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Diane Vaughan
Yale University

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TOWARD UNDERSTANDING UNLAWFUL ORGANIZATIONAL BEHAVIOR

*Diane Vaughan**

The emergence and growth of regulatory agencies charged with controlling organizational misconduct has been so widespread that the monitoring and regulation of corporate interactions has itself become "big business," with the complexity of the regulatory agencies at times matching or even exceeding that of the organizations they regulate. The effectiveness of these efforts to control unlawful organizational behavior has been assessed in many different ways. The records of agency investigations, administrative hearings, and judicial proceedings provide data on enforcement actions, court decrees, trials, convictions, penalties, and other indicators that allow empirical estimates to be made. A realistic assessment of agency efforts, however, must go beyond public records and recognize that all social control efforts encounter natural constraints because of the ways in which the social structure continuously and systematically generates unlawful organizational behavior.¹

* Visiting Fellow, Department of Sociology, Yale University. B.A. 1973, M.A. 1974, Ph.D., 1979, The Ohio State University. — Ed.

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1. Since the early 1970s, research advances and theoretical efforts concerning the unlawful behavior of organizations have increasingly considered the organization as the unit of analysis and have recognized the importance of social structure in explaining unlawful behavior. The body of work that is emerging follows the holistic model suggested by organizational theorists, who note the importance of studying not only the organization, but also the environment in which it exists. See, e.g., H. ALDRICH, *ORGANIZATIONS AND ENVIRONMENTS* (1979); J. PFEFFER & G. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS* (1978); Emery & Trist, *The Causal Texture of Organizational Environments*, 18 *HUMAN REL.* 21 (1965); Evan, *The Organization-Set: Toward a Theory of Interorganizational Relations*, in *APPROACHES TO ORGANIZATIONAL DESIGN* 173 (J. Thompson ed. 1966). Theoretical development is occurring, (see, e.g., *CORPORATE AND GOVERNMENTAL DEVIANCE* (M. Ermann & R. Lundman eds. 1978); Schragar & Short, *Toward a Sociology of Organizational Crime*, 25 *SOC. PROB.* 407 (1978)), but most efforts have been directed toward empirically testing selected variables that may predict unlawful organizational behavior: firm size, financial performance, diversification, market power, industrial concentration, and the interdependence of industry and government. See M. CLINARD, P. YEAGER, J. BRISSETTE, D. PETRASHEK & E. HARRIES, *ILLEGAL CORPORATE BEHAVIOR* (1979); J. PEREZ, *CORPORATE CRIMINALITY* (1978); Asch & Seneca, *Is Collusion Profitable?*, 58 *REV. ECON. & STATISTICS* 1 (1976); Staw & Szwajkowski, *The Scarcity-Munificence Component of Organizational Environments and the Commission of Illegal Acts*, 20 *AD. SCI. Q.* 345 (1975). An overall evaluation of these attempts to examine structural factors that contribute to unlawful organizational behavior would be premature. A summary description, however, is not out of order. Many variables suggested in the literature have not

By social structure, I mean two things. First, the stable characteristics in American society that form the environment in which organizations conduct their business activities: sets of social relations, laws, norms, groups, and institutions. Second, the stable characteristics of organizations themselves: internal structure and processes. These factors produce tensions for organizations to attain goals unlawfully. Although not all organizations experiencing these tensions will respond with misconduct, this Article seeks to open lines of inquiry by presenting the relationship between structural factors and unlawful behavior as a general model. While applicable to the unlawful behavior of organizations other than those engaged in private enterprise, this explication focuses on profit-seeking complex organizations in the legitimate economic order because these organizations present the strongest example.

I. THE STRUCTURAL IMPETUS

The idea that the social structure generates the motivation for individuals to engage in deviance was suggested by Robert Merton.² The concepts central to his thesis are competition, economic success as a culturally approved goal, and erosion of norms supporting legitimate procedures for achieving it.³ Because Merton concluded that these factors differentially affect the lower class, empirical assessment of his ideas has been restricted to individual behavior. But the concepts that he identified in many ways seem more appropriate for understanding rates of misconduct among organizations than among

yet been tested, and those that have been studied exhibit wide variability in industry, violations, enforcing agency, organizational characteristics, and environmental factors examined. Methodological limitations have also plagued researchers: sampling is limited to enforcement actions, and operational definitions do not have proven construct validity. Because of these complicating factors, findings are noncomparable. Nevertheless, one fact is clear: Sociologists are creating the tools necessary for understanding the unlawful behavior of organizations as a macro-phenomenon. For an analysis of this trend, see Vaughan, *Recent Developments in "White-Collar Crime" Theory and Research*, in *THE MAD, THE BAD, AND THE DIFFERENT: ESSAYS IN HONOR OF SIMON DINITZ* 135 (I. Barak-Glantz & C. Huff eds. 1981).

2. R. MERTON, *Social Structure and Anomie*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* 185 (1968).

3. More specifically, Merton suggested that the interplay between the cultural structure and the social structure plays a critical role in the production of deviance. He focused on two elements of the cultural structure: (1) culturally defined goals (ends) that are held out and accepted as legitimate objectives for all members of a society, and (2) norms that specify the allowable procedures (means) for attaining these objectives. When the achievement of the desired goals receives strong cultural emphasis, while much less emphasis is placed on the norms regulating the means, these norms will tend to lose their power to regulate behavior. A state of anomie (normlessness) develops. Given the culturally induced motivation to succeed and the decreased effectiveness of norms, the pursuit of desired goals by illegitimate means may be one response. *Id.* at 186-89.

individuals.⁴

Though organizations have many goals, economic success is imperative for organizational survival. In fact, organizations must seek profits regardless of variability in the values of a particular culture.⁵ Not only is economic success critical to survival in the corporate world, but organizational wealth is also an indicator of prestige. The annual publication of Fortune's "Five Hundred"⁶ indicates membership in the upper class of the organizational stratification system. How organizations are ranked within this stratification system is monitored through quarterly reports, earnings, dividends, and stock market transactions. The key to social mobility within the system is profit-maximization.⁷

Economists disagree, however, about the primacy of profit maximization as a goal for business firms. Professor Scherer has summarized these challenges to the profit-maximization hypothesis, dividing them into three categories: the effects of uncertainty, the complexity of organizations, and the multitude of managerial goals.⁸ The effects of uncertainty may inhibit profit-maximization because managers lack the information necessary to formulate definite expectations about future values that will shape profit-maximization decision rules.⁹ Organizational complexity may inhibit profit-maximization because division of labor, hierarchy, and information blockages may limit the organization's ability to enforce management choices that coincide with profit goals. Finally, organizations may choose to pursue other objectives in addition to, or instead of, profits — preferences for growth, stability, maximum sales, perqui-

4. The precise relationship between Merton's concepts and the ideas presented here is elaborated in D. VAUGHAN, *ON THE SOCIAL CONTROL OF ORGANIZATIONS* ch. 4 (1983) (forthcoming).

5. See Lemert, *Social Structure, Social Control and Deviation*, in *ANOMIE AND DEVIANT BEHAVIOR* 57, 62-66 (M. Clinard ed. 1964) (critiquing Merton's assumption of uniform values for individuals).

6. *The Fortune Directory of the Largest U.S. Industrial Corporations*, *FORTUNE* May 3, 1982 at 258.

7. See, e.g., M. FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962); Coffee, "No Soul To Damn: No Body To Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 *MICH. L. REV.* 386, 395 (1981) ("the economist assumes that firms universally seek to maximize profits").

