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Citation for this version and the definitive version are shown below.

Citation to Publisher Version: Leon, Kenneth Sebastian & Ken, Ivy. (2019). Legitimized fraud and the state-corporate criminology of food - a Spectrum-based theory. *Crime, Law and Social Change 71*, 25-46.https://doi.org/10.1007/s10611-018-9787-6.

Citation to *this* Version: Leon, Kenneth Sebastian & Ken, Ivy. (2019). Legitimized fraud and the state-corporate criminology of food - a Spectrum-based theory. *Crime, Law and Social Change 71*, 25-46. Retrieved from doi:10.7282/t3-fn50-a866.

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Legitimized Fraud and the State-Corporate Criminology of Food – A Spectrum-Based Theory

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Abstract
The role that food corporations have in determining our health and nutrition is concomitant with the power and influence that corporations exercise across all commercial sectors. These large, powerful, and often multinational entities – collectively referred to as Big Food – employ a robust array of strategies to advance the organizational interests associated with a seemingly paradoxical business model: securing the continuous and ever-growing consumption of food products increasingly associated with negative health outcomes. As this model proliferates globally, the implications of this contradiction warrant specific attention to the activities of Big Food corporations through a critical criminological framework. The pervasive and increasingly legitimized activity of Big Food relies on a legal, regulatory, and moral framework that allows for the relegation of all non-market oriented value systems to be secondary to a pro-corporatist ideological and moral superstructure. Whereas previous scholarship has contributed to an understanding of what occurs when profit-maximization values collide with – and then co-opt – public health and nutrition interests, the present study offers a spectrum-based theory to explain how various degrees of food fraud are systematically incentivized by the legal privileges of corporations and the hegemonic moral economy of neoliberal governance.

Abstract Word Count: 192
Manuscript Word Count (Excluding References): 8,908
Figures: 1
Tables: 0

Introduction

As a macro-economic sector, the food industry annually contributes approximately $992 billion to the U.S. gross domestic product (United States Department of Agriculture, Economic Research Service 2017). Globally, food and agriculture represent an $8 trillion market (Plunkett Research 2017). These markets are dominated by corporations. "Big Food," as they are sometimes referred to, includes corporations such as Nestle ($92.2 billion in sales revenue in 2016), PepsiCo ($62.7 billion), and Coca-Cola ($43.5 billion) (McGrath 2016). There is big money in Big Food[1]; the mass production of sweet, salty, and fatty foods has proven highly lucrative, consistent with research demonstrating how corporations benefit from the exploitation of people's biological, psychological, and socio-economic vulnerabilities in service to profit (Roberto et al. 2015; Moss 2013). Big Food corporations are continuously in a position to be praised on measures related to market performance and global finance, while being increasingly criticized for their role in contributing to some of the biggest public health challenges of our time (Tempels et al. 2017; Nestle 2002).

In a contemporary climate where issues of health and nutrition have permeated both popular culture and public policy, Big Food has successfully mitigated financial and public relations risks inherent in a small but growing legislative and market shift that might otherwise frame Big Food as enemies of public health (Brownell and Warner 2009). Food companies are increasingly understood as not only exacerbating non-

[1] The top twenty rankings in the Forbes 500 list (2017) also include food retailers such as Walmart (#1), Costco (#16) and Kroger (#18). Amazon (#12) can be considered as part of Big Food insofar as the company increases its logistics and supply-chain activities related to the Amazon Pantry service. Amazon's ranking may change in the near future due to the company's 2017 purchase of Whole Foods (Fortune 2017).

communicable diseases (NCDs) through the aggressive marketing of "unhealthy commodities" (Moodie et al. 2013; Stuckler et al. 2012), but having a fiduciary interest to do so (Moss 2013). Big Food – and specifically Big Soda – insist on framing these public health issues of health, dieting, and nutrition as a function of individual agency, emphasizing neoliberal terminology like *personal choice, market access,* and *making healthy decisions* (Tempels et al. 2017; Weishaar et al. 2016; O'Connor 2016; Nixon et al. 2015; Ken 2014a; Dorfman et al. 2012). Such discourse emphasizing agency-centric approaches to public health is at odds with empirical social science data; with diet-related chronic diseases such as diabetes and cardiovascular disease affecting fully half of all adults in the U.S. (USDA & HHS 2015), debates about individual decision-making, market freedoms, and personal choices must give way to a more structural analysis.

The continuously increasing role that Big Food corporations have in determining our health and nutrition is concomitant with the power and influence that corporations possess in all sectors (see Whyte and Wiegratz 2017; Barak 2017; Stewart 2015; Yeager 2009). From the school cafeteria to the grocery aisle, from the funding of scientific research to hegemonic market expansion and quashing of public health interests (Brownell 2012; Dorfman et al. 2012; Stuckler and Nestle 2012; Nestle 2002), these large, powerful, and often multinational corporations employ an impressive array of strategies to advance the organizational interests associated with their business models. Embedded in such strategies lies a growing contradiction: the need to secure continuous and ever-growing consumption of products that are increasingly associated with deleterious health outcomes and other negative consequences of global proportions (Stuckler et al. 2012). The associated costs of this paradox demand that the activities of

Big Food corporations be given specific attention through a critical criminological framework, particularly when such activities can be understood as forms of state-corporate crime. The standard business activities of Big Food corporations rely on a legal and regulatory framework that incentivizes fraudulent activities and measurable harms that are not only hidden public recognition, but when discovered, framed as non-criminal. Since the meaning of fraud has been historically undertheorized, both as a legally coherent category and a normative wrong (Buell 2006), we offer a heuristic device to conceptually organize various degrees of fraud, ranging from established criminal violations, to the embedded aspects of capitalist law that systematically underwrite the ability for private entities to pursue harmful activities as a legitimate business model. Our manuscript is structured as follows: we first present select themes found in state-corporate criminological scholarship, and then situate extant work on food crimes within this field. We then present the Food Fraud Spectrum, adapted from Dwight Smith Jr.'s analysis of enterprise crime (1980). The core of our analysis further defines and explains our Food Fraud Spectrum heuristic device, and how it can be used to understand neoliberal food regulation as a deeply embedded form of state-corporate fraud and source of social harm. We conclude the paper with a discussion of the caveats and limitations of our argument, along with an emphasis on the consequences of unchecked corporate power in this conceptual and empirical space connecting human nutrition, public health, and private profit.

