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THE MYTHS AND REALITIES OF DETERRENCE IN WORKPLACE SAFETY REGULATION

Steve Tombs and David Whyte*

Given the proliferation of the use of deterrence in neo-liberal crime control policies, it is remarkable that this concept remains absent from the study and practice of corporate regulation. The paper explores this absence in the regulation literature, highlighting a series of widely accepted myths about deterrence in this literature, myths that have also been reproduced in British policy debates. Having discussed the enduring, if hidden, adherence to deterrence across this literature, we then go on to discuss the significant absences of deterrence and, in doing so, we focus specifically upon the dynamics of law enforcement, as it applies in the case of UK workplace health and safety law. The paper concludes that only through a careful consideration of the politics and praxis of law enforcement can we adequately grasp the context of the regulation of workplace safety—what the proper place of deterrence is and how it might be better secured.

Keywords: deterrence, enforcement, regulation, compliance, occupational health and safety, corporate manslaughter

Introduction

The rise of neo-liberal crime control policies has been closely linked to a revival of deterrence theory in a wide range of contexts that include situational crime prevention and various forms of 'shaming'. This multifaceted revision and repackaging of deterrence theory has been largely driven by its political attractiveness and ready-made policy applications (Cullen *et al.* 2008). This is, of course, only part of the story. When we look to the range of policy solutions offered to deal with *corporate* offending, the principle of deterrence is either absent, or is reframed conveniently to advocate 'self-regulation' and 'internal systems of compliance', rather than strict enforcement of the law or more intense surveillance (Paternoster and Simpson 1993: 54).

This apparent absence of deterrence theory in corporate regulation is remarkable in the current climate. Although no one could have possibly noticed from reading much of the contemporary academic literature on regulation, the United Kingdom is currently undergoing a seismic shift in the regulation of worker safety. The current government has initiated the withdrawal of inspectorial scrutiny from the large majority of British workplaces via a flexible, ideological use of the concept of 'low-risk' work (James *et al.* 2013; Tombs and Whyte 2013*b*). Business Secretary Vince Cable has announced that, from April 2013, 'hundreds of thousands of businesses' will be exempt from 'burdensome, regular health and safety inspections' (cited in Department for Business, Innovation and Skills 2012). In future, businesses will only face such inspections and

* David Whyte, Department of Sociology, Social Policy and Criminology, University of Liverpool Eleanor Rathbone Building, Bedford Street South, Liverpool, L69 7ZA, UK; David.Whyte@liverpool.ac.uk; Steve Tombs, Open University; UK; steve.tombs@open.ac.uk.

only if they are operating in a small number of government-defined hazardous industries, in the event of some serious incidents or deaths (Taylor 2012) or if the regulator identifies a track record of poor performance. These blanket exemptions from routine inspection extend across health, education, prisons and emergency services, public transport including buses and airports, the postal services, agriculture, docks, electricity generation and 'light' manufacturing, including light engineering, plastics and rubber, printing and electrical engineering. Thus, the vast majority of UK employers will be effectively left to self-regulate. Remarkably, this situation has emerged whilst governmental and media claims of health and safety *over*regulation dominate popular discourse (Almond 2009).

This is of no little significance, because, despite appearances very much to the contrary, across the range of academic regulatory studies, there remains a curious fixation with the concept of deterrence. As we shall indicate, this concept, at least in the context of discussions of regulatory strategy and enforcement, is widely agreed to be antediluvian and irrelevant; at the same time, it seems to us that a concept of deterrence in fact remains at the very heart of much regulation scholarship—the same scholarship that consistently dismisses the concept as irrelevant—albeit that this presence is barely recognized or acknowledged. Moreover, this lack of acknowledgement means that, in fact, academic commentaries produce and reproduce all kinds of mistaken and mystifying understandings of the significance of deterrence in the regulatory field. It is with a reconsideration of the significance of deterrence that this paper is concerned.

We begin with a critique of the commonplace rejection of 'deterrence theorists' across regulation literature, highlighting a series of misconceptions regarding the theory and practice of deterrence in regulation. We then point to some widely accepted myths about deterrence in this literature—myths which have also been reproduced in British policy debates. Having discussed the enduring, if hidden, adherence to deterrence across this literature, we then go on to discuss the significant absences of deterrence and, in doing so, we focus specifically upon the dynamics of law enforcement, within an empirical focus on UK health and safety law enforcement. In short, we argue that only through a careful consideration of the politics and praxis of law *enforcement* can we adequately grasp the context of the regulation of workplace safety—and thus what the proper place of deterrence is and how it might be better secured.

