nuts, sluts and perverts, a comment that still applies aptly today. From this perspective crime and deviance are ideological constructs, void of any essence beyond their socially defined parameters. Deviance, as Sumner (1994: 229) suggests, is a series of normative divides or ideological cuts, cuts made in social practice and the dominant cuts in our society are those made by the rich, powerful and authoritative. Accordingly, corporate crime scholarship remains a significant blind spot (Sumner 1994: 310) for many criminologists and sociology of deviance scholars.

The Roots of Criminology and the Sociology of Deviance

Perspectives of deviance trace back to the demonic ages when deviance was equated with sin, and those who committed sins were either tempted by evil or possessed (Pfohl 1985: 20-21).
Systematic examinations of crime and deviance first emerged through the classical school, most notably Cesare Beccaria (1764) and Jeremy Bentham (1769), for whom crime was a problem of hedonism, a rational choice by individuals who wanted to maximize pleasure and minimize pain (cf. Pfhol 1985: 49). Later, Cesare Lombroso (1876) argued that criminals were evolutionary throwbacks—atavic, born criminals (cf. Pfhol 1985: 85). As Tombs and Whyte (2007: 198) note, various forms of individual positivism that emerged after the heyday of the eighteenth- and nineteenth-century classicist theories sought to identify the abnormalities that either propelled individuals into crime, or ensured that they were more predisposed to committing crime than the general population. Crime's aetiology resided in the individual, causing certain people to stray beyond socially ascribed norms. Crime was a disease-like problem, and it needed a cure (Morrison 1997: 9).

Alternative perspectives regarding the causes and consequences of crime and deviance gradually developed alongside of, and in response to, classical accounts. For example, the sociology of deviance, with ties to the work of Durkheim (1966), first emerged during the twentieth century as a liberal version of criminology (Sumner 1994: 301). Although Durkheim did not set out to create the sociology of deviance, nor did he explicitly address this subject, his work provided the conceptual framework for future deviance scholars to ply their trade. In particular, he argued that a certain amount of crime—individual differentiation—was a normal part of society and that the degree of censure was determined by the social conscience (Durkheim 1966: 70; also see Sumner 1994: 16-17). Laws were an expression of the moral majority, a dividing line between acceptable and unacceptable behaviour (Burtch and Arnold 1991: 261). In North America, Durkheim's ideas flourished within a political-intellectual context concerned with what to do about the socially inadequate (Sumner 1994: 38-39).
Although the advent of the sociology of deviance shifted discussion of the causes of crime from the individual to the social, the focus remained individualistic in that it was centred on the impact of the social environment for the individual (Burtch and Arnold 1991; Pfhol 1985: passim). In this regard, if criminology was guilty of individual positivism, then the sociology of deviance was guilty of sociological positivism (Tombs and Whyte 2007: 198). For example, researchers from the Chicago School, including Park, Mead and Shaw and McKay, argued that the amount of crime in a community was dependent upon the level of social integration (cf. Sumner 1994: 42). In essence, criminals were ‘normal’ people who responded to difficult environments in socially unacceptable ways (Sumner 1994: 43). Whether it was Merton’s (1938) strain theory that lower class individuals turned to crime out of frustration with their inability to realize legitimate social goals, Sutherland’s (1939) theory of differential association that crime was a learned behaviour, or Hirschi’s control theory that crime resulted from loose bonds between an individual and his or her social groups (e.g. family, school peer groups), criminals were a product of criminogenic contexts (for a discussion of this, see Sumner 1994: 41-50; also see Morrison 1997). Crime was treated as a ‘normal’ and empirically identifiable fact within society, and, consequently, law reflected the will of the moral majority (Morrison 1997: 139). Implicitly accepted within this body of work were official definitions of crime and deviance (Pfhol 1985: 275), definitions that pertained to crimes of the powerless (street crimes), not the powerful (corporate crimes).

**Contemporary Manifestations**

It is beyond the dissertation research to catalogue the vast literature that has followed the path laid down by traditional criminological and sociology of deviance scholars. However, we can
consider the dominant paradigm to which they have adhered; one that has reinforced the idea that crime is an individualistic problem. For example, for more than fifty years control theorists have examined the factors associated with the decision to commit criminal and deviant acts. Tittle’s control balance theory (Tittle 1995; 1997 and 2004; also Latimore, Tittle and Grasmick 2006) asserts that the decision to commit crime is a reflection of an individual’s ability to obtain cognitive balance and control the factors that potentially propels them into crime. Individuals with strong control balance are best equipped to resist the temptations of crime, while those with weak control balance (e.g. poor internal constraints influenced by strong external motivations to be deviant) are less likely to conform (Tittle 2004: 397).

Agnew employs similar reasoning through his use of general strain theory (GST) (Agnew 1992; 2006; Froggio and Agnew 2007). GST purports that individuals who experience certain strains or stressors are more likely to engage in crime. Strains that produce negative events are conducive to committing crime – crime as a possible response to particular stressful events (Froggio and Agnew 2007: 81). Whether or not these strains lead to crime depends upon a range of factors that include the strain’s magnitude and the individual’s level of social control (Froggio and Agnew 2007: 82).

A life-course approach to crime and deviance contains similar causal inferences (Sampson and Laub 2005a, 2005b; Sampson, Laub and Wimer 2006). Building from Hirschi’s (1969) control theory, Sampson and Laub (1993 and 2005b) consider the factors that contribute to persistence and desistance in offending. A key factor is that, crime is more likely to occur

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2 Potential strains include parental sanctions that are harsh, erratic, and/or unfair; child abuse; parental rejection; low grades; poor relations with teachers; peer abuse; marital problems; chronic unemployment; work in the secondary labor market; criminal victimization; homelessness; and experiences with prejudice and discrimination (Froggio and Agnew 2007: 82; also see Agnew 2001, 2006).

3 Subjective strains (i.e., how the individual interprets the event) are more important in the process of acting out through crime than objective strains (i.e., strains defined as problematic by a group of people) (Froggio and Agnew 2007: 86).
when an individual’s bond to society is attenuated (Sampson and Laub 2005b: 15). Regardless that all offenders desist with age, certain variables, including individual agency and strong social supports (e.g. marriage and employment), promote desistance (Sampson and Laub 2005a: 42-43). In a longitudinal study of high-risk boys, for example, Sampson, Laub and Wimer (2006) found that those who married significantly reduced their probability of committing crime. According to the authors (2006: 498), with its positive social supports (e.g., positive reinforcement, family commitments and structured routines), marriage helps to separate many disadvantaged men from their criminal past.

A similar trend is also revealed in Karen Heimer’s (1996; De Coster and Heimer 2001) use of symbolic interactionism to study role taking as it relates to crime and deviance. Interactionism purports that individuals will adopt particular roles (including criminal or rule violating roles) through significant social relationships. In essence, an individual makes sense of who they are and their role in society by referring to significant others and reference groups (De Coster and Heimer 2001: 802-803). In one study, Heimer examines gender differences in the process leading to juvenile delinquency. The author found that both boys and girls become delinquent through peer associations, group commitments and social location, which shape an individual’s attitudes towards crime and deviance, both positively and negatively. Girls and boys differentially acquire and internalize gender roles, which accounts for lower delinquency among girls than boys (Heimer 1996: 56; also see De Coster and Heimer 2001).

Finally, recent research that incorporates victimization issues also shares an individualized perspective of crime and deviance. Miethe and Meier (1990, 1994) develop an integrated approach to crime that attends to offenders (why they commit crime), victims (why some people are victimized) and the context within which crimes occur. They bring together
considerations of "offenders, victims and situations" (Miethe and Meier 1994: 1) to explore the relationship between the motivations of offenders and the "availability of attractive targets" (Miethe and Meier 1994: 5; 1990: 245). As the authors argue, a complete explanation of criminal events requires attention to offenders, victims, and the social context that brings them together (Miethe and Meier 1994: 63). Using various data sources (e.g. official crime statistics, victimization surveys, telephone surveys) (Miethe and Meier 1994: 73), the authors conclude that, although some individuals have criminal motivations (e.g., they are impoverished, suffer anomie, have weak bonds or low self-control, they are exposed to an excess of pro-criminal definitions), whether or not they act upon them depends on their social context (e.g., whether there are suitable targets for victimization who are attractive, accessible, and lack guardianship) (Miethe and Meier 1994: 171).

From these examples we can see that, like their predecessors, the focus remains on crime as an individualistic problem. Of course it is a tricky venture to draw conclusions from such a cursory overview of the extant research, especially when it relates to such a broad and contested topic. Even this brief account of the dominant trends within criminology and the sociology of deviance reveal a wide-range of perspectives. In addition, beyond these dominant lines of inquiry there is a range of critical perspectives that have, in various ways, attempted to transcend individualistic accounts of crime. For example, the late 1960s and early 1970s witnessed the growth of conflict and Marxist challenges to dominant, consensus-based perspectives (see, for example, Taylor, Walton and Young's (1973) influential, The New Criminology). This critical scholarship continues to garner influence for many contemporary critical examinations (for

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4 In reference to social context, Miethe and Meier consider the "micro-environment," which includes the physical location of the crime (i.e. crime "hot spots"), the interpersonal relationship between offender and victim and the behavioral setting (e.g., home, school, work), and how it mediates the offender's motivation and the victim's characteristics (1994: 66-71).
example, Hillyard, Pantazis, Tombs and Gordon 2004; Taylor 1999; Tombs and Whyte 2003).

Equally important are the contributions of critical feminist (for example, see Adelberg and Currie 1993; Balfour and Comack 2006; Carlen 1985; Chesney-Lind 1978; Chunn and Lacombe 2000; Comack 1996; Heidensohn 1985; MacKinnon 1989; Smart 1976, 1989, 1995) and critical race scholars (for example, see Backhouse 1999; Monture-Okanee and Turpel 1992; Razack 2002). Foucault’s (1977, 1978 and 1979) work also has provided innumerable contributions to the study of crime and deviance, particularly his examinations of a disciplinary society (power as dispersed throughout the entire social body) and the relationship between knowledge and power (cf. Comack 1999: 62-63). As we shall see, this critical work has influenced some contemporary corporate crime research.

For the purpose of the current discussion it is noteworthy that the dominant trajectory within criminology and the sociology of deviance has been, and continues to be, traditional street crimes. As a result, corporate crime is a significant blind spot for many scholars working within these fields (Friedrichs 2010; Pearce and Tombs 1998; Slapper and Tombs 1999; Snider 1993). This does not suggest that the study of crime and deviance is without merit as left realists argue, we should not underestimate the serious material and psychological harm of traditional crime for society’s most marginalized people (Lowman and MacLean 1992). And it does not mean that these perspectives have no relevance for the study of corporate crime. For example, Braithwaite (1989) and Coleman (1987) have attempted to integrate mainstream criminological theories to explain the motivations and opportunities of corporate criminals. However, it does

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5 It is also important not to overstate the contributions of these critical alternatives. For example, while not underestimating the contributions of feminism and postmodernism, Woodiwiss (2007: 14) suggests that these literatures generally have eschewed social structural issues in favour of examinations of discourse and discursive formations that focus on the role of the individual in creating social life (2007: 114). Frauley (2007) critically explores this development within neo-Foucauldian inspired criminology.

6 Coleman’s (1987) integrated theory of corporate crime combines elements of interactionist theory with broader considerations of the culture of competition. Braithwaite (1989) argues that combining aspects of opportunity,
remind us of the ideological dominance of individualistic perspectives of crime and deviance. The ideological table has been set, and while corporate crime scholarship has not been left off the guest list, it certainly has been asked more often than not to sit at the kid’s table. It is against this backdrop that the next section examines some of the key aspects of the corporate crime literature.

3.3 Enter Corporate Crime

Despite the relative paucity of corporate crime scholarship, there is an important body of work that defines and studies this phenomenon. A range of terms have been used over the years to characterize crimes committed by corporations and their actors or representatives: white collar crime (Croall 1992; Sutherland 1940 and 1949), corporate crime (Braithwaite 1984; Pearce and Snider 1995), elite deviance (Simon and Eitzen 1986), crimes of the powerful (Pearce 1976), economic crimes (Edelhertz 1970), occupational crime (Green 1990) and safety crimes (Tombs and Whyte 2007) (cf. Slapper and Tombs 1999: 8-9; also see Tombs and Whyte 2007).

Corporate crime generally can be categorized two ways: financial corporate crime, or activities such as insider trading, fraudulent bookkeeping and price fixing; and social corporate crime, encompassing offences against the environment (air and water pollution) and occupational health and safety crimes (unsafe and dangerous working conditions) (Snider 1993). The dissertation deals with a subset of corporate crime, occupational safety, or what Tombs and Whyte (2007) refer to as safety crimes.7

7 Subcultural and control theories can explain why some corporate actors and corporations commit crimes, while others do not. This thesis research does not engage theories of causality, focusing instead on the production of corporate criminal liability law.

7 Tombs and Whyte (2007: 4) focus on safety rather than health, as the two concepts involve common, but many distinct issues. While the impact of occupational safety crime is often immediate (e.g. death resulting from a catastrophic event), health offences are more difficult to measure in that establishing causation is complex and unfold over a long period (e.g. cancers and other occupational diseases). This distinction is relevant to the thesis.
Edwin Sutherland is commonly credited with pioneering the definition of white-collar crime through a series of lectures and papers in the 1940s. Sutherland defined white-collar crime as a crime committed by a person of respectability and high social status in the course of his occupation (Sutherland 1983: 7, as quoted in Slapper and Tombs 1999: 3). His chief contribution was to challenge the dominant notion that crime was a distinctly lower class phenomenon; that in reality businessmen and professionals routinely committed serious harm and wrongdoing (Slapper and Tombs 1999: 3).

Paul Tappan (1947) argued that Sutherland was wrong to speak of criminals without a legal finding of guilt, underscored by the infrequent charges levelled against those within the business and professional ranks. For Tappan, speculations about crime in the absence of formal determinations of guilt represented mere normative or moralistic jockeying (Slapper and Tombs 1999: 5). Tappan also posited that there were fundamental differences between business crimes and criminal offences, a distinction that finds its contemporary manifestation in that most corporate wrongdoing falls within the category of regulatory as opposed to criminal offences. Tappan further argued that most of what Sutherland deemed to be white-collar crimes were simply part of normal business practice (Slapper and Tombs 1999: 6).

What Tappan failed to appreciate is how Sutherland revealed the ideologically-based distinction between criminal, civil and administrative laws, that there is nothing inherent about the behaviours captured within these respective legal categories to warrant their legal designation (Snider 1993: 15). And while Tappan correctly identified the difficulties of speculating too broadly beyond legal categorizations, some corporate actors accused of wrongdoing would not

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8 However, Slapper and Tombs (1999: 2-3) point out that the concept of corporate crime dates back to the work of Proudhon (1840), Marx and Engels, as well as Bonger's characterization of capitalism as criminogenic and Morris (1947) list of upperworld criminals.
be found guilty of a criminal offence beyond a reasonable doubt. This should not preclude questioning the dark figure of corporate crime, the offences that never come to the attention of authorities and are therefore never subjected to legal scrutiny (Slapper and Tombs 1999: 6).

Sutherland reminded us of the range of actions that potentially fall under the banner of white-collar or corporate crime, including acts of omission and commission, the different victims of these crimes, the factors contributing to the illegality and the ability of powerful members of society to resist legal detection (Slapper and Tombs 1999: 8; Snider 1993: 15).

Despite Sutherland’s important contributions, Slapper and Tombs (1999: 14-15) assert that his definition of white-collar crime anthropomorphizes the corporation (it conceives the corporation as resulting from the conscious intentions of individual actors), which concomitantly means that corporate crime is an individual act or choice to transgress the law. It thus fails to shed light upon the organizational and socio-economic factors that help to shape corporate crime, including why it occurs and how the state responds. According to Slapper and Tombs (1999: 17), the definition of corporate crime should transcend humanist terms to conceive it as a “structural problematic” (see also, Glasbeek 2002; McMullan 1993: 45). This does not suggest that individuals are without fault, but simply that structural factors such as the “pressures of profitability” influence actions (McMullan 1993: 45; see also Glasbeek 2002; Pearce and Tombs, 1998).

Recognizing the limits of Sutherland’s work, many critical scholars turned to definitions of corporate crime that account for the broader context. For example, writers such as McMullan (1992), Slapper and Tombs (1999), and Snider (1993) employ a definition that includes acts of omission and commission within the organizational context. The influence here is from Box (1983), who defined corporate crime as “illegal acts of omission or commission of an individual
or group of individuals in a legitimate formal organization, in accordance with the goals of that organization, which have serious physical or economic impact on employees, consumers the general public and other organizations (cf. Tombs 1995: 132). Building from this, Pearce and Tombs (1998: 107-110), incorporating the work of Box (1983), Kramer (1984), Clinard and Yeager (1980) and Schrager and Short (1978), define corporate crime as

Illegal acts or omissions, punishable by the state under administrative, civil or criminal law which are the result of the deliberate decision making or culpable negligence within a legitimate formal organization. These acts or omissions are based in legitimate, formal, business organizations, made in accordance with the normative goals, standard operating procedures, and/or cultural norms of the organization, and are intended to benefit the corporation itself (Tombs and Whyte 2007: 2).

There are several benefits that flow from this definition. First, it maintains Sutherland’s contribution that legal distinctions between administrative, criminal and civil law are conventional, time-bound social products without an intrinsic substantive meaning that transcends their social or historical contexts (Tombs and Whyte 2007: 3). Second, as Tombs (1995: 133) notes in analysing Box’s work, it challenges us to focus on acts that are prescribed by law so that we do not become trapped within an endless debate about moral blameworthiness. Third, by including both acts of omission and commission, it avoids having to determine a guilty mind to establish that a corporate crime has occurred. In addition to anthropomorphizing and individualizing corporate crime, the expectation of establishing actus rea and mens rea implies a simple causal link between an act or omission and its consequence (Tombs and Whyte 2007: 3). In the process it obscures the organizational production of corporate crime, the fragmentation, decentralization and contradictory goals within the modern corporation that foster the situations and conditions that are conducive to occupational health and safety offences (Tombs 1999: 14). As Tombs and Whyte (2007: 3) argue,
[corporate crime] can be produced by an organization’s structure, its culture, its unquestioned assumptions, its very modus operandi, and so on. Thus to understand such phenomena must not obscure human agency, but does require a shift from abstracted, atomized individuals to account for agency in the context of structures.

In terms of the dissertation, the literature regarding the definition of corporate crime reveals that there is nothing inherent about corporate crimes that dictate whether they are different from or similar to traditional criminal offences i.e., legal definitions of corporate crime do not unfold in a social vacuum (Tombs and Whyte 2007: 3; also see Lacey 1995). The decision to define most corporate offences as regulatory as opposed to criminal is an ideological one that does not necessarily reflect the seriousness of the acts. Further, definitions of corporate crime (including legal definitions) should be broad enough to transcend narrow, individualistic notions of corporate harm and wrongdoing. Simply put, they need to recognize that corporate crime is much more than simply about individual fault: that at its roots lays the pressure of profitability (McMullan 1992: 45).

Although these issues inform this dissertation, they are not used to debate the ‘proper’ definition of corporate crime. Instead, the goal is to examine the factors that contribute to dominant conceptualizations of corporate crime and their relationship to definitions of corporate criminal liability. In this respect, it follows Slapper and Tombs (1999: 12) advice that it is essential to consider aspects of law in the definition of corporate crime, the coverage and omissions of legal categories, the presence and absences within legal discourse, the social constructions of these categories and discourses, their underpinnings of treatment within and development through criminal justice systems. If the goal is to ensure that legislative responses to corporate crime effectively address the harms caused by these offences, then we need to better understand the many different and contradictory factors that shape law and its enforcement.
3.4 Regulating Corporate Crime

The constitution of corporate crime is intimately related to formal state responses to this phenomenon. Definitions that imply individual motivations relate well to traditional legal rules regarding individual guilt. Likewise, definitions that differentiate corporate offences from traditional offences are best suited to non-criminal or administrative responses (see Snider 1993: 8-15; Slapper and Tombs 1999: 3-16). How we conceptualize and define corporate crime matters; it shapes, but does not determine, how the state responds through law.

The history of corporate crime control is best described as a "bifurcated model of criminal process" (Tombs and Whyte 2007: 110). According to Tombs and Whyte (2007: 110), this contains two distinct, yet related, spheres: attempts to assimilate corporate deviance into traditional criminal law by amending the mainstream criminal process to respond to corporate offenders; and efforts to differentiate corporate deviance from traditional crime by responding to it through a separate regulatory framework. As the previous chapter outlined, the dissertation is concerned with attempts to assimilate corporate deviance into the realm of criminal law through the introduction of the Westray bill. However, in opposition to this development stands the dominant model of responding to corporate wrongdoing that differentiates it from traditional crimes (Tombs and Whyte 2007: 3). That is, corporate offences have been, and are, dealt with primarily within a regulatory framework, and more specifically within a compliance model of regulatory enforcement (Gray 2006: 13). In general, regulation involves state imposed limitation on the discretion that may be exercised by individuals or organizations, which is supported by the threat of sanction (Stone 1982: 11; as quoted in Simpson 2002: 80). It emphasizes the use of persuasion and education to ensure organizations comply with regulations,

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9 Mitnick (1980: 20) defines regulatory law as "the intentional restriction of a subject's choice of activity by an entity not directly party or involved in that activity" (as quoted in Snider 1990: 38).
such as occupational health and safety rules, relying on punishment only as a last resort (Simpson 2002: 93). Regulatory approaches stem from the belief that, on the whole, individuals are reasonable, of good faith, and motivated to heed advice (Braithwaite 1989: 131) that corporations and corporate actors are not criminal.

John Braithwaite’s work is commonly associated with this school of thought (Braithwaite 1982; 1985; 1989; Braithwaite and Fisse 1985; 1987; Ayres and Braithwaite 1992). Based on rational actor theory, Braithwaite’s pyramid of regulation advocates a persuasion first policy, or the idea that corporations should be provided with the opportunity to learn from their mistakes and take the necessary corrective action to avoid future offences. The purported benefits of this strategy include that it does not assume that all corporations are potential offenders, it reduces the defensiveness and resistance of corporations through education and persuasion and it does not assume that criminal law is the hallmark of a punitive approach (Braithwaite 1989: 132-133; for a summary, see Haines 1997: 11). Although Braithwaite does not abandon punishment strategies, he cautions against a criminal law-first approach, particularly since these rules are rarely enforced and fail to live up to their deterrence expectations (Braithwaite 1989: 150).

Regulating Health and Safety

Eric Tucker (1995: 245) characterizes three waves of occupational health and safety regulation: market regulation (1830-1880), weak command and control (1880-1970) and partial self-regulation (1970s) (also see, Simpson 2002: 80-82). The first wave was premised on the belief that workers and employers entered freely into contractual arrangements, and that any negotiation of the terms and conditions of employment, including safety measures, was to be decided between the two parties.Workers were assumed to understand and accept that certain
levels of risk were associated with the workplace (Tucker 1995: 246). The second wave
witnessed the introduction of government standards and regulations that attempted to
appropriately balance workplace risks. Although workers were provided with minimum safety
protections, the prevailing assumption was that a certain amount of risk remained and that
workers were only entitled to measures that were "reasonably practicable in the circumstances" (Tucker 1995: 246). In addition, Tucker (1995: 247) notes that, when it came time for inspectors
to enforce safety regulations, compliance was interpreted in ways that "did not significantly
impair profitability or interfere with managerial prerogative. They also relied primarily on
persuasion to achieve compliance. Prosecution was a last resort."

The third wave brought reforms intended to give workers legal rights to participate in
occupational health and safety decisions. In particular, changes were made to both internal
responsibility systems (IRS) and external responsibility systems (ERS). Internally, workers were
given rights to participate in decisions related to health and safety, most notably through joint
health and safety committees. Unfortunately, these efforts were constrained by organizational
issues (e.g. they were poorly organized) and more structural factors, such as the unequal
distribution of power between employers and workers (Tucker 1995: 256). In terms of external
systems, this period was characterized by weak and under-funded government enforcement
strategies and an approach based more on persuasion than enforcement (Tucker 1995: 262-263).

**Regulatory Dominance**

Several factors have contributed to the nature and scope of regulatory approaches to corporate
offences. For one, the assumption that the workplace includes an element of risk and employers

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10 Although unionized workers were better able to profit from joint health and safety committees, this benefit was
tempered by the fact that unions were simultaneously in rapid decline (Tucker 1995: 258; also see Glasbeek 2002).
and employees agree about what constitutes acceptable risk levels (Tucker 1995: 246). Added to this is the perception that corporate offences are different than traditional street crimes; that corporate offences are accidents while street offences are predatory and deliberate. Wells (1993: 6) characterizes occupational health and safety offences as inchoate in that they focus on attempts rather than results. The severity of safety crimes are thereby obscured though the language of regulation. As an example, Wells notes how workplace deaths are rarely referred to as homicides, but instead as incomplete acts or attempts, such as the failure to provide safe working conditions, thereby contributing to their reference as “accidents” (Wells 1993: 12). As Simpson (2002: 49) recognizes, “regulatory offences are not immoral in their own right but rather are illegal because they are prohibited by law.”

There is also a tradition of resistance from corporate owners and managers who argue that safety measures cost too much, interfere with management’s right to develop “effective” production strategies (which do not always equate to the safest production methods) and give workers and unions too much power and control over working conditions (Noble 1995: 268). This does not suggest that corporate owners have totally resisted legal reforms, but that, historically, they supported such efforts primarily in cases where it served their (economic) interests, where they did not unnecessarily impede “capital accumulation and profits” (McMullan 1992: 87). For example, laws restricting the length of the working day helped to ensure a rested and durable workforce and created a level playing field in terms of what companies were expected to do regarding occupational health and safety, thereby avoiding competition with businesses that were only too willing to take whatever advantage possible of workers (Snider 1993: 99-100). As Snider notes, “if all firms were forced by government fiat to behave ethically, not hire children, or provide safe environments, manufacturers would be able to be socially
responsible without suffering economically (1993: 100). In this respect, reforms rarely have been based on humanitarian or moral grounds, but instead related to economic interests of the corporate elite (Slapper and Tombs 1999: 159).

Legislative initiatives related to recent corporate scandals in the United States (Enron, WorldCom) provide further evidence of laws that benefit the corporate status quo by restoring confidence in the marketplace and ensuring that the “free market” continues to operate smoothly (Tombs and Whyte 2003: 11; for a discussion of reforms related to these scandals, see Rhode and Paton 2002-2003; Snider 2006; Tillman and Indergaard 2006). Tillman and Indergaard (2005: 246) note that, despite the United States government’s get tough on corporate crime message in the Sarbanes-Oxley act, there is little evidence of a significant increase in prosecutions. For them, the government is more concerned with “damage control” than they are with actual “crime control” (Tillman and Indergaard 2005: 251).

In the Canadian context, Snider (1993) provides two historical examples of how the corporate status quo resisted reforms aimed at regulating corporate activities. First, anti-combines legislation, introduced in Canada in the late 1800s, represented a growing concern with the ability of corporations to form mergers, thereby reducing the amount of competition and effectively monopolizing certain sectors of the market (Snider 1993: 100-101). Although the business community eventually accepted that some form of regulation was inevitable if not for the fact that anti-combines law contributed to a predictable market environment there was evidence of resistance by corporate elite at almost every legislative juncture. As Snider (1993: 103) notes,

> every time the Canadian government moved to make regulations effective and tighten control over the anticompetitive of fraudulent behaviours of business, it was flooded with submissions, oppositional briefs, and court challenges. Usually it
responded to business pressure by amending the act, watering down key reforms, or eliminating sections that business found offensive.

A similar pattern emerged following the introduction of occupational health and safety legislation during the same period. Ontario’s Factory Act, introduced in 1884, emerged in response to concerns amongst the increasingly vocal working-class with the lack of control in the workplace. It was not uncommon for workers to endure sixty-hour workweeks, poor wages and unsafe working conditions; regardless of gender and age (women and children were used as a source of cheap labour). Once again, the business community resisted reforms that were deemed to infringe too greatly upon their ability to generate profit (Snider 1993: 104-105). Although reforms were eventually implemented and improvements to working conditions realized, the reform process was anything but expeditious, with the close relationship between the political and business elite resulting in changes to laws that favoured the interests of business (Snider 1993: 105).

**Cooperation and Self-Regulation**

Since the early 1980s, the dominant response to corporate offending has been regulation based on a cooperative model. A self-regulatory approach has replaced state regulation, which was thought to be ineffective and overly intrusive (Snider 2001: 123). Fuelled by neo-liberal beliefs that the market was the most efficient means of dealing with corporate wrongdoing that reputation and market forces would prevent misdeeds (Tillman and Indergaard 2005: 15-16; also see Bakan 2004: 143) there was a gradual and pronounced erosion of formal rules of law and regulation (Tillman and Indergaard 2005: 28).

Within the market realm the corporate form became the most important and efficient way to organize production and accumulate capital (Pearce and Tombs: 1998: 5-6; also see
Glasbeek 2002). As a result, corporate harm and wrongdoing became less and less of a government priority (see Pearce and Snider 1995; Snider 2000), giving way to the belief that the corporation is an inherent social and economic good. Snider (2000: 192) argues this shifting mentality meant that corporate crime effectively disappeared as both a concept and in law. Today, potentially profitable acts cannot be wrong (Snider 2001: 112). Propelled by the neo-liberal belief in minimal government interference in the free-market economy, governments in most western capitalist democracies bought into the idea that criminal law (deterrence) was ineffective in dealing with crimes of the powerful, preferring instead to employ various forms of self-regulation. This pales in comparison to the punitive measures introduced during the same time for individuals guilty of traditional street crimes (Garland 2001).

Self-regulation, or compliance strategies, flourished within this neo-liberal context. As with regulation in general, compliance strategies emphasize persuasion and bargaining or the idea that corporations need guidance and do not respond well to chastisement and deterrence (cf. Slapper and Tombs 1999: 165-169). However, compared to state-centred regulation, self-regulation trusts corporations to monitor and control their own compliance with the law under a minimalist regulatory framework (Tombs and Whyte 2007: 166, fn. 14). Regulators are tasked to cooperate with corporations to build consensus regarding the most effective forms of regulation. As Tombs and Whyte (2007: 153) note, from this perspective, corporations have the capacity to act as good corporate citizens, capable of responsible and moral decision-making. The ascendancy of self-regulation as it applies to corporate offences has spawned an industry of compliance scholars dedicated to understanding how to best apply these rules to the corporate realm (Bardach and Kagan 1982; Hawkins 1984; 1997; 2002; Hutter 1988; 2001; Kagan and Scholz 1984).
Braithwaite's (1982; Braithwaite and Fisse 1987) work is (again) influential for supporters of self-regulation. Although Braithwaite (Ayres and Braithwaite 1992; Braithwaite and Fisse 1987) does not advocate a model of pure self-enforcement, he does see it as part of an effective regulatory strategy. In what he refers to “enforced self-regulation,” the author advocates a “carrot and stick” approach, whereby cases in which self-regulation fails, then corporations are forced to develop rules that are approved by outside regulators. Punitive measures are only used in situations where non-compliance continues. According to Simpson (2002: 100), “enforced self-regulation combines the benefits of voluntary self-regulation with the coercive power of the state.”

3.5 Punishment versus Compliance

The dominance of the compliance model has produced considerable debate about the most effective way to regulate the corporation. On one side, compliance scholars support cooperative models that are rooted in persuasion, education and self-regulation. On the other (for example, Pearce and Tombs 1990; 1991; 1998), critical scholars argue for criminal law strategies that are sufficiently punitive and strongly enforced. At the heart of the debate lays fundamental differences of perspective regarding the nature of corporate crime and how to respond through law (Gray 2006: 3).

Compliance school advocates argue against strict legal enforcement, suggesting that it produces, what Bardach and Kagan (1982) refer to as, “legalism,” or assigning a uniform set of regulatory requirements when they are not always necessary (cf. Kagan and Scholz 1984: 73). They also argue that punishment instills resistance or lack of cooperation from corporate actors,

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11 This debate is best encapsulated in an exchange between Frank Pearce and Steve Tombs (1990; 1991) and compliance scholar Keith Hawkins (1990; 1991).
who become defensive and unresponsive to regulatory measures and may in fact coordinate efforts to lobby government for even less state intervention (Kagan and Scholz 1984: 73). Criminal law approaches also cause more harm than good as the act must be allowed to progress far enough along the causal chain of events to collect sufficient evidence. There is a further suggestion that the cost of full criminal law enforcement is both impossible and prohibitive (Snider 1990: 376). In support of their perspective, compliance scholars argue there is evidence that corporations will cooperate with regulators to ensure compliance (Hawkins 1990: 451).

For some critical corporate crime scholars, self-regulation strategies do not work in the face of historical evidence. In addition to the fact that corporations simply will not self-regulate in the absence of external pressures, corporate executives will falsify records to deceive regulators and they will only use self-regulation symbolically and under limited conditions (McMullan 1992: 89-96; Slapper and Tombs 1999: 184). Further, the compliance school argument that strict enforcement does not work is purely hypothetical since it has never occurred (Tombs and Whyte 2007: 156); evidenced by the fact that compliance scholars do not demonstrate how compliance strategies actually work, just how alternatives are ineffective (Pearce and Tombs 1991: 422). Compliance scholars therefore confound the way things are with the way things should or must be. As Pearce and Tombs (1990: 429 Ŧ emphasis original) argue, Ŧtheir work is limited because the legitimacy of a capitalist system and the illegitimacy of its being policed are in fact starting-points for their analysis.Ô

Although cooperative models have been touted as flexible and consistent with market efficiency, they actually work to the advantage of powerful corporate interests (Noble 1995: 271-272). Compliance scholars fail to account for the element of power in this respect (Tombs and Whyte 2007: 156). For example, they argue that resistance to regulations by corporations are the

12 For a summary of these arguments see Slapper and Tombs 1999: 176-177.
exception, not the rule. Meanwhile, history illustrates considerable resistance by corporations in the face of new laws (Tombs and Whyte 2007: 156-157). Further, in assuming that corporations are inherently good, compliance scholars ignore that the imperative to accumulate profit sometimes takes precedence over safety concerns (Tombs and Whyte 2007: 157). Finally, given the prevalence of corporate power, compliance scholars underestimate the relevance of regulatory capture (Tombs and Whyte 2007: 160); that regulators will cooperate too closely with corporations and, in the process, institutionalise corporate influence.

Critics of the compliance model call for strict enforcement of criminal law, along with innovative regulatory strategies that introduce formal sanctions at earlier stages of offending (Pearce and Tombs 1991: 423). Unlike the situation with traditional street crimes, deterrence strategies have an important role in the corporate context. First, in comparison to street crimes, corporate offences tend not to be one-off acts, and hence the identification of the act and offender is relatively unproblematic. Second, since corporate crimes do not pose the same detection problems as traditional crimes, then greater regulatory resources would increase detection. Third, the symbolic message of punishment is easily applied to corporate offenders; there is little risk the corporation will not understand the message. Finally, unlike criminal sanctions against traditional crimes, punishing corporate offenders will not produce greater social inequality (Pearce and Tombs 1997: 92-94; emphasis original).

In the end, both compliance and deterrence scholars are interested in ensuring the compliance of corporations, albeit for two distinct reasons. While compliance scholars condone violations with the hope of preventing future acts, deterrence advocates want to prevent future violations through deterrence (Wells 1993: 28). At the heart of the matter are different views about the nature of the corporate form. Compliance scholars believe that corporations are
motivated to be good and law abiding, and that only some (‘bad apples’) will transgress the law (Bardach and Kagan 1982). In comparison, deterrence scholars argue that corporations are amoral calculators with a mandate to ‘prioritize profit maximization’ (Pearce and Tombs 1997: 80). This does not suggest that corporate executives always act amorally, but that the pressures of profit occasionally force them to act as such. And it is because of this amoral calculation that we need ‘rigorous enforcement by regulatory agencies’ (Pearce 1990: 424).13

This dissertation does not focus on determining the ‘best’ strategies for responding to corporate crime (at least in terms of evaluating effectiveness from an empirical perspective), nor with resolving the debates between punishment and compliance scholars.14 However, building from Pearce and Tombs (1998: 99), it is interested in the ideological assumptions that underpin particular responses to corporate offences, which includes the dominant legal categories and their associated discourses. In this respect the dissertation has a different starting point than compliance scholars who are disinterested in the distinction between criminal law and regulation, treating them instead as natural or pre-determined. As Tombs and Whyte (2007: 155-56) note, theories of compliance ŕ Eid tend to reflect the dominant themes in ŕ official ŕ doctrine and policy on controlling safety crime. As a result, we might say that consensus theories analyse the regulatory process from a perspective that incorporates many of the assumptions that governments, regulatory officials and businesses use to inform policy. ŕ Compliance advocates ignore the fact that it is corporate power that renders regulatory agencies and measures ineffective, ŕ not the measures themselves ŕ (Snider 1990: 380).

13 Compliance scholars argue that there is no way of knowing if accidents were based on an amoral calculation ŕ that it is a post-hoc analysis to attribute offending to economic decision-making (Hawkins 1990: 454).
14 Although it is not my goal to directly engage in this debate, my research has the potential to contribute to overall discussions about corporate crime and how the state should respond through law.
Overall, an important factor that has limited discussion and debate about the introduction of corporate criminal liability is the primacy accorded regulatory responses. However, in recent years there is growing evidence of a desire to develop criminal law strategies to hold corporations to account for their harmful actions and to deter wrongdoing (McMullan 1992: 116). After all, the state is not simply a "tool of corporate capital" – there is relative autonomy of the state, meaning there are times when it must act against corporate interests (McMullan 1992: 108). It is within this context that we have witnessed further attempts to assimilate (Tombs and Whyte 2007) corporate deviance into traditional criminal law through the introduction of corporate criminal liability legislation. In Canada this trend has most recently presented itself with the introduction of the Westray bill.

3.6 Theoretical Links to the Corporate Crime Literature

The first part of this chapter situated the study of corporate crime within broader considerations of crime and deviance, as well as explored some of the main issues and claims within the corporate crime literature. Along the way it highlighted the empirical and theoretical issues that inform the dissertation. In addition, there is a rich body of corporate crime scholarship with its roots in critical socio-legal studies that also constitute an important element of my theoretical framework. This literature is informative in its commitment to situating corporate crime and corporate crime law reform within its broader social-political-economic context (for example, Pearce and Tombs 1998; Slapper and Tombs 1999; Snider 1993 and 2000; Tombs and Whyte 2007). Of particular interest is how it distinguishes itself from approaches that treat law as the mere expression of ruling class interests, as well as liberal legal perspectives that deem law to be reflective of the moral majority (cf. Tombs and Whyte 2007: 109-110). As Tombs and Whyte
(2007: 109) argue, law is not a "naked instrument of power that is always used to control subordinate groups, but a complex and often contradictory system of rules and practices that ultimately aims to maintain and stabilise the existing social order. Several examples from the corporate crime literature underscore this influence for the current study.

Through an analysis of Ontario's occupational health and safety laws from 1850-1940, Eric Tucker (1990) uses a neo-Marxist perspective to illustrate that those who owned the means of production -- the structurally privileged -- were able to resist overly stringent health and safety regulations. The author suggests that the state is dependent on corporate capital to stimulate the economy and contribute to the tax base, thereby placing it in a difficult and complex position when it comes to legislating and regulating corporate offences. Tucker (1990: 7) avoids a simplistic, instrumental Marxist approach, suggesting that capital's privileged position is not automatic, that conflict and contradictions in the private accumulation process will often be displaced into the political-administrative system where they are mediated in complex ways.¹⁵

In another study, Tucker (1995a, also see Tucker 2006) examines the politics of causation as they relate to the Westray mine disaster. In addition to noting that establishing causality is essential for determining "moral, legal, economic or political" responsibility, he suggests that identifying causal factors is a complex and highly contested process, characterized by considerable disagreement about the "significance of the many events that are causal in some sense" (Tucker 1995a: 94-95). Tucker argues that those charged with determining causality operate within a particular social and economic context. The terrain on which judges and other public officials operate is shaped by prevailing political-economic conditions, dominant ideological assumptions and the particular institutional context in which the causal question is

¹⁵ Similar, non-essentialist Marxist perspectives can be found in the work of Snider (1987 and 1990) and Slapper and Tombs (1999).
addressed (Tucker 1995a: 95). A similar terrain must be considered when examining the constitution of the Westray bill.

From a different vantage point, Doran (1996: 524) research considers modern power discursive constitution through an examination of occupational health and safety in the early nineteenth century. Doran examines how official definitions of workplace accidents Ŧ Ŧdisembodied statistics Ŧ Ŧ usurped workers Ŧknowledge and experiences concerning workplace health (Doran 1996: 527 and passim). As part of this analysis, the author employs a theoretical lens that combines elements of Smith’s Ŧrelations of ruling Ŧ with Foucault’s analysis of power and knowledge. For Doran (1996: 524), this framework provides the basis for considering Ŧ Ŧthe complex relationship between class and power/knowledge Ŧ largely ignored in Foucault’s own work."

In this respect Doran attempts to situate discourses of corporate crime within their socio-economic context.

