

Polluting **the** **Narrative**

How Air Pollution Becomes Legitimate in
Buffalo, New York

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About the Critical Corporate Theory Collection

The Critical Corporate Theory Collection is part of the *Systemic Justice Journal*, published by the Systemic Justice Project at Harvard Law School. The Collection is comprised of papers that analyze the role of corporate law in systemic injustices. The authors are Harvard Law students who were enrolled in Professor Jon Hanson's Corporations course in the spring of 2021.

The Collection addresses the premise that corporate law is a core underlying cause of most systemic injustices and social problems we face today. Each article explores how corporate law facilitates the creation and maintenance of institutions with tremendous wealth and power and provides those institutions a shared, single interest in capturing institutions, policies, lawmakers, and norms, which in turn further enhance that power and legitimates its unjust effects in producing systems of oppression and exploitation.

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ABSTRACT

This article takes a critical view of how corporate power exacerbates and excuses the harms of air pollution. By focusing on Buffalo, New York as a lens through which to consider problems of national scope, the paper explores the enduring issue of ozone pollution. Further, to introduce a comparison between pollutants and highlight how pollution harms real people, it connects ozone pollution with a horrifying example of benzene pollution. It discusses, and criticizes, several of the prominent narratives that justify ozone and other pollution, including suggestions that pollution is an inevitable consequence of economic growth or an outdated concern. Further, the article explains how law gives air pollution legitimacy, including how anti-pollution action can legitimize other unrestrained pollution. After, it describes how corporate deep capture of the economy and the political system has worsened and normalized ozone pollution. As a response to abstracted corporate power obscuring environmental harms, it recommends a shift to a human-centric, people power attitude toward air pollution. Crafting a new narrative is the first step in fighting for cleaner air.

Polluting the Narrative

How Air Pollution Becomes Legitimate in Buffalo,
New York

PART 1: THE COLLECTIVE AND INDIVIDUAL HARMS OF AIR POLLUTION

Air pollution kills. A lot of people. In the United States, over 100,000 people a year.¹ But air pollution does not just happen. It originates from cars, trucks, buildings, and factories.² And all those elements of our built-up environment ultimately originate from human decisionmaking. Corporate law, state power, and the dominant narratives of our society, however, function to excuse and obscure the choices that we make individually and together. The stories that are told, and the institutions that tell them, serve to hold up air pollution as a legitimate, unavoidable, and morally neutral phenomenon.

Further, air pollution, and the forces that cause and justify it, is ubiquitous across the country. To spotlight this problem, it is best to look at how it manifests in a particular geographic area. Going forward here, Buffalo, New York and surrounding municipalities will be that area.

¹ See Alan Neuhauser, *100,000 Americans Die from Air Pollution, Study Finds*, US News (Apr. 8, 2019) [<https://www.usnews.com/news/national-news/articles/2019-04-08/100-000-americans-die-from-air-pollution-study-finds>].

² Union of Concerned Scientists, *Cars, Trucks, Buses, and Air Pollution*, uscusa.org (Jul. 19, 2018) [<https://www.ucsusa.org/resources/cars-trucks-buses-and-air-pollution>]; Brady Seals and Leah Louis-Prescott, *Uncovering the Deadly Toll of Air Pollution from Buildings*, RMI (May 5, 2021) [<https://rmi.org/uncovering-the-deadly-toll-of-air-pollution-from-buildings/>].

Buffalo's Rust Belt economic history, environmental improvements, citizen activism, and lingering issues with ozone pollution all illustrate the dynamics at hand.

The bad news is that powerful institutions and ideologies continue to drive pollution into lungs. The good news, though, is that people can fight back. Indeed, dominant narratives that indulge industrial corporate wealth, and allow our political system to launder the harms it causes, are ripe for contestation.

The Clear Problem with Unclear Skies

Of the 100,000 or more Americans who die annually from air pollution, virtually none will go outside and immediately succumb from toxic fumes. Instead, these deaths occur when pollutants do cumulative damage to the basic systems that sustain human life.³ Acutely high levels of pollution can be the disruptor that throws the body into crisis. And so deaths are heart attacks, strokes, cancer, and even mortality from COVID-19 infection.⁴

And long before air pollution leads to premature death, it causes chronic conditions that reduce quality of life.⁵ It is no breeze to spend your days with diminished lung capacity and grasping for air. The lasting consequences of air pollution are particularly severe for children, who suffer from delayed intellectual development, stunted growth, and lifelong respiratory problems.⁶

But these burden do not just fall unequally on the basis of age. People

³ Emily Holden, *Tens of thousands of deaths linked to weak US air pollution rules – study*, THE GUARDIAN (Nov. 20, 2019) [<https://www.theguardian.com/environment/2019/nov/20/us-air-pollution-deaths-study-jama>].