8. F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 29-37 (2d ed. 1980).

9. Herbert Simon has argued that because the firm lacks perfect knowledge, it must examine alternative strategies sequentially. See R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 10 (1963). The process is largely environmentally conditioned — the most obvious or available alternatives are examined first, and managers may end their search when they obtain a satisfactory answer that meets their basic criteria. See J. MARCH & H. SIMON, *ORGANIZATIONS* 113-17, 138-42, 169-71 (1958).

sites, or the proliferation of management itself.¹⁰ Because other goals may constrain decision-making, organizations may "satisfice," or decide to obtain a minimum level of profits, share of the market, or level of sales.¹¹

These alternative speculations concerning the competition for profits, however, do not seriously undermine the primacy of profit maximization. After reviewing the available evidence, Scherer concluded:

When forced into the trenches on the question of whether firms maximize profits, economists resort to the ultimate weapon in their arsenal: a variant of Darwin's natural selection theory. Over the long pull, there is one simple criterion for the survival of a business enterprise: Profits must be nonnegative. No matter how strongly managers prefer to pursue other objectives, and no matter how difficult it is to find profit-maximizing strategies in a world of uncertainty and high information costs, failure to satisfy this criterion means ultimately that a firm will disappear from the economic scene. Profit-maximization is therefore promoted in two ways. First, firms departing too far from the optimum, either deliberately or by mistake, will disappear. Only those that do conform, knowingly or unknowingly, will survive. If the process of economic selection is allowed to continue long enough, the only survivors will be firms that did a tolerably good job of profit maximization. The economic environment adopts the profit-maximizers and discards the rest. Second, knowledge that only the fit will survive provides a potential incentive for all firms to *adapt* their behavior in profit-maximizing directions, learning whatever skills they need and emulating organizations that succeed in the survival game.¹²

While firms may seek power, prestige, or a myriad of other goals, they must obtain the economic resources necessary for continued operation. This Article will, therefore, take as valid the assumption that profit-maximization (the adjustment of output in the face of market conditions so that the firm can maximize revenues over costs) is a motivating goal and a central activity of complex organizations.

Financial success is a goal held out to be attained by all, but profit-seeking organizations must compete to attain it.¹³ They compete not only for economic goals, but also for the resources that promote achievement of economic ends: personnel recruitment, product development, land acquisition, advertising space, and sales territory.

10. See Kamerschen, *The Economic Effects of Monopoly: A Lawyer's Guide to Antitrust Economics*, in *ECONOMIC ANALYSIS AND ANTITRUST LAW* 20, 28-32 (T. Calvani & Siegfried eds. 1979).

11. The classic works on "satisficing" behavior are J. MARCH & H. SIMON, *supra* note 9, and R. CYERT & J. MARCH, *supra* note 9. For an account of profit satisficing, see Coffee, *supra* note 7, at 395-96.

12. F. SCHERER, *supra* note 8, at 38.

13. *Cf.* R. MERTON, *supra* note 2, at 188 (discussing competition between individuals).

An organization's ability to obtain requisite resources may be constrained by the source, nature, and abundance of the resource, by the behavior of other organizations in the environment in the roles of consumers, suppliers, competitors, and controllers,¹⁴ by individuals in the role of consumers,¹⁵ and by the resources already possessed by the organization and preexisting demands on those resources. As a result, attainment of economic goals may be obstructed in two ways. First, an organization may be entirely excluded from the competition (*e.g.*, market entry is prohibited by controllers; resources are unavailable to devote to product development). Second, an organization might gain entry to the competition, but remain unable to attain its economic goals because supplies of the resources that represent the goals (*e.g.*, government contracts, customers for a particular product) are limited. Profit-seeking organizations, therefore, must compete for both economic goals and the means to those goals. The availability of both can be limited, moreover, not only by insufficient supply, but also by the inability or unwillingness to obtain a commodity at a given price. Thus, some scarcity can always exist. And when the scarcity of strategic resources threatens an organization with possible loss in legitimate competition, unlawful conduct may result.

The likelihood that an organization will act unlawfully is not, of course, determined solely by the availability of strategic resources. The effect of goal variability on the competition must also be considered. All organizations must maximize returns over costs to survive, but the more general goal of economic success will be reflected in differential standards in particular organizations. Economic success is relative and an organization's criteria for success are shaped by both financial conditions and by the other organizations with which it must compete. Standards for economic success reflect position in the organizational stratification system, and may take three forms:¹⁶

(1) A shift in economic and social position; higher status competitors.

(2) A shift in economic position; higher status among same competitors.

(3) Maintenance of existing economic and social position.

For organizations already among the elite, an upward shift in social

14. J. PFEFFER & G. SALANCIK, *supra* note 1, at 39-59.

15. A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 4, 21-54 (1970).

16. These standards for organizational success are based on the standards that Cloward and Ohlin presented for individuals. See R. CLOWARD & L. OHLIN, DELINQUENCY AND OPPORTUNITY 94-95 (1960).

position may not be possible, though higher economic status within the same membership group may be. Organizations not among the elite may, at varying times, be concerned with all three standards for success. And *all* organizations, regardless of rank, must seek to maintain their existing economic and social position. To fail to maintain that position is to succumb to downward mobility. Consequently, scarcity, combined with the differential standards for economic success, raises the possibility of blocked access to resources *regardless of an organization's size, wealth, age, experience, or previous record.*

Economic goals vary in a second important way as well. Competitive pressures and the cultural emphasis on economic success typically lead organizations to establish new goals once one is achieved. A "maximum" profit, in the literal sense, becomes an infinitely receding possibility under these circumstances. Motivational tensions continue to operate, reinforcing the pursuit of success. Should a goal be attained, a new one is set, continually recreating the possibility of blocked access to resources and the consequent tensions to attain them unlawfully.

Unlawful conduct is most likely to be chosen as a survival strategy when support diminishes for legitimate procedures for reaching desired goals. The erosion of normative support for legitimate conduct among organizations has been noted in the stratification systems of societies that become modernized.¹⁷ The importance of family lineage as the basis of rank declines, while the rankings of organizations relative to one another become increasingly important. Organizational membership becomes an indicator of individual prestige. In this way, individuals' mobility becomes linked to improving the position of their organization relative to other organizations. In a society that is not experiencing major structural reorganization, the norms governing competition for rank among organizations usually obtain consensus. When modernization is underway, however, the established stratification principles are inappropriate. The units to be ranked are organizations, not families, and the ranking process is further complicated by the rapid multiplication of organizations. Consensus is absent on the ranks of organizations and how the ranks may legitimately be improved.

New organizations, moreover, tend to be led by new leaders, who did not previously occupy elite positions. Because of youth and

17. See Stinchcombe, *Social Structure and Organizations*, in HANDBOOK OF ORGANIZATIONS 142, 169-80 (J. March ed. 1965).

rapid rise to wealth and prominence, these new leaders tend to be "less committed to the norms of the system of stratification among organizations."¹⁸ Unsocialized by the old elite, their behavior is guided by the principle that new organizations only rise rapidly if they have some disrespect for traditional standards.¹⁹ In a period of rapid structural differentiation, "therefore, [w]hat is very generally at stake is the definition of what is deviant."²⁰ Under these circumstances, the means of organizational competition become unlimited.