A different relationship between discourse and power emerges in Pearce and Tombs (1998) examination of corporate crime in the chemical industry, which draws from Gramsci’s (1971; 1975) notion of hegemony and Foucault’s work relating to governance (Foucault 1979) and discursive formations (Foucault 1972). Gramsci provides the analytical lens for examining the role of capitalist hegemony in reinforcing ruling class interests (particularly in terms of the corporate form), albeit in contradictory, uneven ways that are susceptible to counter-hegemonic movements (Pearce and Tombs 1998: 35-38). Foucault’s notion of discursive relations provides insight into how certain discourses dominate within Ŧ Ŧvarious conditions of existence Ŧ (1998: 38), including how different discourses converge at particular (hegemonic) moments to create Ŧ Ŧtruths Ŧ

There is an important difference between my research and Doran’s work. Doran (1996: 525) argues against an understanding of state power within a Ŧ Ŧtheoretically prior capitalist system, Ŧ in favour of viewing power as a Ŧ Ŧlargely discursive phenomenon. Ŧ In contrast, my theoretical framework suggests that state power and discursive formations are mutually constitutive. In this respect, I disagree with Doran’s view of both the state and capitalism in such static terms; their relationship with various discourses is much more complex and fluid than he suggests.
about the social world (1998: 38 and 142-144). Using the tragic example of the Union Carbide chemical disaster in Bhopal, India, Pearce and Tombs examine how the "destructive nature" of the chemical industry is effectively downplayed and ignored, defined away as non-criminal acts (1998: ix). The dominance of this perspective stems from the struggle between how the chemical industry is understood and defined and the privileged position of the corporation within the capitalist (neo-liberal) economy.

The dissertation is also informed by previous work that analysed the constitution of corporate criminal liability in Canada (Bittle and Snider 2006). Employing a theoretical lens that combined the work of Foucault and Gramsci, we argued that conservative conceptualizations of corporate crime dominated the process leading to the enactment of the Westray bill, thereby limiting the reform options that were given serious consideration. Three main arguments supported the analysis. First, legislators emphasized the importance of traditional legal language – particularly the doctrine of mens rea, or the legal need to establish the guilty mind of an individual – which downplayed alternative approaches to combating corporate criminal liability (also see Wells 1993: 1). Second, neo-liberal discourses helped ensure that the legislative framework conceptualized workplace safety as a shared responsibility amongst workers, managers and employers, despite the fact that few employees, namely those who carry out day-to-day production processes, have control over their working conditions (even though they bear the costs of unsafe working environments). Third, dominant conceptualizations of corporate capitalism, the idea that corporations are vital for the effective functioning of the Canadian economy, helped protect against the enactment of overly stringent legislation. Overall, given the convergence of various conservative discourses that dominated the reform process, we

17 While Tombs and Whyte argue that workplace deaths occur across "all industries" and "all types of companies" (2007: 37), they also note that those in certain "manual occupations" (such as process, plant and machine companies) are the most likely to be injured or die at work (2007: 48).
questioned the ability of the Westray bill to hold corporations to account for their harmful actions.

There are several premises that flow from these, and other, critical corporate crime studies that inform the dissertation. First, to better understand corporate crime law reform it is important to consider the modern corporate form, the most prominent vehicle for organizing corporate capital in contemporary society (Glasbeek 2002; Pearce and Tombs 1998). It is significant that Canada’s new corporate criminal liability legislation has emerged within traditional bourgeois law, and yet corporations have consistently proven unable to adhere to such laws (Slapper and Tombs 1999: 19). As several scholars have noted, the incessant demand for profit maximization within the corporate form — corporations as amoral calculators — is a significant factor that shapes and influences the incidences of corporate crime (Tombs and Whyte 2007: 141; also see Glasbeek 2002; Pearce and Tombs 1998; Snider 1990).

Second, in studying corporate crime it is necessary to avoid anthropomorphizing corporate crime and related law reform. This does not suggest that individuals do not matter, but that their actions must be placed within the broader social and economic context (Slapper and Tombs 1999: 14-15; Tombs and Whyte 2007: 3).\footnote{To borrow a familiar Marxist adage, people choose but not in conditions of their own choosing.} As Pearce and Tombs (1998: 281) suggest, corporate crime law is never simply the result of some programmers dream. Although this does not absolve individual actors of any responsibility, it emphasizes the importance of understanding the complex relations that help constitute corporate crime legislation, the processes that produce legal regimes (Slapper and Tombs 1999: 17). The current research therefore examines the politics of corporate crime law reform — the open, fluid and contested relationships between different political actors and groups — including the language used to constitute corporate crime and corporate criminal liability.
A third premise is that the state continues to play an important role when it comes to defining and responding to corporate crime through law, although it does not determine its nature and scope (Haines and Sutton 2003: 10-11; Tombs and Whyte 2007: 207; also see Comack 1999: 67). Ignoring this fact is empirically incorrect as well as theoretically blind. Critical scholars working within a neo-Marxist framework have moved beyond narrow, instrumentalist approaches that espouse a one-to-one relationship between the state and capitalist interests (that the state merely reflects and reinforces capitalist and corporate interests), to conceptualize the state as one of many different mechanisms within society that play an important, but not automatic, role in (re)producing capitalist market conditions (see, for example, Jessop 2002; 2008). As Jessop (2002: 41) notes, the state is both "operationally autonomous" and "institutionally separate" from the capitalist market, meaning there is no a priori guarantee that the state will either advance or challenge the interests of capital.

The operational autonomy of the state is underscored by the fact that, in addition to helping valorize the capitalist mode of production, the state also has the "overall political responsibility for maintaining social cohesion in a socially divided, pluralistic social formation" (Jessop 2002: 21). For example, the introduction of the Westray bill to protect workers' safety stands in contrast to the state's economic supports that made possible the extraction of coal from the Westray mine for profit-making purposes (Richard 1997: 610; also see Glasbeek 2004; McMullan 2005; Tucker 1995a). This contradiction reminds us that there is nothing inherent to the logic of capitalist accumulation that stipulates it will "inevitably subordinate other institutional orders [including the state] or colonize the lifeworld" (Jessop 2002: 30). There are

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19 For example, Haines and Sutton (2003: 10-11) argue that, regardless of the dominance of "free enterprise ideology," the state will develop mechanisms to safeguard against situations where the "market lets them down." In this respect, "general understandings about the role of the state may have changed, but they have not been replaced entirely by faith in the markets" (Haines and Sutton 2003: 12).
times when economic logic imposes its hegemonic will upon the extra-economic realm, but these cases are not automatic or predetermined. Instead, as Jessop (2002: 30) argues, it ‘depends on the outcome of political and ideological struggles around political projects and hegemonic visions as well as on the ecological dominance of the circuit of capital.’

Overall, the critical corporate crime scholarship challenges us to situate issues of corporate crime within their broader social-political-economic context. In doing so it transcends the narrow confines of traditional crime and deviance studies, with their attendant focus on the individual causes and consequences of crime, to better appreciate the ideological basis of (corporate) crime and its control (Pearce and Tombs 1998: 280). Accomplishing this involves stepping outside criminology and sociology of deviance to embrace social theory and political economy perspectives. And this is what this dissertation attempts to do, theoretically situating itself within Foucauldian and neo-Marxist literatures. The next section outlines this theoretical framework and how it relates to the dissertation.

3.7 Theoretical Considerations

Building from the aforementioned critical corporate crime scholarship, the theoretical framework for the current study combines Michel Foucault’s (1972 [2001]) analysis of discursive formations with Louis Althusser’s (1965; 1968; 1971) non-deterministic, anti-essentialist (re)reading of Marx. Of particular interest is Althusser’s notion of aleatory materialism, the idea that any particular social phenomenon cannot be reduced to one identifiable and

\[20\] It is difficult to examine questions of crime, deviance and punishment without reference to the many contributions of Michel Foucault (Cohen 1985: 10; also see Garland 1990). In addition to revealing the nature of the carceral archipelago, particularly in relation to the normalization of discipline, Foucault challenged us to reconsider the relationship between power and knowledge (Foucault 1979; 1980), arguing that power is not a series of linear successions or continuities, but instead a complex array of discontinuities that coalesce in different ways to contribute to the present state of knowledge (Foucault 1972: 3 and passim).
determining cause. Aleatory materialism is a philosophy of history that considers chance as an essential ingredient in the politics of renewal and change (Datta 2007: 275; Ferretter 2006: 5). It reminds us that the socio-economic context shapes, but does not determine, the social world.

Combining elements of Foucault and Althusser offers a rich analytical lens to examine the relationships between discourse and social structures. It combines Foucault's focus with the 'how' of economic exploitation and political domination with neo-Marxist concerns with the 'why' of capital accumulation and state power (Jessop 2007: 40; also see Dupont and Pearce 2001; Hunt 2004). This 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 that class relations are implicated in the phenomenon under inquiry (Hunt 2004: 601-602). It also allows for illuminating the complex relationship between Foucault and Marx, something that many of Foucault's interlocutors fail to acknowledge (Dupont and Pearce 2001).

**Discourse and Discursive Formations**

For Foucault (1972: 31) it is important to examine relations between statements, particularly how different statements converge at certain junctures of history to speak about a particular object (e.g., madness). At different times statements form regularities, what Foucault refers to as discursive formations, thereby constituting the dominant knowledge claims about an object. As Foucault (1972: 38 emphasis original) notes:

> whenever one can describe, between a number of statements, such as system of dispersion, whenever, between objects, types of statement, concepts, or thematic choices, one can define a regularity (an order, correlations, positions and

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21 As Hunt (2004: 606) argues, while discourse theory is essential to distinguish between and understand the mechanisms through which discourses work, ideology provides the important supplement of directionality in the sense that ideology can work to the favour of some and disadvantage of others.
functionings, transformations), we will say, for the sake of convenience, that we are dealing with a discursive formation.

Foucault argues that the relationships between discourses and the emergence of discursive formations produce positivities or that statements made by certain individuals constitute the correct way to understand and describe the social world at a particular time (Pearce and Tombs 1998: 144). For example, Foucault illustrates how discourses of the church, law and medicine converge to delineate psychopathology during the nineteenth century (Pearce and Tombs 1998: 143).

Discursive formations emerge within certain conditions, or rules of formation, which Foucault refers to as surfaces of emergence (for example, social institutions), authorities of delineation or authorized knowers (for example, professionals), as well as the relations between these elements. Foucault also refers to grids of specification which are most usefully thought of as ways in which the production and functioning of discursive formations comes about (Pearce and Tombs 1998: 143). Every element has its own genealogy and internal logic, and therefore does not develop in any linear or predictable manner. At the same time, however, changes to discourse can influence and be influenced by the extra-discursive. As Pearce and Tombs (1998: 143) note, Foucault’s interest was in how statements, as events, and in their so particular specificity, can be articulated to events which are not discursive in nature, but may be of a technical, practical, economic, social, political or other variety. Different discourses are defined by their relationship with each other, thereby forming a discursive relation, while also helping shape, and being shaped by, the extra-discursive.

This dissertation builds from Foucault’s work in two ways. First, it explores the discursive formations (Foucault 1972) that constitute the dominant knowledge claims in relation to corporate crime and corporate criminal liability. Whose knowledge claims had legs (cf. Snider
2000) when it came to defining the nature and scope of corporate crime and corporate criminal liability? Second, it explores the relationship between discourse and the extra-discursive. What are the ‘conditions of existence’ that both shape and are shaped by discourse (Foucault 1972: 38) on corporate crime and corporate criminal liability?

Suggesting that Foucault’s discursive formations lend themselves to considerations of the extra-discursive is not common within neo-Foucaultian studies. In particular, following the lead of Fairclough, Jessop and Sayer (2002; as well as that of Dupont and Pearce 2001; Pearce and Tombs 1998; Pearce and Woodiwiss 2001; Woodiwiss 2007), this dissertation departs from interpretations of Foucault that conceptualize discourse as a catalyst of social meaning – a form of ‘discourse imperialism’ that equates language with ‘strong social constructionism’ (Fairclough, Jessop and Sayer 2002: 4). It attempts to explore Foucault’s notion of discursive formations in relation to his (underdeveloped) reference to broader structural issues (Fairclough, Jessop and Sayer 2002; Dupont and Pearce 2001), which for this research encompasses how discourses that characterize corporate criminal liability are constitutive of the broader capitalist social formation.

Extra-Discursive Considerations

Traditional Marxists view the production and reproduction of the capitalist system in its totality, the ‘laws of motion’ that are essential to capitalism’s expansion and ongoing exploitation of the working class by those who own the means of production (Gibson-Graham, Resnick and Wolff 2001: 1-2). As Gibson-Graham, Resnick and Wolff (2001: 13) note,

traditional Marxian economic theory constructs the capitalist economy as a self-regulating system or as a macroformation coextensive with the nation-state. Complexities of uneven development and noncapitalist modes of production, indeed, they are seen to exist if, are convened within and subordinated to a capitalist totality.
Building from Althusser’s notion of aleatory materialism some Marxists have jettisoned notions of “necessity” to embrace postmodern notions of “contingency and particularity” (Gibson-Graham, Resnick and Wolff 2001: 4). Others, while not expressly employing an Althusserian framework, have followed a similar route and moved beyond characterizing Marx in crude economic terms, in which the economy was thought to directly cause or determine the social realm (for example, see Pearce and Tombs 1998; Resnick and Wolff 2006; Snider 1990; 1993; Tombs and Whyte 2007; Tucker 1990; 1995; 2006). In this respect they provide the space within which we can consider how discourse and discursive relations are inculcated in the capitalist mode of production, albeit in non-linear, unpredictable and often contradictory ways. This dissertation contends that certain aspects of Althusser’s work are fruitful for this line of inquiry.22

For Althusser, Marx had a paradoxical attitude toward bourgeois society. The young Marx was influenced by Hegel’s notion of the history of society as indistinguishable from its genesis; society as a “result produced by a history” (Althusser, 1968 [1997]: 64). The latter Marx considered society to be a complex combination of relations that unfold differently in varied contexts. Here we can see that Marx went beyond Hegel’s linear notion of history to embrace the relative and productive nature of social relations (Althusser, 1968 [1997]: 41). Therefore, according to Althusser, society is both a particular “result” and a particular “society”, the effect of certain mechanisms that make a society possible (Althusser, 1968 [1997]: 65).

22 In two key texts, Reading Capital (1968) and For Marx (1969), Althusser brings traditional Marxism into a post-Marxist phase (Resch, 1992: 2). In doing so, he attempts to rescue Marxism from its Hegelian tendency of characterizing the economic as determinate of the social realm, as well as the teleological belief that class struggle will logically transform capitalism into socialism. Although Althusser was a “child of more than one history”, making it difficult to suture together his many diverse philosophical thoughts, and his relatively impenetrable style of theorizing dissuaded more than a few readers from fully exploiting his theoretical and philosophical contributions (Jameson, 2001: vii), his work remains invaluable for those interested in moving beyond “vulgar Marxism.”
In attempting to rid Marxism of its teleological tendencies, Althusser considers various factors outside the mode of production that help constitute the social. Evidence of this emerges through his (1968 [1997]: 52) discussion of the “problem of knowledge” and the multifarious interests that are constitutive of ideological spaces. For Althusser, the formulation of ideology occurs outside the production of knowledge, the “extra theoretical” factors (e.g., religious, ethical, political) that shape how we understand the social world. This is where we find Althusser’s aleatory underpinnings in that he conceives knowledge production to be more than the result of a single determining cause.

Since Althusser believes ideological formations emanate from diffuse sources, he consequently and necessarily argues that there can be no dominant structure that is reducible to the “primacy of a center” (Althusser, 1968 [1997]: 98). Instead, he recognizes different structured levels including the political, economic, ideological which can in no way be thought of as a “model of continuous and homogeneous time, but may nonetheless converge at different moments to produce particular social formations (Althusser, 1968 [1997]: 99). Different structures have their own genesis and separate timelines in terms of their individual production, the same of which applies to their relationships to other structures. Each structured level is therefore “relatively autonomous and hence relatively independent” (Althusser, 1968 [1997]: 99). For Althusser, this reflects Marx’s anti-essentialist work in The Poverty of Philosophy, wherein Marx questions how society could contain any logical formulation or sequence when it is the result of numerous relations that, in Marx’s words, “coexist simultaneously (gleichzeitig) and support one another” (as quoted in Althusser, 1968 [1997]: 64-65).

Althusser therefore argues that the economic is not a given, as what constitutes the economic differs within each mode of production, and that in each case the levels of the social
(political, ideological, etc.) relate to the economic in uneven and unpredictable ways. As Callari and Ruccio (1996: 24) note, Althusser stressed that ņaction, movement, praxis, process cannot be reduced to any one (single or complex) idea, cannot be motivated by a posited end, but is rather characterized by contingency, by ņhistory ņSocial phenomena are much more than the result of one (economic) encounter; each circumstance must be viewed as the result of an array of encounters, producing their own unique form of ņcausality or effectivity ņ(Read, 2002: 32; Althusser, 1994: 564). The economic is not a homogeneous field or smooth space that exists on an ņinfinite plane ņbut instead a ņdeep and complex ņphenomenon, a different understanding of causality that is non-linear and anti-essentialist, what Althusser considered to be ņdetermination by a structure ņ(Althusser, 1968 [1997]: 183-184).

In Althusser’s terms, society is much more than just a result; it is ņhis particular result, this particular product, which functions as a society ņ(Althusser, 1968 [1997]: 65 ņemphasis original). Contemporary society is the result of a particular structure, but one in which the structure is not reducible to its history ņwe cannot theorize bourgeois society as simply being the genesis of this result (Althusser, 1968 [1997]: 65). It is therefore important to understand the mechanism that shapes contemporary society, the multiple means upon which society, as a particular result, becomes possible (Althusser 1968 [1997]: 66).

A crucial point herein is that no single mode of production assumes responsibility for the ways in which societies function. Just as there is there is no logical sequence to history, there is similarly no ņproduction in general ņ(Althusser, 1968 [1997]: 108). The society effect therefore differs within and between different modes of production (Althusser 1968 [1997]: 108-109). The exploration of these different and specific society effects necessitates the unveiling of the
mechanism that gives rise to them, without ‘pre-judging’ the constitutive elements of these effects (Althusser, 1968 [1997]: 66).

The Canadian Social Formation

Stemming from Althusser’s society effect, an important consideration for the theoretical framework for this dissertation is the Canadian social formation—an integral part of the political-economic-ideological space, or extra-discursive realm that shapes, but does not determine, different discourses about corporate crime and corporate criminal liability. Within Canada, this includes linkages between the state, law and mode of production (economy).

The main form of economic organization in Canada, as with other countries within the Organization for Economic Cooperation and Development (OECD), is capitalistic (Pearce and Tombs 1998: 3). In theory this involves a commitment to a market economy based on private property in which goods and services are bought and sold between economic agents (Pearce and Tombs 1998: 3-4; Pearce and Snider 1995: 20). The economic organization, or limited liability corporation, is the primary vehicle for producing the goods and services that are sold to consumers (Pearce and Tombs 1998: 3; Yalden et al. 2008).

The Canadian mode of production historically has been premised on a staples industry that exploited the nation’s raw materials for export to various metropolitan centres. Originally, commercial staples (fish, fur, placer gold and square timber) were sent to European markets, while industrial ones (pulp and paper, minerals, energy) were destined for the United States (Clement 2001: 2). From this Canada traditionally has enjoyed a strong mixed economy with a significant blend of private and public investment. However, with the ascendancy of neo-liberalism during the 1980s, Canada’s mixed economy was significantly altered through the
privatization of many public institutions. During this time the Canadian government sold off all or part of forty governmental organizations (Pearce and Snider 1995: 25; Mosco 1989). As Pearce and Snider (1995: 25) note:

[t]his process of privatization in traditionally mixed economies has of course provided new market opportunities for many firms, particularly in the financial, manufacturing, and service sectors. Since, increasingly, the only way of producing and distributing goods and services is by capitalist enterprise in a global market economy, the world now looks like a more rational place.

Although these changes transformed the Canadian social structure, the state remains a vital component of the Canadian economy in that it continues to own a significant share of companies (Clement 2006: 147) and is a prominent employer for many Canadians (Fudge 2002: 86).23 Nevertheless, the Canadian economy rests primarily in the hands of the minority of the population. Corporate Canada is heavily oligopolistic and monopolistic in that giant companies dominate it and wealthy families represent a majority of its economic elite (Clement 2006: 147; Glasbeek 2002: 31; Pearce and Snider 1995: 20; also see Carroll 2004).24

In recent decades the Canadian economy has been consumed by capitalism’s globalizing efforts.25 As a result, the economic focus has shifted from considerable domestic investment to international opportunities. While foreign direct investment in Canada has dropped precipitously, Canadian foreign investment abroad has exploded. In the context of free trade this has resulted in a greater presence of multinational corporations within Canada, including considerable US

23 Carroll’s (2004) research illustrates that 22 of the top 250 Canadian companies are government owned (many of which are provincial power companies) (cf. Clement 2006: 147). In terms of employment, Fudge (2002: 86) notes the federal government has a significant workforce, and is the largest single employer of women in Canada.24 Glasbeek (2002: 31) refers to the fact that, in 1984, less than 1 percent of Canadian retail companies accounted for more than 40 percent of the country’s assets and more than fifty percent of its equity. Similarly, using Statistics Canada data, he notes that in 1987 the top 1 percent of all enterprises controlled 86 percent of Canada’s assets and made 75 percent of all profits.25 Globalization is a contested concept, the parameters for which are far too great to discuss here. In official terms, the globalization of economic relations represents an opportunity to provide enrichment for the entire global population. However, for many observers it is about creating a borderless economic venture for the benefit of the few, principally transnational corporations and some of their dependent subcontractors (Woodiwiss 1997: 90; Glasbeek 2002: 3). Regardless of the differences of opinion about the nature and scope of globalization, there is little doubting its many impacts.
presence through the operation of branch plants (Clement 2006: 147-148). Meanwhile, the country's traditional dependence on raw material export has become increasingly vulnerable to the conditions of global business (Fudge and Cossman 2002: 13), particularly in that production has been usurped by the imperatives of distribution and sales (Taylor 1999: 11) and the state's fixation with attracting global capital (Fudge and Cossman 2002: 17). Corporations have assumed unprecedented prominence within this global economy, with some of the largest economies in the world no longer belonging to countries, but instead to multi-national corporations (Pearce and Snider 1995: 21).26

Several developments within Canada's social formation underscore the impact of recent neo-liberal and global capital ideals. First, Canadians have witnessed significant shifts in the nature of work. While previous generations of workers experienced strong unionization and relatively stable employment, the same cannot be said today, evidenced by the declining role of unions under the pressures of profitability (Glasbeek 2002: 83).27 For many Canadians, particularly women and visible minorities, work has become less about employment for life and more about temporary, part-time and contract work that is susceptible to the whims of the market economy (Cranford, Fudge, Tucker and Vosko 2005: passim; Taylor 1999: 10-11). In addition, the once prominent model of the single breadwinner is a thing of the past (Fudge and Cossman 2002: 15; Taylor 1999: 11). As Fudge and Cossman (2002: 15) note, by the 1980s, it took between sixty-five and eighty hours of work each week for a family to earn what it took a single breadwinner, typically a man, to earn in a forty-five hour work week in the mid-1970s.28

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26 As Pearce and Snider (1995: 21) note, of the one hundred largest economies in the world in 1989, forty-seven were corporations, not countries.

27 Today, roughly 30 percent of the Canadian workforce is unionized (Glasbeek 2002: 83), a figure that is undoubtedly supported by the large number of union jobs in the public sector.

28 Despite this shift, women continue to bear the majority of responsibility for unpaid work necessary for social reproduction (Fudge and Cossman 2002: 27).
A second and related point is that, despite these transformations, both the state and law continue to play an important role within the Canadian social formation. In the past, the actions of the Canadian state were rooted in Keynesian welfare principles that embraced (at least theoretically) the benefits of "full employment" and "universal welfare" (Fudge and Cossman 2002: 10). However, the emergence of neo-liberalism following the Second World War marked the death of state socialism (Barry Osborne and Rose 1996), cautioning against "government overreach and overload" rather than espousing the virtues of welfarism and state responsibility for addressing social and economic problems (Rose and Miller 1992: 198). As Rose and Miller (1992: 1999) note:

neo-liberalism re-codes the locus of the state in the discourse of politics. The state must be strong to defend the interests of the nation in the international sphere, and must ensure order by providing a legal framework for social and economic life. Within this framework autonomous actors — commercial concerns, families, individuals — are to go freely about their business, making their own decisions and controlling their own destinies.

A neo-liberal state is thus committed to fostering optimal conditions for the flourishing of economic competition and an entrepreneurial spirit (Barry Osborne and Rose 1996: 10; Mahon 2005). The market thus becomes the most natural, efficient means to accumulate wealth, which is in everyone's best (economic) interests (Glasbeek 2002: 20).

Since the 1980s, when the federal Conservative government declared that Canada was "open for business" (Snider 1990: 131), the state has systematically disassembled the welfare state. During the 1990s the Liberal government introduced crippling cutbacks to unemployment insurance and provincial transfers for "welfare, social services, and post secondary institutions" (Fudge and Cossman 2002: 15-16). Key to this approach was a move away from the idea of dependency on the state for help and support to one of self-reliance. Today, most western
capitalist states virtually trip over themselves to promote their liberal, market-friendly efficiency (Mahon 2005: 9).

The dominance of capital does not mean that the state (and through it law) is a mere tool in the economic process. On the contrary, the (Canadian) state and law both are relatively autonomous and "variously interventionist" (Woodiwiss 1997: 101). State and legal institutions play an integral role in providing the political-economic-ideological space for capitalism to prevail, even if this is not a predetermined fact. We cannot overlook, for example, that the state promotes the free market through the introduction of laws relating to securities and mutual funds (Fudge and Cossman 2002: 19).Whilst previous Canadian governments might have been more directly involved with individual capitalists, the priorities of contemporary governments are more ideologically aligned with free market interests on a global scale (Panitch 1999: 32). In Althusserian terms, this is what provides Canada's social formation with its unique shape and form. The dissertation therefore contemplates these extra-discursive considerations in relation to initiatives to tighten the criminal liability of corporations.

(Re)considering Class

Despite Althusser's contributions to the dissertation, there are certain limitations to his work that need to be reconciled, particularly in relation to his inability to shed certain Hegelian tendencies. According to Hindess and Hirst (1975: 7), Althusser replaces economic determinism with structural determinism, one that conceives modes of production as the result of a reproducing structure; history as the expression of a determinate idea, or a particular mode of production. Jessop is also critical of the idea that the economic is determinative of the "extra-economic" (or ideological superstructure) in the "first, last or any intermediate instance." For the economic to
fulfill such a deterministic role would mean that the capitalist mode of production was entirely self-contained and self-reproducing, what Jessop refers to as a cause without a cause. It would also entail a causal relationship between the economy and all other relations within society. Neither premise holds up when confronted with the reality of the interdependence of the economic and the extra-economic (Jessop 2002: 23).

To avoid this essentialist trapdoor, Hindess and Hirst (1975: 9) return to what they believe is the essence of Marxist theory: the role of class struggle in history. For them, we need to interrogate how class struggles (re)produce determinate social formations. The authors agree that the social formation corresponds to a complex array of social relations in which the economic, political and ideological levels are determined by the economy (Hindess and Hirst 1975: 13). However, while the mode of production sets limits to the structure of these different levels, it can only persist if its conditions of existence are supported, maintained and transformed (Hindess and Hirst 1975: 14-15). These conditions are not predetermined, but instead must be produced through class struggle, what Hindess and Hirst refer to as a conjuncture:

> The economic, political and ideological conditions of existence of the mode of production are secured, modified, or transformed as the outcome of specific class struggles conducted under the particular conditions of the economic, political and ideological levels of the social formation. The particular structure of economic, political and ideological conditions in the social formation determines the possible outcomes of the class struggles conducted under such conditions. Such a structure will be called a conjuncture (1975: 15 emphasis original).

Returning to Marx’s fundamental concept of class has proven analytically fruitful for neo-Marxists who have attempted to move beyond essentialist and teleological accounts of the capitalist economy (for example, see Gibson-Graham, Resnick and Wolff 2001; Resnick and Wolff 1987; 2006). Three different aspects of Marx’s concept of class are instructive in this regard. The first emerges from Marx’s account of the fundamental exploitation that flows from
the difference between necessary and surplus labour. Necessary labour represents the time that is necessary to produce the consumables customarily required by the producer to keep working. Surplus labour is the additional labour time performed beyond what is necessary and is appropriated by someone other than the producer (Resnick and Wolff 1987: 115; as quoted in Gibson-Graham, Resnick and Wolff 2001: 6-7; Resnick and Wolff 2006: 91-92). In capitalist societies each worker performs enough labour in a day to theoretically sustain themselves, a process made possible through the provision of wages in exchange for a worker’s labour. Any extra or surplus labour performed by the worker in a day is appropriated by the individual capitalist or by the board of directors of the capitalist firm (Gibson-Graham, Resnick and Wolff 2001: 7). For the capitalist who owns the corporation and controls the means of production the appropriation of surplus labour is realized and consumed in the form of profits (Resnick and Wolff 1987: 150). As Gibson-Graham, Resnick and Wolff note, the exploitative process in which surplus labour is produced and appropriated is for Marx a class process, and the positions of the producer and appropriator are class positions (Gibson-Graham, Resnick and Wolff 2001: 7). Beyond this fundamental exploitation, Marx’s notion of class contains a second important element: subsumed class processes (Gibson-Graham, Resnick and Wolff 2001: 7-8). Subsumed class processes refer to the distribution of surplus value once the individual capitalist or firm has appropriated it, a process that occurs on a variety of levels, both within the corporation (e.g. in the form of salaries to owners, managers and employees) and across the economy (e.g. in payments to government, financial institutions, landlords and merchants) (Gibson-Graham, Resnick and Wolff 2001: 7). The notion of subsumed class processes takes us beyond the fundamental aspects of the exploiter-exploited to consider the various ways in which surplus
labour is distributed throughout society, and in turn how this process of distribution becomes implicated in society’s organization in support of the capitalist social formation. It is therefore not only class positions and the ability to exploit surplus labour that is important from a Marxist perspective, but also the “social ramifications of class” (Gibson-Graham, Resnick and Wolff 2001: 8).

An examination of subsumed class processes helps illuminate how surplus labour is distributed in a diversity of ways which are necessary for the (re)production of the capitalist enterprise. In particular it reveals how the distribution of surplus value through subsumed class processes is vital to the longevity of the corporation via the distribution of fundamental surplus value within the organization. In addition, as Resnick and Wolff (1987: 178) note in discussing subsumed class processes beyond the corporation, “taxes are paid to the state by industrial capitalists — a subsumed class process — for economic, political, and cultural processes performed in and by the state… All of these social processes and still others provided by the state make possible the existence of the industrial enterprise’s appropriation of surplus value.” Subsumed class processes therefore help create the conditions for those who own the mode of production to continuously extract surplus labour from the individual worker. This exploitation is not a pre-ordained fact, but something that is produced and reproduced through different class processes.

A third aspect of Marx’s notion of class involves the association between productive and unproductive labour. Workers that produce commodities are directly involved in the production of surplus labour. However, those who do not produce commodities, such as marketing firms or financial institutions, are still implicated in capitalist processes, including the corporate entity, albeit in unproductive ways. “Unproductive laborers are paid out of surplus value if they are
employed by capitalist firms engaged in commodity production (thus they are recipients of subsumed class payments) and receive nonclass forms of remuneration if they are otherwise employed (Gibson-Graham, Resnick and Wolff 2001: 8). In some respects the difference between productive and unproductive labour is artificial in that all forms of labour can be said to contribute to the appropriation of surplus value (Resnick and Wolff 2006: 104). Notwithstanding, it does remind us that class processes extend beyond the fundamental extraction of surplus labour and are imbued within the entire social formation.

Outside Marx’s fundamental and subsumed class process lie ŕull other natural and social processes, which he referred to as non-class processes. In addition to the fact that all fundamental class processes have unique conditions of existence, including the economic, political and cultural factors that are constitutive of the fundamental class process, non-class processes may provide a constituent element of other class processes (Resnick and Wolff 2006: 94). Resnick and Wolff refer to the example of educating children as being a non-class process, albeit one that is an important component of the fundamental class process (Resnick and Wolff 2006: 94). The same could be said of law, which does not receive surplus value for either fundamental or subsumed class processes, but which nevertheless forms a key element of the broader social formation.

These different aspects of class are important for understanding the processes in which class unfolds and has particular effects. These class elements include distinct implications for the capitalist enterprise in that each forms part of its overall configuration (Gibson-Graham, Resnick and Wolff 2001: 13). For example, the state, as a recipient of subsumed class benefits, can influence the enterprise through various initiatives, such as the imposition of taxes or the introduction of a new law (such as the Westray bill) that implicates corporate activities (Gibson-
Graham 2001: 13). Further, the importance of class processes is underscored by the limitations of analysing class positions within a two-class focus (i.e., dominant and subordinate class) (Resnick and Wolff 2006: 91). Employing a two-class perspective assumes that capitalism is an all-encompassing structure that "governs political identity and constrains political possibility" (Gibson-Graham, Resnick and Wolff 2001: 17). Within this rigid analytical space the focus becomes trying to place individuals into their appropriate social grouping, a task that is increasingly difficult in the face of multiple class categories and contradictory class locations. It is therefore materially relevant to consider how different class processes are constituent of the appropriation of surplus labour. As Gibson-Graham, Resnick and Wolff (2001: 18) argue, individuals may participate in a variety of different class processes and inhabit a number of different class positions, simultaneously and over time.

In this respect we need to consider how class processes (re)create the conditions necessary for the valorization of the capitalist economy (Jessop 2002: 31). This means looking beyond traditional struggles over wages and working conditions to consider struggles regarding different modes of regulating the economy, forms of competition and various economic and social policy regimes. In short, it means thinking beyond class consciousness to examine the class relevance of different struggles. As Jessop (2002: 31) argues, there is certainly no univocal correspondence between the declared class belonging (i.e. location, affiliation or membership) and the actual class impact of particular social movements or forms of struggle. Class struggles and politics are not closed spaces that are omnipresent and difficult to challenge, but productive and open, effecting politics, not simply determining them (Gibson-Graham et al. 2001: 18-19).  

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29 It is also more fruitful to conceptualize class processes as an element of producing the appropriation and distribution of surplus labour (Gibson-Graham et al. 2001: 18).
For Gibson-Graham, Resnick and Wolff (2001: 4), recognizing the productive nature of class politics is respectful of Althusser’s aleatory materialism. It refuses to assume, a priori, the dominance of any particular social dimension over another, highlighting the importance of specificity and chance in the (re)production of the capitalist mode of production. Class politics focuses our attention toward an ongoing and never finished process of extracting surplus labour through the capitalist mode of production. From a Marxist perspective, class is therefore an adjective, not a noun (Resnick and Wolff 1987: 159). As a result, economic processes are implicated in and by various other social processes that comprise the social totality. It flows from this that individuals are shaped by, and reflect, the different social processes within which they participate, whether it is, for example, the state, home, a corporation, or the education system. As Resnick and Wolff (1987: 159) note, human beings are sites of specific subsets of social processes. Individuals are therefore more than simply a container of economic ideologies; they instead express a range of class and non-class positions that they occupy in life. To reduce individuals to their class position is to fall victim to an essentialist analysis of the economy. Classes, then, do not struggle or do anything else for that matter. The term class struggle must refer to the object of groups struggling, not the subjects doing the struggling (Resnick and Wolff 1987: 161).

**Class Relevance**

There are three key messages from Marx’s class processes that are germane for this dissertation. First, individuals do not represent a universalistic version of capitalist (or any other) interests. As Norton (2001: 44) reminds us, Marx argued that capitalists do not always act as capital personified. Instead, they are subjects that are constructed under particular social and
discursive conditions. Related to this, the second point is that various knowledges and discourses, both economic and non-economic, are implicated in the production of power, and in particular the production and reproduction of particular class processes (2001: 20-21). The essence of this is that class processes do not occur in a vacuum; instead they are constitutive of different relationships in society that produce particular sets of processes (Resnick and Wolff 2006: 93).

Third, the introduction of the Westray bill can be said to have class relevance in that it constitutes an object of struggle that implicates the nature and scope of workplace safety and, hence, about who controls the means of production, or the methods for extracting surplus labour. In particular, the law emerged in response to the killing of twenty-six miners, an incident that resulted from the decision to push production levels beyond the capacity of safety to maximize surplus value extraction. The government responded by introducing legislation that imposes a duty on employers to provide safe working conditions and penalizes those who fail to do so (at least it does so theoretically). A duty of care has the potential to impact upon class processes, such as through additional costs to the corporation through the creation of policies and practices to ensure safety compliance. Punishments also implicate class processes in that they also reduce the surplus value of the corporation, such as through fines or the imposition of probation orders.

The theoretical framework for the dissertation therefore draws from a fundamental aspect of Marxism – class antagonisms – to consider the extent that class processes are implicated in the (re)production of the capitalist mode of production. Through this theoretical integration the research explores how dominant notions of the capitalist mode of production constitute and are constituted by the various discourses that characterize corporate crime and criminal liability. Again, of particular interest is the relationship between the discursive and extra-discursive, for,
as Gibson-Graham, Resnick and Wolff (2001: 20) suggest, discourse is implicated in and constitutive of power, and an important medium through which other social processes are constituted.

Overall, the research does not search for class politics and struggles as exercised by consciously acting individuals, but instead through the relations that unfold at the political, economic and ideological levels—that is, through the law-state-economy nexus. What are the various discourses that run through these relations that help to characterize corporate criminal liability? How do these characterizations support or challenge dominant notions of political economy? How do they reflect class struggles to define or control the means of production? What are their class relevance and effects?

3.8 A Note on Epistemology

A final note regarding the dissertation’s theoretical lens: underpinning this study is a commitment to critical realist traditions that are less concerned with the motives of individuals—the focus is not on the role of human agency in constructing social relations than with the broader structural context within which humans interact and help shape (for example, see Bhaskar, 1978; 1989; Keat and Urry 1982 [1975]). For critical realists, although facts are real, they are necessarily contingent, historically specific and socially produced (Bhaskar 1978: 9). This does not mean that individual experiences are irrelevant, but simply that the social realm is not reducible to them (Bhaskar 1978: 58). Bhaskar (1978: 13) posits that social phenomena can exist and occur independently of our experiences and therefore there is often incommensurability between experiences and material reality. As Pearce and Woodiwiss (2001: 52) note, critical realists assume ontologically that the social world is made up of different
structural entities that continuously and unpredictably interact with each other, as opposed to the anthropocentric notion of interacting human beings as being determinative of the social realm.

From a critical realist perspective there are two key dimensions relating to objects of knowledge: the transitive dimension, whereby the object of interest is the material condition of knowledge, the observable relationship between a particular object and its effects; and the intransitive dimension, which refers to the structure or mechanism that exists and acts independently of our knowledge of it. These are the unobservable "generative mechanisms" that underpin the transitive dimension, or the unobservable conditions that shape and give rise to social phenomena (Bhaskar 1978: 17, 1989: 2). Reference to unobservable mechanisms does not suggest that individuals are unconscious dupes to their social reality, or that these mechanisms can only be revealed through some form of immaculate perception, but that the structures that condition the social are not necessarily observable in any "patterned" or directly causal sense (Bhaskar 1989: 2). Instead we must conceive social phenomena as the result of a plurality of structures that interact in non-deterministic ways, incorporating unconscious motivations and producing unintended consequences (Bhaskar 1989: 3-4). It is therefore the researcher's task to reveal the nature and scope of these generative mechanisms, those "enduring and continually active mechanisms of nature that produce the phenomena of our world" (Bhaskar 1978: 47).

Although critical realists draw from the natural sciences and the laws of nature to support the idea that causal structures and generative mechanisms exist independently of human experience and knowledge, they also recognize that, unlike the realm of nature, social structures cannot exist "independently of their effects" (Bhaskar 1978: 246). This means the intransitive dimension, the generative mechanisms that underpin social reality, are socially produced through human interaction. Again, however, the impact of human interaction on the social is largely
undetectable through human experience—that is, while human interaction and agency helps constitute generative mechanisms in unacknowledged and unpredictable ways, it is also true that they are constituted by the already-existing, independent structural mechanisms. As Bhaskar (1989: 4) notes, \( \text{society} \) is the ensemble of positioned practices and networked interrelationships which individuals never create but in their practical activity always presuppose, and in so doing everywhere reproduce or transform.

Two key critical realist messages are relevant for this dissertation. First, although knowledge is socially constructed (epistemic relativity), all beliefs and ideas are not created equally (judgmental relativity) (Bhaskar 1989: 24-25). It is therefore important to explain how the social realm is constituted through a plurality of structures (open, fluid and always-changing events), but also that these structures can be hierarchically ranked in terms of \( \text{explanatory importance} \) (Bhaskar 1989: 3). For example, while discourse analyses provide important insights about how we think about certain social phenomena, we cannot assume a direct, conscious relationship between language and social action. In this respect, discourse can actually mask more than it reveals. According to Pearce and Woodiwiss, Foucault recognized this in \textit{Archaeology of Knowledge} through his discussion of the complex relationships between the discursive and extra-discursive (Pearce and Woodiwiss 2001: 58), as well as the fact that discourse is much more than its \( \text{representational character} \). As the authors (2001: 61) note, discourse gains its power as a complex of imbricated representational and extra-discursive elements, none of which are exhausted by their presence or role in particular discourses or even discursive formations but continue to subsist in many other forms.