⁴ *Id.*: Editorial Staff, *Understanding the link between COVID-19 Mortality and Air Pollution*, Each Breath Blog (Jan. 4, 2021) [<https://www.lung.org/blog/covid-19-mortality-and-air-pollution>].

⁵ *Id.*

⁶ American Lung Association, *Children and Air Pollution*, [<https://www.lung.org/clean-air/outdoors/who-is-at-risk/children-and-air-pollution>].

of color experience massively higher levels of exposure to air pollution than white people do.⁷ Recognizing that air pollution is a racial justice issue, many activists now use “environmental justice” to encapsulate how environmental problems intersect with race, ethnicity, and socioeconomic disparities.⁸

The scope of the air pollution problem – with overwhelming amounts of suffering spread across the nation – can erase the human dimension of this crisis. Consider, then, how it presents in Buffalo.

A Rust Belt Past and Persisting Pollution

Previously a hub of industry and manufacturing, Buffalo, New York epitomizes the late-20th century Rust Belt experience of economic decline.⁹ As factories shut their doors, “[the] shift of jobs out of manufacturing since the last 1970s was more pronounced in Buffalo than in any area in the country.”¹⁰ Deindustrialization improved air quality in the Rust Belt and in Buffalo, but this reduction came paired with economic crisis.¹¹ Understandably, Buffalonian collective memory connects environmental improvement and increasing poverty.¹²

The fact that pollution has decreased, however, does not mean it is gone.

⁷ Hiroko Tabuchi & Nadja Popovich, *People of Color Breathe More Hazardous Air. The Sources Are Everywhere.*, NYTIMES (Apr. 28, 2021) [<https://www.nytimes.com/2021/04/28/climate/air-pollution-minorities.html>].

⁸ Rick Mullin, *The rise of environmental justice*, c&en (Aug. 24, 2020) [<https://cen.acs.org/environment/pollution/rise-environmental-justice/98/i32>].

⁹ See Mark Goldman, CITY ON THE EDGE 315 (2007).

¹⁰ *Id.*

¹¹ See generally Matthew E. Kahn, *The Silver Lining of Rust Belt Manufacturing Decline*, JOURNAL OF URBAN ECONOMICS, VOL. 46, ISSUE 43 (1999).

¹² See Staff, *Closing of aging Huntley power plant will force a difficult, but manageable, transition*, BUFFALO NEWS (Aug. 27, 2015) [https://buffalonews.com/opinion/editorial/closing-of-aging-huntley-power-plant-will-force-a-difficult-but-manageable-transition/article_0ecc4b7a-df0c-53ac-b9e0-9e2e5f469c30.html].

Buffalonians experience lingering air pollution in extra doctor's visits and labored breaths.¹³ These human effects are devastating. A boy grows up with asthma likely triggered or exacerbated by his environment; his mother stricken with concern about her son's health.¹⁴ With the knowledge that communal action goes farther than any individual effort, Buffalonians organize into groups such as the Clean Air Coalition of Western New York.¹⁵

Further, the air pollution that plagues Buffalo takes many forms. Under the Clean Air Act, the EPA sets air quality standards for six "criteria" pollutants: carbon monoxide, lead, nitrogen dioxide, sulfur dioxide, particulate matter, and ozone.^{16,17} These compounds are created and cause harm in different ways. Much could be said about all six of these pollutants; with Buffalo as the area of focus, it is worth honing in on particulate matter and ozone.

Particulate matter comes both from direct emissions at industrial sites and through indirect atmospheric chemical reactions from emissions.¹⁸ It enters airways and the bloodstream, and is closely linked to premature death. In the present day, Buffalo's levels of particulate matter are described as among the best in the nation, although even "low" levels can be fatal.¹⁹ Nonetheless, it is indisputably accurate that

¹³ *Angelica A. Morrison, Minorities in Buffalo face high asthma rates, air pollution, WBFO* (Jan. 16, 2018) [<https://news.wbfo.org/post/minorities-buffalo-face-high-asthma-rates-air-pollution>]

¹⁴ *Id.*

¹⁵ Clean Air Coalition of Western New York, *About Us*. [<https://www.cacwny.org/about/>].

¹⁶ Ground-level ozone is distinct from stratospheric ozone, which occurs high in the atmosphere and forms the beneficial ozone layer that blocks solar radiation. From here on, "ozone" will refer to its presence at elevations inhabited by humans.

¹⁷ *NAAQS Table*, EPA [<https://www.epa.gov/criteria-air-pollutants/naqs-table>].