Theorizing Food and State-Corporate Crime– A Brief Introduction

Conventional criminological inquiry has implicitly endorsed state-centric conceptions of crime, studying violations of law and state-defined criminals without a similar level of theoretical and empirical inquiry into whether laws or governance structures are adequate (Michalowski 2016; Schwendinger & Schwendinger 1970). Historically, criminology as a field of study has studied behaviors that meet two criteria: i) they are of public concern and ii) they are criminalized by the state (Michalowski 2016). "Acts criminalized by the state, but of little public concern (e.g. tax evasion), and acts of public concern not criminalized by the state (e.g. deep social inequality) are typically treated as having little criminological import" (Michalowski 2016: 184). This is particularly important, considering that the words "crime and justice" often appear together, underscoring how *crimes* generally warrant a response or reaction that seeks to remedy a wrongdoing or attain some form of justice. Phenomena not criminalized by the state are more likely to be viewed as "social problems" that do not receive the same kind of regulatory attention relative to codified misdemeanors and felonies. Broadening the scope of food fraud is useful for understanding how such serious harms occur in practice as opposed to how food crimes are defined, neutralized, or obscured through their absence in regulatory frameworks. Transgressions committed by political and economic elites often avoid being legally classified as crimes, and when they are, such activities are not readily prioritized, detected, or captured by the mechanisms of criminal justice (i.e., police, courts, corrections).[2] Paradoxically, the state is trusted to protect life and liberties

[2] As Alvesalo and Tombs (2002) note, while empirical literature demonstrate how corporate self/deregulation strategies have failed to protect human life, criminalization

and administer the institutions of justice, and yet "one can quite confidently assert that the worst crimes – in terms of physical harm to human beings, abuse of civil liberties, and economic loss – have been committed by individuals and units acting in the name of the state" (Friedrichs 2000).

Food-related crimes – and crimes in general – are overwhelmingly understood through legalistic criteria (Michalowski 2016; Friedrichs 2015; Friedrichs & Schwartz 2007; Schwendinger & Schwendinger 1972). That is, the term *crime* is limited to those actions that explicitly defined as such under criminal law (i.e., felonies and misdemeanors). When the concept of crime is normatively extended to other codified civil or administrative statutes, such actions are then called 'violations' or 'offenses' of a regulatory code that are typically enforced outside the formal bounds of a criminal court. Relying on legal and regulatory statutes for conceptualizing crime offers the benefit of clearly delineated criteria but sacrifices analytic validity, resulting in a narrowly constrained and biased definition of crime (Michalowski 2016; Rothe and Mullins 2011; Chambliss et al., 2010; Hillyard and Tombs 2007; Michalowski and Kramer 2006).

Relying on legalistic criteria can impede sociological inquiry, since doing so implicitly or explicitly reinforces definitions used by the state, which in turn reproduces existing power arrangements and inequalities (Michalowski 2016; Shichor 2009; Matthews & Kauzlarich 2007).

Whereas the research base of criminology has been mostly concerned with the type of offender who is likely to be a young, non-white male on the lower ends of

(i.e., formal criminal justice interventions) as a deterrent strategy has seldom been seriously considered. See also Pemberton (2007).

socioeconomic distribution (Tombs and Whyte 2015; Hagan 2010), a growing list of scholars have focused instead on the "range of socially injurious actions that fall outside the boundaries of the law" (Wonders 2016: 204), and in arenas not commonly associated with criminology.[3] This broadening of the criminological project has also invited sociological inquiry into crimes of the powerful and elite deviance (e.g., Barak 2015; Whyte 2009; Michalowski and Kramer 2006; Wonders and Danner 2006; Friedrichs 2000; Chambliss & Zatz 1993). In *The Corporate Criminal,* Tombs and Whyte (2015) offer a sociological interpretation of crime and criminality, and specifically argue that the corporate form itself is *criminogenic*[4]; in that the corporate form produces conditions favorable to select forms of social harm and victimization. In considering the criminogenic nature of the corporate form, the work of Frank Pearce (2001: 45-6) provides the basis for viewing the corporate structure as constituting a form of "structured irresponsibility" (Tombs and Whyte 2015: 100), and they quote Frank Pearce (2001: 45-6) as follows:

> Shareholders invest in a wide range of companies, and since their only concern is with the return of investments they are indifferent to what occurs within different production processes and rarely live in the areas

[3] For example, emerging subfields that represent this widening of the criminological research base include studies on wildlife criminology (Moreto 2016) and conservation criminology (Gore 2017); rural criminology (Donnermeyer 2016); translational criminology (Laub 2011); and crimmigration (Bosworth et al. 2018; Stumpf 2006). Conversely, lines of inquiry that might have traditionally been associated with crime and justice studies have been addressed in other disciplines. For example, the Johns Hopkins University Center for Gun Policy and Research is housed within the Bloomberg School of Public Health. An example closer to the present topic includes the work of Walter (2004), who articulated the criminological relevance of corporate activities related to genetically modified food.

[4] By this they mean the state or quality of producing conditions favorable to whatever is labeled as "crime." The term is not deterministic, but probabilistic, in that the corporate form will not inevitably produce "crimes" in all corporations, but instead incentivize the consistent maintenance of some rate or statistical likelihood of crime.

> where these take place. They are legally protected from most of the negative consequences of company actions. Company executives are also fundamentally concerned with profitability and with 'willful blindness' are again often distanced from (and legally protected from the consequences of) production, conceive of it abstractly and, in turn, pressure managers to produce as much and as cheaply as possible. This creates a form of structural irresponsibility where it is often difficult to identify how decisions are made and how well or poorly they relate together.

While the parallels between food and non-food industries are readily identifiable, we treat the food sector as having a qualitatively different impact on social groups and institutions. Whereas segments of the population have differential access to, or self-select out of, the use of products or participation in activities governed by corporations (e.g., cars, airplanes, bridges, medical devices, household electronics, lead paint) food enters the body of every living person. With this caveat in mind, the operations of Big Food corporations are not unlike standard corporate practices in non-food sectors. In food and agriculture production and distribution, like in other industries, major companies are able to dictate the conditions of production (e.g., Walmart), through contract, within their supply chains (Ken 2014b). The supply chain in turn becomes a functional technique for contracting out crimes and normative harms, passing down the over-increasingly likelihood of, or even compulsion for, illegality (Tombs and Whyte 2015). This is owed in part to the multiple layers of insulation that prevent major corporations from being liable in criminal or civil court venues. In the cost-benefit analyses of some organizations, breaking the law (e.g., skirting regulatory requirements) at various points throughout the chain is the only rational way to simultaneously meet contractual obligations and secure adequate profits (Tombs and Whyte 2015). This system also perpetuates the plausible deniability enjoyed by the corporate form through the use of contractors and sub-contractors; when corporate food crimes are identified, "both the

explanation of the cause and the blame can be passed down the supply chain" (Ben-Achour 2013; Sethi 2014; Tombs and Whyte 2015: 31).