Second, while there are three overlapping elements to reality—mechanisms, events and experiences (Bhaskar 1978: 56)—generative mechanisms constitute the primary objects of
scientific thought (Bhaskar 1978: 246). This dissertation is therefore focused at the level of mechanisms and the extent to which they are constitutive of events and experiences. This approach respects both Marx’s concern with differences between the ideological basis of capitalism and its essence, or the relationship between unobservable structures and mechanisms and social formations (Keat and Urry (1982 [1975]) and Foucault’s acknowledgement of the complex links between the discursive and extra-discursive ņ that discourse is more than its Ńrepresentational character (Pearce and Woodiwiss 2001: 61).

3.9 Conclusion

This chapter situated the dissertation within the extant criminological, sociology of deviance and corporate crime literatures, as well as outlined the main theoretical claims that inform the research. By contextualizing the study of corporate crime within broader considerations of crime and deviance it revealed that dominant perspectives within criminology and the sociology of deviance have remained fixated on traditional street crimes. Part of this preoccupation includes conceptualizing crime primarily as an individualistic problem, an ill-suited fit when trying to account for corporate crime and its control (Slapper and Tombs 1999: 110). As a result, corporate crime scholarship has occupied a marginal position within crime and deviance studies.

The chapter also canvassed some of the main issues and claims within the corporate crime literature. In addition to exploring key definitional issues, it outlined ongoing debates about the most appropriate way to regulate the corporation and to prevent corporate wrongdoing. Borrowing from Tombs and Whyte (2007: 110), the chapter illustrated that the history of corporate crime control is best described as a ŏbifurcated model of criminal process ő in which attempts to assimilate corporate wrongdoing into the traditional criminal justice system have
developed alongside of, and have been dominated by, regulatory strategies that differentiate corporate crime from traditional offences. In recent decades, fuelled by neo-liberal beliefs that the free market is the most effective way to regulate the corporation, there has been a gradual erosion of “formal rules of law and regulation” (Tillman and Indergaard 2005: 28). The introduction of the Westray bill therefore represents a significant departure from the dominant regulatory regime.

Finally, the chapter outlined the theoretical framework from which the dissertation interrogates the constitution of corporate criminal liability. Drawing from the critical corporate crime scholarship, as well as Foucauldian and neo-Marxist literatures, the dissertation endeavours to develop a political economy of corporate crime law reform which accounts for the links between various discourses and discursive formations that constitute corporate criminal liability and dominant notions of corporate capitalism. Foucault’s work is instructive for identifying the dominant knowledge claims in relation to corporate crime and corporate criminal liability. Neo-Marxist (Althusserian) literatures help situate these discourses within their broader social-economic-political context. Overall, the dissertation considers how discourse and discursive relations are inculcated in the capitalist mode of production, albeit in non-linear, unpredictable and often contradictory ways. Stated differently, it attempts to illuminate the extra-discursive factors that inform the selection and retention of discourses pertaining to corporate crime and corporate criminal liability, as well as how these discourses help stabilize, reproduce and transform the capitalist social formation.

A key aspect of the dissertation’s theoretical framework is that the economic is not a given, but instead must be (re)produced to maintain its ideologically dominant position within contemporary capitalist society. As the chapter suggested, this reproduction occurs through class
struggles at the economic, political and ideological levels that are constitutive of the capitalist mode of production and unique to each social formation (Hindess and Hirst 1975). The Westray bill is an ideal example of such struggles in that it represents an object around which relatively autonomous discourses converge to animate its introduction, discourses that also inform the broader social formation. The chapters that follow critically examine the dominant legal, economic and cultural (ideological) discourses that shaped the Westray bill, and contemplate the extent to which they reinforce the corporate capital status quo.
Chapter 4: Constituting the Corporate Criminal through Law

It is important to acknowledge that the usage of the term ‘law’ operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses which by comparison fail to promote such a unified appearance (Carol Smart 1989: 4).

As a mechanism of power, legal discourse has material effects on people’s lives (Elizabeth Comack 1999: 67).

...the way the state responds to safety crimes shapes the way that those crimes are tolerated from the boardroom to the workplace (Steve Tombs and Dave Whyte 2007: 207).

4.1 Introduction

The next three chapters (chapters 4-6) critically examine the discursive formations that in various, uneven and contradictory ways animated the introduction of corporate criminal liability legislation in Canada. Throughout the reform process both individuals and groups who advocated for, or raised concerns about, the introduction of this legislation were confronted with contradictory messages about the importance of regulating workplace safety. On one hand there was official, broad-level support for introducing federal measures to ensure adequate protections for workers, particularly in that a (supposed) hallmark of liberal democratic societies is the protection of life and liberty. On the other hand, there was significant reference and deference to various other considerations that were oftentimes incongruent with the goal of protecting workers’ discourses that mitigated the seriousness of safety crimes and the nature and scope of corporate criminal liability legislation. These contradictory messages were not part of an orchestrated campaign against corporate criminal liability law, but instead reflected a convergence of different discursive formations that permeated the reform process to produce particular effects.

Three mutually constitutive discursive formations influenced the introduction of the Westray bill: legal, economic and cultural. State discursive formations also played an integral
role in that state institutions and actors helped facilitate the different discourses that constituted this legislation. As Comack (1999: 67) reminds us, the state could be said to *condense* the relations of power in society, and one of the ways it does so is through discourse. Although these discourses overlapped and, at times, occupied the same discursive spaces, they are discussed separately in the chapters that follow so that we might appreciate their unique genesis and specific contributions to the Westray bill reform process. The conclusion (Chapter 7) considers the cumulative impact of these discourses, particularly how they converged to inform the enactment and enforcement of corporate criminal liability law, as well as their constitutive role in (re)enforcing and (re)producing the broader capitalist and class-based social formation.

The chapter is divided into two sections. The first considers the factors that helped propel corporate criminal liability onto the legislative agenda, the arguments in support of the Westray bill. The second begins to critically examine the discursive formations that informed these reform efforts, focussing on the role of law and legal discourses. Of particular interest are the ways in which law was accorded special status throughout the reform process. In addition to being treated as a specialized form of knowledge with unique rules and parameters, law was defined as a *truth* and given scientific-like status (Smart 1989). Those who attempted to use it were subjugated to its discourses, traditions, rules and methods and were expected to adhere to these qualities to be recognized as authorized and credible voices (Comack 1999). This dynamic was revealed most prominently through references to the importance of establishing individual responsibility, or *mens rea*, when assigning criminal fault to the corporation. It also was revealed through suggestions that only certain, credible voices understood corporate criminal liability law, as well as through conceptions of law as infallible. It is the human component of law ï
enforcement that is problematic, not the law itself.\(^1\) Legal discourses thus set parameters to the introduction of the Westray bill, framing the debate within ‘acceptable’ legal confines, therein limiting the reform options that were given serious consideration.

4.2 **Realizing the Westray Bill: the Importance of Life and Liberty**

Various factors propelled the introduction of corporate criminal liability legislation, including: the Westray disaster and related inquiry report; broader societal concerns with corporate power and wrongdoing; official political rhetoric in support of law reform; and, significantly, lobby efforts pressuring the federal government to introduce new legislation. The Westray Inquiry report’s recommendation that the federal government introduce new *Criminal Code* legislation pertaining to workplace safety was in-and-of-itself insufficient to ensure that a new law was enacted. In this respect, it is important to understand the elements that made it possible (perhaps unavoidable?) for the Westray bill to come to fruition. Noteworthy is the lobby efforts of the NDP and the United Steelworkers of America (Steelworkers), both of whom worked diligently to ensure that corporate criminal liability remained on the political agenda, and that the federal government responded to the Westray report by amending the *Criminal Code* accordingly.

This section details the influences that encouraged the introduction of corporate criminal liability law in Canada. In addition to providing an understanding of the impetus for reform, it illustrates that powerful interests that favour the corporate form are not automatic – the state is not always an instrument of capital, the economy is not omnipresent and implementing laws to protect workers is not impossible (Tombs and Whyte 2007). To think otherwise would be to ignore that corporate criminal liability law is now part of the *Criminal Code*, and that, as a consequence, *some* corporations and corporate actors may be (and have been) held to account for

\(^1\) For a discussion of law’s discursive powers, see Smart 1989: 9-14.
their harmful and illegal acts (Archibald et al. 2004; Bittle and Snider 2006; Edwards and Conlin 2006). At the same time, however, if not for the efforts of pro-labour politicians and representatives from the union movement, this law may never have seen the light of day. The reform process was, from the outset, a struggle over the meaning of corporate wrongdoing, and more specifically about how to regulate safety and control the workplace. As we shall see, both in this chapter and those that follow in juxtaposition to the official support of, and lobbying for, corporate criminal liability law were the various discourses that resisted, or raised questions about, the appropriateness of such measures.

**The Westray Report**

The Westray disaster and its aftermath played a vital role in bringing the issue of corporate criminal liability to the fore. The failed criminal prosecution, blatant and obvious negligence uncovered during the public inquiry and Justice Richard’s recommendation that the federal government examine options for introducing corporate criminal liability law, all provided important motivations for reform. They helped create the space within which it became possible to discuss and debate measures to better protect workers and punish corporations and corporate executives for workplace injury and death. As one union representative noted,

There had to be something on the books – this event [Westray] resonated far and wide, I mean not just in Canada. This thing was reported on around the world, right, just because of the nature of the tragedy itself, not just because you killed twenty-six people, but just why it happened was just so blatantly negligent. There had to be something happening as a result of that, as a result of Richard’s report and everything, that couldn’t just be left there as another report put on the shelf of the library at the House of Commons. So there were a lot of expectations everywhere from a whole host of people that something had to be done, that it couldn’t just be left (Union representative, Interview 13).  

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2 All references from the interviews conducted for this study will be identified by the category or type of respondent and the interview number. See appendix C for a complete list of participants.
In this respect the Westray tragedy provided an important backdrop to the introduction of corporate criminal liability legislation. The gravity of the negligence associated with the killing of twenty-six miners made it difficult for legislators to ignore calls for law reform to improve workplace safety.

**Distrust of Corporations and Corporate Power**

In addition to the Westray disaster, the broader social context provided an important ingredient for reform. After all, Westray was not the first time workers had been killed on the job as a result of unsafe working conditions—particularly in the mining industry—nor was it the first time that a corporation and its executives had escaped criminal responsibility for a safety crime (Snider 1993; Tombs and Whyte 2007; Tucker 1990). And while some of these tragedies produced reforms to better protect workers’ safety—e.g., various regulations have been introduced over the years to protect mine workers, even if they have been largely ineffective (see Tucker 1990)—they did not reach the point in Canada of resulting in corporate criminal liability provisions in the **Criminal Code**.

The decade prior to the Westray bill witnessed growing concern with the damage caused by corporate wrongdoing—a concern that continues today in the wake of ongoing corporate financial scandals. Fuelled by a series of high-profile corporate disasters it became more acceptable to consider measures to punish corporations for their harmful and illegal acts. In particular, after the stock market technology bubble burst in 1999/2000 revealed a series of high profile corporate crimes, it became apparent that the profits of many highly respected corporations (for example, Parmalat, Enron, and WorldCom) were built on corruption, dishonesty and fraud (Laufer 2006). In 2002 the United States government declared war on
corporate crime in the Sarbanes-Oxley Bill, with new regulations and increased penalties on everything from insider trading to accounting fraud (Tillman and Indergaard 2005). Since the Canadian economy is hugely dependent on the United States, this had a major impact on the politicians and citizens of Canada, leading to the enactment of new laws dealing with improper insider trading (Snider 2009).³

Shortly before these corporate debacles surfaced, the Canadian public was outraged when neo-liberal initiatives privatizing public water testing facilities and decimating the Ontario Department of the Environment were implicated in a water poisoning disaster that killed 7 and sickened 2300 (Snider 2004). Thus, for the first time in two decades, criticizing anti-social corporate acts became acceptable. Westray, Walkerton, Enron and the like were interpreted by many as cautionary lessons, illustrations of the dangers of industrialization when it is beyond democratic control (Pearce and Snider 1995: 26). As a criminal lawyer noted in discussing the Westray bill, this shift in societal attitude towards corporations—a general concern with issues of corporate power and responsibility—helped fuel debate concerning corporate criminal liability (Criminal lawyer, Interview 5). A representative from a non-profit organization offered a similar observation, suggesting that there was a certain mood at the time that something needed to be done to hold corporations to account for their harmful and illegal acts (Non-profit representative, Interview 10). In short, it became politically feasible (even necessary) for the federal government to call some corporations to account.

Political Support for Corporate Criminal Liability

Another motivating factor that fuelled the introduction of corporate criminal liability legislation was the lobby efforts of key individuals and groups. At the political level this included the

³ Bill C-13: An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence-gathering)
NDP’s Private Members’ bills and, to a lesser extent, the PC’s Private Members’ motion, which urged the federal government to act upon Justice Richard’s recommendation. Each measure helped keep the issue of corporate criminal liability on the political radar.

The NDP and the PCs both had political stakes in championing new legislation in that each party figured prominently in the region of the country where the Westray disaster occurred. As Canada’s pro-labour party, the NDP had (and has) significant roots in eastern Canada, a region of the country that historically has relied on the primary resource (staples) industry, including mining and fishing, for its economic well-being. With the ascendency of neoliberalism and concomitant demise of these industries, this part of the country has experienced its share of economic and labour woes. It is within this context that the NDP’s pro-labour platform has resonated well with the electorate, at times equating to a strong proportion of the party’s seats in the House of Commons.4

In tabling different Private Members’ bills the NDP provided some of the moral and political inspiration for the introduction of corporate criminal liability legislation. This contribution was underscored by comments made by NDP MPs in the House of Commons. For example, New Democrat Bev Desjarlais urged MPs to vote for her legislation in principle so that it might be sent to the Justice Committee for further consideration. In support of her efforts Dejarlais referred to initiatives in the United Kingdom to introduce corporate manslaughter legislation, the essence of which she argued applied equally to the Canadian context.

It is murder. It is murder when someone’s life is knowingly put at risk. We accept in our country that managers and directors in workplaces have control over the workers to the point that in sexual harassment cases we hold them seriously accountable because the workers are controlled by those bosses. They are controlled because they

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4 For example, following Canada’s 37th General Election on November 27, 2000, the NDP won thirteen seats in the House of Commons, 4 (31%) of which were from ridings in eastern Canada (3 seats in Nova Scotia and 1 in New Brunswick) (see Elections Canada, Thirty-seventh General Election 2000: Official Voting Results: Synopsis, online: http://www.elections.ca (accessed: May 20, 2009).
Another New Democrat also employed the discourse of killing and murder in support of the Private Members' bill, drawing a link between drinking and driving and workplace accidents.

É What happens when someone drinks a bottle of whiskey, hops in a car, runs someone over and kills them. That is criminal. That is murder. That is not just a traffic violation. The person is guilty of murder if he or she is convicted under the Criminal Code of Canada. It is not just a workplace safety and health issue when someone is killed due to criminal negligence on the job, it is murder (Pat Martin, Hansard 3 March 2000: 13:35).

At the same time, however, as an indication that this mode of thinking was anything but unanimous, a MP responded by arguing that it was wrong to equate the "tragic events" of Westray to murder, particularly while the issue was, at the time, still before "various tribunals" (John Bryden, Liberal MP, Hansard 3 March 2008: 13:35). In many respects this comment was, as we shall see, reflective of the resistance towards the notion of corporate criminal liability.

The PCs also had a direct link to this region of the country in that Peter MacKay was the MP in the riding where the Westray mine is located, and his father, Elmer MacKay, was the MP there at the time of the disaster. After that, however, the relationship between the PCs and the Westray mine becomes considerably more complex. In particular, it was Elmer MacKay who lobbied the federal government extensively in support of Curragh's bid to re-open the mine. MacKay convinced Brian Mulroney, leader of the PCs and Prime Minister at the time, of the mine's political and economic saleability, despite warnings of the dangers associated with extracting coal from that particular seam (Glasbeek 2002: 61-66; Glasbeek and Tucker 1993: 16;
Richard 1997). As Jobb points out, it was MacKay, along with the then Premier of Nova Scotia, Donald Cameron, who backed Westray to the hilt (Jobb 1994: 13; also see Comish 1993: 52-53). After the mine began production, and as working conditions deteriorated, some observers suggested that these same politicians failed to see the writing on the wall, warnings that something disastrous was about to happen (Glasbeek and Tucker 1993; Richards 1997).

Although Peter MacKay should not be held to account for the sins of his father, as one politician suggested (Politician, Interview 20), and we should not undermine his sincerity in wanting to address workplace safety, this complex history constitutes an important backdrop to the PC’s Private Members’ motion.

Regardless of the Party’s history with the Westray disaster, MacKay’s motion helped keep corporate criminal liability on the political agenda. In forwarding this motion, the MP spoke of the importance of workplace safety and the need to introduce new legislation so that the Westray miners who lost their lives would not die in vain. As MacKay argued,

[i]t alarms us all to no end that such tragedies can occur and that no change results. The circumstances of the Westray mine cannot be forgotten and the lessons learned. To take it one extension further, the efforts made with respect to the tabling of the Westray inquiry only to sit idle on a shelf and to not be adopted or at least examined further is again an abdication of a responsibility that exists within the federal parliament. It is painful and I would suggest puzzling to suggest that we will do nothing further at this time (Hansard 23 April 1999: 12:20).

MacKay’s motion was meant to encourage MPs to realize their responsibility to ensure workplace safety by enacting appropriate and stringent laws, which he argued were necessary given the difficulty of establishing proof of criminal intent in cases like Westray.

I suggest quite strongly that knowing criminal sanctions or other disciplinary acts of retribution exist is the most direct way to ensure that those with the implicit responsibility for ensuring safety will abide. This would lead to a higher level of accountability among executives, CEOs and management in companies that

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6 For a list of previous explosions related to the Foord seam, where Westray was located, see Comish 1993: 1-2.
MacKay further argued that the imperative for reform was rooted in the moral duty of legislators to protect Canadian workers.

We are faced with an issue of complete moral duty when we talk about protecting lives and workplace safety. It is something so fundamental. When people get up in the morning and go out the door to their workplace, whether it is into a factory or on a trawler or in the woods or into a mine or an office building, it is not too much for them to expect or hope that they will be able to return to their homes safely that evening to be with their loved ones. Surely that is not something which should be too much for any Canadian to expect. Yet we are tasked in this place with trying to ensure that is just what happens (Hansard 5 October 2000: 10:35).

Other MPs also expressed support for MacKay’s motion, directly challenging the legal and political status quo. For example, New Democrat MP Michelle Dockrill argued the motion would help ensure adequate accountability and punishment of corporations who run their businesses in unsafe ways (Hansard 18 February 2000: 14:10). During a different House of Commons debate, another New Democrat MP argued that, “it is too bad we have to plead with the government to pass a law that any person in charge of a company should not have a licence to run an industry unsafely and jeopardize the lives of workers ...” (Pat Martin, Hansard 3 March 2000: 14:00).

The PC’s motion recognized the underlying dynamics of unsafe workplaces, including that profits can take precedence over safety. As MacKay noted, in any enterprise corporate executives sometimes seem less interested in the merits of workplace safety and simply in the pursuit of profit, and that the pressures of production deadlines and looming threats of shutdowns oftentimes meant that safety suffers:

It stands to reason that when weighing business goals versus those of safety, sometimes businesses find themselves on the horns of a dilemma. They have to make production deadlines. They have to produce and shutting an operation down obviously has huge financial consequences. That is where the human element and the
safe discretion must be exercised. If we need to remind executives and management and CEOs of this through legislation, I say we do it (Peter MacKay, Hansard 23 April 1999: 12:30).\(^7\)

Acknowledgment of the negative pressures of profitability also came from New Democrat MP Pat Martin, who argued, ìthere is no production schedule in the world that justifies injuring, butchering, maiming, poisoning or killing Canadian workersî (Hansard 3 March 2008: 13:35).

At one point of the proceedings a PC MP criticized other Parliamentarians who questioned the need for reform, arguing that safety was a priority over the economic security of corporations:

\[t\]hose people who have been persuaded that jobs and votes are higher priorities than life enter into a clear conflict of interest and it must stop. Many well-intentioned business executives agree with this motion because it provides safety legislation in the workplace. However there are still some who do not. Sadly the benefits of their behaviours accrue only to those executives and those people involved, while the workers, their families and ultimately the Canadian taxpayer pay for their gain (Bill Casey, Hansard 13 March 2000: 11:05).

From these accounts there appeared to be strong support, at least at the level of political rhetoric, for the idea that workplace injury and death was a serious matter that needed to be addressed through corporate criminal liability legislation. However, as we shall see, this support was anything but unanimous, and even those who acknowledged the need for reform argued that there were certain, extenuating circumstances that needed to be accounted for when considering different reform options.

*United Steelworkers of America Lobby for Reform*

In addition to the support from some politicians, the Steelworkers proved a vital component of the reform process. To fully understand the Steelworkersî contribution one needs to consider:

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\(^7\) MacKay reiterated his position when the motion was brought forward a second time in February 2000 (see Hansard 18 February 2000).
their role in the union organizing efforts of Westray workers prior to, and following, the deadly explosion; their involvement in the Westray inquiry, particularly their role in ensuring that the final report recommended the introduction of corporate criminal liability legislation; and their subsequent lobbying of Parliamentarians to enact such legislation.

Almost from the time that the Westray mine opened in fall 1991, working conditions were of such poor quality that most workers feared their safety and lives each time they descended the mine at the start of a shift (Comish 1993; Jobb 1994; Richard 1997). From the company's viewpoint the mine had seriously under-performed and, as a result, workers were expected to increase coal production to meet the (unrealistic) commitments that the company had made as part of its financing agreement with the provincial and federal government and private investors. As revealed by the Westray inquiry report, coupled with a cavalier attitude toward workplace safety by management, the mine's working conditions were ripe for serious injury and death (Richard 1997). It was within this context that some workers began exploring opportunities to unionize in the hopes of improving their working conditions. Fear of job security in a region of the country with high unemployment levels, and reaction by management to workers who previously had vocalized concerns about workplace safety (those who complained too loudly were singled out for harassment by management, including some who were fired) meant that organizing efforts had to be undertaken without management's knowledge (Comish 1993: 28-29). It also meant that the Westray workers were far from unanimous in their support of unionizing, with many fearing that they would be labelled as trouble-makers and fired. As former Westray worker Shaun Comish (1993: 28) wrote after the tragedy:

A lot of people ask me why we kept working there [despite the safety concerns]. I guess the only answer I can give is that nowadays when you have a job it is very scary to quit and hope to get a job somewhere else. I often felt that maybe things would get better someday. Some guys who worked at Westray didn’t really know
anything else but mining. That’s all they had ever done and probably all they ever will do. The promise of fifteen years of steady work weighed heavy on your mind.

The workers’ first efforts at organizing in fall 1991 failed. A second attempt brought the Steelworkers into the picture (Jobb 1994: 25), efforts that were still underway when the deadly explosion occurred (Comish 1993). As Jobb (1994: 222) notes, membership cards were being sent out at the time of the blast, and some widows received them in the mail within days of their husbands’ deaths.

After the explosion the Steelworkers continued their association with the Westray workers, providing support to grieving families and offering legal advice and support to workers (Jobb 1994). Efforts to unionize continued, and shortly thereafter the Westray workers officially certified (Comish 1993: 49; Keith 2004: 24; Jobb 1994: 222). Although this came too late for those who were killed in the explosion, the hope for those remaining was that organizing would help in the event that they returned to work, as well as make sense of the disaster and hold those responsible for the explosion—particularly management and owners—to account (Jobb 1994).

Following the Nova Scotia government’s announcement of a public inquiry, the Steelworkers sought successfully to gain intervener status in the proceedings. In doing so the union worked extensively to ensure the Inquiry proceeded (Jobb 1994: 240), and once the Inquiry was underway they tabled a number of items for Justice Richard’s consideration. In particular, the Steelworkers pressed Justice Richard to pursue three rather bold initiatives: to recommend a criminal offence that would impose criminal liability on directors or other responsible corporate agents for failing to ensure that their corporation maintained an appropriate standard of occupational health and safety in the workplace; to recommend the offence of “corporate killing”; and to recommend additions to the Occupational Health and Safety Act that...

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8 Immediately following the disaster there were some questions as to whether the mine would reopen (Jobb 2004).
would broaden the liability of directors and offices for offences under the act (Richard 1997: 600-01). While Justice Richard appreciated the Union’s position, noting that the lack of accountability was an indication of a “weakness in our system,” he found that their recommendations were beyond the scope of the Inquiry’s mandate (Ibid.). Notwithstanding, the Steelworkers eventually convinced Justice Richard to recommend to the federal government that they amend the Criminal Code to make it easier to hold corporate executives and directors to legal account for workplace safety.

Following the release of the Westray report, the Steelworkers continued their corporate criminal liability campaign by lobbying federal politicians to adopt Justice Richard’s recommendation. In June 2000, after the NDP introduced its first Private Members’ bill and the PCs had tabled their Private Members’ motion, the Steelworkers sent thirteen of its members to Ottawa for two weeks to lobby MPs to support the proposed legislation. During this time representatives from the Steelworkers were invited to appear before the Justice Committee as part of its examination of the PCs’ Private Members’ motion, even though the Committee was not hearing testimony from witnesses at that time. The Steelworkers used this opportunity to urge the government to act upon Justice Richard’s recommendation. Unfortunately, these efforts were cut short with the dissolution of Parliament, effectively bringing to an end both the Private Members’ motion and bill.

Following this initial lobbying the Steelworkers sent a second, larger group to Ottawa in April and May 2002 to lobby MPs to support another version of the NDP’s bill. In addition to lobbying various politicians about the importance of this issue, the union’s representatives made another appearance before the Justice Committee, this time in relation to the Committee’s examination of the Private Members’ bill. They once again urged the government to introduce
new legislation to better protect workers’ safety and hold corporate management, executives and board members to account for their harmful and illegal actions. As the National Director of the Steelworkers argued before the Committee, “...corporate officers, directors and corporations need to be held accountable according to their responsibility. In this sense, we are asking for nothing more than to make corporations and their officers and directors accountable, as every other person in Canada is...” (Lawrence McBrerty, Justice Committee 8 May 2002: 15:40).

From the perspective of many who participated in this research, the Steelworker’s efforts, which were described as dogged and determined, were instrumental in bringing the Westray bill to fruition. As one union representative noted,

“...once the lobbying started and the Private Members’ bill went in, I think the politicians knew deep down that the Steelworkers were like a dog with a bone and they weren’t going to let go, and they were going to be there no matter what” (Union representative, Interview 12).

The union’s efforts were noteworthy in that they restarted their campaign on a number of occasions after the legislation failed to progress through Parliament because of prorogation or dissolution for an election. After each interruption there was a risk that the government would dominate the political agenda with other issues and priorities, therein limiting the opportunity for corporate criminal liability to become part of the political agenda. There was also a risk that newly elected MPs, both in opposition and government, would not support the legislation, preferring instead to focus their energies on other issues. As one politician noted in describing the process that all MPs must negotiate when contemplating legislative reforms:

“It is a very crowded agenda in terms of a government bill, on the Private Members’ side it is really just a matter of the luck of the draw. But on the government side it is space ... you’re in significant competition with others with the government’s agenda. And the system of having bills, particularly ones with a lot of interest, you spend a lot of time on the legislation, and then that exercise is often put at risk by the vagaries of elections ...” (Politician, Interview 15).
Despite these obstacles the Steelworkers had a plan, and they didn’t deviate. As part of their efforts they kept a score sheet that tracked every politician they had met with, including when they had spoken with them, what they said and if they supported the law. As a union representative noted, they knew they had the votes there when this thing went to a vote. Once it got to a vote at a certain stage, they knew that they had the votes. That’s not always the case (Union representative, Interview 12).

As the Steelworkers continued their lobbying it became increasingly difficult for MPs to ignore their calls for reform; it was too much of a contradiction for politicians to sidestep their responsibility to introduce measures to better protect workers’ safety. As a union representative suggested,

é once they [politicians] committed to something like that [corporate criminal liability law], it’s not like saying you’re going to vote for motherhood and apple pie, or whatever; this was something that people died, they died because of damages. When they committed that they were going to support something, they couldn’t back off on that one. They had to follow through with it, or else that would have been taken by the Steelworkers and just turned against them in their home [ridings]. And we’re talking workers killed, corporate negligence, you’d never live that one down (Union representative, Interview 12).

Without the Steelworkers’ efforts there is some question whether there would have been enough support for the legislation to survive the parliamentary reform process. As one politician suggested,

Somebody should write ... [about] ... the magnificence of the United Steelworkers of America unselfish devotion to that cause. It cost them, I don’t know, did you ever ask them what it cost? é It would be huge, it would be huge, and they had no legal obligation, you know, to do it. é Without the Steelworkers, and I don’t want to sound like I’m a sycophant, because nobody’s perfect, but without the Steelworkers there never would have been a Westray inquiry (Politician, Interview 20).
At the very least, the union helped keep the issue of corporate criminal liability law on the political agenda, ensuring that momentum was maintained at times when it could have been overtaken by the vagaries of politics and the passage of time.

The Possibilities of Change – Lessons from the Reform Process

There are a number of observations to draw from the factors that contributed to the introduction of Canada’s corporate criminal liability legislation. First, despite the seriousness of the Westray disaster and the obvious negligence that was involved, it took several different factors to converge for the Westray bill to come to fruition. Second, although there were various motivating factors for reform, the political support of pro-labour politicians and the lobby efforts of the United Steelworkers of America were instrumental in ensuring the law was enacted. The commitment ‘virtù, or political will (Althusser 1999: 74) of the Steelworkers is noteworthy in that it is conceivable that the law would not have made it on, nor stayed on, the political agenda without their lobbying efforts. Third, underpinning these factors is the element of chance ‘fortuna (Althusser 1999: 74). In particular, the efforts of those involved in the reform process were, to some extent, subject to the whims of politics and the vagaries of parliament. If the political agenda had been dominated by other issues (and there was a period that it was overtaken by the events of September 11, 2001), if the NDP had not been fortunate enough to get their Private Members’ bill on the legislative agenda more than once, or if the politicians who supported the law had lost their seats as a result of the two different elections that occurred during the reform process, then the issue might have been derailed. Finally, as the next section begins to illustrate, interwoven with these different factors were the various competing and contradictory discourses that helped to constitute the nature and scope of the Westray bill. At a
minimum these discourses blunted the support for new workplace safety criminal legislation, providing, “yes it’s a good idea, but” statements at several junctures of the reform process.

4.3 Law as Capital “T” Truth

This section considers how law was constructed as a “T” truth, a discursive formation that animated discussion and debate regarding corporate criminal liability. It considers how established legal principles limited the reform options that were given serious consideration; how notions of individual responsibility, or mens rea, represented the dominant understanding of corporate criminal liability; how particular legal experts, or authorized ‘knowers’ were deemed to have the proper credentials to speak to issues of law; and how law was conceived as unproblematic, that any problems with holding corporations or corporate actors to account resided with the individuals responsible for policing the corporation, not with law itself. It also illustrates how these discourses converged around discussion of the NDP’s Private Members’ bill to downplay support of a corporate culture approach to corporate criminal liability. Overall, this section suggests that, regardless that no individual expressly argued against the desire to create safe and secure workplaces, various legal discourses helped limit the reform options and therein minimized the nature, scope and impact of the Westray bill. The section begins by outlining the role of law in contemporary capitalist society.

The Role of Law in Contemporary Capitalist Societies

In contemporary capitalist societies particularly those steeped in common law traditions law is a potent discourse, one that plays a prominent role in ordering relations of power (Fudge and Cossman, 2002: 30; Smart 1989). Although not a homogenous force that determines how various social relations (gender, race and class) will unfold, it is a powerful constraining and
enabling practice which plays a significant role in the process of governing life (Chunn and Lacombe, 2000: 14). A key element of this process is law's internally dominant concern to achieve consistency (Woodiwiss 1990: 108). In particular, legal method necessitates the establishment of conceptual consistency in the development and use of legal discourse. In turn, legal principles, doctrine, and method provide the normative basis for the authority of the law (Fudge and Cossman 2002: 30).

Through striving for consistency law produces its own will to truth (Hunt and Wickham, 1994: 41-42). Although western law varies tremendously historically and culturally (slavery, for example, was once justified under U.S. Constitutional guarantees; government control over business was excluded under the same legal statutes that now allow it) (Glasbeek, 2002), it is routinely represented as an authoritative, unitary, unchanging entity, a neutral, objective tool. In reality, law is anything but; it emerges and is interpreted through particular, and inherently unequal, social contexts. As Morrison (1995: 213) reminds us, in late modern society, we are not equally located structurally.

The truths that are produced in law's name often disqualify the knowledge claims of others — those based in women's birthing experiences, for example, or the local knowledges of fishing communities (Comack, 1999; Naffine, 1990; Smart 1989). Law is a discourse of closure in that certain criteria are applied to produce particular meaning (Woodiwiss 1990: 118-119). Under the Anglo-American legal system, law's right to speak truth is rooted in its claim to embody key cultural values of fairness, liberty and equality, and its ability to speak in the name of universal human rights (Comack, 1999; Naffine, 1990). Law's legitimacy is guaranteed by its monopoly over legal method, seen as an objective but complex path to truth, a methodology only
legal experts understand, thereby eliminating the subjective by prescribing the one correct, just, fair meaning of text, precedent and statute law (Morrison, 1995: 464; Snider, 2004: 169).

Although western law derives its legitimacy through claims of fairness, stability and justice (Woodiwiss 2006: 525), critical legal scholars remind us that law is anything but neutral and fair, an argument that becomes evident when exploring the differences between law-as-legislation and law-as-practice (Chunn and Lacombe, 2000: 11). As Naffine (1990: 24) notes, "the official version of law – what the legal world would have us believe about itself – is that it is an impartial, neutral and objective system for resolving social conflict" (as quoted in Comack, 1999: 21). In reality, however, Western law has its roots in particular gendered, racialized and capitalist experiences, most notably the liberal belief that law should protect the "rights and freedoms of the individual" (Comack, 1999: 25; emphasis original).

The priority accorded law and legal method does not suggest that law’s effects are unidirectional, or that there is a complete silencing of counter-hegemonic discourses. On the contrary, "legal and social relations are mutually constitutive." Law is not simply a container of ideologies, capitalist or otherwise, it is a site where particular ideologies are (re)produced (Bonnycastle, 2000: 65). Law therefore struggles with, negotiates and mediates various social and legal contradictions (Fudge and Cossman 2002: 4-5). For example, law has played, and continues to play, an important role in advancing capitalist ideals, such as through the enactment of laws relating to property, contract and contract of employment (Woodiwiss 1990: 139), as well as through the constitution of the limited liability corporation. Likewise, law facilitates a "climate of free market enterprise" in today’s global economy (Fudge and Cossman 2002: 33). At the same time, there are certain (limited) occasions where law has ruled against capitalist...
interests (Woodiwiss 1990: 139). Protections for workers through occupational health and safety regulations and corporate criminal liability legislation are two such instances.

Legal discourses within contemporary capitalist societies must therefore be understood as "relatively autonomous" (Woodiwiss 1990; 1997). According to Woodiwiss (1997: 485), "the foundational and constitutive role of consistency in democratic capitalist law is what gives legal discourse its autonomy." However, this consistency does not exist in a vacuum, and instead draws from the broader "ideological background" to gain its substantive meaning. Law in contemporary capitalist society is therefore relative "relative to the economic, political ideological and class-structural balances defining a particular social formation" (Woodiwiss 1997: 485). It is this relative context that must be kept in mind as this section explores the ways in which dominant conceptualizations of law characterized the introduction of Canada’s corporate criminal liability legislation.

**Adherence to Established Legal Principles**

Adherence to established legal principles was evident throughout the discussion and debates in Canada’s Parliament regarding the introduction of corporate criminal liability legislation. In particular, the importance of respecting law’s internal consistency was referenced on a number of occasions as a key parameter of the reform process. For example, following a presentation to the Justice Committee by a family member of a victim of the Westray tragedy, a Conservative Alliance MP informed the witness that certain legal principles restricted the Committee’s work.

I know you can appreciate that this committee has to do things in accordance with certain principles. I’m sure the members of your group want to make sure the laws we pass are effective and just, and that means justice even for people who are accused of a crime. I don’t think I’ve heard anything in your statements here today to suggest that you’re seeking some kind of vengeance that doesn’t recognize certain principles we have in our Canadian legal system. I think, though, hearing from the
victim in that sense is important in having us make sure we balance the interests of victims and the *legal principles* we have to take into consideration (Vic Toews, Justice Committee 7 May 2002: 9:45 – emphasis added).

The importance of maintaining legal principles surfaced once again at the Justice Committee during discussion of whether there was, in fact, a need to implement new legislation in response to the Westray disaster. As a witness stated,

> It may very well be that new legislation is needed for workplace safety. If that’s the case, let’s say it, but let’s not go on to say it looks like or it appears that these disasters mean we can’t get the people responsible; therefore, we’re going to change the law. In my respectful submission, it is very dangerous. I would ask you to continue to study this, and divide it up into deciding what’s really necessary and what may be a reaction to large events (William Trudell, Canadian Council of Criminal Defence Lawyers, Justice Committee 23 May 2002: 11:25).

In response to this comment a MP suggested that enacting new legislation without due respect to core legal principles could result in an unjust situation.

> I, too, share some of the concerns Mr. Trudell has indicated in respect of the scope of the law and issues of constitutionality. It would be a great disservice to the survivors of Westray, and the families, if we were simply to pass a law that reacted to the situation without ensuring the principles were constitutionally sound. I think the advice you’ve provided is very important in this respect (Vic Toews, Justice Committee, 23 May 2002: 11:30 – emphasis added).

In another instance, deference to established legal principles was raised in relation to the *fairness* of stigmatizing corporations through law. A Justice Committee witness suggested that reference in the Private Members’ bill to *ought to have known* that injury or death might occur as a result of unsafe working conditions was too vague to assign liability for fatalities, that it was incongruent with the principle of proportionality.

> A policy consideration is simply when, in Canadian society, we want to stigmatize an individual or a corporation with criminal liability. It might be that the *ought to have known* standard is insufficient in that regard ... it is perhaps unfair and disproportional to stigmatize with criminal conviction and imprisonment on an *ought to have known* basis (Greg DelBiggio, Canadian Bar Association, Justice Committee, 23 May 2002: 11:05).
As these comments reveal, reference to law’s parameters helped characterize the reform process, setting limits to any expectations of what could be achieved through law reform. At the same time, however, these parameters were reinforced further through reference to law’s specific qualities and rules that underpin its normative authority.

**The Predominance of Individual Responsibility**

A primary conduit for the expression of legal principles was reference to the importance of maintaining individual responsibility, particularly in relation to traditional notions of *mens rea*. A (purportedly) novel aspect of the Westray bill is that it attempts to attribute liability to the corporation, focusing on the organization or entity as opposed to solely the guilty individual. However, concern was expressed by some who participated in this study that the new law failed to address the unique aspects of individual liability within the corporate setting. In this respect the law differed from Justice Richard’s recommendation, and the position of the United Steelworkers of America, to enact legislation that specifically addresses the accountability of corporate executives and directors. The Steelworkers had argued that holding senior executives and board members criminally liable was the most effective way to get their attention and ensure that they addressed workplace safety (Union representative, Interview 9).

When the Westray bill was tabled it was clear that the government had chosen a different direction (Union representative, Interview 7). As one government official admitted, senior officers are at no more risk of personal liability than they were prior to the introduction of the Westray bill (Government official, Interview 1). A corporate lawyer described this decision as “ironic” and “tragic” in its abandonment of Justice Richard’s recommendation (Corporate lawyer, Interview 4), pointing out that,
... it is much more plausible and likely that a foreman, supervisor, maybe a plant manager ... is going to be targeted for Bill C-45 enforcement than a senior executive or somebody in a suite in a public or large private corporation. I just don’t think that police on the ground are going to be thinking about what is in Bay street, if there is in a Northern Ontario pulp mill or mine in northern BC somebody injured or killed. You are going to be looking at who is there, who gave direction, who didn’t give direction, and why, and was there wonton and reckless disregard for some worker’s health and safety? I think it is part of police nature to look for a clear suspect or target and they are going to take recommendations from Crown attorneys, not the other way around. And that’s how it is going to play out.

The decision not to enact provisions relating to executive and board member liability was based on the argument that the *Criminal Code* already addresses individual negligence (Government official, Interview 1). From this perspective an individual can only be held responsible for a crime if they commit the act themselves, or are a party to the offence. As a government official (Interview 1) suggested,

> We don’t hold people responsible as individuals for acts that they don’t commit or are not party to, and a lot of the recommendations seemed to be in the nature of, well if you are a CEO of a company, and that company is responsible for the death of 26 miners, then you as a CEO bear a personal responsibility and that is inconsistent with all the principles of criminal law.