¹⁸ *Particle Pollution*, American Lung Association [<https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/particle-pollution>].

¹⁹ Alex Haight, *Erie County Gets Mixed Marks in Air Quality Report*, Spectrum Local News (Apr. 24, 2019)

Buffalo's air has a lower concentration of fine particulate matter than most other areas in the United States, and also lower than Buffalo's itself in prior years. Everything's all good?

Not really. Unlike particulate matter levels, ozone levels in Buffalo remain stubbornly high.²⁰ Ozone is not directly emitted by manmade sources but instead forms in the air after other molecules – generally human-created pollutants – react with sunlight and heat. Sources of those predecessor pollutants are diffuse, rather than traceable to one specific emitter.

Ozone is harmful even when not visible, but under certain conditions it is also the main component of smog. Smog, of course, reduces visibility. But it also leads to stinging eyes, throat pain, and chaos in the respiratory system. It gets worse: much like other air pollutants, ozone is also connected to reproductive problems, developmental delays, cardiovascular disease, harm to the central nervous system, and potentially early death.²¹

*Unlike particulate matter levels, ozone levels
in Buffalo remain stubbornly high.*

And so it is alarming that the American Lung Association has given Erie County, New York, where Buffalo is located, an “F” rating on ozone pollution.²² While media coverage claims Buffalo's air quality is “mixed” on the basis of low particulate levels, this portrayal seems misleading as long as the air also contains high amounts of deadly ozone.²³

[<https://spectrumlocalnews.com/nys/buffalo/news/2019/04/24/erie-county-gets-mixed-marks-in-air-quality-report>]; Jen Christensen, *Air pollution can kill even when it meets air quality guidelines, study says*, CNN (Aug. 21, 2019) [<https://www.cnn.com/2019/08/21/health/air-pollution-deaths-study>].

²⁰ *Id.*

²¹ *Ozone*, American Lung Association [<https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone>].

²² Haight, *supra* note 18.

²³ *Id.*

Admittedly, ozone is easier to avoid than most other air pollutions. Because ozone pollution is connected to warm sunny days, it reaches concerning levels only during certain weather conditions and times of the year. Weather forecasters issue warnings on days when ozone levels will be high.²⁴ Yet while these warnings allow people to adapt their behavior and preserve their health, they also represent a literal atmosphere of fear. Ozone turns warm summer days into hazards that must be monitored.

Furthermore, Buffalo suffers from the same environmental and health racial disparities that are found in national surveys.²⁵ When Black and Brown children have higher rates of asthma that force them to be extra cautious and stay indoors when white children do not have to do, high ozone levels manifest as racial segregation.

One single mother Latinx Buffalonian was given a “less than a year to live” due to severe respiratory illness caused by poor environmental factors.²⁶ She survived, and now finds her voice pushing leaders to understand how many harmful compounds persist and what they do to people.²⁷

Buffalonians deserve better than stifling air, and they could get it. The activities that emit the volatile organic compounds and nitrogen oxides that turn into ozone primarily involve combustion. These include cars, trucks, vehicles, factories, power plants, and even small sources like lawncare equipment.²⁸ Improving the technology behind these activities

²⁴ WKBW Staff, *Why an Air Quality Alert was Issued for Much of Western New York*, WKBW (May 25, 2018) [<https://www.wkbw.com/news/why-an-air-quality-alert-was-issued-for-much-of-western-new-york>].

²⁵ See Zuveria Shaguphta, *Air Pollution & Asthma Prevalence: Hotspot Analysis On Environmental Injustice in Buffalo New York* (2019) at 96. Graduate Dissertations and Theses. 118. [https://orb.binghamton.edu/dissertation_and_theses/118].

²⁶ Luz Velez, *Want to save the planet? Listen to those closest to the pain*, THE HILL (Mar. 4, 2020) [<https://thehill.com/changing-america/opinion/485924-want-to-save-the-planet-listen-to-communities-most-impacted-today>].

²⁷ *Id.*

²⁸ American Lung Association, *supra* note 20.

could substantially reduce ozone pollution.

Tonawanda Coke: A Nightmare, and With It, A Lesson

There's another air pollutant that matters in the Buffalo area: benzene. If ozone is bad – and it is very bad – benzene manages to be worse. Unlike ozone, where harms can disappear in low enough concentrations, benzene has “no safe level of exposure.”²⁹ Benzene is a known carcinogen that is also linked to anemia and a weakened immune system.³⁰ Acute exposure to high benzene levels can cause an altered mental state, accompanied with pain, loss of consciousness and possibly immediate death.³¹ While benzene is not a “criteria” pollutant, it is still closely regulated by the EPA.