In addition to substantial media coverage surrounding high profile cases of food-related scandals or mishaps such as food contamination and product recalls, there is a growing body of empirical research on what some have labeled "food crimes" (Croall 2013). Some scholars have drawn connections between food-related harms and private industry practices, conceptualizing such phenomena as forms of white-collar crime[5] (Friedrichs 2007; Croall 2009; Newman 1957). Relatedly, if we hold "crimes of the powerful" to represent harmful, injurious, or criminal activities perpetrated by actors or institutions with significant social, economic, or political power, then the relationship between food crimes and state-corporate symbiosis is also of import to this line of inquiry (see Barak 2017; Merleaux 2015; Pilcher 2012; Bucheli 2005; Mintz 1985). Nevertheless, these well documented relationships between normal corporate wrongdoing and the political economy of foodstuffs are significantly underrepresented in the emergent literature on food crime. Today, various scholars (Tombs & Whyte 2015; Leighton 2014; Croall 2013; Spink & Moyer 2011; Corall 2009) have contributed to a growing typology of food-related offenses including pricing schemes, labor exploitation, food poisoning, and improper food labeling. We seek to contribute to this growing literature on corporate food fraud by exploring how the law structurally incentivizes the

[5] Official criminal justice data (e.g., the National Incident-Based Report System) suggest that fraud is overwhelmingly committed by blue-collar, non-elite offenders, or "garden-variety" offenses as coined and the Yale White-Collar Crime Project (see Weisburd et al. 1991; Johnson & Leo 1993). Yet the most measurably harmful forms of conscious, intentional decisions is not at the level of *street* crime but attributable to the crimes of the powerful (see Barak 2017; Friedrichs 2000).

measurable harms attributed to a unique form of state-corporate symbiosis sometimes referred to as neoliberal governance.

The Food Fraud Spectrum

Dwight Smith Jr. (1980) proposed a spectrum-based theory of enterprise crime to account for crime and social harm committed by and through organizational types, emphasizing the various degrees of wrongdoing existing at the nexus of criminal acts and legitimate businesses. One of the assumptions that Smith Jr. challenged was the relationship between illicit markets and conventional enterprise. Instead of a misleading dichotomy that is implied with terms like *criminal underworld* or *black market* – which relegates notions of illicit activity as distinctively separate from the conventional economic sphere – Smith Jr. focused on wrong-doing in its range of legal and illegal forms (1980), committed by actors of both legitimate (i.e., lawful) and illegitimate (unlawful) enterprises. In 2010, Kauzlarich and colleagues (2010) similarly organized their argument through the use of a “Complicity Continuum”. We draw from this spectrum-based framework to challenge the dominant discourse on food crime, demonstrating how phenomena that are never formally adjudicated or culturally viewed as criminal (i.e., as misdemeanors or felonies) are still forms of state-corporate fraud posing serious risks and harms to public health and human life.

One major theme of the spectrum-based theory from which we draw from (see Smith Jr., 1980) is the empirically-backed assertion that legal and conventionally reputable organizations can engage in anti-social and injurious acts, and illegal (and often normatively deviant) organizations can engage in pro-social activities. What unites both

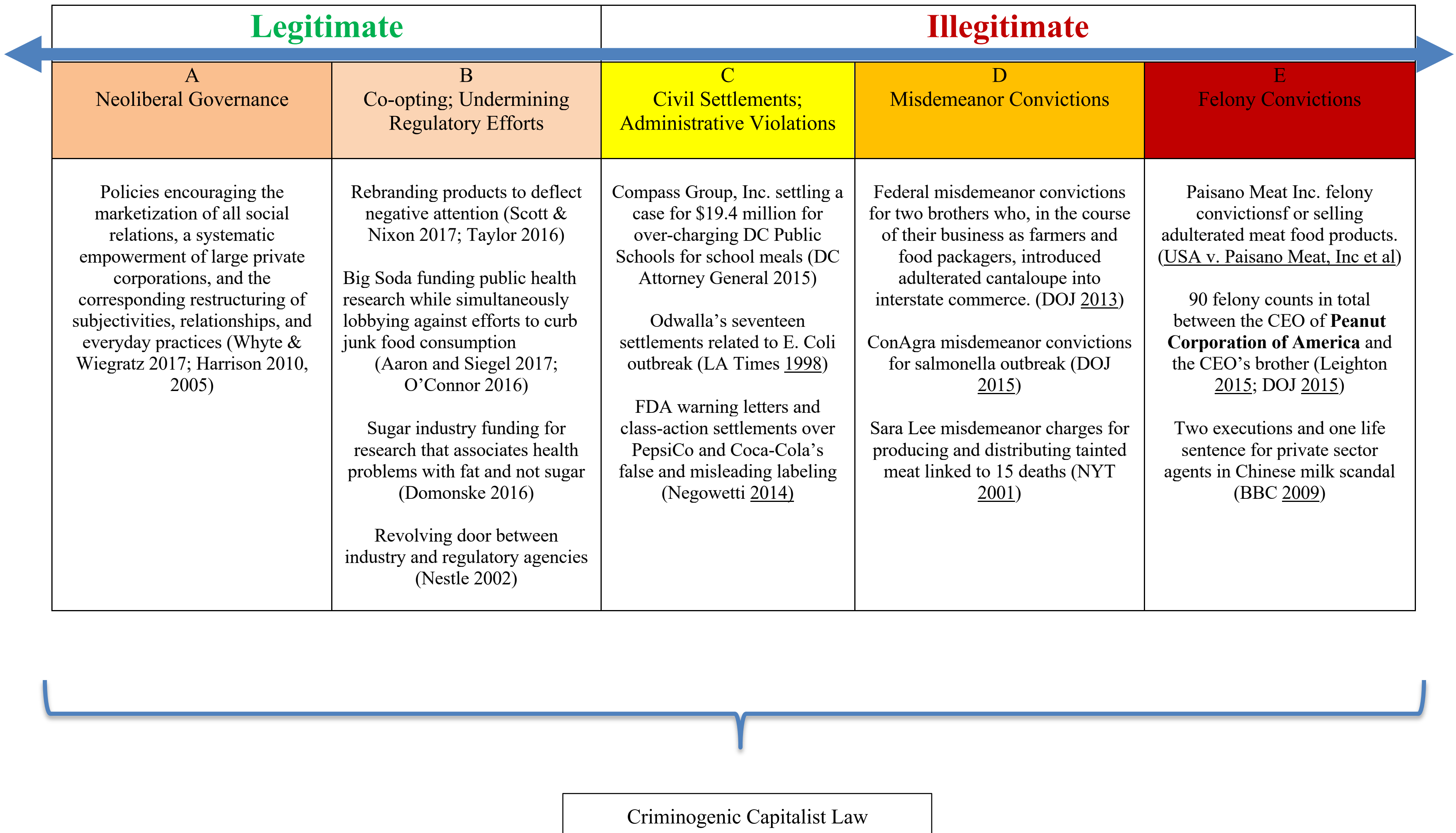
organizational types is the routine and intentional pursuit of capital, which Dwight Smith Jr. (1980) conceptually organizes into a spectrum-based theory of enterprise crime. For the present study, the standard business activities of Big Food corporations involve a wide range of structured activities that are perceived and measured to have both positive and negative effects. Our focus is on the ways in which the legal and regulatory framework has incentivized several forms of harm that is not only under-emphasized, hidden, and blocked from public recognition, but systematically legitimized by both the public (i.e., state) and private (i.e. corporate) sectors. The structural basis for the latter process is – as this paper argues – best understood through a spectrum-based definition of fraud.