The predominance of *mens rea* as it applies to corporate criminal liability, particularly that you need a guilty mind to hold senior executives to personal account, was evident in various comments made by MPs and witnesses during the Justice Committee’s hearings. For example, as part of the Justice Committee’s consideration of the Private Members’ motion, PC MP Peter MacKay highlighted the difficulty of attributing liability for acts of omission: it’s very onerous to try to attach criminal liability to something a person didn’t do, and I think we have to be very careful when we start assigning such a weighty degree of liability for acts of omission (Justice Committee 6 June 2000: 10:55). Similar concerns were expressed by MPs who wondered about the empirical evidence that could be collected to determine director responsibility (Gary Lunn, Reform MP, Hansard 18 February 2000: 13:55), or whether it was appropriate to hold someone
in a head office to account for something that occurred in another location and as a result of day-to-day operations (John Maloney, Liberal Member, Justice Committee 6 June 2000: 11:20). A Liberal MP expressed these concerns in the following manner:

[t]he problem with industrial accidents is that it is very difficult to determine if negligence occurred. Sometimes it may not be negligence at all. It may be that the firm has done everything it thought was correct, but still the accidents occur. The problem is, where do we draw the line between no negligence, negligence and wilful negligence (John Bryden, Liberal Member, Hansard 3 March 2000: 13:45).

Even proponents of corporate criminal liability legislation found themselves subjected to traditional notions of individual responsibility, as evidenced by comments from a non-profit representative who expressed his reservations about assigning criminal responsibility for workplace accidents:

... you really have to understand who is making the decision and if it was something deliberate by, let’s say a supervisor in the field or a line manager who is doing it. The director, I feel, should not be held as liable as that person, and I think the intent of the bill is that you don’t have to necessarily charge the director, you can charge the supervisor, the line manager and leave the directors out of it ... I mean, you have a large corporation ... they’re putting the money, they’ve hired the right people and they still have a line manager that’s going against the rules just to meet production, whatever. Technically, yes they are running the company, but should they be held as accountable as that line manager? I don’t think so (Non-profit representative, Interview 10).

Recognition of traditional notions of individual responsibility therefore raised questions about assigning corporate criminal liability beyond the guilty individual, in the absence of a smoking gun. In this respect there were conceptual difficulties with the prospects of piercing the corporate veil to assign legal responsibility for safety crimes.

**How Far up the Corporate Ladder Can We Go?**

Perceived problems with establishing intent within the corporation was a predominant means of framing discussion and debate about corporate criminal liability. First, there were numerous
comments that questioned whether those in the suites – senior officers, executives and board members – are responsible for what happens on the company’s streets, the corporation’s front line. Second and related to this, establishing criminal intent at the top end of the corporate ladder was described as a constitutionally spurious endeavour.

Several examples underscore the conceptual roadblocks that existed when considering the criminal responsibility of those in charge of the corporation, those who reap the greatest economic rewards but take the fewest risks, at least in terms of workplace safety. As one member noted during debate of the NDP’s Private Members’ bill,

I believe we must tread very carefully in our legislative endeavours for fear that we may inadvertently alter our legal system in such a fashion as to provide a basis for criminal culpability without criminal intent, which would not be congruent with natural justice ... Directors of corporations tend to deal with issues such as strategic marketing and profit margins, whereas middle management tends to deal with operations on the ground. Is it fair to say that the manager who oversees the safety conditions in the factory is not ultimately responsible for the safety conditions in the factory, whereas the director who spends his or her time studying pie charts relating to relative market share is culpable of corporate killing? (Scott Reid, Canadian Alliance MP, Hansard 8 November 2001: 17:40).

Further examples of this reasoning surfaced during the Justice Committee’s work, particularly in terms of establishing intent in the corporation in meaningful, legal ways. As a Conservative Alliance MP suggested to a witness,

I think your position that criminal liability not attach to persons, directors, or officers who do not have the requisite degree of criminal intent is a sound principle, and it’s a necessary principle if we’re to attach criminal liability. I’m pleased that most members here, if not all members, recognize that there are certain minimum standards of criminal intent that we must see in the legislation (Vic Toews, Justice Committee 9 May 2002: 10:05).

Although this MP agreed that there may be workplace safety issues to address in the context of criminal law, he nonetheless maintained that the principle of criminal intent, which is
necessary for criminal prosecution, needs to be saved (Vic Toews, Justice Committee 28 May 2002: 11:35). A witness gave further credence to this perspective by stating,

[w]hen you talk about directors’ and officers’ liability, and then about life in prison for unsafe working conditions resulting in the death of any person, can I just say if wearing a defence counsel’s hat, this is kind of a shocking statement to get us all paying attention. But obviously this flies in the face of everything we know in this country in relation to the presumption of innocence. There are other ways to get the message out in relation to corporate responsibility (William Trudell, Canadian Council of Defence Lawyers, Justice Committee 28 May 2002: 11:35).

Conservative MP Peter MacKay, who supported the introduction of corporate criminal liability legislation, also struggled with assigning criminal responsibility within the corporate form:

[how do we hold the corporation responsible for what, in many instances, were omissions, things they didn’t do, they should have been responsible for doing, chose not to do?] (Peter MacKay, Justice Committee 22 May 2002: 16:05). A short time later MacKay effectively answered his own question by stating to a witness, “I guess what I’m getting at is this chain of evidence. You’re more than aware of the fact there has to be proof of both the act, the actus reus, and the mens rea, the intent” (Peter MacKay, Justice Committee 22 May 2002: 16:10).

One exchange between Liberal MP Derek Lee and a witness, sociologist Susan Dodd, further underscored the perceived difficulties of establishing the intentions of executives and directors. Lee began his intervention by differentiating between “accidents” and “intentional” acts, itself a socially constructed categorization of workplace safety.

The general who was in command of the four Canadian soldiers who died by accident in Afghanistan recently is still on the job. These accidents are not intended. I’m not talking about things that are intended to happen that take life or cause injury, I’m talking about things that are not planned. There may be carelessness, but they’re not intended to happen. And whoever was involved in the Westray matter, either as a victim or as a survivor, life goes on there. I don’t accept that there has been a total failure of the justice system in the Westray file ... (Justice Committee 22 May 2002: 16:15).
The witness responded by suggesting it was a mistake to refer to cases like Westray as an "accident," and that the criminal law was an opportunity to hold corporate "agents and directors accountable in the strongest way we know how, which is under criminal responsibility" (Susan Dodd, Justice Committee 22 May 2002: 16:20). Lee rebutted that it was difficult to hold someone like a corporate director to account for something that they did not know was happening: "I don't see how we can make the criminal law reach that far, walk in the back door with the criminal law when some person on a corporate basis might have had no idea of what was going on" (Justice Committee 22 May 2002: 16:20). Another MP continued by suggesting that there were limits to establishing guilt within the corporate setting. "To carry on with what Mr. Lee suggests, is there a fear of going way too far here?" (Kevin Sorenson, Conservative Alliance, Justice Committee 22 May 2002: 16:25).

The fear of "going too far" was echoed by those who distinguished the decision-making (and profit taking) portion of the corporation from the production side of the equation. One MP questioned whether an officer in a head office should be responsible for a workplace accident at a branch plant. "So if we have an officer of a corporation in Winnipeg, the working conditions relate to an issue in Sarnia, and that officer, as a part of his or her responsibilities, has nothing to do with the Sarnia operation, would this not impose criminal liability on the officer in Winnipeg?" (Vic Toews, Justice Committee 8 May 2002: 16:35). Comments from other MPs further underscored the general uneasiness when contemplating the liability of corporate executives and directors.

...how far up the chain do we attach accountability and liability? Some folks have said that the directors should be responsible for virtually everything done by their employees, and then we get varying degrees of that all the way down. I'd just like some opinions. If you're talking about a large corporation that may have directors in Vancouver and something happens at a plant in Toronto, how liable is the director in

But if I’m sitting in a corporate boardroom in Halifax or Vancouver or Toronto or Montreal, General Motors perhaps, realistically, how can I be held liable because a health and safety supervisor in the General Motors plant in Oshawa is incompetent or negligent? (John Maloney, Liberal, Justice Committee 22 May 2002: 16:55).

A revealing example of the perceived limits of establishing the criminal intent of corporate executives emerged during an exchange between a Conservative Alliance MP and a witness who supported the corporate culture model. The exchange unfolded as follows:

**Mr. Chuck Cadman (Surrey North, Canadian Alliance):** Thank you, Mr. Chair. For me, the crux of this is how far up the line it goes, how many people are affected, who held responsible, and at what level. I worked once in a small shop where I wired high voltage electrical control panels. There was a government inspector who was responsible for coming round and checking those panels to make sure they were safe on a random basis. This government inspector, I found out later, had a little side business going building little ground fault interrupters and had entered into some kind of deal or arrangement with the shop supervisor—not the owner, not the director, but the shop supervisor—that he would buy some of these things if the guy would just look the other way once in a while. If I’m wiring that control panel and somebody gets electrocuted, I have no knowledge of a fault, because I wasn’t the inspector. Is the company owner liable at that point? Is the board of directors liable? You had an inspector that was in collusion with a floor supervisor to look the other way. How far up does the liability extend?

**Dr. Susan Dodd:** To my mind, it would again have to be determined what one had a responsibility to know.

**Mr. Chuck Cadman:** I just want to know whether you feel the owner of the company or the board of directors, the CEOs, should have been liable at that point, when something has happened way down the chain, close to the bottom, where there was no way for them to know what was going on. In fact, I wouldn’t have known it.

**Dr. Susan Dodd:** I’ll make a speculation and say that in that case the board of directors would not be responsible. That’s very different from participating in creating a workplace like the Westray coal mine.

**Mr. Chuck Cadman:** I’ll say it’s similar, it’s just a matter of scale (Justice Committee 22 May 2002: 17:20).
An exchange between another MP and a criminal lawyer also reinforced the prevailing concern with establishing the criminal liability of senior executives. The member suggested that it was important for the Committee to consider how far up the chain of command the legislation could apply (Liberal MP Andy Scott, Justice Committee 23 May 2002: 11:35). The witness responded by reiterating the importance of establishing individual liability.

There is a desire expressed by some to try to press liability higher up the ladder. The question that arises is why that desire exists. To go to the *ought* question, why ought it be the case that liability attaches at the top rather than the bottom or the middle? I don’t know that this question can be answered in the abstract. I would suggest that the best way of examining the question is to determine who is responsible for a particular wrongdoing. Maybe it’s the top, maybe it’s the middle, or maybe it’s the bottom. But without more, simply striving to attach liability at the top is perhaps going to invite problems (Greg DelBiggio, CBA, Justice Committee 23 May 2002: 11:40).

On the surface this presents itself as a legitimate legal question that is concerned with establishing an appropriate balance of accountability within the corporation. The problem, however, is that the structure of the modern corporation already favours those in positions of authority and power – those behind the corporate veil – the very basis of the recommendation for law reform.

The various questions that were raised in relation to establishing criminal intent at the higher end of the corporate ladder were given further credence by legal commentators who reminded everyone that criminal intent was a constitutional matter. The testimony of Professor Patrick Healy, who was recognized by members of the Justice Committee for his legal expertise, is instructive in this regard. Healy provided a thorough analysis of the Private Members’ bill, expressing concern with the possibility of a “cascade of liability” that it would introduce. The idea that someone might be held liable for an act they did not commit was something that strayed too far from the principles of criminal law for Healy’s comfort.
[The Private Members' bill] ...would mean at the end of the chain directors and officers are going to be held liable and exposed to the same level of punishment as a natural person who is proved to have committed the offence with a full degree of fault ... This is a sweeping measure. I understand its purpose; nevertheless, it's sweeping in its scope, and I think there is a very real possibility ... that this measure would be open to constitutional challenge on the basis that the grounds of culpability, certainly so far as directors and officers are concerned, are not of commensurate weight and culpability with the commission of an offence by a natural person (Justice Committee 28 November 2003: 11:05).

Additional interventions from Healy shed further light on this concern, and that intent is intricately related to constitutional matters.

... I do think ... when you're talking about the most serious criminal offences, not just homicide, but the top end of fraud and other commercial offences, it's going to be very difficult for the courts to find constitutional validity in legislation that does not preserve some notion of individual fault, rather than a very diffuse form of collective fault. I'm convinced of that, at least to the extent that the courts have said there are offences that require proof beyond reasonable doubt of an element of mens rea, by which I mean a subjective mental element of intention or recklessness (Justice Committee 28 May 2002: 11:50).

When you move progressively away from the idea of individual responsibility, in my view, it's likely that you would open the legislation to further and further constitutional challenge. That would certainly be a possibility or probability if the corporate culture test were adopted, because, first of all, it would be open to challenge on some ground of vagueness, which is a concern of the Supreme Court under a number of decisions over the last decade, and further, there would be a serious possibility of challenge on the basis that the test for the directors' and officers' liability is not proportional to the offence with which they are being charged. In other words, they're effectively being held responsible for something that they might not have been able to influence or control (Justice Committee 28 May 2002: 12:05).

The association between criminal intent and constitutional protections was reinforced in the written submission to the Justice Committee from the Canadian Bar Association, a leading voice of the legal profession in Canada.

Long standing principles of criminal law and constitutional protections available for individuals charged with criminal offences must not be compromised or eroded in an overzealous effort to attain social objectives. Constitutional and quasi-constitutional protections, such as the requirements of a criminal intent or mens rea, proof beyond a reasonable doubt, the presumption of innocence, and the clarity of criminal
legislation must be appropriately transposed. It is no answer to say that these protections are unnecessary when the accused is a corporation (Canadian Bar Association, 22 May 2002: 2).

In this respect, in addition to being conceptually difficult for many individuals involved in the reform process to consider the criminal liability of corporate executives and board members for workplace injury and death, it was constitutionally unsound.

It may be tempting to conclude that notions of criminal intent were espoused primarily by conservative MPs and legal experts working from a traditional, black-letter law perspective and in many respects these were the dominant voices. At the same time, however, the language of intent also had to be reconciled by those who advocated for reform. For example, at one Justice Committee meeting a MP raised the question of union responsibility for workplace injury and death: that is, if senior executives are responsible for workplace safety, then unions also should be held to account. In response a union representative noted that, "the further you get into the notion of union liability in these cases, the deeper you get into the problem that was previously raised, which is criminal intent..." (Andrew King, United Steelworkers of America, Justice Committee 8 May 2002: 16:45). By responding this way the witnesses reinforced the importance of criminal intent, even if his comments were meant to protect the interests of unions and avoid the suggestion of equally shared criminal liability (an issue discussed in greater detail in chapter 5). In this respect the language of criminal intent was imbued in the reform process, ensuring that law parameters were respected by all when contemplating options for reform.

**Law and Authorized Knowers**

In couching the issue of corporate liability in primarily (exclusively?) legal terms, non-legal descriptions, by non-legal experts, were effectively marginalized. Simply put, corporate criminal
liability, and the Westray bill in particular, was described as complex law that only some knowledgeable legal experts ("authorized knowers") could understand. For example, in speculating on the brevity of the Justice Committee’s report on corporate criminal liability, one government official suggested that it would have been difficult for them to come up with solutions in such a sophisticated area of law. From this perspective corporate criminal liability was seen as a specialized and unique subset of criminal law that only a select group of criminal law experts would understand (Government official, Interview 1).

Other respondents also referred to the particular knowledge or insight that was necessary to understand the law and its implications. As a private sector representative noted when discussing his understanding of the Westray bill:

I may have been at a bit of an advantage [when it came to the Westray bill] because I’m a lawyer by training, so I’m used to looking at legislative amendments, bills, and I think the most important part of looking at anything like this is to understand what the motivating factors behind it are, what its intention is, and then to measure what the impact is likely to be, or the intended impact, of the legislation (Private sector representative, Interview 22).

There also were references during the Justice Committee’s work to the complexities of corporate criminal liability law, and that it took expert, legal knowledge to understand and craft new legislation in a manner that respected core legal principles. The notion of legal expertise gave credence to some voices and disqualified others, especially in that some legal experts were deemed more knowledgeable than other witnesses and members. As one MP commented following a presentation by union representatives:

I’m glad you took this matter to criminal lawyers, who, one hopes, understand constitutional law as well, to take a look at this very important issue. I think we’d be doing the workers of this country a real disservice if we passed legislation that didn’t meet the requirements of our underlying constitutional obligations. I think that is very important, and I think your assistance in that respect will be of use to me and my colleagues in their determinations (Vic Toews, Justice Committee 8 May 2002: 15:50).
In some instances only those with the proper legal training were deemed “authorised” to speak of these complex matters. For example, following a comment made by a union representative that he was not a lawyer (which itself gives special status to legal practitioners), a member thought it was necessary to refer to his own legal training.

é unfortunately, because I’m a lawyer, I do get into some of the technical things, but I have to ask these questions. I think, in order to be able to justify this, not just to myself or my colleagues here, but to the rest of my caucus, there are some questions I have to ask (Vic Toews, Justice Committee 8 May 2002: 16:30).

One MP excused herself for her lack of legal knowledge. “I’m not a lawyer, so excuse me if I’m not particularly up to the necessary terms of law ...”(Hedy Fry, Liberal, Justice Committee 22 May 2002: 16:40). After suggesting that there was a need to introduce rules to criminalize the failure to provide for a safe working environment, the member added:

Isn’t that simple? I don’t know, I’m not a lawyer. It seems to me it’s so simple for us to just do that. There’s a clear moral issue here: the corporation must have a moral duty. It can be made into a legal duty to have the knowledge, and failure to have the knowledge in itself should involve guilt. You shouldn’t be running a company if you don’t have the knowledge. That’s my argument. If it is simplistic, I just want to lay it on the table anyway and ask what you think of that kind of simple way of looking at the problem (Hedy Fry, Liberal, Justice Committee 22 May 2002: 16:40).

Consider, also, the reception accorded another woman and non-lawyer. This woman appeared before the Justice Committee as a representative of the Aurora Institute, a critical, non-profit think-tank dedicated to examining the social and legal status of corporations in Canadian society. The two male legally credentialed witnesses who testified that day were received with enthusiasm — their professional status was outlined, they were asked to expand on their testimony or to tell the Committee the best ways to establish mens rea and actus reas. The representative from the Aurora Institute was asked only one question, and it came after one MP noted that the two male lawyers had been allowed to “run away with the process” (Mr. Paul Harold Macklin,
Liberal Justice Committee 28 May 2002: 12:15). Her comments on the need for strong corporate criminal liability legislation were then rebutted and contradicted, not by a MP but by one of the witnesses. He reiterated the importance of retaining the legal notion of individual responsibility (directing mind) and argued that there was little demonstrated need for reform. His rebuke continued: "I don't know that corporations are getting away with it [corporate crime]. Charges are happening every day in relation to corporations. I don't think the void [in law] has been demonstrated. I think there have been some disasters that resulted in unsatisfactory prosecutions."

(Mr. William Trudell, Justice Committee 28 May 2002: 12:15 and 12:20).

**Law as Neutral/Infallible**

Another way in which law functioned as a truth was through the perception that law is infallible, so long as the rules of legal method and precise legal language are correctly followed. The official version of law, the belief that law is an impartial, neutral and objective system for resolving social conflict (Naffine 1990: 24, in Comack 1999: 21), was fundamental throughout the reform process. This belief is maintained by a legal sleight of hand that transforms social conflicts into individual, legal problems and abstracts individuals (and corporations) out of their social contexts, thus allowing law's gendered, racialized and class-based origins and impact to be ignored (Comack 1999: 23).

Belief in the sanctity of official law is particularly important for the study of corporate crime because law legitimizes the disparity in sanctions between traditional and corporate offenders. As many have noted, corporate actors who cause injury and death rarely receive sanctions equivalent to those meted out to traditional criminals. Workplace injury and deaths, environmental crimes and corporate fraud are rarely sanctioned or shamed. And when they are,
punishments are much lighter than those received by the street offender who commits comparable acts of theft, fraud, assault and murder (Glasbeek 2002; Pearce and Tombs 1998; Rosoff, Pontell and Tillman 2005; Snider 1993). Clearly, as Snider (2004: 177) observes, control is not an equal-opportunity game.

Law’s authoritative status was reinforced by suggestions that it was a neutral arbiter that will establish the “truth” through its proper application. In particular, although corporate criminal liability was seen as complex law, the problem with protecting workers’ safety was thought to rest with extra-legal factors (factors beyond the way in which the law was written), including a lack of enforcement and the factual complexities of different cases (Corporate lawyer, Interview 7). One respondent spoke of the complexities of investigating and prosecuting workplace deaths, citing the difficulties of weaving together the various causal factors (Government official, Interview 1). And while rigorous enforcement would help to ensure the law’s use, advancing this perspective removes the burden of accountability from the law. Law is not the problem; it is those who are charged with its enforcement that do not understand law’s value. In the process, the unequal relations of power that are imbued in law’s constitution are ignored, leaving the impression that law can transcend social conflicts. Law remains above human error, a tool that is “...fair, dispassionate, disinterested, and ... above all ... just” (Comack 1999: 23).

Further expression of law’s infallibility surfaced through suggestions that the failure to hold Westray managers and owners to account was the result of poor regulatory enforcement before the disaster, and an inadequate criminal investigation afterwards. For example, one MP, citing his expertise as a mining engineer, suggested that focusing on the enforcement side of the equation would save implementing legal measures:

[w]e are perhaps shooting at the wrong target here. The problem at Westray was not governance. The problem at Westray was safety enforcement. Perhaps we might say
that line management was guilty but the mine inspection system failed. Any mine inspector should have been able to spot the violations which have been described here which took place in that mine. Because there was this one particular disaster, let us not talk about revamping a law which has served us well over the years (Lee Morrison, Reform Party MP, Hansard 13 March 2000: 11:35).

There was also some discussion about the difficulty and complexity of attempting to hold corporations to legal account, a suggestion that again led to debate about whether the law was the problem or those charged with its enforcement that needed reform. As Conservative MP Peter MacKay asked of a witness,

I guess I have a straightforward question about what you would say, as an expert in this area and having studied this, to the suggestion that the current Criminal Code provisions are sufficient; that criminal negligence, manslaughter these types of Criminal Code charges that currently exist, that in fact were utilized in the Westray case.... What happened in Westray is perhaps not the best example. That prosecution went completely awry. It went in all kinds of directions. Tactical delays were used. The case died by paper instead of on its merits (Justice Committee 2 May 2002: 10:45).

And a representative from the Canadian Council of Criminal Defence Lawyers noted:

I think the proper application of existing legislation, both provincial and federal, will satisfy the need to address environmental protection and workplace safety, etc. I don’t think we need to really examine the whole corporate structure. What we need to do is look at the tools we have in relation to enforcement (Mr. William Trudell, Justice Committee 28 May 2002: 11:35).

Law is perfect, while enforcement is imperfect, as expressed through a statement by Liberal MP Paul Harold Macklin:

In listening to your testimony, I get an impression, as from some other evidence we’ve already heard in this hearing process, that in fact, there were a great many laws available, there were a great many protections available, but the failure was not necessarily in the creation of the laws, but rather in the enforcement process of those laws ... (Justice Committee 7 May 2002: 10:15).

The notion of law as infallible helped propel the myth that it provides the method for determining ñuthñ the belief that legislators simply need to strike the appropriate balance when
creating law to ensure that workplaces are safe. Once again, law is not the problem; it is those who are charged with its enforcement that need discipline and correction.

Was it a failure of law? ... there is truth in saying charges were laid, albeit belatedly, and there were issues with the evidence and how it was collected. Charges were laid, the corporation was charged. The corporation then was insolvent, so it became redundant, the owner-operator was not charged, so there is perhaps a gap there that has to be closed. But the real issue then became the process. The process is what failed. The process completely fell down, and there are all sorts of reasons. We know how those men died, we want to know why, about that convoluted conspiracy of circumstances that led to this disaster (Peter MacKay, Justice Committee 22 May 2002: 17:10).

The perception of law as infallible helped decontextualize legal measures from their social, political and economic context, suggesting that it is above these messy disputes and is a neutral arbiter that can resolve social problems. Meanwhile, the law is anything but neutral and fair, working to the advantage of the powerful few, while distributing its ‘justice’ in a manner that disproportionately affects the most marginalized members of society. It also cast doubt over the need for law reform, shifting the discussion from the limits of the law to problems with the administration of justice. Why should the law be changed if it will only be (mis)interpreted and (mis)applied by those charged with its enforcement?

4.4 Law’s Convergence around the Concept of Corporate Culture

Law’s “T” status factored prominently in discussion and debate of the Private Members’ bill and its support of a corporate culture approach to criminal liability. Within this context there was a convergence of the various legal discourses discussed above – i.e., legal principles, criminal intent and authorized ‘knowers’ – which raised doubt about the viability of such an approach to corporate criminal liability. This section examines how these discourses shaped consideration of the relationship between corporate culture and criminal liability, including how they ensured that
existing criminal law standards were the basis from which to judge all proposals for reform. The section begins by outlining the arguments in support of the corporate culture model.

Considerable support for the corporate culture approach came (predictably) from New Democratic MPs, whose party introduced the Private Members’ legislation. For example, New Democrat Bill Blaikie noted the process by which a culture of rule breaking develops within the corporation.

There are all kinds of situations that I’m aware of, in the railway and everywhere else, where there are all kinds of rules that everyone’s supposed to follow, but there’s an expectation on the part of management that you will not follow those rules if there’s a train they want to get out or if there’s some deadline they want to meet. You’re in trouble if you don’t break the rule. If you break the rule and everything’s fine, then everything’s fine. But if you break the rule and something happens, well, then, it’s your fault as the employee rather than the company, when in fact there’s a culture of expectation that the rules will only be observed when it suits efficiency, so to speak (Bill Blaikie, Justice Committee 2 May 2002: 10:15).

Although MPs from other parties did not expressly support the corporate culture approach, they nevertheless offered comments in recognition of the external factors that shape workplace safety. As Conservative MP Peter MacKay noted to a witness during the Justice Committee’s hearings, [w]e take very seriously this task before us. You’ve acknowledged, and I think you’ve seen through some of the questions, the complexities of all of this. But you and I both know, back in Pictou County, the reason a lot of people went into that mine was economic circumstances. I dare say I and I say this with the greatest respect I if a mine opened up tomorrow, there’d be people lined up across the bridge to get jobs there. That’s the reality we have to take into consideration too, that there are these external forces that come into play and sometimes contribute to these disasters. But your testimony is a very solemn reminder that for every action and reaction there’s got to be some sense of responsibility for what people do and what decisions they take (Peter MacKay, Justice Committee 7 May 2002: 10:25).

Throughout the Justice Committee hearings strong support was expressed for the corporate culture model within the Private Members’ bill. A representative from the Ottawa and District Injured Workers Group argued that introducing legislation based on such an approach would help to ensure that safety concerns extended beyond line managers to directors and officers
(Doug Perrault, Justice Committee 2 May 2002: 11:25). Other witnesses were more overt in lobbying for a corporate culture approach to corporate criminal liability, as evidenced by the statement of one witness, who argued, "It's crucial that our Criminal Code acknowledge [i.e., criminalize] that some corporate cultures are criminogenic, that they tend to produce, or at the very least encourage, the breach of law." (Susan Dodd, Sociologist, Justice Committee 22 May 2002: 15:45). A witness from a community-based organization offered a similar observation in her assessment of the corporate form.

Corporations are institutions created by law. Laws spell out the rights, powers, and responsibilities of the corporation, and these in turn inspire the goals, rules, and purpose that form the basis of any corporate culture. Therefore, the corporate culture this bill rightfully addresses is necessarily a function of the corporate structure as it exists in law, and unless that structure is addressed, the type of corporate culture that overlooks employee safety will always be an issue (Clare Mocherie, Aurora Institute, Justice Committee 28 May 2002: 11:10).

The written submission of the Shareholder Association for Research and Education (SHARE) to the Justice Committee also supported the Private Members' bill concept of corporate culture, arguing, "...it is necessary that legal regimes be able to transcend the legal fiction of corporate personhood in order to ascribe liability to corporations and corporate personnel for harm caused to individuals and the environment through wilful acts or negligence." (SHARE, Submission to Justice Committee 30 May 2002: 1).

Finally, a legal academic argued to the Justice Committee that it was problematic to conceptualize workplace death as "accidents" and hence important to include reference to corporate culture in workplace safety legislation:

When somebody dies at the hands of another person, we usually call it murder; when this happens in war, we call it a casualty; and when this happens at work, it's an accident. I'll say right now that I'm in favour of the adoption of a bill like the one that is proposed, because this culture has to change (Anne-Marie Boisvert, Justice Committee 23 May 2002: 9:40).
The witness encouraged MPs to consider the Australian model as a source of innovation in responding to workplace injury and death, as a way of balancing the traditional common law (individuals are still culpable under a corporate culture model) with the idea of a “deficient” corporate culture. Why not try it, even if it later needs some adjusting? I would say that we have nothing to lose (Professor Anne-Marie Boisvert, Justice Committee 23 May 2002: 9:50).

Overall, there was strong support for the NDP’s corporate culture approach to corporate criminal liability, recognition of the association between corporate culture and corporate malfeasance. However, as the next section illustrates, in juxtaposition to this support were various legal concerns that downplayed the corporate culture model as a viable reform option. Although these concerns were not expressed in terms of opposing the idea of making workplaces safer, they nevertheless imposed limits to establishing corporate criminal liability.

4.5 Concerns with the Corporate Culture Model

From the outset of the Justice Committee’s work it was clear that reference to “corporate culture” in the Private Members’ bill was a problematic concept for many MPs and witnesses in terms of the need to establish mens rea and to maintain established principles under the Canadian Charter of Rights and Freedoms. Of particular concern was that assigning responsibility based on the concept of corporate culture strayed too far from the established legal parameters of individual guilt. For example, in responding to a question from an MP about whether the government ensures the constitutionality of legislation as part of its drafting process, a Department of Justice representative raised the spectre of a Charter challenge to the corporate culture bill:

One would expect a challenge to a corporate culture model as one model, based on whether you were attributing culpability to the corporation as a person, as the
accused, in an inappropriate way. It’s an accumulation of factors in some ways. It sets a standard ... for encouraging conduct, etc. So there may be issues of the *mens rea*, and the actual intent and culpability of the corporation may be challenged under the charter. I have to say we have not done a full-scale analysis on this (Dave Whellams, Justice Committee 2 May 2002: 10:35).

In response to a question from another MP about whether the introduction of federal criminal legislation would raise the possibility of double jeopardy if enforced in parallel with provincial regulatory offences, the Departmental representative responded affirmatively, once again citing particular concerns with the corporate culture model.

Yes. I think you’re going to see double jeopardy arguments in most cases, especially if you go the corporate culture way. There’s a lot more analysis to be done. It’s legalistic but important. For example, with corporate culture, you have to transcend some of the classic problems of *mens rea*, *actus rea*, etc. Professor Healy, in one of his articles it’s excellent on the subject it goes to great length in describing the intersect or non-intersect between what he calls regulatory offences and *mens rea* offences. The question, without my answering it, is that with a corporate culture concept, in a way, you do find ways to transcend the problems of a traditional *mens rea* and *actus rea* analysis. It is not a question of forming the specific intent in the classic criminal law sense. The corporate culture showed an intention, through the accumulation of evidence, about conduct, standards, rules, edicts, etc. You have a problem clarifying the nature of the offence. Are you simply not worrying that regulatory offences are one thing and *mens rea* offences are another? I know it’s not a full answer ... It is going to arise because there has been, first of all, a lack of testing in jurisprudence of corporate culture, if you go for that model. As to what it does to offences that are not *mens rea*, or, conversely, *mens rea* offences, you’re going to have exactly that defence on double jeopardy (Dave Whelms, Justice Committee 2 May 2002: 10:55).

From this perspective the concept of corporate culture was judged by the strictures of existing criminal law and the threat of a constitutional challenge. Established legal frameworks became the benchmark to which all other perspectives were expected to conform if they were to receive serious consideration.

Other members and witnesses also raised questions about including notions corporate culture in corporate criminal liability law. Liberal MP John MacKay suggested to a witness that
the corporate culture model would undermine the notion of *mens rea*, potentially holding certain people within the corporation to account for things they did not realize were happening.

Your essential thesis is that the Australian culture model is one we should explore and adopt, moving away from, if you will, our *mens rea* thesis, which is somewhat more precise: you have to be able, as a crown counsel, to demonstrate some intention, some recklessness, or some knowledge of what people were doing. If you move to the Australian idea, presumably, the directors could set out this directive, which may or may not be followed. Then it would be down to management to possibly also send out directives, which may or may not be followed. Then that would go to junior management, and may or may not be followed, and down to the employees, and may or may not be followed. Those are quite a number of degrees of separation between directives and actual action. This leads to a certain level of imprecision and vagueness, which generally heretofore our criminal law has not contemplated ... I wonder whether adopting that model might also result in some pretty bizarre exercises in corporate liability, where someone way down the feeding chain was doing something of which the people up the feeding chain had no real active knowledge (John MacKay, Justice Committee 7 May 2002: 11:55).

Some witnesses identified the corporate culture approach as vague, lacking the legal precision necessary for criminal matters. As a representative from the Canadian Bar Association observed, "there are concerns with respect to vagueness and over-breadth; some of the words associated with corporate culture do not have precise legal meaning" (Greg DelBigio, Justice Committee 23 May 2002: 11:02). This witness urged the Committee to consider whether a corporate culture model would unnecessarily complicate attempts to hold corporations to legal account.

Sometimes, complicated law — law that is fraught with terms that are vague or terms that are overly broad — will result in a prosecution that goes sideways. That is certainly not in the public interest, nor would terms that are vague or overly broad comply with constitutional standards. In Bill C-284 [the NDP's private member's bill], I would ask you to consider phrases like "tolerate or condone practices" and "allow the development of common attitude". These are phrases of uncertain meaning, and I would suggest that these terms should be very carefully scrutinized (Greg DelBiggio, Justice Committee 23 May 2002: 11:05).

The concerns of this witness were echoed in the written submission that accompanied his testimony, which was prepared by the organization he represented, the Canadian Bar Association (CBA).
Are we to have criminal liability and criminal sanctions because a board of directors failed to meet and therefore tolerated a situation or practice of which it was actually aware? Is an outside director who follows the dictates of an overbearing and secretive management nevertheless to be found guilty of having allowed the development of a culture or having condoned things which, in hindsight only, ought to have been brought to the light of day? (CBA, Submission to Justice Committee 22 May 2002: 3).

The comments of two witnesses, who testified together, provide further indications of the general concerns with the corporate culture approach. The testimony of Professor Patrick Healy and Mr. William Trudell was accorded special status by Justice Committee MPs, with their legal expertise or authorized voices, providing the backdrop to their presentations and subsequent exchanges with members. Both witnesses were adamant in their arguments against the notion of corporate culture, employing the language of legal precision in their defence. For example, Healy argued that the concept of corporate culture simply was incongruent with notions of individual liability:

There is a reference in the [Private Members'] bill to the notion of corporate culture. This leads me to make a couple of observations. One is that there is nothing in this bill that would deal with the specific evidentiary problems raised by corporate criminal liability. If Parliament were to rely on a notion of corporate culture as a basis for the liability of corporations, it seems to me it would be impossible to do it without specific evidentiary mechanisms that would allow for the compulsory production of information that would allow for proof of what that corporate culture actually is. And if that is the case, it going to be extremely difficult, in my view, for the provisions on corporate criminal liability to coexist with the liability for directors and other officers (Patrick Healy, Justice Committee 28 November 2003: 11:05).

At another juncture Healy was quite blunt in his assessment of the corporate culture model:

As for the corporate culture point, I don mean to be flippant about it, but the idea is, was it in the air that this kind of activity would be tolerated on behalf of the corporation? That obviously is a much more nebulous notion, a wider notion, and one that raises, in my respectful opinion, severe evidentiary problems, since, at the end of the day, criminal liability requires proof beyond a reasonable doubt (Patrick Healy, Justice Committee 28 May 2002: 12:05).
William Trudell, from the Canadian Association of Criminal Defence Lawyers, shared Healy’s concern with the lack of precision associated with the corporate culture approach. As far as I’m concerned, the Australian definition of corporate culture – which is in the discussion paper from the Department of Justice – creates problems. It is defined as an attitude, policy, rule, course of conduct or practice (William Trudell, Justice Committee 28 May 2002: 12:25).

The corporate culture model was thus judged as vague and imprecise throughout the Justice Committee’s examination of corporate criminal liability. Regardless of the desire to hold corporations to legal account for their harmful actions, there were certain legal rules and traditions that had to be adhered to for the reform process to succeed. These concerns outweighed any desires to push the legal envelope better to take the conservative root and stick with the familiar than upset the legal status quo in the face of unique problems that lie outside of traditional criminal law concerns with (street) crime.

4.6 Legal Precision and Corporate Culture

When asked about the differences between the NDP’s Private Members’ bill and the government legislation, some individuals who participated in this study also referred to issues of legal precision as it relates to the concept of a corporate culture. As a government official noted, the Private Members’ bill sought to attribute criminal liability...when you couldn’t establish what you would normally consider mens rea, just on the basis of the position you occupy and imposing very heavy penalties upon people... and that’s not the way Canadian

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9 One legal academic (Interview 17) suggested that the notion of corporate culture has not been jettisoned completely from the government legislation, although there is no specific reference to it in the law. For example, she argued that factors associated with a corporation’s culture could be used to determine if the requisite duty of care was taken to ensure the safety of workers. Nevertheless, this does not undermine the fact that traditional notions of criminal law dominated the reform process, and that alternatives, such as the corporate culture model, were considered too much of a departure from the status quo to be given serious consideration.
criminal law operates (Government official, Interview 3). One corporate lawyer offered his opinion as to why the notion of corporate culture was a problematic concept in law:

É corporate culture isn’t sufficiently articulated, I don’t think, for people to really know what that means. The problem is there is fundamental principle in criminal law, as opposed to other areas of law, but it is specific to criminal law, that you must know, with some level of precision, the law that you must obey, because the sanctions of non-compliance are so serious. So there is a level of precision required in criminal law, and I think the fear was, if you enact the law that there could be a Charter issue, if you enact a law that really nobody knows what it means, it is going to be challenged as being too vague and unconstitutional (Corporate lawyer, Interview 7).

A legal academic concurred with this assessment, noting that corporate culture lacks the precision necessary for someone to understand what they are being charged with, and that it would be extremely difficult to train police and crown attorneys as to what to look for when investigating offences (Legal academic, Interview 8).

In general, the concept of corporate culture provided the conduit for various MPs and some witnesses to voice their concerns about the introduction of corporate criminal liability legislation. As one politician noted when discussing the concerns that were expressed in relation to the Private Members’ bill, “absolutely there was some resistance” I think there always is amongst some individuals the fear that you are giving workers maybe too many rights and corporations too many regulations, and I think that was an underlying factor… (Politician, Interview 11).

4.7 The Culture of Political Reality

The dominance of legal discourse does not suggest that these principles were all-encompassing, and that there was no resistance to these perspectives. In addition to the overall support that was expressed for NDP’s proposed legislation, some individuals took umbrage with the comments
that downplayed the significance of addressing the issue of corporate culture. A union representative argued that the anti-corporate culture sentiments were politically expedient for the ruling Liberal party, which allowed them to avoid its reference in the Westray bill, therein claiming that they were being proactive by introducing new legislation, while at the same time reassuring their corporate base that the law would not be overly intrusive (Union representative, Interview 6).

In addition, there also were counter arguments to the suggestions that certain legal parameters had to be respected throughout the reform process. For example, in responding to dominant notions of the guilty mind, or mens rea, a union representative argued:

The guilty mind of what? The guilty mind that knowing it’s your responsibility to make sure that health and safety is being looked at properly given the nature of the corporation, the nature of the organization, which is what we thought the test was suppose to be, or is it you’re not suppose to pull the gun that actually killed someone. Well we already knew that one! (Union representative, Interview 9).

In her testimony to the Justice Committee, Professor Poonam Puri challenged the Committee to look beyond issues of mens rea to consider the potential benefits of corporate criminal liability legislation:

é the criminal law is a policy tool that we have available to us to regulate undesirable conduct. The criminal law is a social tool. It’s a means to an end, not an end in itself, so I don’t think we should get hung up over questions about how a corporation can have a guilty mind. I think we need to keep in mind that what we label as criminal activity is a policy choice. Criminal activities are the worst sorts of behaviour that members of societies can engage in. If corporations commit some of the worst sorts of activities, then we should be entitled to label them as criminal. In terms of some of the questions like how a corporation can have a guilty mind, I think reasonably intelligent people such as us should be able to modify criminal law principles that are aimed generally at individuals in order that they fit the corporate context (Poonam Puri, Justice Committee 23 May 2002: 9:40).

However, regardless of these dissenting voices, the predominant concern was to stay within established legal boundaries, respecting law’s truth status. Even those who advocated for
reform were restricted by law’s parameters and understood the limits of the corporate culture approach. As a union representative noted, “the argument against the Australian [model] was that culture was just not clear enough, it was new language ... we don’t know what it means and from a criminal defence perspective it was too vague.” (Union representative, Interview 9). Adherence to established legal principles also was recognized as important for maintaining consistency with the *Criminal Code*. As a union representative noted to the Justice Committee, “[t]he Code has a long history, there are certain ways things have been done in the Code over the years, and we want to stay consistent” (Andrew King, United Steelworkers of America, Justice Committee 8 May 2002: 16:15). Backed-up by dominant notions of individual liability (the legal status quo), the corporate culture model was therefore a significant conceptual stumbling block for everyone who contemplated the introduction of corporate criminal liability legislation.