When coal is turned into “coke,” a fuel used in steel production, benzene emerges. Equipment can scrub this benzene from the air, but if controls are not used or used incorrectly, benzene will escape into the atmosphere and endanger nearby individuals.

That “if” sometimes becomes a disturbing reality. Turn your attention to Tonawanda, a community on Buffalo's north border dotted with factories. One of those factories was Tonawanda Coke.

For decades, residents knew something was wrong with Tonawanda Coke. Some emissions were to be expected, but Tonawanda Coke's dark, acrid smoke raised eyebrows even among those accustomed to the sight of pluming stacks.³² Neighbors who lived closest to the factory

²⁹ World Health Organization, *Exposure to Benzene: A Major Public Health Concern* (2010) [<https://www.who.int/ipcs/features/benzene.pdf>].

³⁰ *Id.*

³¹ *Id.*

³² Elizabeth Shogren, Sandra Bartlett, & Kristen Lombardi, *N.Y. Plant's Neighbors Expose Regulatory Gaps*, NPR (Nov. 10, 2011). [<https://www.npr.org/2011/11/10/142189390/tonawanda-provides-lessons-for-fighting-toxic-air>].

encountered unpleasant smells, and spotted bizarre “blue fog.”³³

Eyes and noses were not the only way to perceive the problem. Those who lived near Tonawanda Coke were getting sick. They had “breathing problems, rashes, unexplained infertility and all kinds of cancers.”³⁴ And yet Tonawanda Coke escaped government scrutiny. The state denied there was a problem.

Tonawandans refused to take inaction as an answer. Forming the Clean Air Coalition, they cooperated to monitor the air.³⁵ They found shockingly high levels of a substance that, ideally, humans should not be exposed to at all. Armed with irrefutable evidence of benzene leaks, these activists went to work pressuring the state. It took years. Eventually, though, the government investigated Tonawanda Coke.

The outcome surprised no one who paid attention. Tonawanda Coke was dilapidated and filled with outdated control equipment; the factory’s management was failing to abide by pollution standards and then lying about their overall emission levels.³⁶ So severe was the misconduct that the government took the rare step of pursuing Clean Air Act criminal charges against the Tonawanda Coke corporation and its environmental manager. The environmental manager, Mark L. Kamholz, was convicted and sentenced to one year in prison.³⁷

Tonawanda Coke was also convicted, and received a \$24 million dollar fine.³⁸ The sentencing judge reassured Tonawanda Coke that it would survive the fine. “This is not a corporate death sentence,” [Chief U.S.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ T.J. Pignataro and Phil Fairbanks, *Tonawanda Coke ordered to pay 24 million*, BUFFALO NEWS (Mar. 20, 2014) [https://buffalonews.com/news/local/crime-and-courts/tonawanda-coke-ordered-to-pay-24-million/article_e2513e2b-c08f-5c2e-b4bc-b88235889446.html].

³⁷ *Id.*

³⁸ *Id.*

District Judge William M.] Skretny said. “This will sting, but I think it’s doable.”³⁹

The sentencing judge reassured Tonawanda Coke that it would survive the fine. “This is not a corporate death sentence,” [Chief U.S. District Judge William M.] Skretny said. “This will sting, but I think it’s doable.”

And yes, Tonawanda Coke kept operating. Although it agreed to significantly reduce benzene emissions, neighbors persisted in opposing the factory. With exasperation, they continued to emphasize that there is no safe level of benzene. Perhaps not surprisingly, after Tonawanda Coke survived the fine, it did not change its ways. Four years later, in 2018, a state investigation found continued “egregious” environmental violations.⁴⁰ This time, finally, the state permanently shut down Tonawanda Coke.

Benzene degrades quickly in the atmosphere, so Tonawandans now face little continuing additional risk from past emissions. Still, no courtroom judgment or regulatory order will ameliorate the lasting effects from years of exposure, including the additional years after Tonawanda Coke’s criminal conviction. And the factory now scars the landscape as a massive clean-up site for solid waste containing many kinds of recently detected pollutants.⁴¹

The Tonawanda Coke story prompts many emotions. That those running the corporation would put profits over the health of people is repulsive. That the state took so long to investigate is infuriating. That

³⁹ *Id.*

⁴⁰ Harold McNeil, *State orders Tonawanda Coke shutdown after ‘egregious violations’*, BUFFALO NEWS (July 21, 2018) [https://buffalonews.com/news/local/state-orders-tonawanda-coke-shut-down-after-egregious-violations/article_9b50596f-f7da-5340-ba9f-e91fe16218b8.html].