Broadly defined, fraud refers to the intentional misrepresentation of facts for economic gain. Holding normative uses of the word aside, the term is part of a taxonomic hierarchy – or umbrella category – housing a variety of legal operationalizations ranging from federal crimes[6] to state-specific variations in common law fraud. Despite the variation in how fraud is normatively understood, technically litigated, and legally punished, the most common forms of fraud formally recognized in the food industry are breaches of contract and regulatory offenses by food growers (Marklein 2014), distributors (DOJ 2015), and sellers (Barboza 2001). In sharp contrast to these established modes of conceptualizing the meaning and nature of fraudulent activity in the corporate food sector, we propose a spectrum of food fraud, and provide descriptive examples that illustrate the processes by which such degrees of fraud and social harm are made possible

[6] For example, the 18 U.S. Code Chapter 47 contains the statutes related to federal criminal offenses, ranging from fraudulent statements, bank fraud, check fraud, public assistance fraud, and more (see Legal Information Institute, web).

in the first place. That there could be legitimized and systematic forms of harm resulting from actions that are morally defended – and even highly celebrated – speaks to the need for a contemporary explanatory narrative. In furtherance of theorizing state-corporate food crime, we offer a heuristic device titled the Food Fraud Spectrum (see Figure/Illustration X).

Figure 1. FOOD FRAUD SPECTRUM



Criminal Convictions

The literature and cases listed in each column are selected on the basis of their representativeness. Reading from right to left on this figure, Columns E and D represent offenses handled through criminal court proceedings that readily qualify as "food crimes." Public records and newspaper data capture a range of high profile cases of food crime that have involved otherwise reputable (or at least well-known) food corporations. The figure illustrating the Food Fraud Spectrum lists examples of the type of case that would fit within each category, such as the two felony convictions for executives of the Peanut Corporation of America (Basu 2015; Leighton 2014) along with misdemeanor convictions, including a $11.2 million fine for ConAgra's involvement in a salmonella outbreak tied to adulterated peanut butter (Associated Press 2016). While misdemeanors are, by definition, less serious than felonies, misdemeanor charges may be brought in cases that would normatively correspond to more serious charges. For example, in a case where fifteen deaths were attributable to the production and distribution of contaminated deli meats and hot dogs, Sara Lee Corporation faced *misdemeanor* convictions as punishment (Flynn 2012a; Barboza 2001; Durbin 2001), and their products are still widely available today under parent company Tyson. Other misdemeanor convictions include criminal charges for Odwalla Inc. (a current subsidiary of Coca-Cola), which pled guilty to sixteen federal counts of shipping an adulterated food product that resulted in the death of a baby and illness in dozens of other people (Times Wire Services 1998).

For the cases that would pertain to Columns D and E, it is important to note how the concept of fraud is legally translated into language that may omit the word entirely. For example, Gardena, California-based Paisano Meat Co. and an affiliated individual

were originally charged with ten felony counts of two specific offenses: "selling and offering to sell adulterated meat food products" and "preparation of adulterated meat food product" (Flynn 2012b). These charges do not contain the explicit word "fraud", nor would any official database categorize the charges as such. However, the Paisano case can be safely interpreted as the adjudication of an economically-motivated misrepresentation, since knowingly introducing sodium sulfite (a dangerous food preservative) into any meat product virtually guarantees that the user intended to misrepresent facts for economic gain.[7]

Zooming out from the United States, there are some exceptional cases where "food crimes" have been punished severely. In 2009, there were two executions in China of private executives who knowingly sold adulterated baby formula in Chinese markets, resulting in at least six infant casualties (Barboza 2009; BBC 2009). This case of adulterated product stands in stark contrast to the dominant mode of regulatory oversight and adjudication mechanisms in the United States for food industry actions that result in death, illness, and injury. As James Stewart (2015) writes, "the entire structure of a

[7] As Charles Harrington (1904), Assistant Professor of Hygiene at Harvard Medical School once stated at the 1903 meeting of the Laboratory Section of the American Public Health Association: "[Sodium sulfite] is a food preservative…used more especially on account of its effect on the appearance of the food to which it is added, its preservative influence being decidedly a minor consideration. It confers upon mince meat an abnormally brilliant red color, which conveys to the purchase the idea of freshness. Its most extensive use is in the preparation of that form of minced meat which we know as 'Hamburg Steak.' This is made from beef trimming and inferior parts of the carcass; and after it has received its chemical treatment, it takes on a redness that is much more pleasing to the eye than the grayish-brown color which develops within a few hours if no sulphite is added…Meat which is in reality well advanced in decomposition is readily disposed of as perfectly fresh, for although the number of bacteria per gram may run as high as 500 millions, it may give off no marked odor. The Paisano defendants ultimately faced conviction of only one felony count.