The characteristics attributed to modernizing societies continue in highly modernized societies. Because some organizations cease to exist and others are constantly being created, the ranking of organizations remains in flux. Organizational membership continues to be a key element defining individual prestige. Perhaps most important, the definition of deviance remains ambiguous,²¹ creating the possibility of a chronic state of anomie for all organizations, *regardless of rank in the stratification system*. Successful achievement of organizational goals through unlawful conduct tends to reinforce the occurrence of this behavior, so that what the society defines as illegal may come to be defined in the organization as normative. Choice is not simply an output of structure, but a strategic input for the system as a whole.²² The successful become models for others in their environment who, initially less vulnerable and alienated, now no longer keep to the rules that they once regarded as legitimate.²³ Decisions to use illegitimate methods to achieve desired goals thus feed back into the social structure, effectively maintaining the pattern "unless counteracting mechanisms of social control are called into play."²⁴

The "counteracting mechanisms of social control," however, operate at less than maximum effectiveness because administrative rules and regulations and criminal and civil statutes that are directed

18. *Id.* at 174.

19. *Id.*

20. *Id.* at 175 (emphasis added).

21. "On the top economic levels, the pressure toward innovation not infrequently erases the distinction between business-like strivings this side of the mores and sharp practices beyond the mores." R. Merton, *supra* note 2, at 195. See also Geis, *White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961*, in CRIMINAL BEHAVIOR SYSTEMS 139 (M. Clinard & R. Quinney eds. 1967); Kramer, *Corporate Crime: An Organizational Perspective* 14 (Paper presented at the Conference on White-Collar and Economic Crime, Potsdam, N.Y., Feb. 7-9, 1980) (copy on file with the *Michigan Law Review*); CORPORATE AND GOVERNMENTAL DEVIANCE, *supra* note 1.

22. Stinchcombe, *Merton's Theory of Social Structure*, in THE IDEA OF SOCIAL STRUCTURE 11, 23-24 (L. Coser ed. 1975).

23. R. Merton, *Anomie, Anomia, and Social Interaction: Contexts of Deviant Behavior in ANOMIE AND DEVIANT BEHAVIOR*, *supra* note 5, at 235.

24. *Id.*

at organizational behavior do not revolve around sacred values — in fact, in many cases represent no values of individuals — but instead result from compromises reached between agencies or legislatures and the firms that they regulate.²⁵ This situation arises because of the interdependence of controllers and controlled. Interdependence between two organizations means that outcomes for each are, in part, determined by the activities of the other.²⁶ The outcomes they reach are determined by the nature and distribution of resources between the two and the way in which the resources are used: Each has the potential to interfere with the other's activities.²⁷ Both have a vested interest in shaping a regulatory environment that enhances their own survival. Hence, they act in ways that maximize use of their resources to meet survival goals and minimize the other's ability to interfere with goal attainment. Since the information and wealth possessed by organizations can create obstacles to enforcement activities, agencies frequently fulfill their responsibilities through negotiation, internal proceedings, informal hearings, and mutually agreeable solutions. And business firms, similarly concerned with successful operation, soften the power of agencies by efforts to influence law-making and as a consequence, the nature of enforcement, and find equivalent gains to be had from negotiation. Compliance emerges as a product of the power-mediating efforts of both parties, as compliance demands fewer resources from both agencies and business firms than do adversarial activities to impose and thwart punitive sanctions.²⁸ In any given case, of course, a firm or agency may funnel all available resources into a full-fledged adversarial proceeding.²⁹ But when this occurs, the event will take place in a regulatory environment that has developed as a result of

25. Lemert, *supra* note 5, at 69.

26. J. PFEFFER & G. SALANCIK, *supra* note 1, at 40-54, 113-42.

27. *Id.*

28. For a further explication of interdependence, with special attention to implications for social control, see D. VAUGHAN, *supra* note 4, at ch. 6.

29. The recently settled IBM case provides one extreme example. See Gerhart, Corporate Giantism and Effective Antitrust Enforcement (Paper presented at the American Society of Criminology Annual Meetings, Philadelphia, Pa., Nov. 7-9, 1980) (on file with the *Michigan Law Review*). Gerhart notes, for example, that during the first three and a half years of trial in the monopoly case brought by the government against IBM,

the government presented fifty-one witnesses (one appearing for over a month), the trial transcript totaled 84 thousand pages, and 211,000 pages of documents were received as evidence. Equally prodigious work occurred before the trial even began. The parties took over 1300 depositions. IBM is said to have produced over 65 million pages of documents for review by the government and several private plaintiffs suing IBM, and the government produced approximately 26 million pages of documents for IBM's review, almost a million of which were copied by IBM.

Id. at 5.

the interdependence of controllers and controlled. The institutionalized guidelines — laws, regulations, sanctions, and proceedings — have been shaped by the survival interests of both. And in many cases, these guidelines will inhibit the efforts of agencies to restrain unlawful organizational behavior in spite of their skills, resources, and commitment to an adversarial stance.

Unlawful behavior thus receives additional structural support, which aids in maintaining the pattern. The success of some organizations at attaining their goals unlawfully encourages others to follow the same path to success.³⁰ The absence of normative support for legitimate conduct is replaced by normative support for the illegitimate, but expedient. Carried to the extreme, norm erosion might become so extensive within an organization or subunit of an organization that unlawful conduct to attain goals occurs regardless of resource scarcity. Behavior that, if viewed by society, would be considered unlawful may come to be considered acceptable business practice and nondeviant within the organization.

As normative support for legitimate procedures for reaching organizational goals erodes, organizations motivated by the cultural emphasis on economic success and the need to survive, and unable to attain resources legitimately, may instead resort to technically expedient but unlawful behavior. Anticompetitive actions like price-fixing and discriminatory price-cutting, theft of trade secrets, false advertising, and bribery and payoffs to ensure market share could thus be described as the victimization of one organization by another to obtain resources that facilitate upward mobility in the organizational stratification system.³¹ Similarly, organizations seeking either a change in economic position that will bring higher status among similarly situated organizations, or merely to maintain their economic position may also act unlawfully under these circumstances.³²

These concepts, of course, do not explain all unlawful organizational behavior. As presented here, they are directed toward understanding the unlawful activities of profit-seeking complex organizations in the legitimate economic order.³³ The concepts fit

30. R. Merton, *supra* note 23, at 235; Stinchcombe, *supra* note 22, at 23-24.

31. See Levine, *Empiricism in Victimological Research: A Critique*, 3 VICTIMOLOGY 77, 88 (1978).

32. See R. CLOWARD & L. OHLIN, *supra* note 16, at 94-95.

33. I suggested earlier, however, that the applicability of these concepts is not restricted to profit-seeking business organizations. A brief discussion at this point is worthwhile to demonstrate how other organizations may or may not be included. Three types of complex organizations come to mind: (1) organizations designed to fail; (2) nonprofit organizations; and (3) organizations operating in the illegitimate economic order — organized crime.

Organizations designed to fail: Not all organizations seek profits. Some, in fact, are

the activities of organizations that violate the law in pursuit of culturally approved goals, broadly defined as economic success. This criterion excludes behavior that is not directed toward maximizing returns, such as violations resulting from mistakes.³⁴ A law or regulation may be violated because it is misunderstood, or because its existence is unknown. For other violations, such as sex discrimination in hiring, the linkage between the violation and profit-making remains a matter of empirical inquiry. Consider also violations that result from negligence. Because business firms do take risks in the name of profit, negligence may occur as a result of profit-seeking activity. If it can be determined that a firm negligently allocated resources to maximize profits at the expense of proper attention to some task, the concepts would be relevant to the organization's behavior. In this and similar situations, the inability to make the necessary empirical determinations may be a serious impediment. Nevertheless, current opinion on the link between objectives, regardless of diversity, and the need for organizations to maximize returns

designed to accumulate losses, rather than profits. The individual owner or owners receive benefits, while the organization is the center of transactions and losses. See Shapiro, *Detecting Illegals: A Perspective on the Control of Securities Violations* 259 (1980) (unpublished doctoral dissertation, Yale University). These organizations obviously do not fit a motivational scheme based on competition to acquire resources in order to survive.