⁴¹ Phil Fairbanks, *At Tonawanda Coke, one toxic cleanup turns into four*, BUFFALO NEWS (Feb. 18, 2020, updated Aug. 27, 2020) [https://buffalonews.com/news/local/at-tonawanda-coke-one-toxic-cleanup-turns-into-four/article_1c6d8ae5-c3e2-56e0-9942-c819a8f48130.html].

the sentencing judge explicitly kept the fine low enough to preserve the company's economic existence is outrageous. That regulators gave so many undeserved chances boggles comprehension. But that the people stood up, and never stopped fighting for their own health and environment when others would not, is inspirational.

Ozone and Benzene: A Lens into Corporate Power, Narrative, and State Legitimacy

These two pollution stories are being told together for a reason. They show how environmental harms exist and endure in the Buffalo area, and more, they reveal insight into how society views pollution. The legal system and dominant narratives have a powerful inclination to accept pollution as a facet of the world, and this acquiescence to a poisoned reality tends to grant legitimacy onto pollutants. But human bodies do not care whether a harmful compound is state-approved. They get sick anyway.

But human bodies do not care whether a harmful compound is state-approved. They get sick anyway.

The benzene that poisoned Tonawandans was equally toxic before and after the government acknowledged its existence. So too, is ozone no less damaging because our laws allow it to accumulate in abundance.⁴²

Next, then, is an exploration of what narratives and accounts allow pollution to run rampant in the air. The short answer is that wealth and power never fail to make excuses for their own existence. The long answer follows.

PART 2: AIR POLLUTION AS A COST OF DOING BUSINESS

The modern United States is the wealthiest society in history. To account for this level of development, most point to its full-hearted

⁴² See Christensen, *supra* note 18 (documenting that allowable levels of air pollution are still dangerous.)

embrace of capitalism.⁴³

American capitalism, though, has varied. The role of the state can be small, as in the laissez-faire late 19th century, or quite large, as during the Great Depression and New Deal.⁴⁴ Given that American government is rooted in democratic participation, then, presumably the public will calibrate its desired balance of state economic intervention. That includes environmental regulation. But this assumption is too simple.

It's Inevitable, It's Getting Better, It's The Law

A few standard refrains emerge to minimize environmentalist concerns over air pollution. The first is to say pollution is an inevitable consequence of economic growth.⁴⁵ To an extent, this is true: providing goods and services uses resources and generates byproducts.

But beyond that base level, this argument seizes on fears that strict regulations render polluting operations financially insolvent and destroy the local or national economy. Again, this worry is especially salient in Buffalo.⁴⁶ In reality, job losses there stemmed from trade policy with competitive disadvantages based on labor costs; no amount of environmental deregulation would have prevented these positions from disappearing.⁴⁷ In fact, a more robust regulatory framework could

⁴³ James Pethokoukis, *10 reasons why America is so much richer than other rich nations*, AEIdeas, American Enterprise Institute (Mar. 13, 2017) [<https://www.aei.org/economics/10-reasons-why-america-is-so-much-richer-than-other-rich-nations/>].

⁴⁴ Joel M. Ngugi, *Forgetting Lochner in the Journey from Plan to Market: The Framing Effect of the Market Rhetoric in Market-Oriented Reforms*, 56 BUFFALO L. REV. 1, 12 (2008) (discussing evolution of the market versus the state).

⁴⁵ Dwight R. Lee, *The Efficient Amount of Pollution*, Foundation for Economic education (May 1, 2001) [<https://fee.org/articles/the-efficient-amount-of-pollution/>].

⁴⁶ See Oliver Milman, *Scott Pruitt hails era of environmental deregulation in speech at coal mine*, THE GUARDIAN (Apr. 13, 2017) [<https://www.theguardian.com/environment/2017/apr/13/scott-pruitt-epa-coal-mining-deregulation-speech>].

⁴⁷ See Goldman at 312, *supra* note 9 (discussing Buffalo manufacturing moving to Mexico for cheap labor costs).

have guided factories to pursue the latest technology and given them a better shot at competing in the global marketplace.⁴⁸

It also is evident that air pollution can significantly *harm* economic growth. Children who grow up choked by ozone encounter educational difficulties that reduce their productivity in adulthood.⁴⁹ Prevailing anti-environmentalist narratives fail to account for these detrimental forces.

Conversely, a second response about air pollution relies on the fact that both Buffalo and the United States as a whole have enjoyed considerable declines in overall air pollution during the last few decades.⁵⁰

The pernicious part of this progress framing comes when it is deployed to argue that already-achieved reductions should satisfy environmentalists, and that it is time to refocus on industrial development.⁵¹ Let it not be forgotten that environmental progress has come during an era where the Environment Protection Agency (EPA) has, over the long term, steadily tightened controls. If the government reverses policy, conditions very well may reverse too.