The Myths of Deterrence: Beyond Dualisms

In a recent article in this Journal, Almond and Colover (2012) contrast two schools of thought in the regulation literature: a '"deterrence school" of thought' and a 'regulatory orthodoxy'. The former advocates 'tough penalties and a proactive enforcement strategy' and is inherently punitive, based upon a prescriptive, command-and-control model of regulation. In contrast, what they term the 'regulatory orthodoxy' suggests a more selective use of the threat of prosecution as a 'last resort' (Almond and Colover 2012: 1010) and, in general:

> ... gives support to approaches that utilize enforcement rarely and prioritize compliance-centred, accommodative, self-regulatory strategies of risk *management* …. Under this view, adversarial

enforcement action only occurs in a limited number of cases when alternative approaches have been tried and failed. (Almond and Colover 2012: 1000, and references therein, emphasis in original)

It is not our intention in this paper to consider the extent to which a regulatory orthodoxy does or does not exist; nor to consider how it has emerged and is sustained, nor to identify its key claims, representatives, texts and so on. But we do wish to start from the point that, across a heterogeneous variety of regulation scholars, there is a generalized rejection of 'deterrence-based' approaches. Thus, for example, scholars who describe or prescribe compliance-oriented (Hawkins 1984), twin-track (Gunningham and Johnstone 1999), smart (Gunningham and Grabosky 1998), problem-solving (Sparrow 2000), risk-based (Hutter 2001), private or market-based (Hutter 2006) and most significantly those who advocate varieties of responsive regulation (Ayres and Braithwaite 1992)—including really responsive or really responsive risk-based regulation (Black and Baldwin 2010)—all assume that what is generally referred to as 'command-and-control' regulation, where the state prescribes closely what constitutes compliance and then responds punitively on the basis of a deterrence-oriented approach, is unsustainable.

Recognition of this latter 'fact' is generally dated back to the 1980s, when, politically, the emergence of neo-liberal governments meant widespread aim was taken at a variety of programmes for regulating private economic activity, whilst academically descriptions of and prescriptions for compliance-oriented enforcement and self-regulatory strategies began to gather momentum. Some two decades later, a new political and academic common-sense around the viability of regulatory strategies had emerged. Typically, then, Hutter has claimed that the late 1980s 'witnessed a growing disillusionment with state regulation' (Hutter 2006: 1) and that, in the United States and Europe, 'there was a strong deregulatory rhetoric, centring on claims of overregulation, legalism, inflexibility and an alleged absence of attention being paid to the costs of regulation' (Hutter 2011*a*: 10; 2011*b*: 460). As Hutter notes, these 'shifts' were linked to wider changes regarding new public management, the decentring of the state and a shift from government to governance (Brady 2007: 5–6). The momentum of such 'shifts' was overwhelming:

> In business regulation circles these days, there is not much contesting of the conclusion that consistent punishment of business non-compliance would be a bad policy, and that persuasion is normally the better way to go when there is reason to suspect that cooperation with attempting to secure compliance will be forthcoming. (Braithwaite 2002: 20)
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> During the 1980s, a shift began in the public service in the western world from administration to management, with the expectation that results would be achieved in a fast, efficient, and innovative manner .... Disillusionment with a command-and-control style of regulation promoted interest in cooperative compliance, a style of regulation that relied less on coercion and obedience and more on education and persuasion. (Job *et al.* 2007: 88)
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> ... an earlier, simplified view of regulation—in this case, a view focused on the mechanisms by which regulators seek to control business behavior. Under the traditional view, these mechanisms—sometimes referred to as 'command-and-control' regulations—would impose specific, unyielding mandates on firms in an effort to solve public problems. (Carrigan and Coglianese 2011: 114)

Thus, by the start of the twenty-first century, there was a consensus amongst regulatory scholars that a shift away from the 'command-and-control approach' had not only

been 'necessitated' (Ojo 2009: 9), but was 'widely accepted by policy-makers' (Vickers 2008: 216). This command-and-control approach based upon an explicit principle of deterrence had been fatally undermined since hegemonic claims relating to its 'inefficient, costly, stifling innovation, inviting enforcement difficulties and focusing on "end-of-pipe" solutions' had 'been widely accepted' in regulatory reform initiatives taking place worldwide, not least through the OECD (Fairman and Yapp 2005: 492–3; see also Vickers 2008) and other international economic organizations.