Nonprofit Organizations: Some organizations are designed to seek neither profits nor losses (e.g., churches, voluntary associations, government, state-supported universities, and community self-help organizations). Regardless of their diverse goals, they must acquire resources. In the acquisition of resources, as well as in other activities, nonprofit organizations do engage in economic activity encompassing the production, exchange, distribution, and consumption of goods and services. While necessary resources and other activities may not themselves be viewed as profits or mechanisms for obtaining profits, these organizations must maximize returns in order to exist.

Organizations operating in the illegitimate economic order: The organized crime enterprise engages in business activities that extend into both the legitimate and illegitimate economic orders. See J. KWITNY, *VICIOUS CIRCLES* (1979). In both instances, organizational survival depends on the ability to maximize returns. Though the means used to seek profits may consistently be illegitimate, these organizations certainly engage in competition for economic success. The case of organized crime raises an interesting point for speculation. While the origins of organized crime may be attributed in part to blocked access to legitimate means, see Cloward, *Illegitimate Means, Anomie, and Deviant Behavior*, 24 *AM. SOC. REV.* 164 (1959), the continued use of unlawful behavior may call for a different explanation. One principle behind organized crime is that illegitimate means become institutionalized. Some organizations within the organized crime enterprise, therefore, may never find legitimate means blocked because once illegitimate means are institutionalized, legitimate means are abandoned. The continuation of unlawful behavior, then, may be better explained by blocked access to goals. But if one can assume that organized crime organizations are characterized by normative solidarity supporting use of illegitimate means to attain goals, these mechanisms may operate regardless of resource scarcity.

34. Other unlawful organizational behavior that clearly does not fit within the conceptual scheme developed here includes conspiring to overthrow the government and the deprivation of members' liberty or lives by religious organizations. See Sherman, *Three Models of Organizational Corruption in Agencies of Social Control*, 27 *SOC. PROBS.* 478 (1980).

for continued existence³⁵ suggests that the model developed here is generally valid.

While no explanation has yet been found that encompasses all forms of organizational misconduct, the structural factors suggested in this part appear to apply to many instances of unlawful organizational behavior.³⁶ Admittedly, no single paradigm can serve as a tool for investigating the entire range of intriguing questions concerning organizational misconduct. A psychological explanation, for example, may provide acceptable answers to some questions.³⁷ Nonetheless, thinking about organizations in terms of structural pressures to engage in unlawful behavior explains a good deal of what is known and surmised about the phenomenon in question. The extent to which the fit is true, though, must be verified empirically.

II. OPPORTUNITIES FOR UNLAWFUL CONDUCT

While the social structure may produce tensions for organizations to seek desired resources by illegal methods, unlawful behavior cannot be explained by these structural tensions alone. Opportunities must be available to obtain resources unlawfully.³⁸ Opportunities to attain resources unlawfully but through legitimate mechanisms are inherent in all complex organizations operating in the legitimate economic order because of the nature of organizational processes and structure. Created for the purpose of conducting legitimate business activity, these same factors may also

35. See F. SCHERER, *supra* note 8, at 38. For discussions of the methodologically based controversy on the diverse goals of organizations, see R. HALL, ORGANIZATIONS 94-96 (1972); Perrow, *The Analysis of Goals in Complex Organizations*, 26 AM. SOC. REV. 854, 859-66 (1961).

36. See, e.g., C. STONE, WHERE THE LAW ENDS 35-69 (1975); Geis, *supra* note 21; Gross, *Organizational Crime: A Theoretical Perspective*, in STUDIES IN SYMBOLIC INTERACTION 55 (N. Denzin ed. 1978); Staw & Szawajkowski, *supra* note 1; Vaughan, *Crime Between Organizations: Implications for Victimology*, in WHITE-COLLAR CRIME 77 (G. Geis & E. Stotland eds. 1980); D. VAUGHAN, *supra* note 4.

37. See, e.g., Coffee, *supra* note 7, at 393-400, for an explanation of organizational unlawfulness which stresses the interrelation between psychological and structural influences. Discussing the pressures on middle-level managers, Professor Coffee observed:

The middle manager is acutely aware that he can be easily replaced; he knows that if he cannot achieve a quick fix, another manager is waiting in the wings, eager to assume operational control over a division. The results of such a structure are predictable: When pressure is intensified, illegal or irresponsible means become attractive to a desperate middle manager who has no recourse against a stern but myopic notion of accountability that looks only to the bottom line of the income statement.

Id. at 398. See E. SHORRIS, THE OPPRESSED MIDDLE: THE POLITICS OF MIDDLE MANAGEMENT (1981); Getschow, *Overdriven Execs: Some Middle Managers Cut Corners to Achieve High Corporate Goals*, WALL ST. J., Nov. 8, 1979, at 1, col. 6; Editorial, *Why Managers Cheat*, BUS. WEEK, Mar. 17, 1980, at 196.

38. See R. CLOWARD & L. OHLIN, *supra* note 16.

promote unlawful behavior by providing normative support for illegality, providing resources for carrying out illegal acts, and minimizing the risk of detection and sanctioning. As a consequence, organizations may respond to blocked access to desired resources by turning to the opportunities within their own boundaries to attain them unlawfully.

Organizational characteristics have frequently been hypothesized to encourage unlawful organizational behavior.³⁹ The factors examined have included firm longevity, product diversification, financial performance, geographic expansion, market power, and size.⁴⁰ What these characteristics have in common is that they are researchable — this information is publicly available, through corporate financial statements and mandatory agency filing requirements. But, other organizational characteristics — processes and structure that are internal and, therefore, more elusive for research purposes — play an important role in the unlawful conduct of business firms and may complicate the findings concerning those factors that have been studied. Organizational size, for example, has been the most frequently investigated factor thought to be related to violations that are committed by one organization against another.⁴¹ The larger the organization, it has been hypothesized, the more frequent the violations. The evidence, however, has been contradictory. Perhaps a more satisfactory hypothesis is that it is not simply size per se that facilitates the unlawful conduct, but the complexity of the internal processes and structure that *accompany* increased size that explains the behavior.⁴²

This Part examines how structure and processes create opportunities for organizations to act as offenders. Before turning to this topic, I want to make three points. First, these same factors create an arena where individuals may readily engage in misconduct that is in their own interests, separate and distinct from the interest of the organization. Second, the opportunities inherent in business firms not only create the potential for an organization to engage in unlawful conduct, but also promote the possibility that an organization will be victimized — by other organizations as well as by its own members.

39. See, e.g., C. STONE, *supra* note 36; Gross, *supra* note 36.

40. See, e.g., M. CLINARD & P. YEAGER, *CORPORATE CRIME* (1980); Perez, *Corporate Criminality: A Study of the One-Thousand Largest Industrial Corporations in the U.S.A.* (1978) (unpublished doctoral dissertation, University of Pennsylvania).

41. See, e.g., M. CLINARD & P. YEAGER, *supra* note 40; M. CLINARD, P. YEAGER, J. BRISSETTE, D. PETRASHEK & E. HARRIES, *supra* note 1; Asch & Seneca, *supra* note 1; Perez, *supra* note 40.