Let it not be forgotten that environmental progress has come during an era where the Environment Protection Agency (EPA) has, over the long term, steadily tightened controls. If the government reverses policy, conditions

⁴⁸ David B. Goldstein, *A Child of the Rust Belt* (Dec. 13, 2017), NRDC [https://www.nrdc.org/experts/david-b-goldstein/child-rust-belt?_ga=2.10717620.1242198636.1620354267-1213560265.1620354267].

⁴⁹ Austin Frakt, *How Pollution Can Hurt the Health of the Economy*, NYTimes (Nov. 27, 2018) [<https://www.nytimes.com/2018/11/27/upshot/how-pollution-can-hurt-the-health-of-the-economy.html>].

⁵⁰ Stephen Moore, *State of the Planet: Better than Ever*, Heritage Foundation (May 7, 2015) [<https://www.heritage.org/environment/commentary/state-the-planet-better-ever>].

⁵¹ Steven F. Hayward, *Refuting Myths About Air Pollution*, AEI (Jan. 1, 2008) [<https://www.aei.org/articles/refuting-myths-about-air-pollution/>].

very well may reverse too.

Indeed, perversely, the third standard defense of pollution derives from the existence of the EPA and other regulatory agencies. Businesses don't just pump what they want into the atmosphere. American society now has a robust set of institutions – legislatures that issue statutory commands, agencies that enforce them, and courts that examine regulations – to handle air pollution.

However, this framework also serves as a powerful grant of reputational validity to pollution. Contemplate the language: polluters apply for and receive *permits*. And assuming they follow the terms of those authorizations, any harms that arise from those *permitted* emissions will generally go without legal repercussion. So while the human body cannot discern a difference between authorized and unauthorized pollution, the law surely does.

Now, look how that law enters into existence. At core, this narrative advances, policy begins with democratic elections and works its way through representatives and the administrative state into a final form. All along the way, respectable and esteemed public officials, academics, and judges have the opportunity to opine on the wisdom of air pollution policy. The regulatory state will claim to balance the costs and benefits of a rule. As a consequence, the final rules – even when they authorize activity that generates unsafe ozone levels – shine with legitimacy.⁵²

Corporations Do What We Want Them To Do

The corporate form is a legal fiction that exists to serve a useful function: efficiently aggregating and utilizing resources. In our market economy, that leads to profit. Corporations exist to maximize their profits and distribute it to shareholders. Nothing more. Still, the dominant market ideology asserts that this dynamic carries along benefits to the rest of society.

Conceding that corporations may enable an efficient distribution of wealth and resources, such an allocation may still present as unfair or morally troubling. Consequently, government institutions can come in

⁵² Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, *Annu. Rev. Psychol.* 2006 57:375-400, at 382.

to remedy any perceived unfairness.

Thus, while corporations fulfill their profit maximization priorities, they will follow environmental laws. The narrative appraises these corporations not as villains but as rational actors; when they pollute, they are polluting to the extent allowed.

The narrative appraises these corporations not as villains but as rational actors; when they pollute, they are polluting to the extent allowed.

This view says that if the people have a problem with pollution, they can talk to their representatives and vote in the next election. That's the system. In other words, the public should avoid asking corporations to fulfill a duty it was never designed to. Surely, some communities will evaluate the balance of pollution and production differently than others, set rules accordingly, and their environment will reflect these preferences.

Corporations thus are absolved of responsibility; they punt any obligations beyond those owed to shareholders over to democratic institutions. As Milton Friedman put it: “[T]here is one and only one social responsibility of business to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.”⁵³

Finally, another element of this dominant narrative is that corporations are satisfying consumer demand. There are no pollution factories. There are factories and businesses and power plants that meet the needs and requests of society, and pollution is a side effect.⁵⁴ Picture it this way: on the field known as the economy, corporations are balls, and consumers

⁵³ Milton Friedman, CAPITALISM AND FREEDOM 160 (1962).

⁵⁴ Lloyd Alter, *Is It True That '100 Companies are Responsible for 71% of Carbon Emissions'?*, Treehugger (Sep. 28, 2020) [<https://www.treehugger.com/is-it-true-100-companies-responsible-carbon-emissions-5079649>] (“In other words, if we don't buy what they are selling, they go out of business. If we stop consuming, then they stop producing.”)

are the sticks that push them around.

Air Pollution Wrongdoers Get Punished

Once air pollution restrictions successfully navigate through government and attain their sheen of authority, the only remaining concern is enforcement. Yet when the regulatory hammer comes down, it may implicitly boost the perceived validity of other emissions.