corporation is intended to protect and insulate high-ranking executives, who are often shielded form knowledge of wrongdoing, even if they have tacitly approved it" (n.p.), underscoring the unrepresentativeness of this high-profile, comparative case.[8]

For instances of corporate criminal liability across virtually *all* commercial sectors in the United States, "corporation prosecutions rarely result in a criminal trial" (Doyle 2013: xi). Additionally, the food and agricultural sector, criminal prosecution of *people*[9] acting on behalf of corporations (e.g., employees, corporate managers) is also a relatively rare phenomenon (see Eisenger 2017; Kwak 2017) . While rules may exist that allow for the criminal prosecution of individual people *and* organizational entities (see DOJ 1999), the majority of actions related to addressing corporate 'wrongdoing' (i.e., in the processes that are ostensibly designed to hold both corporate organizations and actors accountable), are found not primarily in criminal courts, but in civil and administrative proceedings, to which we now turn.[10]

Civil Settlements

Column C captures fraudulent corporate activities handled *outside* of the domain of criminal law. The pattern here is that companies alleged to have engaged in fraud will never be held to account in a criminal court, where the burden of proof is more favorable

[8] We do not endorse nor intend to imply support for the death penalty in state-corporate food crime. The Chinese milk scandal is selectively chosen to demonstrate how private agents (or institutions) can conceivably be regulated, or in this case, punished, for what corresponds to an egregious form of food crime.

[9] Leon & Ken (2017) raise questions about the adjudication of the corporate organizational form. See also Tombs & Whyte (2015).

[10] Criminal settlement rates vary widely by jurisdiction and offense type (see Eisenberg and Lanvers 2009) but for both federal and state-level civil suits, the overwhelming *minority* of cases (less than 10%) ever go to trial (American Bar Association 2018; Galanter and Frozena 2010; Barkai et al. 2006).

to the regulating authority. In civil cases brought against food service management companies that hold public school contracts, for instance, the results are almost always in the form of negotiated settlements for civil wrongs involving breach of contract. Critically, such settlements allow the violators in question to evade any admission of wrongdoing. For example, in a 2015 whistleblower suit in Washington, DC, the food service director for the city's public school system alleged that Compass Group, the largest food service contractor in the world, "submitted fraudulent claims for payment," provided "false statements," "false representations," and "false projections" over the course of years, "overcharged" District of Columbia Public Schools (DCPS) for meals, "stockpiled excess foods," retained rebates owed to the city, and "fraudulently induced DCPS to enter into" one of its early contracts "by promising cost savings that never materialized" (Office of the Attorney General for the District of Columbia 2015). Compass Group settled the case for $19.4 million (District of Columbia Attorney General 2015). A few years earlier, in 2012, when New York state brought a civil case against Compass Group based on rebate fraud, the corporation settled for $18 million (New York State Attorney 2012). In the same state, for the same reason, another food service company called Sodexo settled a fraud case for $20 million (New York State Attorney 2010).

The regulatory structure governing these institutional arrangements *does* allow for the criminal prosecution of cases like these, and a criminal conviction would result in at least a three-year debarment from contracts with any school that receives federal meal support. But both inside and outside the food industry, settling civil fraud cases is a normal—not exceptional—activity, with companies spending $4.1 billion – as a

conservative estimate – on litigation in 2008 alone (Lawyers for Civil Justice et al. 2010). While regulations like debarment might be understood as mechanisms intended to deter corporate fraud, companies can (and do) strategically violate rules when complying with them would be more expensive than a civil settlement (Stuckler et al. 2012). A cost-benefit analysis that pits the potential loss of billions of dollars of school food revenue against an occasional $20 million settlement, for instance, suggests that committing fraudulent acts and settling legal cases that may (but usually do not) materialize represents a calculated process.

Additional Big Food settlement activity occurs in cases of fraudulent labeling and marketing, some of which involve the use of words like *natural* and *healthy* (see U.S. Food & Drug Administration, 2017). The U.S. Food and Drug Administration (FDA) is responsible for monitoring food products and the health claims on food labels, sharing jurisdiction with the U.S. Federal Trade Commission on issues such as misbranding of food. However, the agencies lack "the enforcement authority to effectively deter food companies from making misleading claims," according to a recent Brookings Institution report (Negowetti 2014). If a food manufacturer violates an FDA regulation, "the agency's principal enforcement tool is to issue a Warning Letter to notify the manufacturer" (Negowetti 2014:3). The agency relies on voluntary compliance and rarely makes use of its enforcement authority to initiate criminal prosecutions because so many infractions are interpreted as minor violations. The possibility of more substantive corrective remedies exists 'on the books,' but the probability of seeing such measures in action is comparatively slim.

Functionally speaking, in the absence of effective state regulation, civil society organizations such as the Center for Science in the Public Interest (CSPI) have stepped in to fill the vacuum. In a lawsuit against Big Soda, the plaintiffs argue that these soda companies knowingly obscured the health problems their products contribute to, according to the executive director of CSPI, who explains in a recent *Forbes* article that "for years they have mounted a multi-million-dollar effort to persuade consumers that their products are benign—even healthful" (Huehnergarth 2017; see also O'Connor 2016). Without admitting any wrongdoing, PepsiCo. Inc. recently settled the class action lawsuit filed by the CSPI over the false and misleading representations in the labeling of its "Naked" brand juice (Taylor 2016). The settlement stipulates that, among other tweaks, PepsiCo, Inc. will reduce the font size of its "no sugar added" claim on Naked juice products by 75% for a period of five years (Gibson, Dunn & Crutcher 2017). Similarly, as a result of a recent false advertising settlement, Coca-Cola, Co. will label its "vitaminwater" products to include the words "with sweeteners" in a font size equal to the product name (The Praxis Project et al. 2017). Given these rather benign sanctions and the near-total likelihood of settlement, the risk of being found legally responsible for fraud in package labeling compared to the benefit of enticing customers with that same false and misleading label presents a structural benefit for Big Food, and a structural form of misinformation for actual and potential buyers of such products.[11]

[11] *If* the relationship between public health measures and food regulation is one that is primarily within the domain of "free choice" and "individual responsibility", then a) intentionally misleading claims on food packaging and b) the correspondingly anemic enforcement of laws that might conceivably deter such claims, renders that position indefensible and logically incoherent.