Yet, as we will argue, a deterrence enforcement philosophy transmitted via command-and-control regulation has *never* featured predominantly in any liberal democratic system of *corporate* regulation. Notwithstanding temporal, geographical and sectoral differences, empirical studies of a range of regulatory bodies across various jurisdictions overwhelmingly point to the facts that non-enforcement of the law is the most frequently found characteristic in regulatory regimes; enforcement; activity tends to focus upon the smallest and weakest individuals and organizations; and sanctions following regulatory activity are invariably light (Snider 1993: 120–4). In this sense, then, reference to 'pathologies of command and control' (Hawkins 2002: 15) invokes an ideal–typical characterization of an imagined regulatory system. Thus, the idea of deterrence, as it is applied in the field of corporate regulation, serves the function of a myth: to act as some kind of cautionary tale or a sacred narrative which explains exactly why the regulatory system is the way it is and why it has to be so.

The invoking of this myth as a means of justifying a particular regulatory strategy is by no means confined to academic critiques of regulatory and enforcement styles; indeed, it is a myth that has been a highly convenient one for politicians seeking to impress business. In a key speech to the CBI by Gordon Brown as UK Chancellor of the Exchequer (at a time when he was enthusiastically driving a business-friendly strategy of reregulation), he told the CBI:

> In the old regulatory model—and for more than one hundred years—the implicit principle from health and safety to the administration of tax and financial services has been, irrespective of known risks or past results, 100 per cent inspection whether it be premises, procedures or practices. (Brown 2005)

Brown's contrived revulsion for an era that never actually existed mirrors the same mythical cautionary tale that we find in the mainstream scholarship on regulation. In fact, despite Brown's characterization of the 'old regulatory model' in the United Kingdom, the Factory Inspectorate was estimated, even at its high point, to carry out a general inspection of each workplace within its ambit 'at least once every four years' (Robens 1972: 61). The Hazards Campaign has estimated that, in 2009, this rate had plummeted to once every 38.4 years (Hazards Magazine 2010). Yet, still, as we indicate at various points through this paper, the dominant, consensual political claim remains that businesses are overburdened not just with health and safety regulation in general, but with the reality and threat of health and safety inspection in particular (and see James *et al.* 2013).

In UK politics, then, it is the re-imagination of a central straw person within this myth—the figure of the inspector who strictly enforces the law—which pervades and underpins claims regarding overregulation, and the creation of unnecessary, state-initiated burdens on productive enterprise. The same straw person has also been located by some academic commentary at the centre of 'the problem of regulatory

unreasonableness' (Bardach and Kagan 2002). Yet, what is notable in both the political and academic 'commonsense' is the lack of attention given to the clearest and most empirical evidence that would render such claims incredible. There is a myth of deterrence at the core of this common-sense—a myth that is revealed by the perennial low level of resources granted to regulatory agencies and the persistently low—if, recently, rapidly declining—levels of regulatory oversight this permits. We return to the implications of this for how we understand the current state of workplace regulation in the section 'The Absence of Deterrence', below. In the meantime, we turn to discuss how a mythical concept of deterrence persists in the regulation scholarship, even on the part of those who appear to have departed furthest from the rhetoric of deterrence.

The Presence of Deterrence

We should begin by stating the obvious: namely that consideration of deterrence in relation to preventing and responding to corporate crimes in general and safety crimes in particular is often made in classic literature on 'white-collar crime' (Chambliss 1967; Geis 1996). True, these considerations often remain relatively undeveloped and, at their core, they were little more than an effort to take seriously Sutherland's oft-cited characterization of the corporation:

> The corporation probably comes closer to the 'economic man' and to 'pure reason' than any person or any other organization. The executives and directors not only have explicit and consistent objectives of maximum pecuniary gain but also have research and accountancy departments by which precise determination of results is facilitated. (Sutherland 1983: 236)

Deterrence theory, of course, is based upon the idea that individual conduct is shaped by the costs and benefits that might follow as consequences of that conduct—a rational calculation that weighs the chances of being caught and the severity of the punishment against the 'benefits' of committing a crime. It invokes Bentham's *homo economicus*, the self-interested, rational-thinking 'economic man'. In conceptual terms, deterrence theory has been most commonly challenged on two counts. First, rational choice depends upon the subject having perfect knowledge of the risks of being caught. Second, rational choice depends upon individuals being capable of exercising rational judgment. Indeed, as Bourdieu (1998) has argued, the precondition for all rational conduct is the ability of the subject to imagine the consequences of a decision in the future. For deterrence to work, the subject must be 'future-oriented'.