Return, now, to Tonawanda Coke. Much of the coverage centered not on the atrocious harms suffered by residents, but that those harms resulted from Tonawanda Coke breaking the law. When the company was closed down in 2018, then-State Senator, and now U.S. Representative, Chris Jacobs targeted special scorn at Tonawanda Coke's "refusal to comply with consent decrees and insistence on ignoring health and safety requirements" and warned that its "willful neglect of the law cannot be tolerated."⁵⁵

Tonawanda Coke, in fact, was foolish enough to ignore a legal system that had punished it in with one hand and offered legitimacy with the other. No less an authority than a U.S. District Court Judge, William Skretny, simultaneously condemned Tonawanda Coke while striving to preserve the company's existence. Go ahead: poison your neighbors, get caught, pay the cost of doing business, and then all's forgiven. Until you do it again.

*Go ahead: poison your neighbors, get caught,
pay the cost of doing business, and then all's
forgiven.*

Even after Tonawanda Coke ran out of chances, the outcry at its misdeeds arguably could diminish concern about other pollution sources. The public surely notices what pollutants garner penalties: leaking benzene will send someone to jail and end a company. Ozone just brings an advisory from the weatherman. Eventually, research shows, people will rationalize this status quo.⁵⁶

⁵⁵ McNeil, *supra* note 38.

⁵⁶ Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications*

PART 3: A SYSTEM THAT SUSTAINS CORPORATE POWER RATHER THAN HUMAN LIFE

When the game feels rigged, it is.⁵⁷ The American legal system and the economy inevitably tilt the playing field toward corporate polluters.

Corporations Don't Breathe, But They Sure Do Speak

“With no physical body,” the corporation will never struggle for oxygen.⁵⁸ By transcending human biology, the corporate form facilitates environmental cruelty and medical horror.

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Corporations are operated and owned by people with bodies, needless to say. But these people are legally obligated – by fiduciary duties – to uphold a non-existent entity’s wellbeing. Otherwise, they can be swiftly replaced with another pawn who is ready to carry out the corporation’s best interest. And shareholders? Most will care little about who does what and how, as long as they get returns.

Moreover, the corporate voice speaks loud in the American system. As described above, the democratic institutions that channel popular will into policy are subject to corruption and co-optation. Corporations, having concentrated wealth in their own hands, can now spend that

for Law, Legal Advocacy, and Social Justice in IDEOLOGY, PSYCHOLOGY AND LAW 82 (Jon Hanson ed., 2012).

⁵⁷ Amy Gardner, *Elizabeth Warren: ‘The Game is Rigged’*, WASHPOST (Sep. 5, 2012) [<https://www.washingtonpost.com/news/post-politics/wp/2012/09/05/elizabeth-warren-the-game-is-rigged/>].

⁵⁸ Adam Winkler, *WE THE CORPORATIONS: HOW AMERICA’S BUSINESS WON THEIR CIVIL RIGHTS* 50-52 (2018).

wealth directly and indirectly on advantages for their preferred candidates. This eviscerates Friedman's idea that corporations should receive no moral judgment if they follow the rules, because many times they're also writing those rules.

Here's how corporate capture of the state works. Rep. Chris Collins, a conservative Republican, represented much of the greater Buffalo area. Before entering politics, Collins was a successful businessman. After becoming a politician, he found support from corporate donors who shared his free market perspective.⁵⁹ This is not to say that Collins was necessarily relinquishing himself to corporate control. Rather, corporate "deep capture" through societal narratives ensured that Collins already had arrived at these views.

During the Obama administration, Collins seized on his district's trauma from deindustrialization and blasted new ozone regulations as "job-destroying."⁶⁰ In 2016, he was the first member of Congress to endorse Donald Trump.⁶¹ And then, during Trump's presidency, the EPA repeatedly refused to heed scientific calls to tighten ozone controls.⁶²

Collins was far from the sole reason for Trump's deregulatory agenda. He demonstrates, though, how corporate capture can wind up from local concerns all the way to the national agenda. To be sure, our democratic system has no place for restrictions on Collins' capacity to speak out on

⁵⁹ Dylan Scott, *House Republican: my donors told me to pass the tax bill "or don't ever call me again"*, Vox, (Nov. 7, 2017) [<https://www.vox.com/policy-and-politics/2017/11/7/16618038/house-republicans-tax-bill-donors-chris-collins>].

⁶⁰ Press Release, Office of Rep. Chris Collins, *Collins Reacts to Obama Administration's Newest Job Destroying Regulation* (Nov 26, 2014) [https://www.legistorm.com/stormfeed/view_rss/590376/member/2902/title/collins-reacts-to-obama-administrations-newest-job-destroying-regulation.html].