In many ways a sense of political realism characterized discussion and debate about the NDP’s Private Members’ bill, particularly in that its proponents did not want their commitment to the corporate culture model to detract from the enactment of some form of corporate criminal liability legislation. As one politician suggested,

> I would have preferred, as I think a good number of people would have, that [the legislation] had continued from the perspective of a corporate [culture] type criminal offence. What came out of the discussions over time was that it would have been tougher, if not impossible with the government of the day, to get that model (Politician, Interview 11).

In response to my question of whether the corporate culture model was that much of a stumbling block for moving corporate criminal liability legislation forward, the politician noted: “well I think it can be made to be that way, because it is not the easiest thing to prove, but in some cases it’s so blatant that it is not hard to prove either” (Politician, Interview 11).
The various concerns that were expressed with the Private Members' bill, particularly with the corporate culture model, illustrate that certain concessions had to be made if corporate criminal liability legislation was to become reality. One politician spoke of a desire to avoid yet another situation where the bill would die on the order table, and that it was important to ensure that some form of legislation was enacted (Politician, Interview 11). In this situation compromise was the only way to ensure that the government introduced new law. This meant setting aside certain commitments to ensure that the reform process continued to move forward: "[y]ou get a lot more just by trying to work with people and [identify] where their main concerns might be ... Sometimes you've got to do it because ... [getting a law enacted] ... is a step in the right direction" (Politician, Interview 11). In this respect compromise was born from an adherence to legal precision and a persistent fear that the law might never come to fruition.

4.8 Law's Privilege

Overall, various legal discourses converged and coalesced around discussion and debate regarding corporate criminal liability to narrow the horizons and limit the reform options. In the process, the concept of corporate culture was abandoned as an option for corporate criminal liability law reform because it was seen as vague and imprecise. It could not, dominant voices said, be stipulated in precise legal language, through acceptable legal methods, according to historic principles of mens rea. This narrow technical frame ruled out any consideration of the structural causes of workplace death, any examination of the roots of corporate power or the privileged legal status and extensive rights conferred by limited liability (Glasbeek 2002; Tombs and Whyte 2007). The overwhelming moral, political, economic and social capital of the corporation was thus judged irrelevant from the get-go. It also meant that those in positions of
power, the individual executives and directors who make the decisions and reap the financial rewards, remain largely hidden behind the corporate veil. While the Westray bill means that some corporations will be held to account for their harmful acts, individual responsibility within the Criminal Code remains unchanged. Adherence to traditional notions of individual responsibility rendered it difficult for legislators to conceptualize criminal responsibility at the higher end of the corporate ladder. While the fixation with individual responsibility means that traditional street offenders are readily held to account for breaking the law, it conversely means that those in positions of power can obscure their responsibility through legal reasoning, by maintaining that guilt can only be established by identifying the individual who removed the safety mechanism, the person who dumped the toxic chemicals, or the manager who directed the worker to climb the building without a safety harness. Clearly, law’s discourse continues to work to the advantage of the privileged few.

However, as this dissertation contends, despite the importance of legal discourse in shaping corporate criminal liability legislation, it is not the only discursive formation that constituted the reform process. In this respect, as Woodiwiss (1997: 485) reminds us, law draws from the broader ideological background to generate its meaning and influence, and therefore must be understood as relative to other defining features of the social formation. It is these additional discourses that the dissertation turns to next.
Chapter 5: Visions of Economic Grandeur: The Influence of Corporate Capitalism

Accumulate, accumulate! That is Moses and the prophets!
(Karl Marx, Capital: Volume 1: 742).

I dreamt I came here [to Parliament] and the [Westray] bill had already been passed, and I was running to a phone to call all the persons [sic] I know who are directors of corporations to tell them to resign immediately before I was reported to the law society

5.1 The Importance of Corporate Capitalism

In early 2002 the NDP withdrew its Private Members’ bill from the order paper after the government agreed to send the issue of corporate criminal liability to a Parliamentary Committee for further study and review. The Standing Committee on Justice and Human Rights (Justice Committee) was an obvious choice for this task, particularly since it had considered the issue in the context of the Progressive Conservative Party’s Private Members’ motion, which asked the government to act on the Westray Inquiry Report’s recommendation by introducing Criminal Code measures to hold senior executives and board members to account for workplace safety. Instead, however, the government pondered sending the issue to the Standing Committee on Industry, Science and Technology (Industry Committee) (Politician, Interview 11). Although they ultimately decided otherwise—a decision that, according to one politician, was made only after the NDP negotiated for it to be sent to the Justice Committee (Politician, Interview 11)—the mere fact that it was considered is reflective of a general trepidation with introducing measures to hold corporate actors to legal account. Was the intent to send the issue to the Industry Committee so that it could be evaluated from a corporate perspective? Was it to examine the impact of corporate criminal liability law for the very people that it was meant to hold to account? As one politician noted when commenting on the possibility of sending the issue to the Industry Committee: “The focus was totally going to be that we [were] going to side with
industry instead of what [was] necessary for justice for workers who are killed because of a corporate culture ... (Politician, Interview 11).

As the previous chapter illustrated, despite general support for the introduction of corporate criminal liability legislation, various legal discourses dominated, and set limits to, the reform options. However, legal discourses do not exist in a vacuum, and instead draw their moral authority from, and are constitutive of, the broader social context within which they emerge (Hunt and Wickham 1994; Smart 1989; Woodiwiss 1990). As Pearce and Tombs (1998: 99) suggest, law is “both an effect of and affects other fundamental social relations.” In this respect there are extra-legal considerations when examining the constitution of corporate criminal liability law – discourses that occupy the political-economic-ideological space that shape, but do not determine, corporate crime and corporate criminal liability. In contemporary Canadian society this includes dominant notions of the economy, particularly as it relates to corporate capitalism and its hegemonic status as society’s primary wealth-generating mechanism.

This chapter examines the economic discourses that characterized the Westray bill reform process, including how this language provided a dominant frame to evaluate, and speak about, corporate crime and corporate criminal liability. These discourses emerged in two distinct, yet related, ways: first, there was frequent reference to the importance of corporate capitalism for Canadian society, and that any attempts to hold corporations and corporate actors (particularly executives and board members) to legal account for their harmful acts should not be too stringent; after all, we should avoid measures that have the potential to impede a corporation’s ability to produce and accumulate. Second, a general commitment to pro-capital and neo-liberal ideals characterized discussion and debate of who is responsible for workplace safety. Can corporate actors be asked to bear the bulk of the responsibility for workplace safety, dominant
voices asked, somewhat incredulously? What about workers and unions, they wondered? Should they, too, not be held culpable? Is that not the fair thing to do, to ask everyone ‘responsible’ to accept blame for workplace injury and death?

What is particularly revealing about the Westray bill reform process is that dominant economic perspectives flourished in the absence of any direct involvement by representatives from the corporate world. Unlike past examples of corporate crime law reform where corporate actors openly and actively displayed their distaste for, and resistance to, government interventions (see Snider 1991), the ‘captains of industry’ (Glasbeek 2002) were publicly silent when it came to discussion and debate regarding the merits of corporate criminal liability law. However, as we shall see, there was little need for corporations and corporate actors to stake their claim in relation to the proposed legislation. The (hegemonic) common sense of corporate capitalism was alive and well throughout the reform process, given voice by legislators and backed by ‘credible’ experts.

The remainder of this chapter is divided into four sections. The first section examines the broader political-economic backdrop that informed discussion and debate relating to the Westray bill. Section two considers why, and to what extent, corporate actors were absent from the reform process. Notwithstanding this absence, section three considers how the perspectives of corporations were represented throughout the reform process, and how they raised fear about the negative impact of corporate criminal liability legislation for both corporations and the economic well-being of the nation. The final section examines how corporate interests were further articulated through neo-liberal perspectives of responsibility for workplace safety.
5.2 The World According to Neo-Liberalism

In chapter three we saw that a dominant and defining feature of the Canadian social formation over the past twenty years has been the "tectonic shift" in public policy towards privatization (Fudge and Cossman 2002: 3). In the past, actions of the state were rooted in Keynesian welfare principles that embraced (at least theoretically) the benefits of "full employment" and "universal welfare" (Fudge and Cossman 2002: 10). As part of this equation the state attempted to offset the downside of "capital's relentless drive to accumulate" by providing citizens with a suitable standard of living -- commonly referred to as the "universal social safety net" (Fudge and Cossman 2002: 11). However, the emergence of neo-liberalism following the Second World War ultimately marked the death of state socialism (Barry et al. 1996), raising caution against "government overreach and overload" rather than espousing the virtues of welfarism and state responsibility for addressing social and economic problems (Rose and Miller 1992: 198). Confronted with declining profit levels and economic recessions throughout the 1980s and early 1990s, neo-liberal political and economic reasoning provided the basis for questioning the viability of the Keynesian welfare state (Fudge and Cossman 2002: 13).

Beginning in the 1980s, when the federal Conservative government declared that Canada was "open for business" (Snider 1990: 131) the state proceeded to systematically disassemble the welfare state. These neo-liberal rationalizations continued throughout the 1990s when the Liberal government introduced crippling cutbacks to unemployment insurance and provincial transfers for "welfare, social services, and post secondary institutions" (Fudge and Cossman 2002: 15-16). A significant aspect of these decisions was a move away from the idea of dependency on the state for help and support to one of self-reliance. Today, most western capitalist states have enthusiastically embraced their commitment to market-friendly efficiency (Mahon 2005: 9).
In recent years neo-liberalism has evolved hand-in-glove with capitalism’s globalizing efforts. In the process, corporations have assumed unprecedented prominence within the neo-liberal global economy, with some of the largest economies in the world no longer belonging to countries, but instead to multi-national corporations (Pearce and Snider 1995: 21). In this respect, although the market is supposed to be for the benefit of everyone in society, the truth is that it is dominated by, and benefits, the privileged few.

The nature of work in Canada has been transformed as a result of neo-liberal policies and practices. Strong unionization and relatively stable employment has been replaced by non-unionized and precarious forms of employment (Glasbeek 2002: 83). Women and visible minorities are particularly vulnerable in today’s market-driven economy, evidenced by growing levels of temporary and part-time work (Cranford, Fudge, Tucker and Vosko 2005: passim; Taylor 1999: 10-11). In addition, the once prominent model of the single breadwinner is a thing of the past (Fudge and Cossman 2002: 15; Taylor 1999: 11). What is more, today’s double-income family has to work longer and harder to make ends meet in comparison to the previous generation’s dominant model of the single breadwinner (Fudge and Cossman 2002: 15).

A complete understanding of the social and economic effects of neo-liberalism are too vast to catalogue herein (for this, see Fudge and Cossman 2002; Glasbeek 2002; Pearce and Tombs 1998). However, two important developments are particularly germane for this chapter. First, concomitant with neo-liberalism’s unwavering commitment to the free market economy, corporate actors have argued that laws governing the economic realm are unnecessary, even

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1 Globalization is a contested concept, the parameters for which are far too great to catalogue in the space provided here. In official terms, the globalization of economic relations represents an opportunity to provide enrichment for the entire global population. However, for many observers it is about creating a borderless economic venture for the benefit of the few, principally transnational corporations and some of their dependent subcontractors (Woodiwiss 1997: 90; also see Glasbeek 2002: 3). Regardless of the differences of opinion about the nature and scope of globalization, there is little doubting its many impacts.
redundant, given that the marketplace is the best way to separate out the bad apples. No need to worry, they suggest, as those who act inappropriately will suffer accordingly when they cannot find anyone to work for them because they operate in an unsafe manner, when nobody will purchase their products because they are tainted by malfeasance, or when they are outperformed economically by corporations who operate as good corporate citizens. Law simply interferes with the effective functioning of the market, according to dominant corporate voices, making the introduction of new laws a dangerous proposition (Williams 2008: 478).

Beginning in the 1980s, deregulation of the economic realm became the prominent mantra within neo-liberal circles, underscoring the belief that government regulation produced economic inefficiencies (Snider 2002: 218). Fuelled by visions of bureaucratic "red tape" and "regulatory burden", governments in most western nations began to ditch many forms of regulation that were deemed to be standing in the way of (corporate) economic "progress", including "...safeguards governing some forms of anti-social business activity, perhaps most notably worker safety" (Tombs and Whyte 2007: 158). According to Snider (2001: 112; 2000), it was during this time that corporate crime disappeared as both a concept and in law, washed away by knowledge claims that were "compatible with hegemonic interests" (Snider 2000: 181). Fudge and Cossman (2002: 19-20) refer to this regulatory shift as a process of re-regulation, not full deregulation. It is not that the state got completely out of the regulation business, but that it reconfigured its regulatory responsibilities in pro-business and pro-market ways. In particular, while the state was preoccupied with befriending corporate capitalism, it was at the same time busy sharpening its regulatory teeth when it came to traditional street crimes (Fudge and Cossman 2002: 20; Tombs and Whyte 2007: 158).
Corporate culture, the so-called lynchpin of the free market system, therefore became something to be celebrated, even lionized, for its contributions to society. The neo-liberal message was (and is) that corporations are an unequivocal good, a mechanism that will contribute to society’s overall well-being even profitable corporations are in everyone’s best interests (Glasbeek 2002; Peace and Snider 1995). This, however, stands in stark contrast to the resistance that emerges when it is suggested that this same culture is responsible for untold harm and unlawful behaviour, as per the comments in opposition to the NDP’s proposed corporate culture approach to corporate criminal liability. In this respect it is permissible to speak of the benefits of the free market culture, and the essential role of the corporation therein, but inappropriate to suggest that this same culture has a dark, harmful downside, especially for those who are injured or killed working on the corporation’s behalf.

A second and related development under neo-liberalism that is germane for this chapter is the dominant belief that an individual is free to choose how he or she wants to participate in the market (Fudge and Cossman 2002). From this perspective workers are seen as submitting freely to the conditions within which they work, and that they are compensated accordingly for enduring unsafe conditions in the workplace (Tombs and Whyte 2007). Part of this neo-liberal mindset is that the market will self-regulate when it comes to unsafe workplaces, including that companies would have a difficult time getting workers if things were too risky or dangerous. However, as one participant for this research suggested, this ignores the contradictory and unequal choices that many individuals face when trying to earn a living.

Historically, you know, there’s danger pay, there’s the discourse ... in the law and economy ... about why bother regulating asbestos exposure because the economy will take care of it, workers won’t want to work with it ... and that is still being, to some extent, there’s some people that still believe that; that workers have sold their right to a healthy workplace because they are getting good money. Well first of all they are not getting good money, and secondly, the idea that you can sell the right to a healthy
environment is a morally difficult, difficult thing to accept (Legal academic, Interview 19).

Overall, the common sense of neo-liberalism has provided a dominant political and economic frame for more than two decades. As Tombs and Whyte (2003: 262-63) suggest, neo-liberalism has reached the status of “conventional wisdom,” contributing to the prevailing notion that there is no alternative. Although recent and ongoing examples of massive corporate fraud in both Canada and the United States have raised questions about the free market economy (Laufer 2006; Snider 2009; Tillman and Indergaard 2005), the commitment to neo-liberal political and economic ideals were alive and well in Canada’s Parliament during discussion and debate of the Westray bill. It may be necessary in some circumstances to introduce new laws to regulate and govern the corporate form, dominant voices submitted; just as long as it does not interfere with the natural flow and function of the market economy and the essential role of the corporation therein.

5.3 Where are the Captains of Industry?

The history of corporate crime law reform reveals a pattern of resistance by those from the corporate world to most new laws aimed at governing and controlling the corporate form. Corporations have consistently and, at times forcefully, if not blindly, voiced their concerns when confronted with the prospects of new laws that were perceived to be against the corporation’s interests. Examples include resistance to rules stipulating proper working conditions, or limiting the length of the working day, particularly for women and children, in the early part of the nineteenth century (Carson 1970; 1980; Snider 1991; 1993), or push-back over the introduction of anti-trust laws (Goff and Reasons 1978; Sargent 1991; Snider 1978), workers compensation rules, or various occupational health and safety regulations (Snider 1987; Noble
The trend continues today in Canada and the United States with recent laws introduced in response to cases of corporate fraud, whereby corporations have warned against the perils of government (legal) overreach, including downplaying the significance of law to deal with corporate wrongdoing and lobbying for reduced enforcement levels (see, for example, Laufer 2006; Snider 2009; Tileman and Indergaard 2005).

Contrary to examples of corporate actors openly voicing their concerns about the nature and scope of particular laws, in the case of the Westray bill there was a noticeable absence from the reform process of representatives from corporate Canada. While some participants suggested that many in the corporate world were simply unaware that Parliament was contemplating corporate criminal liability legislation (Criminal lawyer, Interview 5; Corporate lawyer, Interview 18), many others explained this absence in terms of it being difficult for corporate actors to stand up in public to state their opposition to workplace safety measures too great of a risk for public declarations given the negligence associated with the Westray disaster (Government official, Interview 1). As a government official suggested in discussing why corporate Canada did not appear before the Justice Committee: ÒIím not sure I would want to go in there when talking about the Westray disaster, and all that stuff, and start talking about our directors ought not be liable, director chill, or words to that effectÓ (Government official, Interview 3). Several other participants also suggested that the business community was in a difficult position to lobby against the proposed law.

ÒThey were in a tricky situation ... I mean they couldnâ€™t ignore the fact that this was a serious consequence of negligence, corporate negligence. So they had to be careful, I think, how they were lobbying the government. They couldnâ€™t say to the government, Òwe donâ€™t need anything,Ó but I think they were trying to mitigate what the government put in placeÓ (Union representative, Interview 12).

It was kind of a tricky issue, if I can be frank for a moment. It was tricky in one sense, because I think, especially for [organizations] that represent such a broad
array of businesses ... So on the one hand one always wants to appear progressive and recognize what is going on, but cannot be totally insensitive to issues and concerns of other members who may not be there, so I think that most business groups, and the reason most didn’t write a lot letters to the Minister of Justice and do other things, is I think most businesses thought this was a reasonable balance. I don’t think frankly that anyone thought they could argue against it, effectively. I mean that would have been very difficult to put a credible position forward. Again, if some of the worst ideas from the Private Members’ bill had found their way into this, then you would have seen more of a reaction (Private sector representative, Interview 14).

Well, I don’t know why it is [that the private sector did not appear before the Justice Committee], so it would be only be speculation, and I want to make that point, but we [politicians] all speculated at the time that nobody wanted to be seen to be on the side of not taking responsibility for things that people should be held responsible for. Nobody with an obvious interest in the outcome – i.e., some president of some company or some member of a board of directors of a company that could conceivably see themselves affected by this bill, nobody wanted to be on the public record saying, “I don’t think that I should be responsible for this,” and those sort of things (Politician, Interview 15).

A union representative suggested that the absence of corporations from the reform process was an indication of their unwillingness to stand up to corporate wrongdoing. As he stated,

é unfortunately [it] reflects the unwillingness these days for corporations to take any responsibility for how other corporations behave. é By any standard what Westray did was utterly unacceptable in any other mining company, at least to the major players, some of the smaller places I’m not so sure. But it was a real opportunity for the industry to come out and say, “this kind of bottom feeding is not acceptable. We believe in complying with the law, we believe in health and safety, and we practice it.” Not a single one spoke out. So, you know, they failed to show up. What does that mean? Is it arrogance, ignorance? Could be; it’s sad though (Union representative, Interview 9).

To underscore his point he noted that the owners of the Westray mine, Curragh Resources, had received the John T. Ryan award for coal mining safety just prior to the deadly explosion, and that the sponsoring agency only rescinded it after receiving considerable pressure to do so from unions.²

² Although the award was rescinded, the sponsoring agency’s website still lists Westray mine as having received a national award for coal mining safety in 1991 (see archives of past winners at: http://www.cim.org/awards/JohnTRyanTrophiesPW2.cfm. Accessed 20 May 2009). What is more, as Jobb (1994: 228) notes, workers noted in the media shortly after the disaster that “mine management had fudged accident figures to capture the award.”
In many respects the visible absence of corporate actors from the reform process speaks volumes to an inherent contradiction within corporate capitalism. Contrary to dominant claims to universal benefits of the corporate form, the fact that workers (not directors) are, and continue to be, injured and killed in the workplace suggests otherwise (Glasbeek 2002; Pearce and Tombs 1998). In addition to sounding cold and arrogant, standing up in public to argue against legal protections for workers would have risked exposing the reality of this contradiction – it would have meant potentially drawing undue attention to the fact that workers suffer life and limb while the privileged few enjoy the fruits of their surplus labour (Resnick and Wolff 1987).

*Corporations Entered Through the Back Entrance*

Despite the absence of corporate actors from the formal reform process (particularly the Justice Committee hearings) there was some belief that they found alternative, less public, ways to express their opinions to government about corporate criminal liability legislation. For some research participants it was implausible that the corporate world remained completely silent about such a prominent issue. As one NGO representative suggested,

> I think if you could see the true picture of what went on, the lobbying, they [corporate representatives] would have said look, this is the [New Democratic Party’s] Australian approach don’t go down this road, make it more limited, because it is going to increase our costs if we have to change our corporate culture and they would have said things like we are going to get trouble getting directors (NGO representative, Interview 2).

A union representative noted that corporations typically are not shy about sharing their opinions, and postulated that they probably found other ways to share their thoughts with the government (Union representative, Interview 6). Another union representative agreed, and argued that it was conceivable that at least some corporations found a way to express their concerns, even if they thought that the legislation was inevitable.
I'm sure [corporations lobbied]. I mean I wasn't there with them, but they were talking to the politicians of the day, as we were. I don't think that corporations were trying to prevent the legislation. I think they were trying to mitigate the legislation, so it would have the least impact as possible. Let's put it this way, they didn't want it to have as much teeth as we wanted. And I don't think they wanted it to have as much teeth as it has, because what it does to them, it not only puts them in a situation where they know they can be held liable, corporations have the view that they totally want to be self-regulated, to the greatest fault possible. And they don't want any interference in what they do, and any regulation or legislation, even this being under the Criminal Code, puts a spoke in the wheel, I guess, in progress, because they always have to be doing more than what they would normally, and what they had traditionally done around some of these issues (Union representative, Interview 12).

In responding to a question about whether corporations had an opportunity to provide their views outside the Justice Committee process, a politician responded: Absolutely ... I believe there was, and I believe that's why some [MPs] were really cautious in how they approached [the Private Members' bill] (Politician, Interview 11). She continued: I think industry decided that it didn't want to get into the fray of the discussion at the [Justice] Committee, and let just say that I knew there were meetings happening on the side (Politician, Interview 11).

Another politician noted that private sector interests are always heard behind closed doors on just about any issue that makes its way through the political process, a matter of fact in the political world that all MPs accept and try to work with, or around:

... we watched what happens when the corporate forces get, you know, into the back rooms and get to influence things, and I think what you saw was pretty predictable that every attempt would be made to either kill it or water it down. But it didn't succeed because it was too compelling for nothing to happen at all ... it just wasn't going to be allowed to happen for nothing, would have been horrible. In fact, we knew there were going to be compromises. If anything was going to succeed at all, it wasn't going to be as strong as it needed to be. You know, and that sort of the art of the possible, to some extent in the political arena. There no victories for holding out for the perfect piece of legislation and saying, you know, those bastards wouldn't allow it to happen if there is a possibility of making some headway through some compromises that will get you something (Politician, Interview 20).
During one exchange in the House of Commons, New Democrat MP Alexa McDonough asked Canadian Alliance MP Jim Abbott whether he was concerned with the possibility that the legislation might die on the order paper if Parliament were to prorogue for an election, and that the Liberal leader (then Paul Martin) might be too pro-business to re-introduce the bill should his party be re-elected. While Abbott expressed concern with the potential for the legislation to fall by the wayside, he also stated that he was familiar with the pressures coming from the business world, referring to the fact that he had been approached by some people in businesses identical to Westray who were expressing a deep concern about this, adding that he was very much aware of the pressure that there is from corporate Canada(Hansard 15 September 2003: 17:25).

Although no representatives from the corporate world appeared before the Justice Committee, the Department of Justice Canada did organize consultations with representatives from corporations and umbrella organizations that represent different corporate sectors as part of their examination and drafting of the law (Government official, Interview 3). A private sector representative spoke of his involvement in this consultation process, at which he was informed of the nature and scope of the proposed legislation and the rationale behind its introduction. He recalled being reassured by the message of legal restraint that was conveyed by government officials:

To be fair, I think, you know, the lawyers at justice tended to approach it from a fairly legalistic viewpoint, which [the new law] was to deal with these particular circumstances, these particular situations, there is a high burden of proof, you have to prove all of these elements in order to get a criminal conviction, you know presumably any crown is not going to be interested in launching a prosecution with a low likelihood of success because they're likely to be very costly prosecutions and it is not as though many crowns in many jurisdictions have a lot of experience in dealing with those issues. They have to delve into the inner workings of the corporations and codes of practice and employees, who's responsible for what and those sorts of things can become a fairly complex case. And presumably they are not
going to launch a lot of those unless they feel they have a pretty strong case (Private Sector representative, Interview 14).

This individual also suggested that, based on his experience from the consultation process, the introduction of the Westray bill was not as much of a watershed moment for the corporate world as many observers have suggested. As he noted, I didn’t get the sense that there were a lot of people out there [in the corporate world] that were worried that this was adding a huge new field of liability to the corporation (Private sector representative, Interview 14). In this respect there was a general understanding in the business community that there are some (limited) situations for which the existing criminal law was not appropriate, and that certain reforms were necessary and appropriate (Private sector representative, Interview 14).

Corporations are Always on my Mind

Regardless of whether there was any direct lobbying by corporations, it is evident that concern for corporate interests corporate common sense permeated the reform process and shaped the nature and scope of the government approach to the proposed legislation. Several examples illustrate that legislators had their corporate thinking caps on when it came to contemplating the proposed reforms. One politician suggested that the perspectives of the business world were something that was always at the back of his mind.

I think you can just read a bill and know what the concerns [of corporations] would be. I don’t remember anybody; in fact I can pretty much say that nobody ever called me ... specifically, as a business person, to say here is the problem with this bill. But there was a sort of an understanding that there were concerns, whether there were concerns maybe, and I don’t remember, but maybe they were expressed publicly, but not at committee, by commentators or business people or whatever, but I think on my part I just knew in reading it that here where they are going to have a problem (Politician, Interview 15).
Another politician admitted that her belief that corporate representatives were lobbying other MPs influenced how she approached the reform process, particularly in terms of ensuring there was sufficient support to pass the new law.

And knowing that [corporations were lobbying], I didn’t stand as firm in some of the areas where I would have liked to have seen stronger legislation, because I wanted to have at least something [passed] and then we could work on that in the future (Politician, Interview 11).

During question period the Minister of Justice and Attorney General of Canada thought it was unfortunate that the Justice Committee had not heard from the corporate community or from labour during its consideration of the Private Members’ motion (Anne McLellan, Minister of Justice and Attorney General of Canada, Hansard 9 May 2001: 14:40). Another MP admitted during question period that he used a corporate lens to examine the government’s legislation.

Before getting into the pith and substance of the legislation, I would like to say that I examined this bill as my party’s industry critic to see what impact it would have on the industry sector, while recognizing the fundamental merit of plugging a loophole in the Criminal Code that absolutely had to be plugged (Paul Crête, Bloc Quebecois Member, Hansard 15 September 2003: 17:50).

### 5.4 Protecting Capital’s Interests: Avoiding Director Chill

In addition to questions of, “what would corporations think,” there was ample articulation of the common sense of corporate capitalism. In particular, concern with the impact of the law on corporations, or the notion that there would be strong resistance if the legislation went too far, helped to frame the reform process. Even if corporations were not present physically (at least publicly), they were most definitely present in spirit. Questions regarding the potential chilling effect of the NDP’s Private Members’ bill and that overly stringent laws would drive
corporations out of the country (or even out of business) are two ways in which the perspectives of corporations were well represented in Canada’s Parliament.

Harry Glasbeek (2002: 13) refers to arguments against recent calls to hold corporate directors and officers to legal account as being groundless and "touched by arrogance." As Glasbeek argues,

[t]here is unconcealed anger that law-makers are seeking to make directors and officers of corporations, that is, corporate actors, answerable as if they were ordinary mortals like you and me. There are vehement (unsupported) claims that the best and brightest will no longer make themselves available to serve corporations. Then we — the rest of us — would truly be sorry (Glasbeek 2002: 13).

In the case of the Westray bill this anger and arrogance was channelled through those with the responsibility for legislating against corporate illegality.

Consider, for example, the comments of two MPs, both of whom expressed concern with the impact that corporate criminal liability law would have for the brightest lights of the corporate world:

People become directors for a lot of reasons. Some of the reasons are very good reasons and some of the reasons are not particularly good reasons. You [a witness at the Justice Committee] frequently used the phrase "sending a message." I would suggest to you that by engaging in legislation, we are sending a message. The message may not be heard in the same way by all people at all times, particularly by directors who may well have to reconsider their positions as directors (John MacKay, Liberal, Justice Committee 23 May 2002: 10:30).

We do not want to create the situation where we dissuade competent people from being the directing minds of corporations. We want to encourage competent people who exercise sound skill and judgment to continue working through the vehicle of corporations to ensure that jobs are preserved and created in Canada (Vic Toews, Canadian Alliance, Hansard 20 September 2001: 18:05).

Similar sentiments were expressed by some of the witnesses who testified before the Justice Committee. A criminal defence lawyer argued, "[w]hether it’s a big company or a small company, corporations are important. Some are offensive, but corporations are important. You
will not have people who want to be directors and officers. Then we’re in a different state (William Trudell, Justice Committee 28 May 2002: 11:55). A representative from the Canadian Bar Association (CBA), a powerful and influential voice for lawyers in Canada with a membership that includes lawyers from the corporate ranks, suggested that the criminal law offers legislators the opportunity to send a clear message that particular behaviours are unacceptable, but that this creates certain challenges when attempting to send such a message to corporations and corporate actors.

... here are my remarks with respect to the possible chilling effect — it is of course the case that corporations must be competitive. Competitive corporations are essential to the vitality of the Canadian economy. Corporations must operate competitively within the domestic and international markets, and that requires dedicated and talented directors and employees. There’s a concern that by casting too broad a net of liability, this could have a chilling effect. It could deter the participation of the people you would otherwise want to have acting in the capacity of director or officer, and that could result in less competitive corporations. This is an issue to consider, and it is a concern expressed particularly by the representatives of the CBA’s business section (Greg DelBiggio, CBA, Justice Committee 23 May 2002: 11:05).

Shortly thereafter the CBA witness once again raised the issue of director chill in response to a question from a Justice Committee MP:

With respect to the question of director chill and whether or not good directors will stay, the CBA puts this forward as a consideration: it’s a difficult issue. In fact, it is a question for which there might be empirical data, but there’s no doubt that, in the face of increased risk, at least some people will be deterred. The extent of the weight of that which would be attached to that particular consideration is for you to decide. We, however, are of the view that there is little doubt that, in the face of increased risk, it will have a deterrent effect. It’s not the case that good people will stay regardless of the risk. If there is an unfair risk, even good people will leave (Greg DelBiggio, CBA, Justice Committee 23 May 2002: 11:05).

3 The perspective was reiterated in the CBA’s written submission: “An overly inclusive and over-broad model of corporate criminal liability will have the effects of deterring qualified people from becoming directors or officers of Canadian corporations, particularly if we are to fear the imposition of criminal consequences based on an external assessment of what should have been known. We are concerned that Bill C-284 [the NDP’s Private Member’s bill] could have a very chilling effect on corporate relations, causing Canadian corporations to operate with less expertise and less qualified leadership than currently available” (Canadian Bar Association, 22 May 2002: 3).
Another witness characterized the issue of director chill to the Justice Committee in dramatic terms: "I dreamed I came here and the bill had already been passed, and I was running to a phone to call all the persons [sic] I know who are directors of corporations to tell them to resign immediately before I was reported to the law society." (William Trudell, Canadian Council of Defence Lawyers, Justice Committee 28 May 2002: 11:20). A Committee MP seized the opportunity to agree with this comment, arguing that there would be "mass resignation of directors from corporations" the day after the new law was introduced. "I probably would agree with you [Mr. Trudell]. It would immensely, over time, have an adverse impact on the workers we're actually trying to protect." (John Maloney, Liberal, Justice Committee 28 May 2002: 12:30).

The fear of offending corporate stalwarts was thus front-and-centre in the minds of many of those who participated in the reform process. Unfair targeting of corporate actors would negatively affect the Canadian economy, it was suggested, and workers would be left jobless when corporations were forced to relocate or fold because they lacked the talent to compete in today's much celebrated global economy. The unfounded basis of this argument is evidenced by the fact that some individual directors have been held to account for workplace deaths. For example, some high profile cases in the United Kingdom and the United States have resulted in manslaughter convictions (Slapper and Tombs 1999: 22). Regardless, many individuals continue to seek corporate directorships. Glasbeek makes a similar point in examining the increased statutory responsibilities of directors and managers in recent years (e.g., through new environmental and occupational health and safety regulations), a trend that corporate directors see as raising their level of risks and responsibility (Glasbeek 2002: 173-177). And yet, as Glasbeek notes, "[f]amous and supposedly intelligent people are continuing to fall over
themselves to become directors of large publicly traded corporations, and there is little evidence to suggest any accelerated loss of directors due to resignations brought on by the increases in risk [related to any statutory responsibilities] (2002: 176). The arrogance and inanity of the director chill argument was identified by one union representative when recalling his experience appearing before the Justice Committee:

... one of the Liberals raised the kind of director chill argument. A stupid argument, right? I always had the notion ... the vision of this guy [who] goes down to the labour exchange. They are looking for corporate directors for ten thousand bucks a meeting, plus expenses, stock options, and he says, kind of worried about this potential criminal liability stuff. No, going to hold out for that eight buck an hour job (Union representative, Interview 6).


In the end, any fears of a director chill were assuaged by the government’s decision to jettison the corporate culture model with its provisions to punish individual executives and board members in favour of an approach that holds all organizations to legal account. As a representative from the private sector stated, with some relief, when asked about the potential chilling effect of the NDP’s legislation:

Corporations can be held liable, and that my understanding about what’s different with the law now, is that the corporation as an entity can be criminally responsible, but I don’t believe that individual board members can be held criminally responsible. Unless there really is some, I assume unless there really is some proof that individual on the board actually was involved in day-to-day operations, knew what was going on and either told the people to do the irresponsible thing or wilfully ignored what they must have known was going on. I’m not sure that that situation is likely to arise, but I guess potentially they could be held responsible. Yeah, that was my sense of one of the problems with at least one of the [NDP] Private Members’ bills because that’s an obvious concern for corporations because how do you get people to serve on your board (Private sector representative, Interview 14)?

A corporate lawyer noted that the director chill argument is essentially void in the Westray bill given that it does not increase the personal liability of directors. From his perspective the only way that people might be discouraged from becoming directors is if there were a number of
convictions based on the actions of directors and senior officers, which he suggested might have a cumulative chilling effect.

... in terms of director chill, I don’t see it, because it hasn’t increased individual liability of directors. I suppose the only impact could be this, if there was a range of C-45 charges, let’s hypothesize that in the next ten years there is a bunch of C-45 charges and the basis of the convictions is the actions of directors or senior officers. Although they are not personally liable, it is not really a career-maker to have brought down the corporation because of your actions. That might I suppose create some chillé (Corporate lawyer, Interview 7).

However, he quickly added that it seems highly improbable that this will ever happen, particularly given the apparent lack of impetus to enforce the new law.

5.5 Corporations will Leave if we’re not Careful

A second and related expression of concern for corporate capitalism was through suggestions that corporations would leave the country in the face of overly stringent laws, a decision with potentially devastating effects for the economy, or so we were told. Corporations will threaten to relocate when confronted with new rules or laws that they perceive to be overly stringent or reduce profitability, or to leverage favourable government policy decisions, such as reduced taxes or low interest loans. However, these threats are more apparent than real, with very few corporations having the ability, or actual desire, to pack-up and leave a particular country on a moment’s notice. In addition to requiring access to a skilled workforce, something that is not always available in countries with cheap labour, many corporations are constrained geographically by the markets that they need access to for purchasing materials and selling their products (Hirst and Thompson 1996: 198; Pearce and Snider 1995; Pearce and Tombs 1998). The primary resource industry is a good example where a corporation’s existence hinges on access to a country’s natural resources, such as with mining, forestry and oil production. In
addition, corporations will first consider the "social, economic and political stability" of a country before deciding to set-up shop (Pearce and Tombs 1998: 54; also see Hirst and Thompson 1996).

In the context of the Westray bill, the sell job worked. Several MPs expressed their worries over legislation that would be perceived as too stringent by those in the corporate world, and that some corporations might leave Canada as a result. For example, Canadian Alliance MP Vic Toews argued that the NDP's bill would adversely affect "economic growth and jobs," "investment" and add to the costs of production, although he acknowledged that safety should come before profit (Hansard 20 September 2001: 18:00; 18:05). Similarly, Reform MP Gary Lunn argued that the law would have "a serious impact on investment and would add dramatically to operating costs and consequently the profits and the motivation to expand. Employment levels in corporations would no doubt be reduced" (Hansard 18 February 2000: 14:00). Another MP suggested that,

[y]ou have to be very careful, if you believe all these Canadian corporations and companies are just going to stay around if we put in something that's a little too tough on them. I'm not suggesting that what you've been proposing here. But I can tell you, there are many companies right now who look at our tax laws and other laws and are on the verge of heading somewhere else. Obviously, our resource-rich country means that a lot of them have to stay here, because this is where the resources are (Kevan Sorenson, Canadian Alliance, Justice Committee 2 May 2002: 12:20).

Concern for corporations also emerged in terms of the negative impact that criminal sanctions would have for a convicted corporation. As one MP responded to a witness who argued that there may be occasion when a suitable penalty would be to shut down a corporation: "None of the sanctions you suggest could be corporate capital punishment. I wonder how you justify that to the 50, 100, or 500 other employees of that firm" (John Maloney, Liberal MP, Justice Committee 22 May 2002: 16:50). The MP added that holding directors criminally liable would
reduce the corporation’s competitive advantage, which would not be in anyone’s interests, employees and employers alike. As the MP quipped, "why would anybody in their right mind want to be a director? How would this affect the competitive advantage of corporations and the economic seas companies have to negotiate these days, to the benefit of all, employees, shareholders, officers, and directors?" (John Maloney, Liberal MP, Justice Committee 22 May 2002: 16:50). Another MP argued that holding corporations to legal account would disrupt the economy: "...the economics of Westray were such that had someone gone out and said, this has to be shut down, and they were going to be fined appropriately, as an alternative method of punishment, it would have also put them out of business and would have collapsed the economic process" (Paul Harold Macklin, Liberal MP, Justice Committee 8 May 2002: 16:20).

Corporations are the most effective and efficient means of generating wealth, according to these dominant voices. This is particularly so in neo-liberal times where the state has enthusiastically embraced the role of ensuring the smooth flow of capital (Pearce and Tombs 1998), and wherein the government relies on corporations to carry the bulk of the country’s economic load. As such, governments are in a difficult position when it comes to disciplining the very mechanism that they helped catapult to such prominence.

5.6 Hesitant Resistance

Well, look, if you cannot run a safe workplace, then go. The only possible response to that is if the only way you can run this place is unsafe, that you are going to be vulnerable to criminal charges because it is that unsafe, it’s not worth killing people for. It really doesn’t hold up. I have never see any place that shuts down, they shut down for all kinds of reasons: the dollar going up, labour costs, yeah, and a variety of other things. But I’ve never seen anybody present the notion on the ground [that] it’s the health and safety environment that is putting us in trouble (Union representative, Interview 6).
The dominance of pro-capitalist discourse does not mean that there was wholesale purchase of the suggestion that corporations need protection from undue legislative intrusion. Various counter-hegemonic perspectives were offered throughout the reform process, particularly from NDP MPs, union representatives and some academics. Take, for example, the following comments from different New Democrat MPs:

[i]t is not a justifiable excuse for CEOs to say their work is in the office, that they have never set foot in the plant or that it is only one of many enterprises they have under their direction and control. That is no excuse. The buck should not stop at the frontline manager who works in the plant where the offence might have taken place. The buck stops at the CEO’s desk. If CEOs do not know what is happening in their plants they have an obligation to know (Pat Martin, New Democrat, Hansard 8 November 2001: 18:20).

é it interesting to me that a lot of our economic freedom is based on this equivalency between corporations and persons when it comes to freedom, but when it comes to responsibility, all of a sudden there’s a big difference and they can’t be held responsible in the same way (Bill Blaike, New Democrat, Justice Committee, 2 May 2002: 10:05).

I’m a little disturbed that I’m actually hearing around this table that somehow, by wanting to improve a system where corporations, directors, and managers should be held accountable if they are found to have neglected the lives or the well-being of employees or others, that’s moving backward.... From the earliest of times we have had this economic argument that corporations and industries can’t survive if they have to meet what I think many of us have seen as progressive changes, decreasing the hours of work, putting in place safety standards, putting in place employment equity standards, making sure certain safe practices were put into the workplace. Somehow these are seen as always too much of a cost for industry, yet most corporations and industries survived just fine with these rules, and they don’t have to neglect the rules (Bev Desjarlais, New Democrat, Justice Committee 7 May 2002: 12:25).