Generally, the model is applied to those who are *least* capable of acting rationally. We have overwhelmingly persuasive evidence from theoretical argument and empirical data to show that relatively low-status offenders are in no position to respond to rational choice/deterrence-based forms of crime control. In short, the ability to act rationally is severely compromised where people do not have any control over the social conditions that shape their present and their future. Conversely, companies and their senior officers have a much higher degree of motivation and ability to consider the long-term consequences of their decisions, including the likelihood of detection and the severity of sanctions to their business and their social position; they are, as a result of their access to resources and the structure of motivation within which they are socialized, likely to be much more 'future-oriented'.

Although, as individuals, directors and senior managers are unlikely to possess the information necessary to calculate rationally—in precise terms—the probability of detection and punishment, large bureaucratic organizations do generally have access to sophisticated information-gathering systems and thus to make far better-informed operational and strategic decisions. Both companies and their directors are in a position to—indeed are required to—make decisions which, if not based upon perfect knowledge, are based upon a range of knowledge resources available to them which allow them to determine options in a calculative sense.

There are numerous concrete ways in which we can ascribe rationality to the corporation—none of which means that any particular corporation can or does act entirely rationally at all times. Internally, a corporation generates inward- and outward-facing legitimacy through its efforts to act as a rational entity: it has a formal structure, which includes formal divisions of labour, mechanisms of governance and lines of accountability within those mechanisms, and formal means of reporting; it has established mechanisms for distributing rewards, benefits and censures; it generates strategic plans and operates through a plethora of written documents, plans, procedures, policies and so on; it sets targets; it generates a mass of information. In all of these ways, one might argue, it continually seeks the future-oriented control of unpredictability and uncertainty (Box 1983) through mechanisms based upon formal, calculative rationality. Through these legal and operating rationalities, a corporation seeks at the very least *to present itself* to external environments as rational. Now, whether corporations actually act rationally, or according to some 'organizational politics' or 'political citizen' rationale (Kreisberg 1976), or muddle their way through in decision-making terms via some 'garbage-can' model of decision making (Cohen *et al.* 1972), this representation of themselves, whether aspiration or obfuscation, is essential to their existence. Moreover, it is also central to claims made by them and for them as regards appropriate forms of regulation—specifically regarding their motivation and capacities effectively to comply with law in the absence of external law enforcement. In short, then, deterrence theory is *in principle* relevant to the structure of corporate and white-collar crime, whereas it is very rarely relevant in cases of 'street crime'.

Although 'deterrence theorists' are frequently criticized on the basis that deterrence-based schemas imply rationality on the part of the regulated, this rather obscures the converse—that those who argue that deterrence-based forms of regulation are inappropriate also do so on the basis of a rational actor model of the corporation, whether they recognize this or not. Let us explore this latter point in a little more detail.

In a text which has gained 'canonical' status (Parker 2013: 2), Ayres and Braithwaite develop the idea of responsive regulation—a concept that has been applied, developed, tested, affirmed and subjected to critique across Australasia, North America and Western Europe in a diverse range of contexts from 'corrections to school bullying to international peacemaking' (Burford and Adams 2004: 12; Nielsen and Parker 2009: 376–7; Wood *et al.* 2010). Central to responsive regulation is the prescription of a regulatory enforcement strategy which these authors characterize in terms of a regulatory pyramid. Most regulatory activity with most companies involves forms of self-regulation, whilst the most punitive tactics need only to be resorted to in dealings with a small number of firms—hence the self-regulatory base is far larger than the punitive peak. Thus, most companies have 'demonstrably effective self-regulatory systems', so that 'scarce regulatory resources' should be 'concentrated on companies that play fast

and loose' (Ayres and Braithwaite 1992: 129). Companies that failed to demonstrate effective self-regulation would be 'told that they will be targeted for more interventionist direct enforcement' (Braithwaite and Fisse 1987: 245). Thus, they envisage a schema of 'escalating interventions'—culminating for the most recalcitrant companies in the most severe sanction of licence revocation (Braithwaite and Fisse 1987: 35), a sanction virtually unheard of with respect to corporations—which would operate on a 'tit-for-tat', 'carrot and stick' basis. In short, the threat of credible enforcement is the guarantor upon which all other forms of intervention in the regulatory pyramid rest. There is no way to read this approach other than as a system of deterrence, based upon the assumption that most companies for most of the time will behave rationally, even if they need to be nudged externally to do so, in order to avoid more punitive, interventionist regulatory attention.