Column C phenomena *could* conceivably be placed at various sections of the right-most part of the spectrum, but instead, actions that might have otherwise been formally documented as crimes are exempt from a) the purview of criminal law and b) public recognition of such actions as crimes. In practice, they are regular, normal, and expected business practices. To the extent that some of these civil matters could be interpreted as crimes from a normative perspective, the regulatory public sector (i.e., the state) is less of a victim of such 'crimes' than an apathetic observer at best or an intentional accomplice.

Consistent with the understanding that corporate crime is – both empirically and conceptually – a function of a state-corporate relationship (Barak 2017; Leighton 2014; Chambliss et al. 2010; Matthews & Kauzlarich 2007; Friedrichs 2000; Chambliss & Zatz 1993), public-sector agents who are made aware of the details of these companies' fraudulent activities sometimes continue to business with them. In the Compass Group whistleblower case, for example, the Attorney General for Washington, DC, released a statement after the company's multi-million-dollar settlement that said that the company "has quite reasonably acknowledged and addressed mistakes it made in administering the contract to provide food and food services to DCPS…In light of its acceptance of responsibility, DCPS looks forward to continuing its contractual relationship with the company." Such a statement is consistent with the interpretation of deceptive and calculated actions as "mishaps," "accidents," and the result of a few "bad apples," implying that the case in question represents a deviation from an otherwise legitimate rule structure, as opposed to being a foreseeable and logical byproduct of the same (Chambliss 1978; see also Anand et al. 2005). Compass Group retained its contract with

DCPS for one more year until being replaced by a new DCPS agreement with another multi-billion-dollar food service management company (see Stein 2016).

Corporate Strategies and Legitimized Deviance [Column B]

It might be reasonable to assume a positive correlation between the punitiveness of a criminal law and the measurable harms it seeks to deter. However, criminal laws tend to be biased in overwhelmingly capturing activities that are both a) of public concern and b) of instrumental regulatory interest of the state (Michalowski 2016). Phenomena *not* of instrumental interest to the state (e.g., there is no incentive to punitively regulate or criminally prohibit) may escape the purview of criminal law entirely. The Food Fraud Spectrum – horizontally organized – captures fraudulent activity ranging from being explicitly illegal and unequivocally defined as a serious crime (the rightmost column) to activities that are not likely to be viewed as fraudulent.

Whereas Leon and Ken (2017) identified savvy and politically expedient practices that empower soda and snack companies to be entrusted with the national objective of "combatting childhood obesity", the public-private partnership examined in that case study is technically doing exactly as promised: promoting non-binding commitments and raising awareness about the importance of drinking water and moving about for thirty minutes a day. Arguing that there has been a victimization concerning fraud may be untenable, unless one views the concept of allowing ultra processed (i.e., junk) food companies to be positioned as progressive pioneers of public health as fundamentally – albeit normatively – fraudulent.

Leon & Ken (2017) document how major food corporations positioned themselves to be part of the efforts of Former First Lady Michelle Obama's campaign to combat childhood obesity, engaging in a systematic and strategic "corporate capture" (see Monks 2012a; Monks 2012b) through tactics more commonly understood in business school curricula as manifestations of Corporate Social Responsibility (Schuetze 2013) or market positioning (eCornell 2015). The conceptual integrity of CSR has been problematized for decades[12], but it remains a critical feature of the neoliberal landscape, where rhetorical ploys emphasize the importance of altruistic value systems that really only exist insofar as they are instrumental in furthering their ultimate goals" (Pearce 2009: 113; in Whyte ed. 2009). Other examples of corporate tactics embedded in neoliberal arrangements include a) manipulation of science, b) the corporate capture of science- and health-oriented institutions, c) the corporate capture of public health interventions, d) campaign financing and political lobbying, e) robust public relations campaigns, and f) symbolic, piecemeal concessions to deflate critiques. (Scott 2017; Stuckler et al. 2011).

Relatedly, Marion Nestle's book *Food Politics* (2002) describes how food companies have systematically worked the regulatory system by developing arrangements with nutrition experts for favorable acceptance and lawmakers who would otherwise regulate them. Indeed, sometimes these lawmakers and industry representatives are one in the same, given the well-documented "revolving door" between

[12] Economist Milton Friedman made his influential pronouncement in *Capitalism and Freedom* that, "There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits" (1962:133). Within this doctrine, any social initiative, whether meant to affect employees, communities, or customers, must be subsumed under the profit motive.

these spheres. Nestle notes that officials of regulatory agencies who later go to work for industry have valuable knowledge and relationships that help food companies avoid regulation or have it designed in their favor (Tempels et al. 2017). Conversely, food industry lobbyists comprise a large portion of the politically appointed positions in agencies, such as the US Department of Agriculture, that are meant to regulate and set the contract terms for food companies. For example, as many as 500 agency heads and staff at the US Department of Agriculture, which controls the large contracts with food companies that supply its programs, are political appointees. As a result, food companies have "undue influence" not just on our health but also on our "democratic political processes and institutions" generally (Nestle 2002:94) and on the institutions ostensibly designed to serve the public's health and safety interests specifically. It is important to underscore an observation made by Nestle (2002), who argues that despite the clear damage this state-corporate symbiosis does to a healthy populace, "most of the methods used by food companies to obtain sales advantages for their products meet the letter (if not the spirit) of the law" (Nestle 2002:166). She, along with other food studies scholars, express frustration that the forms of symbiosis they document are both legal and legitimized. We emphasize the nature of this latter process in our concluding section of the State-Corporate Food Fraud Spectrum.