42. Though not addressing organizational misconduct, R. HALL, *supra* note 35, at 171, also states that complexity may be more important than size alone in understanding organizational behavior.

Finally, although these same opportunities exist in general form for all organizations, the conditions and combinations of factors that do or do not result in unlawful behavior cannot yet be unraveled. They cannot, therefore, be discussed in the language of causality, but rather as factors that facilitate, generate, encourage, or present opportunities to obtain resources through unlawful conduct.

A. *Organizational Processes*

Processes are the dynamics of organizational life that affect individual members. While introducing the notion of organizations as actors is legitimate and effectively accounts for certain actions, organizations must rely on individuals to act as their agents. To describe properly the behavior — lawful or unlawful — of organizations, therefore, we need an explanation that goes beyond the goals and actions of the organization to the nexus of the goals and actions of the organization and the goals and actions of its members.⁴³ This necessity draws attention to the internal processes of organizations and to the normative environment that results.

It is common knowledge that organizations selectively recruit new members who in many ways match those already there. But individuals come to business firms influenced by their affiliations with other organizations: families, churches, clubs, schools, trade unions, and previous employers. Because business firms depend on their members to attain goals, they must ensure that members' skills, motivations, and values are consistent with the organization's needs. To the extent that members subscribe to, support, and are willing and able to pursue organizational interests, the firm's chances for survival are enhanced.

The existence of these important characteristics of members is, not surprisingly, rarely left to chance. As Selznick has noted, "the more esoteric the activities of the organization, the less it can rely on the general education provided by the community, and the greater the need for internal orientation."⁴⁴ Most organizations, therefore, subject new recruits to education and training. Skills are taught, sharpened, and adjusted to meet organizational needs through both formal and informal mechanisms: training classes, apprenticeships, peer groups, and mentoring. Integral to the mechanisms operating to

43. Coleman, *Legitimate and Illegitimate Uses of Power*, in *THE IDEA OF SOCIAL STRUCTURE*, *supra* note 22, at 221, 234-35.

44. P. SELZNICK, *THE ORGANIZATIONAL WEAPON* 36 (1960).

develop these skills are systematic socialization processes that attune members ideologically to the organization's goals.

Educational and training programs are supplemented, and perhaps eventually superseded, by an internal reward system incorporating both remuneration and prestige. The rewards are often formal, tangible, and obvious to other employees and even outsiders: promotion, bonuses, salary increases, profit-sharing, parking privileges, expense accounts, gold watches, company cars, employee-of-the-month awards, attractive offices, and assistants. In other cases, the rewards are informal and not so obvious, but are powerful incentives, especially in the upper echelon, because of their long-term impact on a career. Use of first names, inclusion in after-hours get-togethers with management officials, or an invitation to play golf with the boss reward the employee with admission to the informal organization of the firm. Behavior inconsistent with organizational goals typically leads to negative sanctions. These, too, can be formal — loss of parking privileges, a lateral transfer, or a shift to a dead-end position — or informal — exclusion from the boss's golfing clique. The ultimate sanction, of course, is a resignation or firing.

Large organizations, moreover, tend increasingly to absorb members, while at the same time insulating them from the outside world.⁴⁵ Skills and language for a particular task may be so specialized that an employee cannot find similar work in other organizations. Members with no alternative skills are tied to the firm by financial dependence. Accumulated retirement benefits and delayed remuneration also encourage long-term commitments to organizations. Profit-sharing not only encourages long-term commitments, but gives the individual a stake in the system. The luster of future financial rewards binds members to the organization like a pair of golden handcuffs, securing their continued affiliation with the firm. And recreational activities, committee work, company cafeterias and corporate dining rooms, long hours, special projects, and frequent transfers separate an organization's members from the outside community and foster a dependence on the organization that is social, as well as financial.

In these and other ways, the needs of the individual member eventually become linked to the organization's success. Because a primary criterion of individuals' status in highly modernized societies is the social status of the organizations to which they belong,⁴⁶

45. D. MARGOLIS, *THE MANAGERS: CORPORATE LIFE IN AMERICA* 41-66, 93-116 (1979).

46. See Stinchcombe, *supra* note 17, at 164-80.

the individual identifies with the organization and the organization's goals. The organization's ability to attain desired resources affects the ability of members to be upwardly mobile, to improve their economic position while remaining in the same social class, or simply to preserve their existing position. Because the interests of members and organizations coincide, employees may engage in unlawful behavior in the organization's behalf, using the skills, knowledge, and resources associated with their position to do so.

Organizational processes, then, create an internal moral and intellectual world in which the individual identifies with the organization and the organization's goals. The survival of one becomes linked to the survival of the other, and a normative environment evolves that, given difficulty in attaining organizational goals, encourages illegal behavior to attain those goals. But some finer distinctions must be made. Not all agents of an organization will act illegally in the organization's behalf. The nature of the response — lawful or unlawful behavior — will be shaped by structural factors both internal and external to the organization.⁴⁷ While organizations may experience structural tensions to violate, variation in subunit membership,⁴⁸ position in the information system,⁴⁹ and in rewards and punishments⁵⁰ may undermine the organization's ability to unify the goals and actions of its members with its own goals and actions, producing either deviance or conformity to legal norms.⁵¹

Subunit membership. Tensions to attain resources unlawfully differentially affect the various parts of the organization. The subunits with skills and resources most relevant to profit-seeking goals are most likely to be affected. Because of the many and changing goals of organizations, the subunits affected may vary over time, and some may never experience such tensions. Members of subunits not subject to these tensions will not be motivated to engage in illegal behavior in the organization's behalf.

Position in the information system. Though working in a subunit that is experiencing tensions to act unlawfully, members without information about necessary resources and difficulties in attaining them will not be motivated to act illegally in the organization's behalf. For unlawful behavior to occur, the member's position must

47. Stinchcombe, *supra* note 22, at 17-23.

48. *Id.*

49. *Id.*

50. See Lemert, *supra* note 5, at 70-73; Stinchcombe, *supra* note 22, at 17-18.

51. Lemert, *supra* note 5, at 73-75.

provide access to information regarding the organization's goals as they relate to the activities of the subunit in which the member is employed. The position, moreover, must entail some responsibility for goal attainment. Finally, the position must provide skills and resources that allow the individual to resolve the organization's difficulties.⁵²

Rewards and punishments. Even if subunit membership and position in the information system create tensions to engage in unlawful behavior in the organization's behalf, members thus situated may not do so. Norms and values learned through association with other organizations (both formal and informal) may compete with and contradict those learned while in the firm.⁵³ Should the norms be contradictory, members will make choices in accordance with the rewards and punishments accompanying the various alternatives.⁵⁴ Members will weigh the possibility of gaining rewards against the possibility of incurring punishment.

As the rewards and punishments accompanying the alternatives vary, the patterns of individual choice will vary.⁵⁵ Should the firm's rewards for gaining the desired resources outweigh the perceived costs of pursuing them unlawfully, members may commit violations on behalf of the organization despite competing norms. Again, position in the information system is relevant, for information flows affect the probability that rewards and punishments — both internal and external to the organization — will be meted out.⁵⁶ The significance of the organization's rewards and punishments, moreover, will vary as the individual's dependence on the firm varies. Alternative skills, alternative sources of income, and alternative validating social roles reduce financial and social dependence on the firm.⁵⁷ Consequently, external rewards and punishments may reduce the organization's ability to mobilize individual efforts in its behalf, despite processes that produce a normative environment supporting unlawful conduct.