Elsewhere, we have noted how this system of deterrence and its offsprings, such as Gunningham and Johnstone's (1999) 'two-track' system of regulation, have been used by policy makers to justify the withdrawal of regulatory resources and the move away from both inspection regimes and enforcement practices (Tombs and Whyte 2010*a*; 2010*b*). It is a shift that began in the midst of Labour's 2001–05 Government with the imposition of a twin- or two-track regulation model in which regulatory interventions were to be targeted at the worst offenders (Tombs and Whyte 2010*b*). Despite the lack of theoretical justification or empirical evidence supporting such an approach, the institutionalization of a twin-track regulation model in UK regulatory agencies was based upon the idea that the vast majority of corporations are 'good performers' (Hampton 2005: 4), which, *because they take rational decisions to comply*, are viable candidates for self-regulation.

A rather different—and increasingly now voluminous—variant within regulation literature has sought to establish a 'risk-regulation' paradigm (see, e.g. Black and Baldwin 2010). This is significant, for risk-based regulation increasingly forms the basis for regulatory policy across a wide range of regulatory areas in diverse national contexts (Tombs and Whyte 2006; 2013*a*). This literature shares several assumptions with responsive and twin-track regulation perspectives. One is familiar: that state resources are not and never will be sufficient for the task of overseeing compliance with regulation (and, indeed, that state capacities in general have dwindled and will continue to do so). Second is that this requires a targeting of regulatory resources at those firms or sectors where risk is greater or the chances of non-compliance are more significant, or both. Third is the assumption that the preferred regulatory option is to leave the management of risks to institutions beyond the state—notably to business organizations and their managements themselves, but also other private actors including trade associations, insurers and investors—so that corporations should be encouraged to act as responsibilized, self-managing, risk-mitigating organizations. A fourth assumption is that this is not only desirable, but also feasible, because corporations can and do have moral commitments to preventing and mitigating risks.

Those shared assumptions are only made credible by granting a high degree of rationality on the part of corporations and the claim that, specifically, managements within these can identify and act upon rational corporate self-interest. And this is where we come across a fundamental—if not *the* fundamental—contradiction that runs through the regulation literature: *it is only on the basis of ascribing rational action to 'the corporation' that it is possible to depart from a regulatory schema based upon deterrence, a*

departure which itself is based upon ascribing rational action to the corporation. In the absence of a set of rather idealised assumptions about corporate rationality, it is difficult to see any basis upon which many contemporary claims for compliance–in the absence of deterrent-based interventions–can be sustained. Even if it is something that is never acknowledged, the basic premise of deterrence is at the heart of some of the key texts and claims of contemporary regulatory scholarship.

The Absence of Deterrence

The conceptual confusion at the heart of regulation scholarship regarding the idea that most corporations for most of the time can be trusted effectively to self-regulate raises the possibility that there is something other than its analytical robustness which explains its appeal. Elsewhere, we have argued that much regulation scholarship has a *political* appeal to contemporary policy makers (Tombs and Whyte 2013*b*). Crucial here is that this scholarship can be invoked by governments to justify the withdrawal of enforcement resources, not simply to justify 'no-cost' compliance outcomes, but in fact to support claims that overall levels of compliance can be *improved* at the same time as inspection and enforcement are diminished. Thus, Ayres and Braithwaite grounded their concept of responsive regulation in the need to focus upon limited regulatory resources—and the pyramid enforcement schema which they develop is central to this task, focusing limited regulatory resources on those amongst the regulated who present the greatest risk through recalcitrance. A similar rationale lies behind Gunningham and Johnstone's twin-track regulatory schema. Further, this logic is precisely that which sits at the heart of risk-based, targeted enforcement which informs governmental regulatory policy. Such conceptual schemas, then, provide perfect cover for the contemporary rhetoric used to justify the allocation of ever-decreasing levels of regulatory resources.

Now the issue at stake here is not merely the recognition of limits to regulatory resources; after all, this is a recognition that is by definition present in analyses of all publically funded functions. Rather, what we find in this scholarship is a starting recognition that corporate regulators have never been granted anything comparable to the resources that various branches of police forces or other mainstream criminal justice agencies have (e.g. Box 1983; Snider 1993; Sutherland 1983)—an analysis which seemingly builds upon *whilst forgetting* this fact. This is a subtle omission that creates a major distortion in regulatory studies. This distortion has consequences for the political appeal of 'orthodox' regulatory scholarship. Notwithstanding the intentions of its proponents, there is *a logical affinity* between the mainstream regulation literature and the declining credibility of regulatory intervention—so that responsive, twin-track and risk-based regulation are all vulnerable to effective deregulation (Tombs and Whyte 2013*b*).