Similar counter-hegemonic perspectives came from some of the witness who appeared before the Justice Committee, particularly those who supported the NDP’s corporate culture model and its approach to holding corporate actors to legal account for workplace safety. As one witness argued during her presentation,
We need to recognize organizational culture as something people make and remake on a daily basis, and that deaths like those in the Westray mine are not the inevitable outcomes of things left undone. It’s not a matter of neglect, but of the consequences of positive acts, of choices made in pursuit of profit, and these days, of increasingly deregulated workplaces. Often the authors of those choices are hidden within the black box of the corporate hierarchy, and this black box is a culture within which corporate decision-makers decide on the priorities of the organization. If this government wants people to believe there is justice in this country, it will need to draw on the rich literature on corporate criminology and develop ways to either shed light on the contents of such black boxes or to compensate for this lack of transparency by finding means to discipline the corporation as if it were an agent in its own right (Susan Dodd, Sociologist, Justice Committee 22 May 2002: 15:45).

Regardless of these resistances, there was general recognition of the inevitability of corporate capitalism, and that this dominant frame, or common sense, limited the reform options. This was most obvious in comments from those who struggled conceptually with balancing the need for new legislation with the need to protect corporate interests. For example, the sponsor of the Private Members’ motion, Peter MacKay, recognized that any legislative measures would have to consider the potential financial impact for corporations, particularly during competitive economic times (Peter MacKay, Justice Committee 6 June 2000: 10:45). Likewise, an NGO representative, who was critical of the lack of corporate accountability, suggested that increased regulation would undoubtedly produce extra compliance costs for corporations and therefore discourage economic growth.

... they [politicians] don’t want to be truthful and say We are in a dilemma. We have a trading economy and we have signed on to a bunch of free trade deals, and it means that we can’t regulate our corporations. And you don’t even see the NDP or the Greens speak about this reality, and this reality is a big problem. We know in these big areas there are hundreds and thousands of Canadians that have jobs, and we as a government do not want to threaten those jobs. But at the same time, everyone else should realize, and the workers should realize too, we can’t even regulate the health and safety of those workers, really. So we are in a really difficult position here (NGO representative, Interview 2’i’ emphasis added).

A New Democrat MP also noted the difficult position of legislators in trying to hold corporations to account without upsetting the economic status quo:
[o]ne thing to keep in mind is that there is a fine line to be walked between accountability and the public interest. For example, sometimes it would not make sense to indict a corporate director or other people in corporate management and impose massive criminal fines if those fines meant having to wind up a company which employs 500 people to meet those liabilities. It is important to note that in a situation where a corporation is only competitive because of its low operating costs which were achieved only at the expense of worker safety, for example, a sweatshop, it may be in the best interests of the public to completely liquidate the company (New Democratic Member, Hansard 15 September 2003: 16:25).

The common sense of corporate capitalism was thus firmly rooted in the sensibilities and mentalities of many of those involved in the reform process. While not denying that there may be cause to hold some corporations to account, the prevailing belief that corporations are essential for the proper functioning of Canadian society meant that any reform options that were given serious consideration needed to be carefully crafted so as to not upset the corporate status quo.

5.7 Responsibilization

Neo-liberal and corporate interests also dominated discussions of responsibility for workplace safety. The prominence of neo-liberal political ideals has been accompanied by the triumph of individualism—the notion that we are all economic beings who are equally equipped to make rational and prudent choices (Barry, Osborne and Rose 1996; Fudge and Cossman 2002; Pearce and Snider 1995). From this perspective an individual can choose freely whether to participate in the market (Fudge and Cossman, 1996: 21-22), including the choice of entering into contractual relationships for work. Workers are equal market participants who are free to work for whomever they want, under whatever conditions they choose, and they receive appropriate remuneration based on the skills needed to complete the work and the risks involved in the job (Pearce and Tombs 1998: 16). However, this dominant rhetoric ignores that the capitalist arrangement is premised on the ability of those who own the means of production to extract maximum surplus labour from the production process; to essentially squeeze as much free labour
as possible from workers to maximize profits. What is more, this dynamic is amplified in today's global economy where control of the workplace rests primarily in the hands of the privileged few, and where workers are confronted with increasingly precarious (and decreasingly unionized) working conditions of which they have little control (Pearce and Tombs 1998: 23-24; also see Cranford et al. 2005; Glasbeek 2002).

In addition to the fact that most workers are not paid all that well for what they do or the risks that they take (and one has to ask why it is acceptable for someone to be paid for the potential to be injured or killed?), particularly in comparison to the handsome salaries of corporate directors, control of the workplace is directly related to the ability to control risks. Even in instances where employers and employees cooperate to address workplace safety issues, such as through joint health and safety committees, there is evidence to suggest that these arrangements are often dysfunctional and that they change little in terms of the ability of employees to ultimately control their work environment (Tucker 1995; 2007). In addition, as the Westray example clearly highlights, workers have died when they have been so desperate to find and keep work that they believed that they had little choice but to continue working in overwhelmingly unacceptable conditions (Jobb 1994; Richard 1997).

There has been much written in recent years about the impact of neo-liberalism on traditional forms of crime and its control (Ericson and Haggerty 1997; Garland 1999, 2001; Shearing 2001; Valverde 2003). According to Garland, neo-liberal crime control strategies divest responsibility for crime from the state to the individual, a process which he refers to as responsibilization (2001: 124-126). Obscuring the broader structural factors of crime including the socially constructed notion of what constitutes crime responsibilization strategies abstract the individual from his or her social circumstances and challenge them to act in a 'prudent'
manner (Hannah Moffat 2001: 522; Rose 2000: 327). However, contrary to official claims that everyone has an equal opportunity to enjoy economic success, the growing disparity between the rich and poor over the past two decades suggests otherwise (Fudge and Cossman 2002). In the Canadian context the asymmetry of these opportunities means that the affluent have enjoyed unparalleled (economic) freedom and opportunity, while marginalized populations — for example, lower class, racialized and, in Canada, aboriginal peoples — have been subject to increasing surveillance and control (Boyd, Chunn and Menzies 2001; Comack 2006).

Within the context of occupational health and safety, neo-liberal responsibilization strategies play out in a similar manner in that they reduce the burden of responsibility for workplace safety for those in positions of power (particularly those who own and control the means of production) and instead spreads it across the entire workplace, emphasizing the role of the individual worker in preventing his or her own injury or death. Garry Gray (2006; 2009) observes that the workplace is going through a process of responsibilization, wherein workers are increasingly the subject of regulatory health and safety enforcement. Gray examines Ontario, Canada’s health and safety ticketing program, which provides for both workers and employers to be ticketed (which Gary likens to a parking fine) for health and safety violations (Gray 2009: 330). Of particular note, he finds that the ticketing patterns of labour inspectors reveals that health and safety ticketing falls more heavily on frontline workers than high-risk employers (Gray 2009: 336). In effect, responsibility is pushed down the corporate ladder, rendering the worker responsible for guarding against his or her own victimization.

Tombs and Whyte refer to the dominant discourse of the “accident prone worker” as a subtle, yet insidious form of victim blaming (2007: 74-80). As an entrenched part of the occupational health and safety lexicon, the notion that workers are generally prone to accidents
whether through incompetence, carelessness, apathy, recklessness and so on (Tombs and Whyte 2007:75) means that safety crimes are individualized, putting the onus on the individual worker to address his or her victimization. In the process, the authors note, the structural causes of workplace safety, including the relationship between workplace accidents and the pressures of profitability, remain untouched (Tombs and Whyte 2007). Instead of addressing the root causes of workplace injury and death, individual workers are subject to increased surveillance and regulation.

**Shared Responsibility**

Throughout the Committee hearings there were frequent references to the importance of shared responsibility; the idea that if people wanted responsibility for workplace safety, then responsibility they would get, as long as everyone workers, unions and employers was prepared to accept this expectation equally. Comments from different MPs illustrate the perception that workplace safety is a shared responsibility, not just the bailiwick of those who own and control the means of production. Of particular concern was ensuring that workers and unions accepted their share of responsibility.

For example, in discussing his Private Members’ motion, Progressive Conservative MP Peter MacKay suggested that corporations needed to consider the input and knowledge of workers when it comes to workplace safety. At the same time, however, he argued that workers must share culpability and responsibility, although he recognized it was not a politically popular thing to say (Hansard 23 April 1999: 12:30). Another MP similarly argued that, although not politically popular, it was important to understand that workers share culpability and responsibility, and that any legislative reform should ensure that accountability and
responsibility are held by all (Inky Mark, Progressive Conservative MP, Hansard 15 September 2003: 16:20). At the Justice Committee stage of the Private Members’ motion, another MP suggested that negligence applies to everyone equally, and also implied that workers must bear responsibility for workplace safety:

[t]here’s no question in my mind that Westray must never happen again. It’s just that I’m trying to say that although we can quote statistics of how many people die a day, it would be difficult to say if a person died of their own negligence or because of someone else’s negligence. Most important here is to come up with a resolution in law that is well done, well researched, and appropriate (Aileen Carroll, Liberal Party, Justice Committee 6 June 2000: 11:05).

The interventions of one Justice Committee MP were noteworthy in suggesting that workers bear responsibility for ensuring their own safety. In responding to a witness who suggested that employers should ensure that workers receive adequate training, Conservative Alliance MP, Kevin Sorenson, argued that workers should simply refuse to work in unsafe conditions.

So there’s no responsibility on that worker to say, listen, I haven’t been adequately trained here? I realize that at Westray it was totally different, but you're saying that never is there any responsibility on the worker to say, I’m not picking up this equipment, because I have not been trained on it (Justice Committee 22 May 2002: 16:25).

At another juncture Sorenson questioned a former Westray worker about shared responsibility. Mr. Vern Theriault had just finished sharing his experiences at the Westray mine with the Justice Committee, explaining how management had bullied employees and undermined workplace safety. It was an emotional presentation that seemed to affect all of the MPs on the Committee. Towards the end of the session Sorenson asked Theriault about the Murphy switch on mining machines, a mechanism that detects methane gas levels in the mine and automatically turns the machine off when dangerous levels are detected. Theriault noted how it was common practice to
disconnect the Murphy switch to ensure uninterrupted production, something that was condoned by management. The ensuing exchange went as follows:

**Mr. Kevin Sorenson:** My concern is this. The legislation we see here mentions directors, those involved. It mentions management, it mentions directors of the company, and any of those individuals way down the chain. What happens if all of a sudden, included with this, they were to include you?

**Mr. Vern Theriault:** To include me for blame?

**Mr. Kevin Sorenson:** Well, yes, because...

**Mr. Vern Theriault:** Actually, they themselves tried to blame the miners. I’ve been blamed too, in a way, but if everybody else down the line is going to take the charge for it, I’ll get the blame too.

**Mr. Kevin Sorenson:** But was it management that unhooked the Murphy switch, or could it have been a worker who just went over and said, “I’m getting tired of this” and unhooked-- (Justice Committee 2 May 2002: 12:25).

From this it is clear that an ideology of individual responsibility (cf. Walters et al. 1995: 285) helped animate discussion and debate about assigning responsibility for workplace safety.

### Union Responsibility

Notions of shared responsibility also were raised in reference to union culpability for workplace safety. Pearce and Tombs (1998: 58) note that capitalist relations are characterized by continuous antagonisms between capital and labour. To ensure maximum profits, corporations will attempt to control the production process to the greatest extent possible. As a result, relations between corporations and labour are often strained as corporations attempt to extract maximum surplus labour (and hence, profit) from workers. Since the dominance of neo-liberal political and economic reasoning beginning in the 1980s, the balance of power between capital and labour has tilted in capital’s favour. In particular, it has meant that corporations have been

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4 Ironically, the fact that the Westray workers were not unionized when the disaster occurred was a lost detail by those who raised this issue.
able to self-regulate (and self-control) the workplace, becoming the most logical and effective mechanism for undertaking this task (Pearce and Tombs 1998: 150).

With the push and pull between capital and labour as the backdrop, it was thus deemed problematic (even antagonistic) for unions to argue for legislation with the potential to alter the workplace in favour of workers’ rights, and in a manner that is beyond the control of those who own the means of production. For those who espoused pro-corporate ideals, it was a difficult pill to swallow for labour to dictate the nature of the production process, particularly in suggesting that directors are ultimately responsible for ensuring workplace safety. In response, many legislators argued that unions should also be prepared to accept their share of responsibility for workplace safety.

For example, Canadian Alliance MP Vic Toews expressed concern with the possibility that unions would not be held to the same level of accountability as corporations.

I have concerns with some of the comments I heard, and hopefully, matters will be clarified, either in your comments here today or in the documentation. Let’s start on the first point. Unions participate in management decisions; there is joint management of certain areas. If unions are aware of certain oversights of the law, should they be held to the same standard you’re proposing corporations be held to? They, in many respects, are very similar to a corporate entity, with the same kinds of problems about the entity and the individuals under it. I’d specifically like to hear from you on that, because I think we want to ensure that our workplaces are safe. Should all of those involved have that level of responsibility you’re seeking to impose as corporate responsibility? (Justice Committee 7 May 2002: 11:25).

In answering Toews’s question the presenter noted that anyone involved in the management structure would be responsible for workplace safety. Toews pressed further, “So some of the recommendations on corporate liability you made may well be applicable to unions in regard to the standards of mental intent required?” The presenter was left with little choice but to agree with this line of inquiry (exchange between Vic Toews and Duff Conacher, Corporate Responsibility Coalition, Justice Committee 7 May 2002: 11:25-11:30).
A similar concern about union responsibility was raised shortly thereafter, when a representative from the Ottawa and District Labour Council noted that joint health committees are ineffective and dysfunctional, which would make it very difficult and inappropriate to try and hold unions to account. A MP from the Bloc Quebecois replied,

It is obvious that we must look at the criminal responsibility of corporate entities, but we must not forget that unions are also corporate entities. I am a little surprised to hear you say that it should be applied to one but not to the other. I think we should have laws that will apply to all corporate entities and take care in the drafting and implementation of those laws (Robert Lanctôt, Bloc Quebecois, Justice Committee 7 May 2002: 11:30).

Shared responsibility was once again raised following the testimony of representatives from the United Steelworkers of America, in which an MP asked the following question regarding union responsibility:

So if there were evidence that even if the recommendation wasn’t followed, the union simply went along with it, didn’t go the workplace safety and health officer in the province to file a complaint, were just silent and moved along, should the union or union officials not be liable? (Vic Toews, Justice Committee 8 May 2002: 15:55).

The union representative answered “no” to the question, arguing that unions are not part of the decision-making process of corporate executives or boards. The MP replied,

I understand that, but should they be considered part of the management process? Unions, and rightly so, hold a very important role in the workplace. The power of a union official to make a recommendation and then to bring in government officials is a necessary power, an important power (Vic Toews, Justice Committee 8 May 2002: 15:55).

Although politically right-leaning MPs were most likely to raise the spectre of union responsibility, other MPs also raised this issue. As a Liberal MP stated to a witness,

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5 The notion of shared responsibility also emerged through reference to unions acting as good corporate citizens, effectively placing them on the same level of authority and control as corporations. In a statement following a presentation by representatives of the United Steelworkers of America, one member stated, “I want to commend the witnesses for their presentation and for their educational efforts in respect of workplace safety and health. It certainly fits with the mandate of occupational health and safety legislation, workplace safety and health legislation, right across Canada. It’s important to see the unions actively involved in that. I think it shows good corporate responsibility on their part” (Vic Toews, CA, Justice Committee 8 May 2002: 15:50).
I'm a little disappointed in your not wanting unions to take any responsibility in this. Before I became smart enough to run my own company, I worked for a very large company where health and safety were the primary concern. They said it paid in the end. That was their philosophy, but I know of companies where, if a worker feels he doing something that unsafe, he goes to his union steward, and the steward passes it on. He should pass it on, but if he doesn’t and nothing happens, if the employee told to go back to his work, that union steward would have no responsibility, even though it was in the agreement that it was his duty to report that. I think he has an equal responsibility with the plant management or even the director of the company (Ivan Grouse, Liberal, Justice Committee 8 May 2002: 16:40).

At times shared responsibility was debated expressly in terms of who controlled the production process. In one exchange a Committee MP pressed a union representative on the idea that unions share responsibility for workplace safety. Although the union member did not disagree with the notion that, in certain circumstances, a union member might be responsible for workplace accidents, he underscored the fact that shop stewards have little power to control the work environment (i.e., to stop production for safety concerns). The MP disagreed, suggesting that shop stewards oftentimes have more power than plant managers. ‘I don’t think you’ve ever seen a CAW shop steward in action. Believe me, some days the plant manager doesn’t have much influence’ (Ivan Grouse, Liberal, Justice Committee 8 May 2002: 16:40-16:45). This exchange was followed immediately by another MP’s statement regarding union responsibility:

Continuing on, because I like to come full circle on this, I understand very clearly most of what you said. However, if the board of directors follows a union recommendation that proves to be unsound, or if the union fails to make a wise recommendation, then you telling me that the union cannot be prosecuted as a body corporate. The union, which operates in close proximity to its members, may do nothing or make a poor recommendation that the board of directors implements. Why not include every eventuality at this time? When will we come back to a bill such as this? In my opinion, we have a duty to protect all workers. If, as you said, it possible to shut down a mine or a plant before a worker dies, then why not consider all of these possibilities now? It not that we absolutely want unions to be held accountable, not by any means, but if we tell the corporate managers and directors who testify before our committee that unions are to be fully excluded, we certainly hear both sides of the story. However, if we propose some compromises and arrive with a suggestion like this - and there are certainly others - it would demonstrate your good faith without putting you in a difficult position. Your job is to protect your
As these comments suggest, antagonisms between labour and capital over who controls the workplace informed the debate over responsibility for workplace safety. Confronted with the prospects of having the balance of power altered, by introducing criminal legislation that potentially threatens the dynamic of corporate self-regulation, the dominant reaction was to argue that everyone needs to accept responsibility for ensuring workplace safety; to spread responsibility across the entire workplace to ensure that it did not fall solely to those at the higher end of the corporate ladder.

**Objections to Shared Responsibility**

Despite the dominance of neo-liberal notions of shared responsibility, some legislators (particularly left-wing politicians) took umbrage with the suggestion that workers and unions must share the blame for workplace injury and death. For example, New Democrat Wendy Lill argued,

> It is difficult for me to understand why some are opposing the bill. After all it does have a noble and practical objective ... I would hate to think that anyone in this place would believe that a corporation or a boss should be above the law simply because of status. I hope that all members would condemn that notion. I have heard from some who oppose the legislation. They believe workers in Canada are protected from dangerous workplaces and predatory actions from bosses because they can always refuse to work. That argument is basically that it is the victim’s fault. That argument is not only immoral and offensive, it is also inaccurate (Hansard 8 November 2001: 17:35).

Similarly, New Democrat Bill Blaikie referred to suggestions that workers and unions should share responsibility for workplace safety equally with corporate executives and board members as “spurious and vaguely malicious” (Justice Committee 9 May 2002: 10:20). As Blaikie commented:
I think it would be regrettable if somehow we got off on this path of discussion of what the liability of unions is with respect to accidents in the workplace. I'm sure people in the trade union movement would be glad to accept responsibility once they were granted the same amount of power over the workplace as management, but that's clearly not the case in the law or in the way corporations are run. I think this is something of a blind alley we're going up... (Justice Committee 8 May 2002: 16:10).

... I do urge the [Justice] committee not to forget what we have been charged with, the subject matter of the private member's bill, a bill intended to address the situation that was reported on with recommendations by Justice Richard following the Westray mine disaster. I don't recall there being any dimension of this that had to do with the culpability of workers or unions or any esoteric points that can somehow turn this into a discussion about how people who don't have any power over the workplace, who don't own it, who don't manage it and don't run it can somehow be made the object of this committee's work (Justice Committee 9 May 2002: 10:20).

Unfortunately, however, these dissenting voices paled in comparison to the dominant perspective that workplace safety was the responsibility of everyone, not just those with decision-making powers. The comments by a MP to Bev Desjarlais, sponsor of the Private Members' bill, encapsulate this prevailing ideal.

The comment I want to leave with you--because we're all going to be lobbied by people with varying degrees of interest in this bill, unions, individuals, corporations, and bar associations--is that one of the things we need to be sure of is that there is a sense of fair play in the bill and that it addresses both sides of the equation. It's an issue that has been raised at this committee a number of times. It basically deals with union culpability and the culpability of union officials. For example, if a union official fails to observe his or her legal obligations--and I'm talking about legal obligations that we see in places like the Workplace Safety and Health Act, and of course, you're familiar with the Manitoba act--should that disregard, where there is the appropriate degree of criminal intent, carry a similar criminal intent? That's the question I think many of us are going to be asked about in this bill (Vic Toews, Justice Committee CA, 9 May 2002: 10:05).

Overall, notions of responsibilization place the onus on the individual to take control of his or her environment, to make the prudent decision to behave appropriately and in accordance with the rules. However, since we are not all equally located structurally (Morrison 1995: 213), these decisions are differentially applied depending on one's social location. And with the growing precariousness of work in contemporary society (Cranford et al. 2005), along with the
declining number of unionized workplaces (Tucker 1995: 253; Glasbeek 2002), it is increasingly
difficult for workers to control decisions in the workplace. In addition, given the very different
structural location of employers and employees, responsibility in the corporate context means
that individual workers bear the greatest burden for ensuring workplace safety, while the
corporation and its senior executives remain hidden behind the corporate veil, making all the
decisions and reaping the greatest rewards, while taking the fewest risks (at least in terms of life
and limb) (Tombs and Whyte 2007; also see Gray, 2006; 2009). Despite claims of equality that
are embedded in notions of shared responsibility î who can argue against the idea that everyone
should ensure workplace safety î the reality is that this sharing is anything but symmetrical,
favouring those in positions of power who are best equipped to avoid the lawû reach.

5.8 The Definition of Organization
Following from dominant notions of shared responsibility, the governmentû legislation differed
from the NDPû Private Membersû bill in that it abandoned reference to corporation in favour of
organization. While the NDPû proposed bill was explicit in focussing on ūoffences by
corporations, directors and officers,û the governmentû legislation employs the much broader
notion of ūpublic body, body corporate, society, company, firm, partnership, trade union or
municipality.û Although the definition of organization applies to the entire Criminal Code ū that
is, it is used for purposes beyond the Westray bill ū there was a prevailing belief from some
participants that this difference was a legal sleight of hand that has particular effects, both
ideologically and ontologically, for workers and unions. As Archibald, Jull and Roach (2004:
375) state: ūthe explicit reference to [organizations] in this legislation sends a green light to
policing bodies and private complainants that they may now become potential targets.û
One union representative expressed concern with the potential impact of the definition of organization for unions and employees, wondering if there is now a risk that they will be held criminally culpable for workplace injury and death (Union representative, Interview 16). Another union representative expressed concern that unions can be held responsible for workplace accidents, noting that unions and employees have little decision-making control with the organization:

\[...\] basically we wanted the legislation to go after corporate bosses, basically, because they’re the ones that make the decisions. At the end of the day any decision that made on anything to do with the business comes about as a result of management’s decision. It doesn’t come about because of a union decision. We wish, but it doesn’t. They have the ultimate authority to manage, and that authority is only restricted by terms of a collective agreement, and in very few cases, maybe in terms of regulations or legislation. So we were hoping that it would focus more on criminal liability for those that have the power to make decisions. But in reality what it does is that it will hold anybody accountable if the investigation shows there was any part played in any particular incident by anybody from the janitor right up to the CEO. Now some people will argue, why not? Well normally, in my experience in almost forty years, is that any decision made by the janitor is usually something that is usually handed down from above, right. And there are very few cases where you could actually cite where somebody at that level had any type of malicious intent to do anything to cause harm (Union representative, Interview 12).

Despite this concern, most union representatives thought that it was important to support the Westray bill given that it addressed issues of corporate liability. As one union representative noted:

...if there was something beyond corporations it would be worth addressing, but it’s not. The corporation is the problem, but they [government] expanded the coverage beyond the corporate identity to include those who do not have an individual identity. So a non-profit, any kind of organization could potentially get scooped-up in [the new law], which we think is both a mistake and will be a source of problems for the legislation going forward. But since it did have clearly corporate responsibility in it as well, then it’s okay because the notion that a charity, a hospital, or even a union is somehow got the same kind of issues and responsibilities as a corporation is odd, to say the least (Union representative, Interview 9).
Another union representative similarly suggested that the expanded definition of organization was worth the risk to ensure the legislation was enacted.

Most of the time, the union is not in the position to stop it [accident] happening anyway. We don’t direct the workplace. The employer directs the workplace. By benefit of some case of legislation, certainly on the health and safety side we can put certain limits on what the employer does, but very, very rarely can we actually force the employer to do anything that isn’t sort of a statutory requirement. The employer organizes the workplace. I guess you are always concerned that they are going to find the scapegoat. They will find the supervisor, if they can get to be the co-worker doing the unsafe things, they [the corporation] will do it. So there is always that possibility (Union representative, Interview 16).

Although this individual believed the legislation was a step forward in terms of corporate criminal liability, he also expressed trepidation with the historical reality that the law has worked to the advantage of powerful corporations, leaving workers to assume responsibility and pay the price for unsafe work conditions.

5.9 Conclusion: Economic Discourses at Work

This chapter has interrogated the economic discourses that animated discussion and debate in Canada’s Parliament regarding the introduction of corporate criminal liability legislation. Intertwined with legal discourses (examined in the previous chapter), dominant notions of the economy limited the reform options that were given serious consideration. Although there was general support for the introduction of corporate criminal liability legislation, any enthusiasm for this law was tempered by concerns with its potential impact for the economic well-being of corporations. We need to be careful when attempting to hold corporate actors and corporations to legal account, dominant voices argued. We must ensure that any law that is introduced is not too strict or overly intrusive to the point that it impedes corporate capital’s wealth-generating capacity, or so we were told. We’ll all be sorry, they argued, if the best and the brightest no
longer want to serve as corporate directors because of the legal risks involved, or if corporations pack-up and leave when confronted with overly stringent laws.

Two key issues emerge from this chapter. First, despite the absence of corporate Canada from the reform process (at least in terms of a visible presence), the interests of corporations were thoroughly articulated by pro-corporate legislators and some witnesses who appeared before the Justice Committee. Similar to the framing of the debate through legal discourse, these voices were not part of any concerted or organized efforts to resist corporate criminal liability legislation even if the claims of backdoor politics involving corporations had vaguely instrumentalist implications. The (re)production of capitalist relations of power is not that omnipotent or automatic; otherwise the Westray bill would never have come to fruition. On the contrary, it was a commitment to neo-liberal common sense that informed perspectives regarding the importance of the corporation as society’s vital wealth-generating mechanism (Glasbeek 2002). The ascendancy of neo-liberal ideals, along with the power of corporate capital, over the past two decades has contributed to the prevailing assumption that corporations are the most “efficient way of organizing production” (Pearce and Tombs 1998: 5), leading to the dominant belief that there are few (if any) alternatives to “the global expansion of neo-liberal capitalism” (Tombs and Whyte 2003: 262-63). And while some of this corporate cheerleading may be more subdued today in the wake of serious and ongoing cases of corporate fraud in Canada and the United States, pro-corporate ideals were most definitely present and accounted for in the Westray bill context.

Gramsci’s notion of hegemony is helpful in understanding how and why the state’s reform process provided a conduit for the expression of pro-corporate ideals. Gramsci (1971: 244) defined hegemony as “the entire complex of practical and theoretical activities within
which the ruling class not only justifies and maintains its dominance, but manages to win the active consent of those over whom it rules (as quoted in Pearce and Tombs 1989: 36). The capitalist class maintains and (re)produces its hegemonic position in society through the formation of historical blocks, which occurs when those with the ability to extract surplus from the economy convince others to accept its moral and political leadership and to both accept and contribute to its mode of governance. This block must be constituted, to some extent, in and through the state (Tombs and Whyte 2003: 10). This is what happened in the case of the Westray bill, and it explains how, and why, dominant voices supported particular legislative perspectives. In essence the political sensibilities of corporate capitalism formed an essential component of the reform agenda, acting as the dominant ideology (Tombs and Whyte 2003:10) from which to evaluate options for corporate criminal liability law.

The second prominent issue from this chapter is that responsibility for workplace safety was constructed primarily in neo-liberal terms. Workplace crime was repeatedly conceptualized as the responsibility of workers, labour and unions as much as (or more than) management and executives. In particular, workplace accidents were seen as a result of defective low-level employees not bad corporate management, malign corporate culture or profit-maximizing strategies. There are no structural flaws in corporate capitalism. As Glasbeek (2002) has said, they looked for the rotten apples in the barrel, not at whether the barrel itself was rotten.

Focusing on individual responsibility is consistent with neo-liberal beliefs that individuals are free to choose the conditions within which they work, thereby obscuring the broader context within which decisions about workplace safety are made (Pearce and Tombs 1989: 133). In particular, an ideology of individual responsibility directs legislative attention down the hierarchy, not up, ignoring the power gap between workers, unions and bosses, and the
structural/legal realities that give executives and management the right to set production targets, shut down the plant, hire, lay off and fire workers. Senior management reaps the lion’s share of the benefits of not fixing the unsafe workplace; employees take the lion’s share of the risks. Corporate harm and wrongdoing become a shared problem, not an artefact of corporate culture, and most definitely not “the natural by-product of the pursuit of the corporate capitalist agenda” (Glasbeek 2002:4).

At its heart, discussion and debate regarding shared responsibility is about which parties, interests and agendas control the workplace. While corporations hold themselves up in official discourse as having everyone’s best interests in mind — including workers, unions and the general public — in actuality it is the privileged few who enjoy the bulk of the corporation’s financial rewards (Glasbeek 2002; Pearce and Tombs 1998; Snider 2008; Tombs and Whyte 2007). Putting forward the mirage of shared responsibility as a basis of corporate criminal liability therefore ensures that this myth is (re)produced, effectively downplaying attempts to pierce the corporate veil to expose the inherent contradictions of the modern corporate form.
Chapter 6: Obscuring Corporate Crime and the Corporate Criminal

Between crimes that are characteristically committed by poor people (street crimes) and those characteristically committed by the well-off (white-collar and corporate crimes), the system treats the former much more harshly than the latter, even when the crimes of the well-off take more money from the public or cause more death and injury than the crimes of the poor (Jeffery Reiman 2004: 146 [emphasis original]).

Everyone grows up knowing what crime is. From a very early age children develop social constructions of robbers and other criminal characters who inhabit our social world. But in reality there is nothing intrinsic to any particular event or incident which permits it be defined as a crime. Crimes and criminals are fictive events and characters in the sense that they have to be constructed before they can exist (Paddy Hillyard and Steve Tombs 2004: 11).

6.1 They’re not Really Criminals, are they?

The previous two chapters explored how corporate criminal liability, and with it corporate crime, was constituted through various legal and economic discourses. Overlapping and mutually reinforcing (Tombs and Whyte 2007), these discourses helped limit the reform options to which legislators gave serious consideration, and in the process raised questions about the culpability of workplace injury and death. Dominant voices claimed that criminal law is an ill-fitted and misplaced tool to deal with corporate wrongdoing, and decried that corporations and corporate actors are too important to be treated harshly or subject to overly stringent laws. Corporations are vital a wealth-generating mechanism, or so we were told, so handle with care.

This chapter further interrogates the constitution of corporate criminal liability by considering the ways in which dominant and culturally embedded notions of crime animated the Westray bill’s introduction and enforcement — discourses that provided the space within which the meaning of corporate criminal liability was (re)constituted. In contemporary Western capitalist society it has become an anathema to label corporations as criminal (Glasbeek 2002: 145; Snider 2008). Although recent and ongoing cases of massive corporate fraud have raised questions about corporate accountability (and some high profile cases have resulted in significant
prison sentences) (Snider 2009; Rosoff, Pontell and Tillman 2005), corporate harm and wrongdoing has been, and continues to be, primarily beyond the criminal justice system’s gaze (Glasbeek 2002; Reiman 2004; Snider 2003).

As we shall see, ideologically-based notions of crime provided an important backdrop to the Westray bill. These are not ‘real’ crimes, dominant perspectives suggested, but unfortunate accidents; the regrettable but mostly unavoidable incidents that happen along capital’s road to success (Glasbeek 2002). Although there was general agreement in the House of Commons that new federal legislation was needed to hold some corporations to legal account for workplace safety, it was deemed necessary only for the Westrays of the world, the so-called rogue corporations that represent the exception to the rule; definitely not crime, and certainly not the result of a problematic corporate culture or the structural realities of corporate capitalism (Glasbeek 2002).

This chapter contains two separate, yet related sections. The first considers how particular cultural scripts of crime and disorder informed the Westray bill. In addition to examining how these perspectives acted as conceptual barriers to contemplating workplace injury and death as crime, it explores how they have continued to influence the Westray bill in its enforcement. The mere fact that there have been only two charges and one conviction since the law came into effect in 2004 is itself a reflection of the priority accorded safety crimes. Many participants offered their opinions about why it has rarely been enforced, reasons that speak to dominant discourses of crime and the structure and focus of the criminal justice system.

The second section examines the Westray bill’s capacity to address issues of workplace safety, a topic that many participants contemplated given the lack of charges and convictions. A particular focus is the law’s symbolic impact, whether its mere introduction has encouraged or
forced some corporations to improve their safety measures. In many respects there is symbolic import to new legislation dealing with corporate criminal liability; it signals official approbation of corporate harm and wrongdoing. At the same time, however, what is the value of this message if the law is not enforced? Is it merely “symbolic but ineffectual law” (Smandych 1991:47)? Although it is beyond the scope of this research to empirically evaluate whether the Westray bill has helped improved workplace safety and if so to what extent it is possible to examine the discourses that underpin some of the measures undertaken within the corporate world thus far in response to this legislation. Examining these discourses is important for, as Ericson and Haggerty (1997) remind us, language matters; it does not determine, but shapes our thinking and actions.

This final section suggests that the most significant development since the Westray bill’s enactment is not its enforcement, but the emergence of a cadre of legal experts and consultants poised to provide for-fee services to corporations about how to avoid getting caught in this newly spun crime control web. While these initiatives may encourage some corporations to change their approach to workplace safety, their nature and scope suggests that they are more about profit-making ventures to help corporations avoid criminal responsibility than about embracing the value of workplace safety. In true entrepreneurial form, the Westray bill has produced what is referred to herein as a crime (un)control industry, one that reinforces dominant beliefs that corporations cannot be criminals. As such, many of the cultural assumptions about corporate crime, and that it is somehow different than traditional street crimes, continue to hold sway beyond the introduction of Canada’s corporate criminal liability legislation.
6.2 What is a (Corporate) Criminal?

In contemporary society crime has become a social and political obsession. It is almost impossible today to escape the constant messages about the perils of crime and disorder, warnings about dangerous individuals who lurk behind every street corner waiting for their next victim (Boyd, Chunn and Menzies, 2001; Christie 2004; Garland 2001). On a daily basis we are reminded about the so-called ‘crime problem’(Menzies, Chunn and Boyd 2001: 11), whether it be through sensationalized media coverage of interpersonal violence, stories of cops and robbers on television or in movies, or the constant political chatter about the need to ‘crack-down’ on crime and criminals. In reality, however, there is little evidence to support these claims and concerns, with, for example, ‘official’ statistics demonstrating that crime rates have been in steady decline for a number of years (Menzies, Chunn and Boyd 2001; Silverman, Teevan and Sacco 2000). As Menzies, Chunn and Boyd (2001: 12) argue, ‘[b]y every account, the ‘average’ Canadian today is less likely to be victimized criminally by another individual than at any time since the 1970s.’ And yet ‘conventional wisdoms’ (Menzies, Chunn and Boyd 2001) about crime continue unabated.

From a very early age we are all taught what is a crime (Hillyard and Tombs 2004: 11). What these ‘common sense’ lessons do not acknowledge, however, is that crime and its control are ideologically-based, social constructions (Henry and Lanier 2004). There is nothing inherent about any particular act that gives it a criminal quality; it only becomes a crime when it is officially labelled as such (Christie 2004; Hillyard and Tombs 2004). As Christie (2004: 3) argues, ‘crime does not exist. Only acts exist, acts often given different meaning within various social frameworks.’ Witchcraft was once deemed to be criminal; so were most forms of gambling, at least until governments saw the revenue-generating opportunity of state-run casinos
and lotteries. And slavery was once deemed acceptable under the U.S. constitution (Glasbeek 2002). Crime is therefore historically and socially specific; its constitution contested, its definitions never complete.

What is important for the current discussion is that, for the most part, corporate wrongdoing has been absent from dominant considerations of crime (Menzies, Chunn and Boyd, 2001; Glasbeek 2002; Snider 1991). As Glasbeek (2002: 118) reminds us, “...when corporate actors commit crimes they are rarely charged; if charged, they are rarely convicted; and if convicted, they are rarely punished severely.” The exclusion of corporate wrongdoing from crime’s lexicon is puzzling when considering that corporations cause exponentially more harm than “...all the street thugs, youth gangs, home invaders, illegal (im)migrants, pot growers and squeegee kids that our society can produce” (Menzies, Chunn and Boyd, 2001: 13). When it comes to safety crimes, although political rhetoric would have us fear violent street crime, the truth is that most people have a much better chance of being victimized on the job than on the street (Snider 1993; Tombs and Whyte 2007). And regardless of the growing concern with the abuse of corporate power—fuelled by recent cases of corporate fraud and high profile workplace disasters, including Westray—the notion of corporate crime has a long way to go before it can be accused of being ensconced as part of mainstream law and order agendas.

Tombs and Whyte (2007: 67) suggest that a key reason why safety crimes (and corporate crime more generally) have remained beyond discussions of crime control is the overwhelming political priority given to crime committed by the “usual suspects.” Throughout the 1980s and 1990s, during the rise of neo-liberal political and economic reasoning, the idea that corporations and corporate actors were criminals became increasingly problematic, even unthinkable (see Slapper and Tombs 1999; Tombs and Whyte 2007). During this time the temperature of the
state’s crime control policy-making shifted from cool to hot, expressing a "...collective anger and a righteous demand for retribution rather than a commitment to a just, socially engineered solution" (Garland 2001: 10-11). However, these demands for justice varied considerably depending on the crime and offender. While penalties and punishments for traditional street crimes became considerably more punitive (Boyd, Chunn and Menzies 2001; Garland 2001; Glasbeek 2002; Snider 2008), corporate wrongdoing enjoyed a period of unprecedented deregulation, effectively becoming "exempt from legal control" (Snider 2008: 3). As Snider (2008: 3) notes, "[t]he urge to criminalize ... stopped at the door of the executive suite; jail sentence and criminal fines, ideal for the poor and powerless, somehow became ineffective and inappropriate responses to business assault, homicide and fraud." Deemed to be the economic lifeblood of the country, corporations could do no wrong. Corporate crime was therefore irrelevant, defined away as of little concern or consequence, despite overwhelming evidence to the contrary.

These dominant, socially-based conceptualizations of crime, which largely exclude corporate wrongdoing, also have structural roots. That is, they do not emerge in a vacuum, drawing their moral and cultural authority from different discursive formations. For example, as the previous chapters illustrated, legal and economic discourses shaped and limited the nature and scope of corporate criminal liability legislation, therein downplaying the seriousness of corporate crime. Cultural scripts of crime and disorder therefore represent another "mutually reinforcing" (Tombs and Whyte 2007: 69) discourse that shaped and animated the Westray bill. The next section explores this dominant frame, how safety crime, and through it corporate crime, was differentiated from "dominant definitions of crime, law and order" (Tombs and Whyte 2007: 66).
6.3 Illegal, yes, but not Criminal\textsuperscript{1}

Throughout the Westray bill reform process there was reference to historically-rooted, culturally-based beliefs that corporations and corporate actors are not criminals. While not expressed in absolute terms \textellipsis\ nobody argued corporations cannot commit crimes \textellipsis\ dominant voices suggested that only a minority of corporations are guilty of such sins and that most corporate crime cannot be considered \textit{true} crime. Corporate crime is the exception to the rule, not something that constitutes too much cause for concern.

The hesitancy to equate corporate wrongdoing with crime first emerged during discussion and debate of the types of corporations that should be subject to the NDP\texteuro s proposed legislation. The prevailing sentiment was that it should apply only to the handful of corporations that deviate too far from acceptable standards and norms. For example, New Democratic MP, Bev Desjarlais, sponsor of the Private Members\texteuro bill, offered the following observations during the Justice Committee\textapos; hearings:

\textit{Quite frankly ... I don\textapos;t believe this legislation will ever deal with probably 99\% of the corporations and industries in our country. What it will deal with is the 1\% or 2\% that do carry on this kind of action. They\textapos;re the ones we want to deal with} (Justice Committee 9 May 2002: 10:20).

Similarly, Desjarlais also suggested,

\textit{[i]f we have such an absolute objection from industry in different sectors to a bill such as this ... methinks they protest too much. What are they worried about? You would have to be so blatantly negligent to fall into this category that you shouldn\textapos;t even be able to stand up and look anyone in the face. That\textapos; what we\textapos;re dealing with. We\textapos;re not dealing with corporations or individuals who are honest and caring, which I believe the majority of our companies and corporations in this country are. I wouldn\textapos;t expect that they would ever fall into this legislation} (Justice Committee 7 May 2002: 10:55).