Although all organizations create normative environments that join the goals and actions of members to those of the firm, to assert that organizational processes produce a fertile atmosphere for ille-

52. See note 37 *supra*.

53. Lemert, *supra* note 5, at 62-71.

54. *Id.* at 70-73; Stinchcombe, *supra* note 22, at 17.

55. As Lemert has noted, "[c]osts are important variables in analysis because changes in the costs of means can modify the order of choices, even though the 'ideal' value order of the individual remains constant." Lemert, *supra* note 5, at 63.

56. Stinchcombe, *supra* note 22, at 21.

57. P. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 119-25, 140-42 (1964).

gality obscures the complexity that exists. The degree to which an organization experiences pressures to act unlawfully varies not only by subunit, but within subunits, and over time. The ability and willingness of members to act illegally in the organization's behalf depend on the subunit in which they work, their position in the information system, and the weighing of rewards and punishments. These factors may not only generate lawful conduct in the face of organizational pressures to violate, but may generate unlawful conduct despite a normative environment that supports compliance with legal norms. It is important to recognize, therefore, that the normative environment generated by organizational processes will have a variable relationship to unlawful conduct, and that the problem of measurement remains a powerful obstacle to a complete understanding of the relationship between internal environment and behavior.

B. *Organizational Structure*

The structure of complex organizations creates opportunities by providing many settings where unlawful behavior might occur, and by isolating those settings and masking organizational behavior. Size and the complexity that frequently accompanies size provide many locations in which unlawful behavior might take place. As organizations grow larger, specialized subunits result, each providing opportunities to engage in unlawful behavior on the organization's behalf. Not only are organizations internally diversified in ways that multiply the possible settings for illegality, but many organizations are geographically dispersed, with locations throughout the United States and the world, greatly expanding the number of locations in which unlawful behavior might occur.

These specialized subunits compete for resources with other organizations and with each other.⁵⁸ The need for a subunit to outperform other organizations, other units within the same organization, or even its own previous record to secure resources from the parent organization may generate illegality, such as falsification of records, or theft of trade secrets. Subunits' concerns about their own survival may or may not coincide with the interest of the larger organization, and if given an opportunity to exercise discretion, lower-level managers will tend to act not to maximize the firm's

58. For a dramatic example of intra-organizational competition, see Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1135 (1977) (reporting a case where "two wholly owned subsidiaries of U.S. Steel . . . actively lobbied with regard to proposed legislation, *but on opposite sides*") (emphasis in original).

welfare, but rather to enhance the interest of their own unit or division.⁵⁹ In a recent book on the internal workings of General Motors, for example, the corporation's continual competition with the Ford Motor Company bears striking similarities to the description of the rivalry between two divisions of General Motors, Chevrolet and Pontiac, as well as to the adversarial relationship between the divisions of the company and their respective dealers.⁶⁰

Specialization not only generates opportunities for unlawful behavior by increasing the locations where it might occur, but also by obscuring organizational behavior, lawful and unlawful. Task segregation cloaks activities. No one individual or group can command all the knowledge pertaining to particular operations, materials, or technology.⁶¹ This serves a protective function for the organization, increasing its ability to survive despite information leakage or personnel turnover.⁶² The secrecy generated by task segregation, however, also creates the opportunity for misconduct. Specialization creates problems of coordination and control. Consequently, organizations develop rules and procedures to handle the various internal contingencies the organization faces by specifying how, when, and by whom tasks are to be performed.⁶³ The rules and procedures are expressed in a language common to all subunits of an organization, symbolically integrating the various parts. They seek not only to control and coordinate activities, but also to facilitate the systematic exchange of information that is necessary for decision-making.

Though directed toward integrating the separate parts of the organization, the potential for rules and procedures to achieve internal coordination and control varies considerably. Progressive loss of control over subunits seems to be a natural consequence of organizational growth. Structure interferes with the efforts of those at the top to "know" the behavior of the diverse parts by obscuring activity at other levels.⁶⁴ As the organization grows, and as the distance be-

59. O. WILLIAMSON, *MARKETS AND HIERARCHIES* 125 (1975); O. WILLIAMSON, *CORPORATE CONTROL AND BUSINESS BEHAVIOR* 47-52 (1970) [hereinafter cited as *CORPORATE CONTROL*]; Coffee, *supra* note 58, at 1135-36; Pettow, *The Analysis of Goals in Complex Organizations*, 26 *AM. SOC. REV.* 854 (1961).

60. J. WRIGHT, *ON A CLEAR DAY YOU CAN SEE GENERAL MOTORS* 73-97 (1979).

61. Technology is used here to encompass operations technology, materials technology, and knowledge technology. See Hickson, Pugh & Pheysey, *Operations Technology and Organization Structure: An Empirical Reappraisal*, 14 *AD. SCI. Q.* 378 (1969).

62. See D. NELSON, *MANAGERS AND WORKERS* (1975).

63. See R. HALL, *supra* note 35, at 173, 196.

64. See Gouldner, *Reciprocity and Autonomy in Functional Theory*, in *SYMPOSIUM ON SOCIOLOGICAL THEORY* 241 (L. Gross ed. 1959); Weick, *Educational Organizations as Loosely Coupled Systems*, 21 *AD. SCI. Q.* 1 (1976).

tween subordinate units and those at the top likewise grows, "authority leakage" develops.⁶⁵ Authority leakage conveys an image of an organization that has, by reason of increased size, hierarchical authority system, and specialization, become so unwieldy that the upper levels cannot control the subunits. The organization, in short, can diversify beyond the capability of those at the top to master it.

Authority leakage allows an organizational subunit — a subsidiary, the accounting division, or the research and development branch, for example — to engage in a fraudulent transaction with another organization and ensures that no countervailing intra-organizational authority can prevent or control the unlawful behavior. Specialized knowledge further complicates this problem. In an organization with highly specialized subunits, one may lack the expertise to detect ongoing violations in another. Interestingly, subgoal pursuit and authority leakage may also lead to *compliance* with legal standards in the face of organization pressures to violate. Nevertheless, these characteristics also should be considered as factors that may generate opportunities for violation.

Implicit in the concept of authority leakage is that an organization should be able to control its subunits. It might be thought, therefore, that authority leakage could occur only when an organization is operating irrationally or ineffectually, and that if a firm were operating in best form, information would flow smoothly (and accurately) from bottom to top and vice versa, maximizing the possibility of control. This notion is contradicted by both research and theory.⁶⁶ The result that may in some cases be described as inefficient or irrational behavior may thus in others be the rational institutionalization of systematic censorship procedures by those controlling the flow of information.⁶⁷

65. Studying governmental bureaucracies in the 1960's, Gordon Tullock observed the phenomenon of "authority leakage." He described this as a progressive loss of control over subordinate units within the same bureaucracy as the organization expanded and the distance between such units and those at the agency's top became greater. Subsequently, another student of bureaucracies, Anthony Downs, formalized Tullock's perception into a general law, the "Law of Diminishing Control," which states: "The larger any organization becomes, the weaker is the control over its actions exercised by those at the top." Both Downs and Tullock found one underlying cause of this progressive paralysis to be the ease with which generalized orders and nonspecific policies imposed at the top could be successively reinterpreted, distorted, or qualified as the commands filtered downward through the organization.

Coffee, *supra* note 58, at 1136-37 (footnotes omitted). See A. DOWNS, *INSIDE BUREAUCRACY* 143 (1966); *CORPORATE CONTROL*, *supra* note 59, at 26; G. TULLOCK, *THE POLITICS OF BUREAUCRACY* 142-93 (1965).