Neoliberal Governance

An unintended consequence of focusing on *corporate* strategies (Column B) in a neoliberal climate is that it implies that the private sector has somehow bested the regulatory structure; as if the state is a passive, unwilling, or oppositional party to such processes. Big Food corporations like Coca Cola and Compass Group are not defrauding

the state, but being supported and legitimized by it. The leftmost column on the Food Fraud Spectrum captures harms and effects of Big Food that are made possible by the state-corporate symbiosis known as neoliberal governance. Corporations are guided by a profit-maximizing incentive structure that qualitatively differs from the organizational mandates of regulatory institutions focused on the public good. Of the many responsibilities that food corporations navigate, fiduciary responsibility to their shareholders is the primary organizational mandate. Additionally, successful and high-profile corporations – both past and present – generally influence the laws and regulations that govern them. One of the clearest manifestations of this influence is the associations or partnerships in which the private entities position themselves to be "part of the solution" (Leon & Ken 2017; Nixon et al. 2015), ostensibly agreeing to voluntarily regulate themselves as opposed to being subject to adversarial, restrictive, or otherwise formally imposed mechanisms of oversight. In this voluntarist configuration, profit-oriented entities are expected to competently prioritize regulatory needs – some of which are inherently unprofitable – counting on the state to curb or disincentivize harmful corporate activities. A cooperative relationship enables the co-constitution of corporate interests and state postures, in which corporations generate agendas that can be facilitated by state action, while those agendas come to define the priorities and approaches the state adopts (see Barak 2015; Kramer et al. 2002; Michalowski & Kramer 2006; Chambliss 1989). The direction of these approaches, so constituted, rarely prioritizes human and environmental well-being. Rather, state economic intervention has often been intended

to "save the corporate world, not secure civil society or ordinary citizens from the (known and predictable) predations of the market" (Comaroff 2011:144).[13]

Both conceptually and empirically, "the corporate form and the state are inextricably linked to the extent that in contemporary capitalism, each is a condition of existence of the other" (Tombs and Whyte 2015: 54).[14] The failure of the state to encode more robust regulatory frameworks is less of an accident, but "can result from the conscious pursuit of a 'business friendly' environment that minimizes criminal liability for corporations and their executives, regulates reluctantly and promotes weak, underfunded, even dysfunctional, regulatory agencies" (Leighton 2014: 77). In this arrangement, "actions that clearly are injurious fail to be included in penal codes because those who benefit from them have imposed their will on legislative bodies" (Dodge & Geis 2009: 1).

The state can and has directly facilitated the organizational mandates of private food companies (Simon 2006). From the US Dietary Guidelines to school meal regulations, the state's stance on what people should be eating is decided collaboratively—but not always publicly—by food corporations and lobbyists. Simon's work highlights the subtleties of how this complicity is accomplished, with government

[13] When considering state economic intervention, some scholars of the financial industry have studied the contradiction represented by corporate behemoths that are simultaneously too big to fail and too big to jail, placing regulators in the untenable (i.e., contradictory) position of having to punish *normal* capitalist behavior while also ensuring their continuation (Barak 2015: 526).

[14] Tombs and Whyte (2015) provide historical examples from the age of exploration and colonial era, where state entities granted corporate charters that would symbiotically benefit the sponsoring state and the sponsored private party. Today, economic indices continue to influence how political and legislative power-holders navigate the concerns of their constituencies. A thriving economy – no matter how disparate the distributive benefits – symbiotically benefits political incumbents and private coffers.

agencies such as the USDA and the Federal Trade Commission "stacking" their public meetings with what she calls "happy talk" about all the contributions that "conscientious" food companies make to "foster healthier choices" (Simon 2006: 163). She documents the agencies' ongoing attempts to dissuade lawsuits against food companies and the absence of public discussions that name food companies as the ones who engage in harmful marketing to children, the ones who lobby against scientifically generated nutrition guidelines, and the ones who may need to be regulated rather than "partnered with."

In studying the social networks of corporate board members, Lyson and Raymer (2000) found interlocking corporate directorates and other common ties among members of the board of directors in US based food and beverage corporations. Nearly two decades later, the intimacy of elite networks of capital remain, and for the sake of example, can be evidenced by the more notable 2010 holdings of the Bill & Melinda Gates Foundation, which include Berkshire Hathaway (Portfolio Rank #1), McDonald's (#2), Coca-Cola (#4), Walmart (#7), Coca-Cola FEMSA (#9) and Monsanto (Stuckler et al. 2011: 4). Berkshire Hathaway, the multinational conglomerate of the Democratic ally, Warren Buffet, had 2010 holdings that included Coca Cola (Portfolio Rank #1), Kraft Foods (#5), Walmart (#7), and Nestle (#23). Elite capital networks that are ostensibly external to the Big Food sector are nonetheless figuratively and literally invested in its continued growth and expansion. We have, then, not only a revolving door between the state and industry (Nestle 2002), and not only a heavy degree of industry influence in the state's agenda setting (Simon 2012), but also a massive degree of consolidation among a handful of mega-companies across the food and non-food chain, which is allowed and

fostered by the state (Hauter 2012:39). In all these ways and more, a case can easily be made that the state and the food industry act symbiotically to prioritize profit and stock value over human health.

Criminogenic Capitalist Law and the Moral Economy of Fraud

Referring to Figure 1 (the Food Fraud Spectrum), the text box and corresponding bracket titled "CRIMINOGENIC CAPITALIST LAW" is intended to convey the ideological, legal, and political superstructure in which the Food Fraud Spectrum exists. The existence of phenomena in the left-side columns of the Food Fraud Spectrum reflects this superstructure and guides what is and is not defined as fraudulent or criminal. Neoliberalism, as a logical extension of capitalist value systems, cannot be understood narrowly as a policy orientation or an economically-oriented regulatory model (see Whyte & Wiegratz 2017; Tombs & Whyte 2015; Steger & Roy 2010). Economic structures have a reciprocal and mirroring relationship with social, political, and *moral* values, and the phenomena contained within the Food Fraud Spectrum are in turn, reflective of a state-corporate hegemony embedded into the dominant claims in the moral economy.

On the Food Fraud Spectrum, as one moves towards extreme ends on the right side, one can expect strong legal and normative reactions that seek to punish the activity in question. As one moves towards the left-most end, there is an intellectually defended and widely celebrated belief system; some call it neoliberalism while others use iterative terms or phrases like "the power of free markets" or "private industry solutions" (Nixon et al. 2015). We place neoliberalism itself – and its familial concepts like corporate social

responsibility – on the Food Fraud Spectrum so that we might call attention to the "largely unseen offenses" that "not only cause economic and physical harms, [but] also undermine the legitimacy of the [regulatory] system" (Chambliss 1999: 156).