\footnote{This title is a quote from a senior executive from Westinghouse in response to questions why he had been involved in a major price-fixing scandal (as quoted in Glasbeek 2002: 155).}
The problem, however, is that corporations of all shapes and sizes have been found guilty of serious occupational health and safety offences (Pearce and Tombs 1990: 426) i.e., "corporate crime is not an aberration" (Glasbeek 2002: 133). In addition, suggesting that only rogue corporations are guilty of wrongdoing obscures the organizational and socio-economic factors associated with corporate crime. This does not mean that individuals are without fault, but simply that structural factors ("pressures of profitability") influence actions (McMullan 1992: 45; also see Glasbeek 2002; Pearce and Tombs, 1998).

A general reluctance to define corporate wrongdoing as criminal also emerged in reference to "true" crimes versus regulatory offences. For instance, in response to a question from a Justice Committee member about the challenges of drafting corporate criminal liability legislation, a witness argued for the need to differentiate between types of offences.

... [F]irst of all, there has to be some attention given to the differences between true crimes as we know them and offences that are more of a regulatory nature. In current Canadian criminal law, this is one of the most intractable, difficult problems. We do not have, in current law, a workable distinction between regulatory liability and criminal liability, and it's absolutely central to the problem of corporate liability (Patrick Healy, Justice Committee 28 May 2002: 11:50).

What this fails to consider, however, is the socially constructed basis of the distinctions between "true" crime and regulatory offences (Pearce 1992: 319). It reinforces the dominant belief that corporate (regulatory) offences are somehow objectively distinguishable from traditional street crimes (Tombs and Whyte 2007).

A telling instance of the generosity of spirit accorded corporate wrongdoers was revealed serendipitously when the Justice Committee interrupted hearings on the Westray bill to discuss a motion relating to legislation on violent crime by individuals. In an abrupt change of tune, one Committee MP wanted to summon the Commissioner of Corrections to answer questions concerning an individual on statutory release who had committed homicide (Peter MacKay,
Conservative MP Peter MacKay asked why this individual was given parole and why it was not revoked ignoring the fact that no law and no jurisprudence justified his continued detention. Others used this example of individual violence to criticize how “criminals” are dealt with post incarceration (Chuck Cadman, Canadian Alliance, Justice Committee 7 May 2002: 10:45). What is particularly revealing is the shift in discourse: precise legal language and maximum legal protection is required for corporations and corporate officials involved in corporate violence, but these can be ignored when dealing with individuals involved in interpersonal violence. Such issues become mere legal niceties. Take, for example, comments from Conservative Alliance MP Vic Toews:

I don’t think it serves this committee well to say we don’t know whether this is conditional or statutory release. Who really cares? Let’s not get into that kind of thing; I think that brings discredit to this entire committee. I don’t really care what the difference is, and I don’t think it’s particularly relevant. There are certain rules that govern those releases. I think the prior witness, Mr. Martin [a former Westray mine worker who testified before the Committee], would just be shaking his head if we hinged our decision on that kind of thing (Justice Committee 7 May 2002: 10:45).

Likewise, another member expressed little concern with the difference between statutory release and parole, preferring instead to talk about the gravity of the offence.

To me, somebody breaching a condition of parole is a slap in the face of society. We told that person we’re going to give them a chance, they breach the conditions they’ve been given that chance on, and parole is not revoked. That concerns me, and I think it goes to the heart of this (Chuck Cadman, Justice Committee 7 May 2002: 10:45).

Finally, as MacKay argued in response to concerns by some MPs that there is a difference between statutory release and parole,

[as to point about whether it was statutory or conditional release, my information is that it was statutory release, but I think such things are minutiae. What happened here is that this man breached conditions of his parole and may have been picked up if there were proper mechanisms in place that would have prevented Mr. Hearn [the victim] being beaten with a claw-hammer in his own home (Peter MacKay, Justice Committee 7 May 2002: 10:50).]
In general this example underscores the vastly different discourses that are used to characterize interpersonal violence (traditional crime) compared to corporate violence. Gone were concerns with legal precision and the need to do things in accordance with certain legal principles – ideals that were obvious during discussion of corporate criminal liability replaced instead by concerns with the 'proper' administration of justice and the need to get to the bottom of the issue, and fast. No more commitments to justice and fairness, just the criminal justice hammer waiting to swing into action at a moment’s notice.

**Making Corporate Crime Saleable**

In many respects this differentiating, or ‘othering’ of corporate offences from traditional crimes was an artefact of the lobbying for the Westray bill’s introduction. To make the legislation saleable, a key message was that it would deal with only the most egregious cases of corporate malfeasance. As a private sector representative noted, he understood from consultations with the Department of Justice that the legislation was not meant to open up a new level of prosecutions, but to deal with cases of extreme negligence (Private sector representative, Interview 14).

Likewise, a criminal lawyer noted that the lack of charges under the new law has helped reassure corporations of its restricted application.

> You know what I think? It’s gone back to where we were before. You don’t have to worry about it. It’s for those other guys. It’s the bad, greedy few, not us. We run a good company, we’re careful. There’s a certain sense of complacency… (Criminal lawyer, Interview 5).

References to reasonableness and fairness therefore helped assuage fears that the law would go too far in holding corporations to legal account. By attributing corporate wrongdoing to organizational and individual bad apples (therein ignoring the role of the corporate form or the
nature of capitalist production in workplace injury and death), dominant perspectives helped ensure that the Westray bill did not upset the corporate apple cart. In this respect it was as if the entire reform process was premised on maintaining the status quo (Haines 2003).

6.4 The Westray Bill in Action

Dominant assumptions of crime and its control also animated the Westray bill beyond its enactment. There are valuable insights to be gleaned from examining the differences between law-as-legislation and law-in-practice that what the law promises on paper is oftentimes substantially different than what is achieved through its enforcement (for example, see Smart 1989; Chunn and Lacombe 2000). An important consideration herein is that law plays an integral role in reproducing a repressive social order (Chunn and Lacombe 2000: 11), whether it is in terms of recreating a gendering practice (Chunn and Lacombe 2000: 16), racialized space (Razack 2002) or capitalist ideology (Woodiwiss 1997).

For some respondents, particularly those from the labour movement, the one conviction—the Transpavé case—did not bode well for the potential of holding corporations and corporate actors to legal account for workplace safety. As one union representative noted, the Transpavé case involved a small company where there was little difficulty tracing the chain of responsibility throughout the organization (Union representative, Interview 9)—hardly the sort of complex case that critics had in mind when arguing for changes to the identification doctrine. Another union representative raised similar concerns, suggesting that one of the only reasons the Transpavé case made it to court was because the Québec Federation of Labour (QFL) aggressively lobbied the Crown to proceed with charges. According to the union representative, the QFL believed that the accident report of the Commission de la santé et de la sécurité du travail (CSST), the province’s occupational health and safety authority, underscored the criminal negligence of the case in
finding that the machine’s safety mechanism had been purposely disabled (Union representative, Interview 16). Compounding the negligence was that this was known to most everyone in the company except the victim, who was not properly trained to operate the machine. Adding to the union representative’s frustration was the perception that the safety mechanism had been deactivated to save time and money:

Some people told us ... the only reason it [the safety mechanism] was deactivated was to save about $600 per production day, no quote on that, okay ... it would speed up the fix when there is a jam in the production. Because to reactivate the [machine] you’ve got to get out of the area press the button, and there’s a two-minute delay before it starts over again (Union representative, Interview 16).

In addition to these concerns, a number of participants offered insights regarding problems with the law’s enforcement. Three main factors emerged from these discussions. First, provincial occupational health and safety regulations provide built-in disincentives for enforcing the Westray bill. That is, the new law operates within the context of a “bifurcated model of criminal process” (Tombs and Whyte 2007: 110) in which attempts to “assimilate” corporate wrongdoing into the criminal law have had to develop alongside a robust regulatory frame that involves a separate, non-criminal sphere for dealing with occupational health and safety offences. Second, there is a lack of education regarding the legislation amongst police and crown prosecutors. A related point is the traditional focus of criminal justice actors on “real” crimes, the sensational stuff of guns and gangs. Finally, corporate crime, and more specifically safety crime, is not an important societal priority – it occupies a marginal position on law and order agendas.

Collectively these factors are constitutive of dominant and culturally-based notions of crime and its control, socially constructed beliefs that, for the most part, exclude corporate crime.
Enforcement in Context: The Regulatory Frame

An important factor animating the Westray bill is the regulatory environment that dominates the state’s response to occupational health and safety offences. Within Canada’s constitutional framework the federal government has the power to enact criminal law, while responsibility for the administration of justice falls to the provinces, primarily through the provision of a system of police, courts and corrections. However, despite that criminal legislation is within the federal government’s bailiwick, the provinces can enact provincial laws and regulations, some of which include provisions for fines and imprisonment that resemble federal measures (see Osborne 1991). This is particularly relevant for discussions of workplace safety in that the provinces are responsible for establishing and enforcing occupational health and safety regulatory regimes. While there is no constitutional division of power that stipulates that occupational health and safety is exclusively a federal or provincial matter (Keith 2004: 97-98), it is the provinces that have assumed this responsibility in a majority of cases.

It is within this context that the Westray bill came into effect. Corporate criminal liability legislation was set against a backdrop of a well-established set of provincial (non-criminal) regulations meant to address issues of workplace safety. In this respect there was a pre-existing, non-criminal structure and process that the Westray bill had (and has) to compete against, both practically from an enforcement viewpoint and ideologically in terms of which mechanism was deemed to be the most appropriate for responding to corporate harm and wrongdoing.

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2 There are some exceptions to this rule. For example, if an offender is sentenced to more than two years in prison, they are sent to a federally run institution, while those sentenced to less than two years are sent to a provincial custody institution. Further, the province has some powers to enact some regulatory laws (e.g., highway traffic offences).

3 The exception is that the federal government is responsible for establishing health and safety laws for workplaces under federal jurisdiction, which accounts for approximately ten percent of Canada’s workforce. These rules are laid out in Part II of the Canada Labour Code. As Keith (2004: 97-98) notes, while roughly 10 percent of Canadian employees are regulated federally, 90 percent are provincially regulated for the purposes of labour relations, employment standards, workers’ compensation and OHS (97-98).
Even before the Westray bill was enacted this dominant regulatory frame helped to raise questions about the appropriateness of the law’s introduction. The perception that occupational health and safety is the bailiwick of the provinces meant that the idea of adding criminal law to the mix represented an uneasy proposition for some legislators. For example, a Liberal MP expressed concern that corporate criminal liability legislation was “far reaching” in its implications and required further study given that it had the potential to infringe on the “constitutional” right of the provinces to deal with occupational health and safety (Marlene Jennings, Hansard 23 April 1999: 12:35-12:40; also see Monique Guay, Bloc Québecois, Justice Committee 6 June 2000: 10:40).

Similarly, a Liberal MP cited the difficulties of “... extending the federal model to include workers outside the federal jurisdiction...” given that it is a “provincial concern.” The MP cautioned that any initiative at the federal level that treads on provincial jurisdiction may not “...be viewed positively by those other levels of government” (Brent St. Denis, Hansard 18 February 2000: 14:20). Finally, a Bloc Québécois MP raised the spectre of infringing on provincial jurisdiction in response to a union representative who suggested that it might be necessary for the federal government to assume responsibility for workplace safety regulations to adequately protect workers (Robert Lanctot, Justice Committee 9 May 2002: 12:25). A Liberal MP quickly added:

“We’re wandering off here. We’ve talked in the last hour mainly about something that concerns us not at all, provincial jurisdiction ... Health and safety is not our jurisdiction, it’s not our problem. We don’t want to get into it, as far as I’m concerned. We want to get this thing done, I want it to happen. All we’re being asked to do is provide a hammer to hold over them, and someone else is going to have to provide the nail. That’s the way our federation is made up (Ivan Grouse, Justice Committee 9 May 2002: 12:30).
A politician who participated in this research acknowledged that federal politicians are aware of the federal-provincial split when developing criminal law, but that in most cases they cannot do much about it. His comments are revealing about the complexities of federal-provincial relations, as well as the different priorities accorded traditional street crimes and corporate offences:

We’re [federally] stuck between a rock and a hard place. If we’re too prescriptive around what provinces might do, then the charge is that we are interfering. If we don’t even mention it, then we are grandstanding. So ultimately I think the balance generally is we recognize that we’re imposing some burden on the provinces to take actions, and we hope they will. And in some cases there were any resources attached to this [the Westray bill] ... and I don’t think there were any resources attached to this [the Westray bill] and I don’t think frankly that you would see it as being of the volume, and history has demonstrated that, the volume [of offences and charges] is not comparable to the volume around the Youth Criminal Justice Act. (Politician, Interview 15) emphasis added).

The dominant regulatory context also animated the Westray bill after its introduction, which many respondents believed was a prominent factor in the law’s virtual disuse. For example, one respondent suggested that the criminal law was being used as a tool for securing convictions for provincial occupational health and safety offences.

What I found with the people I deal with, the issue of labour, and other people, is that it is more of a tool that is being used to, if you are a corporation that has had a fatality or lethal injury, they go in and say, here’s your choice. You can either have a charge under C-45, or we you can take the charge under the provincial offences act, and no criminal record. I don’t know if it is a tool to get them to accept the provincial, but that seems to be the way that it is, at least in Ontario (Non-profit representative, Interview 10).

A corporate lawyer noted that it was the policy of Ontario’s crown attorney to first consider if it is more effective to use provincial regulations than criminal charges when dealing with corporate offences – a regulation first policy (Corporate lawyer, Interview 18). Others spoke more generally of how labour inspectors are more familiar with provincial regulations, therein providing an incentive to rely on these rules as opposed to incorporating new criminal laws into their daily routines. As a private sector representative suggested,
... you know, the thing that struck me at the time and I think is probably still the case is that clearly there is health and safety legislation in every province and that would be the natural thing that people would look to. To go the Criminal Code route you'd have a much higher burden of proof to actually try to determine, which is not impossible in some of these cases, you have to determine what practices were in place, what was the likelihood of harm that anyone did it did they totally ignore it or was it a matter of having some policies, but they weren't adequate (Private sector representative, Interview 14).

Provincial regulation is therefore the default starting point for investigating safety crimes. In this respect the federal-provincial split is a significant discursive formation that limits the application of the Westray bill and ensures that it does not unduly infringe upon provincial matters. In the process it helps reinforce the dominant belief that corporate offences are mala prohibita (wrong because prohibited), not mala in se (inherently evil and wrong).

**Lack of Legal Education and Interest**

Another factor that respondents noted when contemplating the lack of Westray bill charges and convictions was the poor knowledge of, and disinterest in, this legislation amongst police and crown prosecutors. As Glasbeek (2002: 149) notes, an ideological bias against criminalizing corporations and corporate actors saturates the efforts of the police forces, prosecutorial offices, and policy-making institutions. A union official described the law's status as having our feet planted firmly in mid-air, which he argued is a familiar position for occupational health and safety law.

It like all legislation that you get. I mean we have some great health and safety legislation on the books in Canada, both at the federal level and the provincial level ... but our biggest thing is ... that there is lack of enforcement out there. And I think it the same thing with this particular legislation, you know that part that was put in the Criminal Code. It not being used, frankly (Union official, Interview 12).

The union official added that he found it puzzling that nothing had been done to ensure the proper enforcement of such important legislation.
And what bothers me about [the lack of enforcement] is it had such a high profile introduction into the *Criminal Code*. I would have thought that there would have been an effort with the solicitors general and attorneys general of the provinces to get together and say, *this is important stuff, we want to make sure that this is not going to be just put on the shelf ... and never see the light of day* That never happened; it never happened. In fact there was more information and education among corporate managers than there was around those with those who have to actually enforce that legislation (Union representative, Interview 12).

A corporate lawyer cited the lack of education and training for police and prosecutors as the *biggest single impediment to the enforcement of this law* (Corporate lawyer, Interview 7). He argued that prosecuting corporations criminally requires *pretty sophisticated* knowledge of corporate law and of the ways in which corporations are structured (Corporate lawyer, Interview 7). Unfortunately, he noted, Crown prosecutors do not have the time, expertise or requisite training to undertake such work, particularly in comparison to the legion of well-paid corporate lawyers that stand waiting to defend against criminal charges. Another corporate lawyer concurred with this argument, adding that it was puzzling given the number of annual workplace fatalities in Canada.

Lack of awareness and education on the part of the police *clear problem*. Some of our clients have probably benefited from the ignorance of police, but I am not saying that is really the way the enforcement of law should be. *I* rather argue that the law is a bad law and you shouldn’t pass it, or you should amend it, rather than pass it and pretend it’s not there, because that is essentially what is going on, a fact that many corporations have probably benefited from ... There are approximately 1,000 workplace fatalities every year in Canada according to the National Association of Workers’ Compensation Boards, and I am hard pressed to believe that some of those aren’t pretty serious in terms of potential criminal negligence (Corporate lawyer, Interview 7).

Some participants attributed the lack of enforcement to the traditional focus of criminal justice actors. For example, one union representative argued that police tend to conceptualize violence from a narrow, stereotypical perspective:

Another part of the problem is that the police, when they end up where there’s been a death, work related, their only concern ... is to make sure that it is not a murder that
has been camouflaged by a work accident, that it is really an accident. That is their concern. It seems that their approach, the way they are looking at work accidents, hasn’t changed … (Union representative, Interview 16).

Similar concerns were expressed in reference to crown prosecutors, who generally do not consider occupational health and safety offences as an important part of their work. A legal academic suggested that those who become crown prosecutors are more focused on, and interested in, prosecuting traditional street crimes than they are corporate offences. ‘I just don’t know that most criminal prosecutors think about this realm of criminal law when they are thinking about being a prosecutor in law school, or even before law school’ (Legal academic, Interview 8).

Not on Society’s Radar

Some respondents suggested that part of the reason for the Westray bill’s lack of enforcement is that safety crimes are not an important societal priority. Although there is not a one-to-one relationship between the (non)enforcement of corporate crime and societal priorities (for example, some research suggests that, when asked, many people identify corporate crimes as being as serious, if not more so, than many traditional crimes), there is a prevailing belief that society is more interested in issues of cops and robbers than corporate criminals (perhaps the exception being cases of massive corporate fraud, a la Bernie Madoff). As one criminal lawyer suggested, a majority of people in society do not pay much attention to occupational health and safety issues until they affect them personally.

If it touches you and I, like the Maple Leaf food case [the listeriosis case of 2008] [then people pay attention] É but not, you know, the door that collapses on a worker at a construction site, or the worker that falls seventeen stories to their death. No, it’s got to be, it’s got to touch everybody. That’s like criminal justice; it’s a microcosm of criminal justice. If it doesn’t touch you, it’s for those other people, those bad

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4 For example, see The National Public Survey on White Collar Crime (Rebovich and Layne 2000).
people, those guns and gangs people, until it’s your kid. But workplace safety is not sexy (Criminal lawyer, Interview 5).

A legal academic similarly noted that societal attitudes undervalue workers’ safety and overvalue the economy, a process that serves to downplay the importance of corporate criminal liability.

Case in point, she referred to a presentation she attended where a medical doctor argued that doctors hurt the economy when they sign a sick note for a worker:

I saw a professor of medicine giving a training course to doctors ... it was one of these all day training sessions ... and he said, every time you write a doctor’s note for a person saying that they should be off work because they are ill, you are jeopardizing the economy and you are jeopardizing the livelihood of hundreds of workers, and he said that just like that. And there were 300 doctors in the room and they were taking their notes, and they all probably didn’t agree with that, but the fact ... [is that] ... this is the very senior doctor ... the one who’s running the show ... (Legal academic, Interview 19).

For other respondents the lack of enforcement was a reflection of an overall inability to equate workplace injury and death with violence and murder. A union representative argued that society does not think of death in the workplace as killing, which he saw as being no different than killing someone by driving drunk (Union representative, Interview 9). To support his argument he compared the response to the death of a police horse on the same day that an employee was killed at a large industrial workplace.

It’s now a few years old, but a worker [at an industrial plant] was killed on the job. There was nothing in the newspapers, nobody shows up at his funeral except his family and the union members, etc. On the same day, you want to know what was on the front page of the Toronto Star? The death of a police horse. It warranted an honour guard, the mayor showed up, I think McGuinty [Ontario’s Premier] was there (Union representative, Interview 9).

Similar frustration was expressed by another union representative when discussing the death of Steve Lécuyer, the Transpavé worker who was killed on the job.

There 97 people who died on the job in Afghanistan over a five-year period [at the time of the interview]. Every Canadian knows about it. Ask any Canadian how many people die on the job other than those [military workers] ... when a fireman dies on
the job, national funeral. When a policeman dies on the job, national funeral. Why is it different for Steve LÉcuyer? And there’s a lot more Steve LÉcuyers who die in a year than there is policemen or firemen (Union representative, Interview 16).

Once again, dominant, culturally-based notions of what constitutes crime permeated the Westray bill reform process and helped characterize its enforcement.

6.5 Law’s Symbolic Value: They’ve Changed, Honestly

Despite the lack of Westray bill charges and convictions, many participants in this study suggested that the law’s enactment had persuaded many corporations to improve their occupational health and safety practices. The potential of the law’s productive contributions was underscored by a politician who suggested that it would encourage corporations to practice their due diligence, ensure that employees knew about the law and protect workers from risky and unsafe conditions (Politician, Interview 15). As New Democratic MP Pat Martin argued during debate in the House of Commons, introducing corporate criminal liability law into the Criminal Code would force corporate actors to “make a point of knowing about their company’s safety policies and practices. Martin continued,

[p]eople would not accept directorships on boards without first asking solid questions about the enterprises that would be under their control. They would ask if reasonable steps were being taken to ensure the workplace was safe so that there would be no problem ... If [the legislation] were in effect executives would take an instant interest in the workplaces under their control. They would ensure that basic, reasonable steps in workplace safety and health were taken. Smart managers and CEOs know that a clean, healthy and safe workplace is more profitable and that safety is not a cost factor (Hansard 8 November 2001: 18:25).

From this perspective the Westray bill contained a general deterrence message—it established a moral benchmark to which all corporations were expected to aspire. Respondents offered a variety of opinions as to whether the law had achieved, or could achieve, this lofty goal.
Some respondents suggested that the Westray bill had an immediate impact on corporate activities, with corporate representatives determining what they needed to do to comply with the new law. One corporate lawyer suggested that more sophisticated corporations responded by introducing policy changes, while many unsophisticated ones made no changes at all (Corporate Lawyer, Interview 7). Similarly, a union representative agreed that some corporations have responded positively to the Westray bill, but argued that the message has been received only by those who already understood the importance of workplace safety.

I would say ... the large company that was already training their officers, supervisors, whatever you want to call them, their management team, on health and safety, and are doing the things right, mostly, are the same ones where they give the training for their people on ... [the Westray bill] ... because they were already concerned with health and safety, and now it's just another incentive, of being concerned, but it's the same ones. It's the ones who are organized, and quite often there are unions present to keep knocking on the door saying, if this doesn't work people are going to get injured. And with time you realize that it's an investment to work on prevention (Union representative, Interview 16).

As the following quotes illustrate, other respondents were even more convinced that the Westray bill had encouraged corporations to improve their occupational health and safety practices.

I attended a conference not all that long after the legislation was put into force, and different workers around the country got up and said right after this was done there were meetings in the workplace to start dealing with some of the issues that they had not been dealing with. So it had some immediate impact. I think that if even in one instance an employer improves a situation and we save lives, it's been beneficial. I would much rather have a situation where they make the preventative changes and we never, ever have to charge anyone under this legislation. But it's like anything, having the legislation makes a difference (Politician, Interview 11).

I think the message being sent was that we've taken notice of this practice in the industry and that we're kind of giving the heads-up now that we're not going to let this continue. And I guess we are waiting to see what kind of an impact it has out there to determine if there is a need to go past that ... I think it's more symbolic than practical right now, especially since the past has shown that. I think it has had the desired effect that they [government] wanted to wake up the industry and say, okay times have changed... (Non-profit representative, Interview 10).
A private sector representative argued that senior officials in his organization took notice when the Westray bill was introduced. When the can was tied to senior leadership, and they were made aware of it [the Westray bill], they opened their eyes to ensure that the accountability mechanisms that were being passed down throughout the company were being followed. He suggested that the law provides health and safety experts with a strong mandate to give more and frequent updates to senior executives and management regarding potential criminal liabilities within an organization. From his perspective it provides the checks and balances that are necessary to ensure that the appropriate safety programs are implemented and that employees have the proper skills and training for their jobs (Private sector representative, Interview 23).

**Symbolic of What?**

Not everyone was convinced of the Westray bill’s ability to encourage changes in a corporation’s occupational health and safety practices. For example, a government respondent argued that, at most, the law would raise awareness of the issue and help police and prosecutors deal with serious cases of workplace injury and death (Government official, Interview 1). Similarly, another government official suggested that the law is an after the fact response, and therefore lacks a preventative element (Government official, Interview 3).

For some respondents the introduction of the Westray bill allowed the government to claim that it was taking the issue of corporate criminal liability seriously without fundamentally changing things. As an NGO representative argued,

[w]here politicians stop when regulating the corporate sector, across the world, is they stand at the podium and say, “we have passed this law and it is now illegal.” Well, illegal does not mean that there are words on paper. Illegal means that if you do it, that there is a very high chance of getting caught and the penalty you face will stop you from doing it again. The penalty is much higher than could be absorbed by
doing it, paying the penalty and just writing it off as the cost of doing business (NGO representative, Interview 2).

A legal academic suggested that the Westray bill was a typical government response to a high profile disaster.

For me when [the Westray bill] was enacted it was a typical case. We have a problem, let's enact a new crime. We've resolved it. If you know somebody in criminal law who for one minute believes this would change anything, please tell me. ... And what I remember is that after, or around the enactment of this, I got a few phone calls. The business community was very worried, and what's going to happen to us, are we going to be prosecuted, what does it change? And I remember saying, I don't know, it doesn't change much (Legal academic, Interview 17).

In terms of her assessment of the new law, she quipped, something is done; nothing is fixed (Legal academic, Interview 17).

Some respondents argued that the law is irrelevant in situations where corporations act as amoral calculators. One union representative suggested that, although corporations do not always make decisions in economic terms, they will ultimately, and if necessary, calculate workplace safety as the cost of doing business.

There is this tendency to kind of impute this absolute fiscal rationality in management behaviour and corporate behaviour and say, well they all do this very fine cost benefit analysis. I mean I don't think that's true. But still, it is ultimately a matter of, okay, it happens, we pay the fine, and we go on [Corporations] try to avoid your worker comp fees, and that it (Union representative, Interview 6).

A non-profit representative echoed a similar sentiment, noting that another Westray is out there waiting to happen, and that some companies still believe that workplace injury and death is just the price of doing business... (Non-profit representative, Interview 10). The reality that unsafe practices remain a concern despite the introduction of corporate criminal liability legislation was underscored by a union representative who argued the immanence of another high-profile disaster.
There’s still another Westray out there waiting to happen, I know there is. And unfortunately, I know there is. And the next Westray actually could be in the tar sands in the Alberta north, to be honest about it. I’m just waiting for a catastrophe to happen out there because they have a large proportion of foreign workers that they bring in, because they’re saying they don’t have enough skilled trades, and everything. The foreign workers are not being trained properly, they’re not being informed of their rights, there are all kinds of barriers involved, language barriers, cultural barriers, all kinds of things, that these workers, I believe, are in jeopardy, because they’re not, I don’t think they’re being trained properly in a lot of cases. In some cases they are, I don’t want to put one big broad brush on it, but I know and I’ve heard examples and this is just a disaster waiting to happen out there. And that could be the next, probably worse than Westray (Union representative, Interview 12).

Although he suggested that the law may have encouraged some corporations to reconsider their occupational health and safety standards, he suggested that the lack of enforcement was undermining the law’s ability to promote change.

é I think that because there hasn’t been any high profile charges [against] CEO’s or corporations [under] the Criminal Code that that has been leading to, how should I put it. I think it’s leading to almost ignorance of the legislation that’s there, or a lack of seriousness of the legislation that’s there, not taking it seriously. Because even though in the back of their minds they know it’s there, they’re seeing that in every major incident that happen so far ... everything is being charged under the occupational health and safety act of the province. And they know under that particular legislation, even though there could be some serious fines, they could be fined up to a couple of million bucks, but you’re not going to jail under the acts of the provinces. And that’s sort of my fear, is that it’s one of those things were you have good legislation but in this case the legislation, that basically becomes almost abstract to people. And that doesn’t help the cause, and I can see down the road that things are going to deteriorate again. I mean they’re not the best because Canada still injures and kills more workers than most of the G-8 countries (Union representative, Interview 12).

A regulator suggested that some corporations may not be taking the legislation all that seriously, although he was unsure to what extent (Regulator, Interview 15). In his mind part of the problem was that regulatory overload or fatigue has meant that many corporations only focus on what they have to do to comply with a particular rule, as opposed to seriously and thoroughly reflecting on what it takes to operate safely.
There became a sense that has evolved with so much regulation that says, “as long as I’m in the regulation, okay, I’m following all the rules.” And these people are not breaking any rules; they are following everything, meeting all of the conditions, and following all the rules. They’ve lacked the judgement to say, the rules are not enough, there is more to it than just the rules (Regulator, Interview 15).

In this regard, some of the changes that corporations may have made in response to Westray bill are akin to what Gary Gray (2006) refers to as Potemkin villages, the idea that some corporations will make it appear to regulators that they are complying with occupational health and safety standards, even though the company’s day-to-day practices are anything but safe and compliant.

6.6 The New Crime (Un)control Industry?

As the preceding illustrates, there were a variety of opinions as to whether the Westray bill has helped to improve corporate occupational health and safety policies and practices. When broaching this subject a legal academic warned that it is too difficult to determine the law’s impact without a thorough empirical analysis, and that it would be erroneous to conclude that the law’s enforcement (or lack thereof) is the sole benchmark of success.

Well, in other contexts ... we have this new harassment legislation ... [for example] ... and it’s very clear to me that the measure of the impact is not the measure of the outcome of the cases that have been brought. I mean that part of it, but it’s a very, very, very minor part of what types of changes were implemented and why there were implemented. So that in measuring efficacy of legislation the number of cases and the size of the fines is really not how you measure that (Legal academic, Interview 19).

Although it is beyond the scope of this dissertation to thoroughly evaluate the relationship between the Westray bill and improvements to occupational health and safety practices, we can interrogate the nature and scope of some of the education and training that has been offered to corporations since the law’s introduction. That is, we can examine the discourses that underpin
this work, including how they make sense of the law and the perceived steps that corporations need to take in response to its introduction.

As we shall see, the signs are not encouraging in terms of holding corporations to legal account for safety crimes. In fact, the most significant development since the Westray bill’s introduction has been the emergence of for-fee services offered to corporations on the measures needed to avoid criminal responsibility. In addition to various newsletters and advertisements from law firms and occupational health and safety consultants, this body of work includes various training courses, seminars and books, all of which detail the law’s parameters, how to avoid getting caught and what to do in the event of serious injury or death in the workplace. As one respondent noted when discussing the measures that have popped-up in the wake of the Westray bill,

[g]o on the Internet and look for training for C-45, many of the legal firms, that’s one of the courses that they push for right now is compliance with C-45, or understanding C-45. And they’re making a ton of money by going out and doing these presentations to companies (Non-profit representative, Interview 10).

Another respondent similarly suggested that the various for-fee courses and training on the Westray bill appear to advise corporations about how to avoid criminal responsibility.

Even before the legislation was declared there were consultants that already had their whole, you know, presentations and educational materials on this legislation in place, and were going after the corporations. I mean you could go on the web and you had god knows how many different consultants who were going to go and tell corporate leaders what the dos and don’ts were that would impact them as a result of this legislation, and they are still doing it today. They’re making a lot of money basically going out there, and some of this stuff I’ve read is that they’re almost advising people how to get around the legislation, right. It’s more subtle than really blatant, but I’ve dealt with these guys for a long time, so you’ve got to read between the lines, and I

In March 2009, a Google Internet search of the terms “bill C-45” and “Westray bill” yielded 12,500 and 1,100 hits, respectively. The majority of these sites offered general information on the law and its implications for employers and employees, and originated from law firms, occupational health and safety consultants, unions and labour groups, industry associations and online magazines. Although this does not constitute an overwhelming volume of Internet activity, it is nevertheless significant given the Westray bill’s virtual disuse. In addition, as part of this study I attended a half-day workshop on the Westray bill to gain further insight into the nature and scope of some of the available training.
get pretty good at reading between the lines of the stuff they say (Union representative, Interview 12).

Yet another respondent noted that many law firms are more than happy to help corporations set up programs to help ensure compliance with the law — for a fee, of course.

Now the interesting thing is that some of the sensational coverage of this bill, particularly those that were saying, boy oh boy you better have a good workplace safety program in place, and you better have it well understood by your employees, and because of the attribution, you better have or managed to have a way to monitor it and report back to the company. Oh, and by the way we'd be happy to set that up for you (Private sector representative, Interview 22).

Of particular note is how the available training and information on the Westray bill emanates from law firms and occupational health and safety consultants that are, at their core, profit-making enterprises. Although these organizations have legitimate interests in helping improve workplace safety, they nevertheless occupy a contradictory position in that they are making money by informing corporations on how to avoid being punished criminally in the event that they are accused of a safety crime. In this regard they help (re)produce workplace injury and death as non-criminal, ensuring that corporations and corporate actors remain largely beyond the criminal justice system's reach. Several examples help illustrate how these profit-making endeavours are part of what might be referred to as a crime (un)control industry.

The first example is the various newsletters that provide information about the new law. On the surface this material is for information purposes to keep interested parties informed of the law. At the same time, however, given that a majority of these items are provided by law firms and consultants who specialize in labour law and occupational health and safety matters, one cannot overlook that it is for the consumption of both clients and potential clients. At its core this information emanates from organizations with an underlying profit-making mentality, underscored by the fact that most newsletters end by encouraging readers to contact the firm if
they have any questions or need advice setting up an effective health and safety program. For example, one newsletter from a large law firm lists the contact information of its occupational health and safety specialists beside an information item on the Westray bill (Gowlings 2004). Another invites readers to contact its employee and labour relations staff to seek more information about the new law (McMillan Binch 2004). One item even provides a disclaimer, as required by the provincial law society, which states that the information constitutes ‘advertising material’ and ‘commercial solicitation’ (MacPhearson, Leslie and Tyerman 2005).

Similar profit-making endeavours are evidenced by the various for-fee courses and training sessions offered on the Westray bill. Not unlike the traditional crime control industry, much of this information plays on people’s fear of crime, the difference being that the traditional industry exploits fear of victimization (Christie 2004; Garland 2001), while the (un)control industry exploits the fear of being charged as an offender.6 Instead of frightening people into purchasing home alarm systems or personal safety devices (doesn’t everyone need a cell phone to protect themselves!?), the Westray material warns corporations that they could be charged with a criminal offence if they do not get (purchase) the relevant information to ensure that they understand the law and can defend themselves “in the event that a workplace accident occurs” (Abicus Safety Training).7

The products of one major law firm aptly reflect this burgeoning crime (un)control industry, particularly the relationship between the Westray bill, profit-making opportunities and keeping corporations out of the criminal justice system. In addition to various newsletters and updates on the law, this firm has hosted a series of Westray bill-inspired seminars across the country. The first, “From Boardrooms to Courtrooms: Bill C-45 and the new Health and Safety

6 For a discussion of the traditional crime control industry, see Christie 1993; 2004.
Crime, was a half-day session ($369.15, including tax, continental breakfast, coffee breaks and seminar materials) that outlined the law and what corporations need to do to protect themselves from criminal liability. Advertisement for the session read: “Join us for a half-day (morning) seminar to learn about the Bill C-45 Criminal Code changes that could put corporate decision-makers in jail. Neglecting workplace health and safety has become a crime ... punishable up to life imprisonment” (Gowlings – emphasis original). The second, “Bill C-45 Five Years Later: Understanding the New OHS Crime, the Cases, and how to Prevent Liability” ($275 per person, plus GST and including continental breakfast, coffee breaks and seminar materials), covered similar topics and provided analysis of existing case law (two charges and one conviction!). In addition, a prominent lawyer with the firm has written two editions of a book relating to the Westray bill (Keith 2004; 2009). Finally, the firm offers a trademarked legal auditing service that will review an organization’s health and safety program to help reduce potential risk for legal liability under OHS law and Bill C-45 (Gowlings 2004: 3).

Various occupational health and safety consulting companies also have developed profit-making ventures that prey on fears associated with the Westray bill. “An ill-equipped and ill-prepared employer is more likely to suffer severe consequences than one which is properly prepared,” exclaims one firm that sells online training on the Westray bill. “Due diligence is the primary defence for corporations charged with an offence under health and safety legislation,” the company reminds the reader. “Are you ready?” For only $799.50, reduced from the original price of $1595.00, corporations can ensure that up to ten of its employees receive training to identify foreseeable workplace risks and practice appropriate due diligence to avoid criminal responsibility (Abicus Safety). (It is difficult to know whether the price reduction reflects the

lack of interest in, and concern with, the Westray bill, or an enticement for would-be consumers to act now which leaves one wondering if the training includes a free set of steak knives.) For $150.00, OHS Canada, an occupational health and safety magazine, offers an online course that provides information on the new law, as well as details how corporations can mitigate risk and losses within the organization, and provide due diligence for corporate executives (OHS Canada).\textsuperscript{10}

The Sundown Interactive Communication Corporation warns companies of the risk of criminal liability. The company offers online training, referred to as the WebWSIT Training Program, which provides important health and safety information, as well as saves all the information in a database. That way, if a company is ever asked for its training records (e.g., following an accident), the employer simply has to click on the inspector’s report and press print. Don’t get caught, the company warns, get WSIT! (Sundown Interactive Communication Corporation).\textsuperscript{11} Similarly, the Excellence in Manufacturing Consortium offers due diligence training ($250.00 for a one-day session, $295.00 for non-consortium members), the goal of which is to reduce, if not eliminate, a company’s liability from potential charges. The Consortium decries, this is a must attend seminar for lead hands, supervisors and managers [apparently executives do not need disciplining] to enable them to reduce the company [sic] and personal liabilities (Excellence in Manufacturing Consortium).\textsuperscript{12}

Another advertisement warns school principals and vice-principals (not exactly the upper-echelon of the corporate world) that they could be subject to criminal charges if they fail to take the necessary precautions to protect their students. The document includes an ominous

\textsuperscript{12} Excellence in Manufacturing Consortium, online: www.emccanada.org, accessed 20 March 2009.
description of a school fundraising event where a young student with peanut allergies eats cookie mix before she checks the ingredients for peanuts. As the author warns, "while the above could best be described as a series of unfortunate events, if a school principal failed to take reasonable measures to protect any child with an identified life threatening condition, her or she perhaps could face criminal charges under Bill C-45."
The hypothetical horror ends with information on Professional Legal Expense Insurance for Principals and Vice-Principals, and by encouraging the reader to contact their nearest insurance broker (Elston 2005). Yet another company warns employers that the Westray bill highlights the importance of establishing due diligence within the organization, an ideal that they suggest is linked with developing systems to prevent the commission of an offence. This includes purchasing safety programs and site evaluations, as well as medical and safety equipment (for example, first aid kits, defibrillators, fire protection gear and equipment), all of which the company happens to sell (Canadian Onsite Medical Inc.).

Finally, a private security firm raises the spectre of criminal charges under the Westray bill as a reason why corporations should purchase its security services. "Did you know that as an employer, you may be held criminally liable if one of your employees gets injured in the workplace," the security company asks? A description follows that plays on a corporation's fear of being both a victim of street crime and a safety crime offender:

... if your worker is harmed while taking your deposit to the bank, your company can now be charged under the Criminal Code. The risk of robbery and harm to you or your staff is a very real and viable threat no matter the value of the deposit that you are transporting. Any risk is a real risk. If your employee is injured in a robbery attempt, your company may be exposing itself to criminal charges.

And what does the security firm believe is the solution? Let them transport your cash deposits safely and securely, of course. It not only exonerates you from being criminally liable (Bill C-

What is revealing about these various profit-making ventures is that they are dominated by the language of due diligence. Due diligence offers corporations an opportunity to defend themselves against a criminal charge by illustrating that they took all “reasonable” steps to prevent bodily harm. Law firms and consultants capitalize on this by encouraging corporations to implement new safety programs to illustrate that they have achieved this standard. To avoid becoming the subject of a Criminal Code prosecution, suggests one law firm, corporations must implement appropriate safety practices, ensure that senior managers are aware of any health and safety concerns and document all preventative policies, procedures and preventative actions (Stewart McKelvey Stirling Scales 2005). Another suggests that establishing due diligence is necessary to avoid “triggering” any “major legal issues and to “becoming the subject of a potentially precedent-setting action” (McMillan Binch 2004). Employers can limit their liability and reduce the chances of being charged under the provisions of the Criminal Code by implementing an effective workplace health and safety program, noted the Canadian Centre for Occupational Health and Safety (CCOHS), a federal government agency with the mandate to support “the vision of eliminating all Canadian work-related illnesses and injuries” (CCOHS,).

Other due diligence warnings employs similar language:

- It will take some time for the real impact of Bill C-45 to be felt by those it governs. In the meantime, attached is a Checklist that provides some guidance how to avoid liability under Bill C-45 (Erickson and Partners).