66. See J. EMERY, *ORGANIZATIONAL PLANNING AND CONTROL SYSTEMS* 24-48 (1969); Coffee, *supra* note 58, at 1137-39.

67. See K. ARROW, *THE LIMITS OF ORGANIZATION* 73-75 (1974); C. STONE, *supra* note 36, at 43-44; *CORPORATE CONTROL*, *supra* note 59, at 22, 25-26; Coffee, *supra* note 58, at 1134-47.

While authority leakage is a consequence of structure that focuses attention on the inability of those at the top to control the organizational bureaucracy, systematic censorship procedures can originate at *any* point in the hierarchy and mask behavior throughout the organization. Units at the top may thus be encouraged to engage in unlawful conduct not only by their structural isolation, but also by systematic censorship of information that obscures misconduct from others. Furthermore, the hierarchical authority structure diffuses personal responsibility for decision-making throughout the organization. Determining where within an organization a decision was made is difficult.⁶⁸ As a result, "[t]he delegation of responsibility and unwritten orders keep those at the top of the corporate structure remote from the consequences of their decisions and orders, much as the heads of organized crime families remain 'untouchable' by the law."⁶⁹

III. IMPLICATIONS FOR ENFORCEMENT

Economic success, competition for scarce resources, norm erosion, and organizational structure and processes provide some insight into how unlawful organizational behavior may be systematically produced by the social structure. Not all organizations will respond with unlawful conduct,⁷⁰ but the structural origins of misconduct have some interesting implications for social control.

Many scholars and activists have suggested increasing agency resources to better control unlawful organizational behavior. This suggestion is directed toward strengthening not only sanctions and surveillance, but the laws and regulations that undergird the use of these technologies. Some suggest, for example, that unlawful organizational behavior be met with sanctions more appropriate to corporate actors: statutes that impose both organizational criminal

Coffee points to the Theory of Cognitive Dissonance, which "simply states the much-observed phenomenon that recipients of information unconsciously focus on and relay only the information that reinforces their preexisting attitudes, while filtering out conflicting information." *Id.* at 1137. See L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); M. ROKEACH, *THE OPEN AND CLOSED MIND* (1960). For more recent revisions of this theory, see I. JANIS & L. MANN, *DECISION MAKING* 15-16, 82-85, 420 n.3 (1977).

68. For an extended discussion of how this organizational characteristic relates to legal issues of responsibility for organizational behavior, see C. STONE, *supra* note 36, at 60-69.

69. J. CONKLIN, "ILLEGAL BUT NOT CRIMINAL" 65 (1977).

70. See Lemert, *supra* note 5, at 68. Moreover, "[t]he fact that deviance fails to occur under these conditions (and occurs when they are absent) merely suggests that structural strain is not a necessary and sufficient cause of deviance. To deny the relation between deviance and anomie on these grounds would be like arguing that hunger is not causally related to eating because people sometimes eat when they are not and refrain from eating when they are." Ewick, Memorandum, Feb. 1981 (on file with the *Michigan Law Review*).

liability and personal liability for organizational conduct; statutes that more accurately describe organizational violations; greater penalties; prison sentences for corporate executives; federal chartering of organizations; variable fines based on gross sales rather than fixed amounts; licensing of businessmen so that those licenses can be revoked; and elimination of "no contest" pleas.⁷¹ Recommendations for strengthening surveillance technologies include, for example, increasing the skills, knowledge, and numbers of agency personnel, creating laws that require disclosure of certain information on corporate activities, public representation on boards of directors, and mixing agency monitoring strategies to vary the timing of surveillance for an organization.⁷²

Any consideration of policies aimed at increasing agency resources should be grounded in realistic expectations for effectiveness. Despite increased resources, all social control efforts encounter natural constraints because of the ways in which the social structure continuously and systematically generates unlawful organizational behavior. Consequently, while increasing resources to strengthen surveillance and sanctioning capabilities may result in greater efficiency and effectiveness in a particular case, the social structure perpetuates the phenomenon. For business firms, profit-maximization is a central activity and scarcity will always be a factor. The structure of business organizations, their internal environments and the complexity of their daily transactions⁷³ are aspects of modern life that provide suitable opportunities for illegality.

The autonomy and interdependence of agencies and the firms they regulate, moreover, will predictably mitigate social control efforts by increasing the probability that the firms' rewards for gaining resources will outweigh the perceived cost of pursuing them unlawfully, thus contributing to misconduct.⁷⁴ The autonomy of corporate actors is protected by structure and the nature of business transactions, as well as by notions of privacy, all of which present barriers to surveillance of organizational behavior. Specialization reinforces this protective barrier by requiring agencies to possess highly technical knowledge concerning specific industries, organizations, and of-

71. See M. CLINARD, P. YEAGER, J. BRISSETTE, D. PETRASHEK & E. HARRIES, *supra* note 1; J. CONKLIN, *supra* note 69; R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* (1976); C. STONE, *supra* note 36; Geis, *supra* note 21.

72. See M. ERMANN & R. LUNDMAN, *supra* note 1; R. NADER, M. GREEN & J. SELIGMAN, *supra* note 71; C. STONE *supra* note 36.

73. See Vaughan, *Transaction Systems and Unlawful Organizational Behavior*, 29 *SOC. PROBS.* (1982).

74. See D. VAUGHAN, *supra* note 4, at ch. 6; note 28 *supra* and accompanying text.

fenses to carry out their mandates. And the interdependence of government agencies and business firms critically affects the creation and use of sanctioning technologies. Possession of a resource critical to an exchange affects the behavior of the resource-dependent organization,⁷⁵ and when the government is dependent upon a firm for some commodity or service, the probability of vigorous enforcement is decreased.⁷⁶ Business firms and agencies frequently compromise, both in the creation and application of laws and regulations, for negotiation requires fewer resources from both than adversarial strategies. Resource exchanges between agencies and business firms also influence the effectiveness of restraints. Despite increased resources devoted to social control, therefore, organizational misconduct appears to be a natural accompaniment to the complexity of business organizations and their interactions that will continue as long as the structure of opportunity and organizational goals remains the same.

It is important to recognize, finally, that laws and regulations, surveillance, and sanctioning may themselves be related to unlawful behavior. Increasing these resources to strengthen agency capabilities may have the unintended effect of increasing real rates of unlawful business conduct, even after accounting for increases from greater enforcement activity.⁷⁷ This possibility is created in a number of ways.

First, the laws and regulations that prescribe and proscribe the behavior of business organizations are a major resource of social control agencies. Certain characteristics of these rules may be related to patterns of violations. For example:

(1) *Number*: A proliferation of guidelines related to a particular industry, task, or exchange may defy mastery, or result in some regulations being selectively ignored. Large numbers of laws and rules moreover, create monitoring difficulties, which reduce the risk of detection and sanctioning.

(2) *Recency*: The date of origin may affect the legitimacy of a law or regulation, knowledge of its existence, or the degree to which it has been tested or officially interpreted. These factors may influence willingness to conform or deviate.⁷⁸

(3) *Relevance*: The degree to which a law or regulation is rele-

75. J. PFEFFER & G. SALANCIK, *supra* note 1, at 51.

76. D. VAUGHAN, *supra* note 4, at ch. 6.

77. See Marx, *Ironies of Social Control: Authorities as Contributors to Deviance Through Escalation, Nonenforcement, and Covert Facilitation*, 28 SOC. PROBS. 222 (1981).