⁶¹ Jeremy Diamond, *First congressman to back Trump: 'We need a chief executive'*, CNN (Feb. 24, 2016) [<https://www.cnn.com/2016/02/24/politics/congressman-chris-collins-endorses-donald-trump/>].

⁶² Juliet Eilperin, *Trump administration keeps existing smog limits, rejecting calls to toughen them*, WASHPOST, (Dec. 23, 2021) [<https://www.washingtonpost.com/climate-environment/2020/12/23/trump-smog-rule/>].

policy issues. But through donations and psychological capture, corporate interests exploit widely agreed upon free speech principles to infiltrate government.

Therefore, the polluter's playbook is simple: don't break the rules. Just make them.

*Therefore, the polluter's playbook is simple:
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Peddle fear in your community, spend money to get favorable politicians elected, and influence the policymaking process. Rinse, wash, and repeat.

Bigger Corporation, Bigger Problem

Corporate law's encouragement of mergers and acquisitions makes all these issues worse. Polluters hide wrongdoing in a web of ownership, or create megabrands that become impossible to challenge. The relatively small Tonawanda Coke eventually succumbed to people power. Good luck, however, taking on ExxonMobil.

In fact, global climate change ushered in by the world's largest corporations exacerbates Buffalo's ozone problems.⁶³ Contrary to narratives that suggest communities control their own emissions levels, inevitable record warmth in Buffalo will generate more ozone heavy days and stunt local anti-pollution measures.

Consolidated corporate dominance also shows how despite ozone now being legitimized as a fact of life, it is a constructed problem.

In 1950, Buffalo's urban streetcar system was removed as part of a national effort by automobile companies to hasten a car-based economy.⁶⁴ In following decades, Buffalo was plagued by high crime

⁶³ Union of Concerned Scientists, *Rising Temperatures, Worsening Ozone Pollution*, (June 2011).

⁶⁴ Adrian Gamble, *Buffalo's 180-Year Streetcar History Linked to the City's Changing Fortunes*, Skyrise Cities (Jan. 20, 2017) [<https://skyrisecities.com/news/2017/01/buffalos-180-year-streetcar-history-linked->

rates that fueled suburban flight.⁶⁵ Recent studies indicate that those elevated crime levels were partially connected to elevated lead levels in the population, from cars filled with leaded gasoline.⁶⁶ So corporate forces hollowed the city from the inside out through infrastructure destruction and toxic fumes – and created a population distribution pattern such that many residents depend on cars. Those same vehicles go on to contribute to the ozone levels that still plague the era today.

Change is in the Air, Too

This story can be bleak, but it is not hopeless. The inspiring activism that shut down Tonawanda Coke can be brought to bear on ozone rules as well. Growing awareness of environmental concerns has the potential to uproot persistent excuses for corporate polluters. And an environmentally conscious presidential administration promises to reshape the regulatory landscape.

Yet, what is truly needed is a reframing of the narrative to highlight humanity, and those most actually battling the ravages of pollution. Think back to the pages you just read. You learned the names of those with traditional power – a manager, a judge, politicians. But the individuals suffering harm were written only with descriptions.

Did you notice that disparity? If not, take it as a sign of what needs to change. These are not abstractions, but real people. Jeani Thomson, the neighbor with multiple cancers caused by Tonawanda Coke.⁶⁷ Luz Velez, the activist who won't let respiratory problems silence her voice.⁶⁸ Victor Small, the boy with asthma, and his mother, Laticka.⁶⁹ As corporate law

[citys-changing-fortunes](#)].

⁶⁵ This flight was also motivated by racism among white residents.

⁶⁶ Kevin Drum, *Lead: America's Real Criminal Element*, Mother Jones (Jan./Feb. 2013) [<https://www.motherjones.com/environment/2016/02/lead-exposure-gasoline-crime-increase-children-health/>]

⁶⁷ Shogren, *supra* note 30.

⁶⁸ Velez, *supra* note 24.

⁶⁹ Morrison, *supra* note 13.

attempts to make pollution abstract, keep it human.

CONCLUSION

Buffalo's ozone problem is not unique. Countless other cities suffer from ozone, and other air pollutants. Widely shared problems, though, can lead to widely shared solutions. It is time to adopt a critical eye toward the mainstream accounts of good pollution and bad pollution, and to look deeper than the veneer that our institutions place on environmental harms.

Air pollution is a choice. And it is no surprise that a system built up to be dominated by corporate interests keeps choosing it. The people, however, can reject that system. They can begin to cleanse the narrative.

FURTHER READING

Erik M. Conway and Naomi Oreskes, *MERCHANTS OF DOUBT* (2010).

Mark Goldman, *CITY ON THE EDGE: BUFFALO, NEW YORK* (2007).

ENDNOTES