- Poorly considered language in financing and other agreements could now expose unwitting organizations and supervisory employees to criminal liability for health and

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14 Group 4 Securicor, online: www.g4s.com, accessed 20 March 2009.
safety, environmental and other accidents. Fortunately, it’s relatively easy to develop appropriate language to mitigate that risk (Kirby and Perrin 2004)

- Although a comprehensive compliance program will not provide a complete defence to criminal offences, it will demonstrate a measure of due diligence and may be considered as a mitigating factors by a Court when considering liability and assessing [the] appropriate penalty (Standryk).  

One law firm spells out a number of considerations that corporations must address in the wake of the Westray bill. In particular, they suggest that senior management should issue policy directives to illustrate that reasonable care has been taken to ensure workplace safety. The firm also highlights the need for *immediate accident response* that allows corporate actors to cooperate with authorities without incriminating the organization. As the firm states,

> Obtaining immediate advice in the event of a tragic workplace accident at a construction project often means the difference between an imprudent, crisis-driven approach that reveals unnecessary incriminating information, and a legally compliant but thoroughly managed approach to incident reporting, preserving details and evidence, obtaining expert analysis and privileged expert reports, and protecting the rights of organizations and individuals (Edwards and Thibault).

Note, however, that due diligence is about risk management, not of eliminating risk as is common in the traditional crime control realm. Instead of eliminating bodily harm, the goal is to reduce it to the greatest extent possible and defend against criminal charges in the event that such harms do occur. The overriding message is to avoid criminal responsibility, not to implement an ethic of safety or ensure that nobody is killed at work, no matter what the circumstance. Safety as a means to an end, not an end in-and-of-itself. As Tucker (2006: 303) has observed in noting the *professional risk managers* that have sprung up in response to the Westray bill, while some companies may improve their safety practices as a result of this training,  *they may also adopt legal strategies, such as invoking their right to counsel and their*

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19 For an examination of risk discourse in relation to the traditional crime control realm, see Garland 2001.
right to remain silent in the aftermath of a workplace death or serious injury, that do nothing to reduce worker risk exposure (emphasis original).

One union representative suggested that this due diligence speak bordered on instructing corporations on how to commit crime without being held responsible. While he noted that this was not the explicit goal of such advice particularly that it would be unethical and illegal for lawyers to do so he nevertheless found it puzzling that the primary message was how to defend against criminal charges (Union representative, Interview 12); that there was an assumption that serious injury and death was inevitable, so just prepare for it the best you can! It is hard to imagine similar reasoning being applied to traditional street crimes. Would legislators tolerate young offenders receiving advice from lawyers on how to avoid criminal responsibility in the event that they found themselves committing an offence? Try to avoid breaking into houses, the advice would suggest, and to help with this you should implement (even purchase) measures in your daily life to avoid committing such crimes. The advice would continue: however, we know that there will be occasions when breaking and entering will be unavoidable, so that why we suggest that you practice due diligence so that you can launch an effective defence when you do get caught breaking the law.

6.7 What’s the Westray Bill’s (Symbolic) Value?

Overall, the Westray bill on the books and in action illustrates the very contradictory market of crime control in contemporary society. While traditional street crime is bound-up with an industry that depends on continuous criminalization for profits to be realized (see, for example, Christie, 1993; 2004 Garland 2001), the crime (un)control industry makes money by securing the non-criminal status of corporations and senior executives. Zero tolerance for some crime,
acceptable tolerance for others. It would therefore appear that Jeffrey Reiman’s observation, “The Rich Get Richer and the Poor Get Prison,” remains as cogent today as when he first made it thirty years ago (1979).

If corporations were confident about the occupational health and safety measures that they have adopted (if any) in the wake of the Westray bill, then why are they not advertising so? After all, the captains of industry are quick to applaud themselves for their efforts at good corporate responsibility and citizenship, wearing them as a badge of honour and as indicators of their contributions to society and the economy (which is in everyone’s best interests, after all).²⁰ While it is still too early to fully understand the nature and extent of any changes that corporations may have made since the introduction of this legislation (even though the law came into effect more than five years ago!), if the experience for this research is any indication, then they are likely to remain hidden behind the corporate veil, treated as proprietary information.

For example, it was difficult to get anyone from the corporate world to talk about the Westray bill for this study. Even representatives from umbrella organizations that represent different corporate sectors were hesitant to speak about the law, although many were only vaguely familiar with it. And once I eventually found someone from the private sector who was willing to participate, he changed his mind just before the interview took place, informing me that he had been discouraged by his company’s senior management from participating. Feeling badly about the situation, he introduced me to someone who had worked in the private sector as the head of an occupational health and safety program. Several days after interviewing this individual he contacted me to say that he was having second thoughts and was considering withdrawing his participation from the study. After informing him that the decision to do so was within his rights as a participant, I asked him if there was a problem with the interview, or with

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²⁰ For a critical discussion of corporate social responsibility, see Bakan 2004; Laufer 2007; Shamir 2005.
any of the questions that I had asked. He responded no, but that he had spoken with some of his colleagues after the interview who expressed concern that his participation might bring undue attention to the industry in which he worked. They were particularly worried that the information he provided might reveal the industry’s safety standards and practices, and that authorities might unfairly target the industry for investigation and inspection if they believed that safety was not being taken seriously. He eventually agreed to remain in the study after I reassured him that the research would not identify the company he worked for, or the industry that he worked in.

Another example of the corporate world’s reticence to speak about the Westray bill came during an interview that I conducted with a lawyer who represents corporations on occupational health and safety matters. I asked this individual why I might be having difficulty getting people from the corporate world to speak about the new law. Her response was telling: corporations are hesitant to share any information about their occupational health and safety strategies and regimes, not only in fear of revealing what they might not be doing, but at risk of revealing themselves to regulators and competitors. She also added that, if asked, she would advise her clients against participating in any research on the Westray bill for these very reasons (Corporate Lawyer, Interview 18).

Isn’t there still Reason for Optimism?

For some respondents, regardless of any problems with the law, the mere fact that the Westray bill was introduced represented an important victory. A politician argued that the law’s enactment was in-and-of-itself an important accomplishment given that it was not the most pressing piece of legislation in the House of Commons.

Thereâ€™s probably some [MPs] that thought it would never ever happen [that the law would be introduced], certainly those who had some uneasiness about supporting it.
in the first place ... I know there were Liberal members who weren’t totally happy with it, and there were Conservative members who weren’t totally happy with it. I’m not aware of any Bloc members, and certainly the NDP totally supported it. But it was that uneasiness, so, again I saw that as a plus in a sense that they did follow it through because it was the government that made the commitment to doing that, and their members followed through (Politician, Interview 11).

For those in the labour movement, the enactment of the Westray bill came at a time when workers’ rights have been increasingly jeopardized over the past twenty years by neo-liberal policies and decisions.

The introduction of the legislation was sort of a bit of a victory, I guess. Well, quite a victory considering how long from the time that Westray took place until the bill actually became law. It was several years of quite hard lobbying by the Steelworkers to make it happen. And everybody was quite happy at the time because, even though it wasn’t perfect and wasn’t necessarily what we would have written ourselves, [what] the Steelworkers would have written. It did go a long way to hold corporations liable for negligence in the workplace causing serious injury and death. Overall, the initial reaction of most folks within labour was quite positive (Union representative, Interview 12).

Similarly, another union representative noted:

I think from their [the Steelworkers] point of view it was a big victory, they looked at it as a victory ... recognition that some people should be held accountable, at least the possibility in very egregious cases (Union representative, Interview 6).

In the end, however, any achievements associated with the Westray bill appear limited to moral victories, at least thus far. A union representative admitted that the Westray bill was not worth much if it was not enforced, but that it did provide some hope, a starting point from which to address future incidences of workplace injury and death. His argument is worth quoting at length to illustrate the complexities and contradictions of engaging the process of law reform in the hopes of promoting change.

Question: What is the law’s symbolic value? Response: On its own, virtually none. If you look at it as a step saying that we have brought in legislation, you can maybe make it stronger. You say this is the first step to get it on the books. It’s there, it’s in the Criminal Code, at least it’s a possibility, and then you can build. That would be
the argument that you would get. I guess it is a step. You say, okay, it is a step. If this is all it is going to be ever. Again, you sort of say, well, there is so few victories. I mean it's funny we go through all sorts of stuff in terms of the anti-scab bill that didn't pass in the last Parliament. A lot of what we do in trying to sell it is say it is not going to be bad - it's not going to have a huge impact, don't worry, that sort of stuff. Still you got to do it. And still, in terms of your activists and everybody else you've got to say we are doing this and it is a good thing to do and it's a step. Again, you have to have victories. You are telling people why it is important to be involved in political action, why is it important to all this sort of stuff. You got to have some sort of positive stuff there. If it is simply just banging your head against a wall, people will lose interest - if you want to be cynical about it, it's a way to get a victory, even if it is more symbolic than anything else, and look upon it as a step, but a very, very small step, but it's a step, which can be depressing - how many decades before we get the next step? (Union representative, Interview 6 - emphasis added).

In many respects there was some recognition of the limits of what the Westray bill could achieve in terms of holding corporations to legal account for workplace safety. As one politician noted,

I would very much have liked corporations to have a lot stronger penalties and corporate directors to have stronger penalties in some areas, but this was a step in the right direction. And it was important to have something on the record in terms of legislation... (Politician, Interview 11).

Similarly, another politician offered a sobering account of her expectations for this legislation.

... I don't think we [those lobbying for reform] ever had any illusions, because the legislation wasn't as tight as it would need to be, for there to be a lot of convictions. I don't think that was ever the greatest value by far, not that I'm saying that wouldn't even be better if the legislation was tougher and tighter and so on, but the biggest factor was always going to be, in my mind, the deterrent factor, the threat of finding yourself on the wrong side of the law, the threat of the financial liability, the criminal culpability was always going to be the biggest value in the legislation ... It's not as strong as it should be, but it's as strong as it was going to be if we were going to get it. We knew that, you know, we knew that. Well, I'm partisan, some people would say jaded and cynical enough to think as long as the country is governed by people who were, you know, at the behest of the corporate boardroom, we weren't going to get something stronger than that. And it was a take it or leave it thing, really, at that point. We were either going to get something, it's also the point at which, I know I'm in over my head legally ... I don't have the research and legal resources with which to launch a bigger, more successful campaign to win a tougher piece of legislation, you know. A lot of things compete for your scarce resources. And just for your mental, you can pretend to be an expert on something like that while you're trying to cover off on huge numbers of things. I guess I would say, not to either apologize or not, it
was kind of the best thing we could get at the time given the political realities (Politician, Interview 20).

In the end, while the Westray bill was deemed to be symbolically important, expectations were low as to what it could achieve in practice. Limited by dominant discourses that claimed corporations were not really criminals, Canada’s corporate criminal liability law has therefore been largely ineffectual, reduced to the hope that some corporations have changed their safety regimes as a result of its enactment.

6.8 Conclusion

This chapter has explored how dominant notions of crime animated Canada’s corporate criminal liability legislation. Prevailing notions of corporate wrongdoing – that it is not crime – characterized discussion and debate about the introduction of this legislation, as well as shaped its subsequent enforcement. Dominant voices argued that even if some corporations occasionally do bad things they cannot be painted with the same brush as common criminals. From this perspective, crime and its control is about the street level violence that strikes fear in everyone, not about corporations who, but for the rogue few, have everyone’s best interests in mind. However, even if corporations provide a social benefit (at least theoretically) that street criminals do not, this should not deny that distinctions between these offences are arbitrarily and socially constructed, rooted 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).

This chapter also revealed that, despite the lack of charges and convictions, many respondents believed that the Westray bill had nevertheless encouraged corporations to improve their safety policies and practices. However, a closer look at some of the training and education
that has been offered to corporations thus far 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 a crime (un)control industry in which lawyers and consultants stand ready to help corporations (at least those who can afford their services) avoid getting caught in the web of crime control. It also means that dominant notions of crime continue to shape responses to corporate criminal liability legislation beyond its enactment.

All of this should not deny the importance of the Westray bill’s introduction, even if the lack of charges and convictions has limited it to a largely symbolic development. Its introduction means that corporate power is not absolute, and that some corporations will be held to legal account for serious injury and death in the workplace. At the same time, however, this and previous chapters demonstrate that corporate criminal liability is a highly contested term that is constituted by different, yet “mutually reinforcing” (Tombs and Whyte 2007: 69) discourses. Although these discourses did not, and do not, determine the Westray bill’s fate, they nevertheless significantly shaped its nature and scope, downplaying the need for it to be introduced and minimizing the seriousness and extent of safety crimes. The final chapter considers the empirical and theoretical implications of this dissertation, including what the Westray bill means in terms of holding corporations to account for workplace safety, as well as its constitutive role in (re)enforcing corporate capitalism.
Chapter 7: Constituting the Corporate Criminal: More of the Same or Hope for the Future?

Whatever happened to the Westray bill? Why are we still dying for a living? (United Steelworkers of America, March 2006 \textit{emphasis} original).

If there is only the \textit{iron hand of necessity shaking the dice-box of chance\textsc{then} under the \textit{constructed unity of things\textsc{there} is only disparity, dispersion, difference, and the play of dominations} (Frank Pearce, 1988: 264).

7.1 Visions of Law and Order

Crime stories on television and in movies are prominent sources of mainstream entertainment. The typical plotline revolves around a gruesome, if not sensationalistic, murder or serious assault. In most cases the response is swift, certain and, to everyone’s satisfaction, severe. Viewers watch political figures make public pronouncements that the crime will be solved and that the streets will once again be safe. Meanwhile, police and prosecutors waste little time leaping into action, spending considerable resources investigating the crime, catching the perpetrator and prosecuting the offence. Although they do not always \textit{get their man, justice most often prevails}, with everyone in the case working together to ensure that someone is punished; the ultimate message being, \textit{do the crime, do the time.} And while these are obviously contrived visions of \textit{reality} they nevertheless represent contemporary society’s dominant crime control image.

The introduction of Canada’s corporate criminal liability legislation does not make for very dramatic story-telling. Despite official political rhetoric in support of cracking-down on corporate criminals \textsc{and} holding corporations and corporate executives to legal account for safety crimes \textsc{the manner in which the law was conceived and introduced, along with the lack of charges and convictions since its enactment, runs counter to dominant crime control narratives. It is hard to fathom a politician proclaiming crime-fighting success in taking more
than ten years to introduce a new law in response to the mass killing of twenty-six Canadians. It is equally implausible to imagine legislators taking great care to ensure that the laws they developed were not unnecessarily stringent or overly punitive. Nor does it seem likely that criminal justice officials would boast about securing only two charges and one conviction five years after a new law was passed. In reality, there is little crime control drama to the Westray bill: no declarations of justice being served and no law-and-order rhetoric for politicians to hang their fortunes on; just the "pretence and rhetoric of a benign big gun" (Laufer 2006: 198).

As an example of corporate crime law reform, the Westray bill paints an all-too familiar picture. It was a much publicized disaster that prompted legislators to contemplate changes to the law (Braithwaite 2005: 61; Snider 1993: 89-113; Tucker 2006), to react incredulously to the fact that a corporation and its actors went unpunished for such a tragic and preventable disaster. The contradictions were too great to ignore: although politicians frequently valorize the corporation for its wealth-generating capacities (Glasbeek 2002), the liberal democratic ideal of protecting life and liberty meant that a program of reform was necessary, perhaps unavoidable. After considerable political discussion and debate, and amidst much fanfare, a new law was introduced, bringing with it the potential for a new era of corporate criminal liability (Archibald, Jull and Roach 2004). The problem, however, was that the law quickly faded into the background, overshadowed by the priorities of a criminal justice system more accustomed to dealing with issues of guns and gangs than corporate miscreants. As a legal academic who participated in this research quipped when summarizing the Westray bill's effects, "something is done, nothing is fixed."

This final chapter summarizes the main dissertation findings and considers some of their empirical and theoretical implications. It offers three concluding observations. First, a series of
relatively autonomous, yet “mutually reinforcing” (Tombs and Whyte 2007: 69) discourses animated the introduction of Canada’s corporate criminal liability legislation. 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 were given serious consideration. This production of corporate crime and corporate criminal liability raises serious questions about the potential of holding corporations to criminal account for workplace injury and death. It also helped (re)enforce and (re)produce the dominant capitalist social formation. Second, the Westray bill’s reform process reminds us that the state plays an important role in the operation and exercise of power in society (Comack 1999: 67). Although the state does not automatically nor necessarily (re)produce capitalist interests (otherwise corporate criminal liability law would never have come to fruition), it does provide the space within which powerful discourses can coalesce to inform important legal and policy decisions. Finally, although the current status of the Westray bill does not leave much room for optimism, we should not (must not?) lose sight of the symbolic import of corporate criminal liability’s inclusion in Canada’s Criminal Code.

7.2 The Making of Corporate Crime and the Corporate Criminal

This dissertation critically examined the evolution of Canada’s corporate criminal liability legislation. The goal was to interrogate the discourses that informed dominant conceptualizations of corporate crime and corporate criminal liability, as well as how these discourses corresponded to the broader social-political-economic context. Foucault’s (2001 [1972]) insights regarding discourses and discursive formations helped to identify the dominant knowledge claims that animated the Westray bill. Neo-Marxist (Althusserian) notions of class antagonisms at the
political, economic and ideological levels helped reveal the extra-discursive factors that informed the selection and retention of discourses pertaining to corporate crime and corporate criminal liability, as well as how these discourses helped stabilize, reproduce and transform the class-based capitalist social formation (Althusser 1968; 1971; Hindiss and Hirst 1975; Resnick and Wolff 1987; 2006). In carrying out this task I took Cohen’s observation seriously that, “a major part of criminology [and socio-legal studies] is supposed to be the study of law-making, but we pay little attention to the driving forces behind so many new laws: the demand for protection from abuses of power” (Cohen 1996: 492, as cited in South 1998: 444).

As the dissertation research revealed, there was significant support for the notion of introducing corporate criminal liability legislation. Building from the findings and recommendations of the Westray Inquiry report (Richard 1997), federal legislators recognized that what happened at the Westray mine was unacceptable and that legal reforms were necessary to ensure adequate protections for workers. At the same time, however, there was considerable deference to various other considerations that were incompatible with achieving this goal. We agree with the need to bring forth new legislation, dominant voices submitted, but in doing so we need to respect certain values and principles. These contradictory messages were mediated through legal, economic and cultural discursive formations that helped constitute the reform process and resulting legislation. Although each set of discourses had its own unique genesis and particular influence, together they contained a “mutually reinforcing” character that downplayed the seriousness of workplace injury and death, effectively isolating these crimes from crime, law and order agendas (Tombs and Whyte 2007: 69).

1 An important aspect of this goal was to avoid conceptualizing discourse as a catalyst of meaning, a form of “discourse imperialism” that equated language with “strong social constructionism” (Fairclough, Jessop and Sayer 2002: 4).
First, fuelled by a commitment to legal precision and established legal principles that favour individualized guilt – not exactly conducive to investigating complex chains of responsibility within the modern corporate form – dominant legal discourses narrowed the horizons and limited the reform options that were deemed ‘reasonable’. Of particular note, legal discourses downplayed support of a corporate culture approach to corporate criminal liability, defining it away as vague, imprecise and constitutionally unsound. This narrow technical frame ruled out any consideration of the structural causes of safety crimes, any examination of the roots of corporate power or the privileged legal status and extensive rights conferred by limited liability (Glasbeek 2002; Tombs and Whyte 2007). In addition, it marginalized discussion and debate of the moral, political and economic capital of the corporation, helping ensure that individual executives and directors of corporations who make all the decisions and reap the lion’s share of the economic rewards remain obscured behind the corporate veil (Glasbeek 2002).

Second, there was an overriding concern with the economic well-being of the corporate form. Despite the physical absence of Canada’s captains of industry from the reform process (at least in terms of a visible presence), the interests of corporations were thoroughly articulated by pro-corporate legislators and some witnesses who appeared before the Justice Committee. A commitment to neo-liberal common sense – that corporations are necessary for the economy and the most ‘efficient means of organizing production’ (Pearce and Tombs 1998: 262-263) – provided the dominant ideology (Tombs and Whyte 2003: 10) from which to evaluate corporate criminal liability law. Alignment with neo-liberal ideals also meant that workplace safety was conceptualized as the responsibility of workers, labour and unions as much as (or more than) management and executives (Gray 2006; 2009; Tombs and Whyte 2007). The prevailing myth was that workplace accidents are the result of defective low-level employees, not bad corporate
management, malign corporate culture or profit-maximizing strategies. These voices meshed well with historic beliefs that individuals are free to choose the conditions within which they work; beliefs that mask the reality of hierarchical decision-making within the workplace (Pearce and Tombs 1998: 133).

Third, dominant ideas that corporate wrongdoing is not a crime also characterized the Westray bill’s introduction and enforcement. Informed by cultural ideals that crime is an act committed by individual street offenders, legislators found it conceptually difficult to contemplate corporations and corporate executives and board members as criminals. Even if some corporations commit crimes, they argued, surely these are the exceptions to the rule, and they most certainly do not present the same threat as ‘common’ criminals. A similar mentality has permeated the Westray bill’s enforcement, wherein it occupies a marginal position within mainstream law-and-order agendas. In fact, the most significant development since the law’s enactment is not its enforcement, but the emergence of a cadre of legal experts and consultants ready and willing to provide for-fee services for corporations to learn how to avoid getting caught and punished. From this perspective the Westray bill in-action has produced a crime (un)control industry that is more about making money to keep corporations and corporate actors from becoming entangled in the crime control web than about embracing the value and ethic of workplace safety.

As a recipe for law reform, the making of Canada’s corporate criminal liability brought together a number of key ingredients: to begin, it required a healthy portion of established legal principles, with more than a pinch of respect for the legal doctrine of mens rea. It then called for (neo) liberal concern for the economic prosperity of the corporation. Be careful, the recipe warned; you need to ensure that the law you make is not so repulsive that corporate board
members will not buy it or that corporations will move elsewhere to avoid its acrid taste. The next ingredient suggested folding-in scepticism about what constitutes crime. After all, those who will be subject of the finished product are really not that bad. They may overindulge from time to time, causing ‘unanticipated’ injury and death, but they do not mean any harm; they are simply doing what is in society’s best (economic) interest. It is ‘real’ criminals that you need to worry about, but that is for another recipe. As a final tip, the recipe suggested taking time putting all the ingredients together to ensure that expectations did not get overheated and that unnecessary ingredients did not make it into the mix. In the end, legislators got credit for trying something new, but avoided criticism for being too outlandish or over-cooking the law.

The Westray Bill’s Class Relevance

The concoction of discourses that animated the Westray bill has important relevance in terms of (re)enforcing and (re)producing the capitalist social formation. This is not to suggest that law can single-handedly transform the corporate form and the broader social conditions within which it thrives. However, as Pearce and Tombs (1998: 286) note, the law’s constitution is an important site of ‘struggle for safer workplaces’ (Pearce and Tombs 1998: 286). It provides the space within which discourse becomes ‘implicated in and constitutive of power’ (Gibson-Graham, Resnick and Wolff 2001: 20), a process that recreates the conditions necessary for valorizing the capitalist economy (Jessop 2002: 31). Two points drawn from this dissertation illustrate the class relevance of the Westray bill.

First, corporate criminal liability law constituted an object of struggle over the nature and scope of workplace safety and, hence, about who owns and controls the means of production. The mere suggestion of introducing this legislation necessitated the reproduction of the
ideologically dominant position of the class-based capitalist social formation (Hindess and Hirst 1975). This struggle was given meaning through the convergence of relatively autonomous discourses that, despite their differences, helped shape and set limits to the reform process. In essence, a legal duty of care to provide a safe(r) working environment has the potential to alter the relationship between workers and employers, as well as add costs for the corporation that must spend money to change its safety practices or pay a fine if found guilty of an offence.

However, as this dissertation illustrated, in the struggle over the meaning of corporate crime and corporate criminal liability, the final product favoured, and hence (re)enforced, dominant corporate interests. In particular, the law was sufficiently constrained so as to prevent any undue intrusions into the day-to-day functioning of corporations (deemed to be private property). The entire process leading to the law’s enactment ignored that the capitalist arrangement is premised on the ability of those who own the means of production to extract maximum surplus labour from the production process, to essentially squeeze as much free labour as possible from workers to maximize profits (Hindess and Hirst 1975; Resnick and Wolff 1987; 2006). This dynamic is amplified in today’s vaunted global economy where power and wealth is monopolized in the hands of the privileged few, and where workers face increasingly precarious and decreasingly unionized work environments of which they have little control (Pearce and Tombs 1998: 23-24; Cranford et al 2005; Glasabeek 2002). This is the culture within which the corporate form operates, the very basis that creates the conditions where concerns for safety take a backseat to the pressures of profitability. In this respect, while corporate criminal liability legislation may give the illusion of change, the corporation can, for the most part, continue to produce in ways that are deemed to be in its best (economic) interests, interests that are often
inconsistent with ensuring workers’ safety (Glasbeek 2002; Pearce and Tombs 1998; Tombs and Whyte 2007; Tucker 2006).

A second and related way in which the Westray bill has class relevance is in reference to the politics of engaging the process of law reform. Although a variety of perspectives and individuals were represented throughout the reform process, the main impetus for the legislation came from unions (most notably the United Steelworkers of America) and pro-labour politicians. It was union and labour that pushed for the Westray Inquiry report to recommend to the federal government that they introduce corporate criminal liability legislation, and these same groups subsequently and aggressively lobbied the federal government to enact the Westray bill. This commitment was also evident during the interviews for the dissertation research in that union and labour representatives were the most familiar with the legislation, providing intimate details about the reform process and the law’s enforcement (or lack thereof) since its enactment.

However, engaging the law is fraught with political difficulties and pitfalls. In particular, law can impact class processes through the provision of certain powers to unions and managers permitting them to establish and enforce rules necessary for the extraction of surplus labor (Resnick and Wolff 1987: 21-22). However, while these rules may empower some workers to have greater controls over their workplace (such as the right to refuse unsafe work or the reminder to managers of the need to protect against corporate criminal liability) they also serve to entrench labour in the process of generating surplus value. As Resnick and Wolff (1987: 22) note, the effects of political and legal processes help workers, in part, participate in their own exploitation. The dominant message of corporate crime law reform therefore becomes, ‘you’ve got your new law and legal protections, now get back to work so that we, the corporation, can

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2 The pitfalls and challenges associated with engaging the law are best illustrated by feminist researchers who critically examine the use of law in response to violence against women (see Bonnycaslte 2001; Chunn and Lacombe 2001; Comack 2006; Smart 1989; Snider 1994)
continue to make money. In this respect, while the engagement of law and politics holds much promise for those interested in protecting workers, it can also help (re)enforce and (re)produce dominant class relations.

7.3 Don’t Forget the Role of the State

The various legal, economic and cultural discourses that permeated the introduction of Canada’s corporate criminal liability legislation do not suggest that state discursive formations were insignificant to the reform process (an observation first made in chapter 4). On the contrary, although the advent of neo-liberal political and economic reasoning has recast the state in more market-friendly, pro-capital ways (Fudge and Cossman 2002; Glasbeek 2002; Pearce and Tombs 1998; Snider 1993), the state’s role has not been usurped entirely by faith in the markets (Haines and Sutton 2003: 12). As this dissertation has revealed, the state played an important role when it came to defining and responding to corporate crime through law. It provided the space for dominant discourses to define and set parameters to the reform process.

In terms of the state’s role, the Westray bill’s evolution was very much rooted in Parliamentary politics. It was, after all, the efforts of pro-labour politicians from the NDP and, to a lesser extent, MPs from the PC party that helped keep corporate criminal liability on the political radar. Absent these efforts (along with those of union and labour representatives) it is questionable whether the law would have ever come to fruition. In addition, the Justice Committee played a significant role in shaping the nature and scope of the legislation, providing the conduit for the expression of various perspective regarding corporate crime and corporate criminal liability. Further, it was the government’s legislative drafters (essentially the Department of Justice) that were left to interpret the Justice Committee’s proceedings when
creating the new law. As these examples therefore illustrate, it is empirically incorrect and theoretically blind to ignore that the state acts as a site where different discourses and discursive formations coalesce to animate particular legal and policy matters (Comack 1999); a process that, in the case of the Westray bill, also helps reproduce capitalism’s hegemonic status (Jessop 2002).

Resnick and Wolff (1987: 231-232) argue that the state is in a contradictory position in capitalist society, guarding against its excesses while also supporting and maintaining the conditions necessary for the capitalist fundamental class process. For example, laws that support the creation of corporations or the freedom to purchase and sell labour exemplifies how the state provides ongoing support to capitalist endeavours. Subsumed class payments from capital to the state help to defray the costs of providing these services, a cycle that helps ensure that fundamental class processes continue in a profitable manner (Resnick and Wolff 1987: 235). At the same time, however, the state must occasionally enact laws that do not necessarily favour capitalist class interests, as was the case with the Westray bill. The point is the state “does not merely derive from and reflect some subset of its constituent processes, including the capitalist economy (Resnick and Wolff 1987: 252). As Resnick and Wolff (1987: 253) argue, “rather than an entity determined by the economy or a particular economic class, the state is a specific subset of social processes, each of which is overdetermined by the other processes in that subset and by all the other political, natural, cultural, as well as economic processes in the society.”
7.4 Corporations beyond the Law?

A key finding of the dissertation is that the assumptions that animated Canada’s corporate criminal liability legislation and the meanings inscribed in its provisions throw serious doubt on its ability to hold corporations legally accountable for their harmful, anti-social acts. As Snider (2004: 180) argues, “if neither the law nor the public can see crime except through the body of the individual bad acts, the possibilities of disciplining the most powerful entities in the modern social order – the organizations dominating our economic and political system – appear slim.” What is more, the possibilities of disciplining the corporate form seem all the more daunting in the face of neo-liberalism’s globalizing efforts, a hegemonic project that has transformed the corporation (along with its illegalities) into a transnational actor (Tombs and Whyte 2003). There is thus little reason to believe that the law will produce a crackdown on safety crimes, or seriously challenge companies to address workplace injuries and death in industries where fixing these problems is an expensive proposition. Although the Westray bill will hold some corporations and corporate actors accountable and thus far it has been the smallest and weakest that have been subject to the law’s gaze the primary causes of workplace injury and death (e.g., the tension between profit maximization and the costs of safety and the relative worth of workers/employees versus owners and investors) will continue.

Despite this gloomy outlook, it would be erroneous to conclude that the production of corporate criminal liability legislation was pre-determined or its future complete. Gibson-Graham and Ruccio (2001: 159) caution against overanalysing the downsides of capitalist hegemony, particularly the tendency to view it as all-encompassing and dominating, therein diminishing our ability to think of alternatives and pessimistically believing that cultural practices of resistance lack potential for development. Non-capitalist positions are thus seen
to be opposite of capitalism, too weak or marginal to make a difference, or simply complementary in that they support the status quo (Gibson-Graham and Ruccio 2001: 168). We therefore need to conceptualize capitalism’s effects within the framework of class processes of producing, appropriating and distributing surplus labour (Gibson-Graham and Ruccio 2001: 169) – a process of becoming, not a necessity within a structure.

In many respects the evolution of the Westray bill was, and is, a process of becoming, one in which capitalism is both challenged and reinforced. The law was not a predetermined result, but a process that emerged through various legal, political and economic discourses. It was, in Althusserian terms, a result produced by a history (Althusser, 1968 [1997]: 64). After all, the mere fact that this legislation was introduced speaks to the incompleteness of capitalism’s hegemony. It illustrates that corporate and economic dominance is always uncertain, fluid and open to contestation; that powerful interests that favour the corporate agenda are not automatic, the state is not always an instrument of capital, and that implementing laws to protect workers is not impossible (Tombs and Whyte 2007). It reminds us that dominant economic logic does not automatically impose its will, but instead it depends on the outcome of political and ideological struggles around political process and hegemonic visions as well as the ecological dominance of the circuit of capital (Jessop 2002: 30).

From this vantage point we should recall that the Westray bill is a new and symbolically important way to speak of corporate wrongdoing – a language that departs from regulatory approaches to corporate offences that have dominated for more than two decades. In this respect, it is emblematic of growing concerns with the dangers of corporate power in the absence of accountability (Pearce and Snider 1995: 26). At the very least it creates the possibility for change, the foundation for future struggles to secure corporate criminal liability.
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Appendix A – Members of the Standing Committee on Justice and Human Rights

Below is a list of members of the Standing Committee on Justice and Human Rights whose names appear in the minutes from the Committee’s study of corporate criminal liability legislation in May 2002. Members’ names are listed in alphabetical order.

Michel Bellehumeur, Bloc Québécois
Bill Blaikie, New Democratic Party
Chuck Cadman, Canadian Alliance
Beverly Desjarlais, New Democratic Party
Hedy Fry, Liberal Party
Ivan Grose Liberal Party
Jay Hill, Canadian Alliance Party
Mario Laframboise, Bloc Québécois
Robert Lanctôt, Bloc Québécois
Derek Lee, Liberal Party
Peter MacKay, Progressive Conservative Party
Paul Harold Macklin, Liberal Party
John Maloney, Liberal Party
John McKay, Liberal Party
Lorne Nystrom, New Democratic Party
Andy Scott, Chair, Standing Committee on Justice and Human Rights, Liberal Party
Kevin Sorenson, Canadian Alliance Party
Vic Toews, Canadian Alliance
Appendix B – Witnesses Appearing Before the Standing Committee on Justice and Human Rights

Thursday, 2 May 2002
- Dave Whellams, Criminal Law Policy Section, Department of Justice Canada.
- Greg Yost, Criminal Law Policy Section, Department of Justice Canada.
- Dominique Vaillancourt, Vice-President, Director of Outreach and Communication, Canadian Council for the rights of Injured Workers.
- Maria York, President, Canadian Council for the rights of Injured Workers.
- Doug Perrault, President, Ottawa and District Injured Workers Group.
- Vern Theriault, Individual Presenter, former Westray Mine Employee.

Tuesday, 7 May 2002
- Allen Martin, Westray Families Group.
- David Miezenger, Ottawa and District Labour Counsel.
- Duff Conacher, Chairperson, Corporate Responsibility Coalition.

Wednesday, 8 May 2002
- Lawrence McBearty, National Director, United Steelworkers of America.
- Andrew King, Department Leader, Health, Safety, and Environment, United Steelworkers of America.

Thursday, 9 May 2002
- Bev Dejarlais, Member of Parliament, New Democratic Party, and sponsor of Private Member’s bill on corporate criminal liability.
- David Bennett, National Director, Health, Safety and Environment, Canadian Labour Congress.
- Hassan Yussuff, Executive Vice-President, Canadian Labour Congress.
- Barbara Davidson, OC Transpo Widows.
- Terrie Lemay, OC Transpo Widows.

Wednesday, 22 May 2002
- Susan Dodds, Sociologist.

Thursday, 23 May 2002
- Louis Erlichman, International Association of Machinists and Aerospace Workers in Canada.
- Poonam Puri, Individual Presenter, Osgoode Hall Law School.
- Anne-Marie Boisvert, Individual Presenter, University of Montreal Law School.
- Tamara Thomson, Director, Legislation and Law Reform, Canadian Bar Association.
- Greg DelBiggio, Member, National Criminal Justice Section, Canadian Bar Association.
- Chris McCormick, Individual Presenter, St. Thomas University (Criminology).

Thursday, 28 May 2002
- Patrick Healy, Individual Presenter, McGill University Law School.
• Clare Mocherie, Director, Aurora Institute.
• William Trudell, Chair, Canadian Counsel of Defence Lawyers.

**Wednesday, 29 May 2002**

**Thursday, 30 May 2002**
• Assistant Commissioner William Lenton, Federal Services, Royal Canadian Mounted Police.
• Gil Yaron, Director, Law and Policy, Shareholder Association for Research and Education.

**Wednesday, 22 October 2003**
• Richard Mosley, Assistant Deputy Minister, Criminal Law Policy Section, Department of Justice Canada.
• Donald Piragoff, Criminal Law Policy Section, Department of Justice Canada.
• Greg Yost, Criminal Law Policy Section, Department of Justice Canada.
• Joanne Klineberg, Criminal Law Policy Section, Department of Justice Canada.
• William Bartlett, Criminal Law Policy Section, Department of Justice Canada.
• Lucie Angers, Criminal Law Policy Section, Department of Justice Canada.
Appendix C – Interview Participants

A total of twenty-three interviews were conducted for the dissertation research. The interviews are listed below by number, category of interviewee and date of interview. For reasons of confidentiality, the names of participants are not provided. The breakdown of the interviews, by category, is as follows: Government officials (2); Non-governmental representatives (3); Corporate lawyers (3); Criminal lawyers/Legal academics (4); Union representatives (4); Politicians (3); Regulators (1); Private sector representatives (3).

Interview 1: Government Official, 9 September 2008
Interview 2: Non-governmental Representative, 11 September 2008
Interview 3: Government Official, 3 October 2008
Interview 4: Corporate Lawyer, 7 October 2008
Interview 5: Criminal Lawyer, 8 October 2008
Interview 6: Union Representative, 8 October 2008
Interview 7: Corporate Lawyer, 9 October 2008
Interview 8: Legal Academic, 9 October 2008
Interview 9: Union Representative, 9 October 2008
Interview 10: Non-governmental Representative, 23 October 2008
Interview 11: Politician, 3 November 2008
Interview 12: Union Official, 11 November 2008
Interview 13: Non-governmental Representative, 11 November 2008
Interview 14: Private Sector Representative, 18 November 2008
Interview 15: Politician, 19 November 2008
Interview 16: Union Representative, 20 November 2008
Interview 17: Legal Academic, 20 November 2008
Interview 18: Corporate Lawyer, 28 November 2008
Interview 19: Legal Academic, 8 December 2008
Interview 20: Politician, 9 December 2008
Interview 21: Regulator, 15 December 2008
Interview 22: Private Sector Representative, 16 December 2008
Interview 23: Private Sector Representative, 2 March 2009
Appendix D – Interview Schedule


1) What do you think of when you hear the term corporate crime?
2) What do you think of when you hear the term occupational health and safety offences?
3) What do you think of when you hear the term corporate criminal liability?
4) What do you consider to be the main causes of corporate crime?
5) What do you consider to be main factors that contribute to occupational health and safety offences?
6) How do you think the government should respond to corporate crime?
7) How should the government respond to serious injury in the workplace?
8) How should the government respond to cases involving death in the workplace?

Part II: The Introduction of Corporate Criminal Liability Legislation

1) What influence do you think the Westray disaster had for the introduction of corporate criminal liability legislation in Canada?
2) In your opinion, are there any other factors that provided the impetus for Canada’s corporate criminal liability legislation?
3) Can you tell me who was involved in lobbying for the introduction of corporate criminal liability legislation?
4) Were you involved in the federal government’s consultations that preceded this legislation?
   a. If so, can you please tell me what your position was regarding the need for corporate criminal liability legislation?
   b. Has your position changed since then?
5) If yes to question 4: can you please tell me about your experiences testifying before the House of Commons Standing Committee on Justice and Human Rights?
   a. What did you think of the process?
   b. What did you think of the questions that were posed by Committee members?
6) Are you familiar with the different individuals and groups who appeared before the House of Commons Standing Committee on Justice and Human Rights?
   a. If so, in your opinion, were there any omissions in terms of the witness list?
7) Are you familiar with the different legislative options that were proposed before the final legislation was tabled in Parliament?
   a. If so, what is your opinion of the different options?
8) Can you tell me about the main components of Bill C-45/the Westray bill?
   a. How does it assign corporate criminal liability?
9) What was your response to the legislation (Bill C-45) following its introduction?
   a. In your opinion, is this legislation necessary?
   b. Are there elements that you believe are missing from the law?
10) Are you familiar with the sentencing regime contained in the Bill C-45/the Westray bill?
    a. If so, what are your impressions of these punishment options?
    b. In your opinion, are there any punishment options that are missing from the law?
11) What message do you believe the federal government sent with the introduction of Bill C-45/the Westray bill?
12) In your opinion, does this legislation represent a fundamental change in corporate criminal liability?

Part III: Expectations for Bill C-45/the Westray Bill

1) What are your expectations for this legislation?
2) In your opinion, what will the legislation achieve?
3) Can you tell me how the Westray bill has been enforced since its enactment?
4) Are you familiar with any of the cases for which charges have been laid under this legislation?
   a. If so, how were charges laid?
   b. Did the charges proceed to court?
   c. What was the final outcome of the case(s)?
5) In your opinion, how should the government enforce this legislation?
6) What legal evidence do you think will be needed to secure a charge under this new law?
7) Are you aware of any problems with enforcing this law since its enactment?
8) Some observers have noted that the new law blurs the line between regulatory and criminal offences. What is your opinion of this statement?
9) Other observers have suggested that the new law will make relations between regulators and corporations increasingly adversarial. In other words, companies will be less inclined to cooperate with regulators if there is a possibility of future criminal charges. What is your opinion of this position?
10) Some observers suggest that regulatory offences are more effective because they encourage corporations to establish safe working environments. Do you agree?
    a. If yes, why?
    b. If no, why not?
11) What other strategies, besides the use of criminal law, do you think the government should consider when addressing occupational health and safety offences?
12) Are you aware of similar legislation in other countries/jurisdictions?
   a. If so, how do they compare to the Westray bill?

Part IV: Conclusion

1) Is there anything else that you would like to discuss?
2) Is there anything that you feel that I omitted to ask?
3) Do you have any final comments?