Arguments and ideological preferences in favor of capitalist, corporatist values do not exist solely among corporate representatives or private industry actors.A bifurcated understanding of the public-private divide is misleading, as it can be challenging to find any substantive difference in the overriding master ideology of those who might self-categorize as pertaining to either side. Additionally, the claim that "American legal jurisprudence *is* corporate jurisprudence" might seem, *prima facie*, radical or hyperbolic, but the privileges enjoyed by the corporate form can be understood as a logical result of larger belief systems.[15]

The Food Fraud Spectrum is our way of arguing that the very concept of neoliberal food regulation is a form of systematic state-corporate fraud. What's more, academic, political, economic, and media elites vigorously defend the ideological belief systems that are part-and-parcel to the Food Fraud Spectrum meta-structure. Similar to concepts like sunny night; scorching hot ice; cold-blooded mammals; and domestic transnational flights, there is no such thing as neoliberal food regulation. Whether it is an oxymoronic term or a conceptual contradiction is separate from the assertion that it is

[15] For example, the law schools whose graduates are perceived as being of the highest public and private pedigree also generate scholarship that influences the legal profession (Patrice 2016; Jackson 2016). The Yale Law Journal – one of the most highly regarded legal publications in the world – would likely include in its readership the entire federal judiciary, considering that every single Supreme Court Justice attended law school at either Harvard or Yale (Jackson 2016). In a 2008 publication in The Yale Law Journal, Diskant (2008) asserts that "corporations are under attack" and that "the area of arguably greatest risk to corporations in Modern America [is] criminal prosecution" (p. 128). The first three words of this article are "In Post-Enron America," consistent with the tone of disagreement with the ways in which the Department of Justice "aggressively" prosecuted Enron for their fraudulent activity (see Eisinger 2017).

instead, a conscious, intentional, state-sponsored arrangement to *decrease* the resources allocated to ensuring the integrity of our food and agricultural systems in the name of whatever economic indicator is in vogue (e.g., more jobs, lower taxes, more economic freedom, less costly regulation). Neoliberal food regulation is state-corporate (i.e., capitalist) food regulation, which suggests that whenever profit-oriented value systems (or moral claims) clash with claims prioritizing anything else, the former is likely to prevail. The consequences of such an arrangement are more far-reaching than the regulation of any other "consumer good" that exists; the production, distribution, and consumption of food is the foundation of human life. Every living person need not possess health insurance, an automobile with premium safety features, or a "Cadillac" legal defense, but all persons require food. The current regulatory structure that not only legitimizes the unrelenting and predatory sale of patently unhealthy products, but exempts these same entities from serious penalties when the pursuit of profit leads to death and disease, is reflective of a larger moral economy that has systematically incentivized such outcomes.

Discussion

Our development of a Food Fraud Spectrum is primarily intended to expose the harms, opportunity costs, and intentionally cryptic messaging that allows for the historical culprits of major public health crises to avoid financial losses or declines in growth through a hegemonic subsuming of public health and nutrition-related policy objectives. As one influential nutrition scholar, Kelly Brownell (2012) has stated,

> When the history of the world's attempt to address obesity is written, the greatest failure may be collaboration with and appeasement of the food

> industry. I expect history will look back with dismay on the celebration of baby steps industry takes (such as public–private partnerships with health organizations, 'healthy eating' campaigns, and corporate social responsibility initiatives) while it fights viciously against meaningful change (such as limits on marketing, taxes on products such as sugared beverages, and regulation of nutritional labeling).

A substantive critique of this work is that we are evoking concepts from criminal law to critique legal (and for many academic and non-academic audiences, legitimate) economic practices. The presentation of the left-most columns of our Food Fraud Spectrum seem to be at odds with systematically rational, competitive, and legal business practices. Well-intentioned and well-informed minds would understandably differ in their views for whether private-partnerships are the best method of advancing the public interest. The private sector has long been the backbone of innovative public projects, and in this process, private capital is typically leveraged to advance a private goal that "trickles down" to benefit collective good/service/system, even if the empirical basis for a "trickle down" effect is indefensible. Still, for this public-private investment to occur, there must be room for growth (e.g., profit), so that private capital is not used merely once and then exhausted. There would be no incentive to levy private capital for public works otherwise. We do not purport to condemn such a practice and argue for its abolishment, nor do we want to indirectly promote a false dichotomy of suggesting there is a decision to be made between having public-private partnerships or not having them at all. Collaborative governance can be viewed as a complement to conventional oversight and regulation instead of a self-standing alternative or replacement. The expectation that we are advancing an unpopular position, further pigeon-holing ourselves with the self-imposed label of being "critical" scholars, reflects a larger contest and structural conflict between opposing moral claims for preferred social-political-economic structures. What's

more, “more overtly than other forms of criminological research, the study of corporate lawbreaking has conjoined issues of values and politics with issues of science” (Yeager 2009: 5), resulting in enduring difficulties with defining, studying, and communicating about this topic of inquiry without running afoul of other elites across various public and private constituencies. Nevertheless, we offer the left-most columns of the Food Fraud Spectrum to add to the extant literature on how “institutionalization of routine fraud and corruption in both the Global North and the Global South [is] a key state-corporate strategy of power mongering in contemporary capitalist economies” (Whyte & Wiegratz 2017: 7; Whyte 2007; Wiegratz & Cesnulyte 2016).

For criminology to have a meaningful role in *preventing* threats to human life, the field must continuously and critically challenge the extent to which its subject matter is determined by lawmakers and state representatives, who may have entirely different incentives and objectives relative to the social scientist (Sellin 1938; Michalowski 2016). In closing, one broad consideration regarding harms perpetuated by the power elite (see Mills 1956) is that “nothing short of fundamental changes in the way crime is perceived and criminal law is enforced will suffice” (Chambliss 1999: 165). The Food Fraud Spectrum should be of use to anyone who buys and eats food as well as to those who have the difficult task in the current environment of balancing market-dominated ideology with concerns of public health and food justice. When one in ten people in the entire U.S. population has diabetes (National Diabetes Statistics Report 2017), when Type 2 diabetes is becoming increasingly common (Centers for Disease Control and Prevention 2017) and when heart disease accounts for more deaths than all cancers combined (Centers for Disease Control and Prevention 2016), it would be reasonable to

claim – at the very least – that an evidence-based regulatory framework for hazardous products (marketed to the public as food) has not only yet to be taken seriously by the state, but is removed from serious consideration entirely. More fundamentally, though, when our mode of nourishing ourselves is simultaneously harming – while depending – on the integrity of the biosphere and climate, perhaps there are larger moral considerations to be had before accepting as normal the corporate reductionism embedded in every time we are referred to as *consumers.* Such a state of affairs, of course, is subject to change, provided that the public imagines new systems for how we interact with food, guided by a reflection on the fraudulent and injurious features of existing ones. To that end, we offer the Food Fraud Spectrum to underscore some of the sociological dimensions embedded in every occasion that our collective eating habits are targeted by a measurably harmful state-corporate enterprise.

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