78. Ewick, *Theories of Organizational Illegality: A Reconceptualization*, 2 YALE WORKING PAPER SERIES 12 (1981).

vant to a particular task or the larger purposes of the organization may influence willingness to abide by it.⁷⁹

(4) *Complexity*: A law or rule having many interrelated parts or elements may be difficult to interpret, generating unlawful conduct out of misunderstanding.

(5) *Vagueness*: A law or regulation that is stated in general or indefinite terms, or that is not clearly expressed may result in misconduct.

(6) *Acceptability*: Acceptability of a rule or a law may be influenced by substantive focus, cost of adherence in terms of time, personnel, and equipment, existence and strength of sanctions invoked for violation, predictability of enforcement, or any of the preceding five characteristics.⁸⁰

Second, the surveillance technologies of social control agencies — monitoring and investigating the behavior of business firms — may also be related to unlawful conduct. Surveillance subjects an organization to accountability. “[T]o hold an organization accountable is to set up norms or criteria by which its success in goal-attainment is judged.”⁸¹ Not only may this intensify pressures to attain goals, creating tensions to attain them unlawfully, but organizations may respond to the surveillance by falsifying the performance indicators being monitored. Surveillance also imposes costs on organizations. Filing, reporting, and inspection requirements for organizations demand resources that could be directed toward profit-maximization or related goals. In the event that surveillance imposes costs on organizations that interfere with other survival strategies, it may produce tensions to attain necessary resources unlawfully.

Third, sanctions that interfere with the attainment of organizational goals may operate similarly. Many sanctions seek to punish organizational misconduct by affecting profits. A business firm that incurs handicaps to its profit-making capabilities due to sanctions imposed may continue to operate with goals altered to match the reduced performance capacity, or may try to maintain its position in the competition with reduced resources. In the latter situation, firms may experience pressures to engage in unlawful conduct to attain goals.

The cost of surveillance and sanctioning will, of course, have va-

79. See A. COHEN, *DEVIANCE AND CONTROL* 6 (1966); R. HALL, *supra* note 35, at 173-77.

80. A. COHEN, *supra* note 79, at 16-21.

81. Gross, *supra* note 36, at 63.

riable impact on organizations.⁸² When costs are in proportion to sales or output, the impact will be the same across organizations. When costs are fixed, however, some organizations will have greater difficulty absorbing them than others. Firms not experiencing economic strain and possessing resources to adapt to regulatory strategies may escape the additional competitive pressures the social control efforts are likely to generate. Firms operating under uncertainty are more vulnerable. While all firms at times may face uncertain conditions, large and wealthy corporations can draw on greater resources should this be the case. The costs of surveillance and sanctioning technologies are thus likely to have a greater impact on small, new, or struggling firms than on large, established firms that can afford to be regulated. The greater the cost relative to net income, the greater the probability of subsequent pressures to attain resources unlawfully.

Fourth, while surveillance and sanctioning may impose costs on business firms that precipitate misconduct in exchanges with other organizations acting as suppliers, competitors, and consumers, the *threat* of agency interference with business operations may initiate unlawful conduct between businesses and the social control organizations. To protect organizational resources, bribery may occur to ensure licensing, inspection, or contract relations that are in the firm's best interest.⁸³

In a number of ways, therefore, the threat and application of surveillance and sanctioning technologies that increase corporate expenditures relative to net costs may produce illegality. While strengthening the resources of agencies may result in greater efficiency and effectiveness in a particular case, in the aggregate greater regulatory resources may be accompanied by a rise in the rate of misconduct, in spite of the manifest purposes for which these tools are created. In his research on nuclear accidents, for example, Perrow concluded that better regulation is hard to achieve without increasing costs and risking further accidents because of imposed complexity.⁸⁴ This statement also may hold for organizational illegality. Because misconduct appears to be a function of the complexity of organizations, their interactions, and the structures in which

82. See Zald, *On the Social Control of Industries*, 57 *SOC. FORCES* 79, 85 (1978).

83. A. BIDERMAN & A. REISS, *DEFINITIONS AND CRITERIA FOR A SELECTION OF PROSPECTIVE FEDERAL SOURCES OF WHITE-COLLAR CRIME DATA 37-38* (1979) (National Institute of Law Enforcement and Criminal Justice, U.S. Dept. of Justice, Law Enforcement Assistance Administration).

84. Wolf, *The Accident at Three Mile Island: Social Science Perspectives*, *SOC. SCI. RESEARCH COUNCIL BULL.* 33, 58-59 (1979).

they operate, a logical extension is that strengthening the resources of social control agencies will increase the complexity of the regulatory apparatus and thereby increase the possibility of structurally produced tensions and opportunities for misconduct. This possibility underscores the importance of distinguishing between tactics that increase the level of surveillance and the likelihood of apprehending and sanctioning and tactics that will change the corporate environment in ways that will reduce the incidence of unlawful behavior.

If unlawful organizational behavior is systematically produced by the social structure, if firms and agencies negotiate a regulatory environment that inhibits the imposition of costs for violative behavior, and if efforts to control violations may have the unintended effect of encouraging them, what remains to be said concerning the social control of organizations? Does this mean that social control efforts are to no avail and should be abandoned because they only succeed in stimulating rates of corporate misconduct? While such a policy of radical nonintervention⁸⁵ may indeed reduce the system's complexity and thus alleviate tensions to engage in unlawful conduct, agencies' ability to regulate specific corporate behaviors should not be overlooked.⁸⁶ Any conclusions about nonintervention, therefore, are unjustifiable without an accounting of the aggregate monetary and social costs and benefits of social control and of how those costs and benefits are distributed.⁸⁷

Some of these are difficult to assess. Recognition that unlawful business conduct is a natural accompaniment of modern life, for example, should neither obfuscate nor deny the issue of moral responsibility in the individual case. Beyond the question of effectiveness and efficiency, investing resources in the social control of organizations may serve an important societal function by challenging the notion of corporations as elite entities beyond the law. Another issue is deterrence; little is known about deterrence and corporate actors. While it may be true that an accounting of aggregate costs and benefits of social control and their distribution is impractical or even impossible, policy should not be structured to preclude the possibility that such benefits may occur.

Rather than a nonintervention stance reflecting the negative implications that structural constraints pose for the control of unlawful

85. See E. SCHUR, *RADICAL NONINTERVENTION* (1973).

86. See D. VAUGHAN, *supra* note 4, at ch. 3.

87. See Barnett, *Corporate Capitalism, Corporate Crime* 13-14 (Paper presented at Conference on White Collar and Economic Crime, Potsdam, N.Y., Feb. 7-9, 1980) (on file with the *Michigan Law Review*).

organizational behavior, an understanding of these constraints can offer some guidelines for positive remedies addressing the structural origins of organizational misconduct. Of the generating factors discussed, the least addressed by scholars and activists, yet perhaps the most vulnerable to manipulation by social control agencies, are the activities of agencies themselves.⁸⁸ Agencies engage in exchange with business firms and establish the guidelines for transactions *between* private enterprise organizations. In addition to their mandated surveillance activities, agencies can guard against the possibility that these regulatory efforts may generate unlawful conduct. The simplification of reporting and filing requirements for firms, for example, and attention to the characteristics of law and regulations that may generate violations are positive directions that agency self-surveillance might take.

88. One exception is the work of Gerhart, who analyzes the variables that influence the length of antitrust cases and evaluates techniques that have been or might be used to expedite antitrust litigation. See P. GERHART, 2 REPORT OF THE EMPIRICAL CASE STUDIES PROJECT TO THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (1979).