If we take as an example the regulation of deaths, injuries and illnesses caused by work in the United Kingdom, then we see how regulators can offer little more than a symbolic response to the problem they are charged with monitoring and controlling.

UK Health and Safety Executive headline data for fatal occupational injury only reflect a fraction of such deaths by fatal injury, understating the actual total each year by an order of anywhere from five to six times (Tombs 1999; Tombs and Whyte 2007). This distortion is not only significant, but symptomatic—for it simply sidelines the experience of workers' struggles for recognition of the full magnitude of the risks which they face at work. Thus, at the most basic level of counting the numbers killed,

injured or made ill annually by work, the role that counter-hegemonic workers groups have had in struggles to recognize the extent of the scale of the problem is crucial. This is most obvious in struggles to capture the toll of death as a result of occupational illness as opposed to injury. The HSE does not report an annual figure for such deaths, but its latest (2012) statement notes that 'Over 12,000 deaths each year are estimated to have been caused by past exposure at work—primarily exposure to chemicals and dusts'.[1] This is a far more significant number than the annual headline figure—some 60 times greater, in fact, shedding a rather different political light on the scale of the problem which regulation is designed to address.

But there are even greater estimates of the scale of annual deaths. For example, long-term research by the Hazards movement, drawing upon a range of estimates derived from studies (some commissioned by HSE) of occupational and environmental cancers, the percentages of heart-disease deaths which have a work-related cause, as well as percentage estimates of other diseases to which work can be a contributory cause, such as Parkinson's, Alzheimer's, Motor-Neurone Disease, rheumatoid arthritis, chemical neurotoxicity, auto-immune conditions and restrictive lung diseases, adds up to a convincing—and lower-end—estimate of deaths from work-related illness in the United Kingdom of up to 50,000 a year, or more than four times the HSE estimate (Palmer 2008). This is a figure that has been supported in the academic research that has seriously attempted to generate a global figure of deaths caused by work. O'Neill *et al.* (2007) produce a UK estimate of up to 40,000 annual deaths caused by work-related cancers alone.

In a context in which, as we note above, most workplaces in the United Kingdom are currently being removed from inspection regimes, our capacity to know about both the extent of harms and the extent to which those harms may have been criminally produced is being reduced to a minimum. A decade ago, research by the Centre for Corporate Accountability (2002) found that only a very small proportion of cases of work-caused cancers and other diseases were reported to HSE; the majority of those that were reported were not investigated; and, of those investigated, less than 1 per cent are prosecuted. This process, which, as we have shown elsewhere, acts as a 'regulatory filter' (Tombs and Whyte 2007) ensures that only a negligible fraction of deaths that have been criminally caused by employers attracts even a token response by enforcement agencies. In this context, any prospect of deterrence through the certainty and severity of punishment begins to melt into thin air.

This section has indicated one empirical example of a general principle of corporate regulation in liberal democratic systems that endures across jurisdictions and across time: that regulatory systems cannot be based on anything approximating a 'command-and-control' system of strict enforcement. Whilst we have focused upon the regulation of death, injury and disease caused by working in the United Kingdom, the gaping chasm between the scale of the problem and the scale of resources required to maintain even a minimal presence that we point to in this example is one that is generalizable across corporate regulation in liberal democracies. A recognition of the magnitude of the scale of work-related deaths and harms in general in the preceding paragraphs, juxtaposed with indications of the level of surveillance of these, forces us to ask very

[1] www.hse.gov.uk/statistics/causdis/index.htm.

stark questions about the absence of resources that governments allocate to surveillance and regulation.

If this is a fairly glaring absence in the ideal regulatory system that is, according to most regulatory scholarship, supposed to be based upon a foundation of deterrence, it is one that is now taken for granted in academic discussion. It is a point that is taken for granted particularly in analyses of law reforms and their implications. This seems even more incongruous in a period that witnessed the emergence of a politics which encouraged the 'entrepreneurialism' of the business class over the enforcement of protective law. Removing the burdens from business looks very much like class politics conducted under another name. The impact of the Labour Government's intervention on behalf of the business-owning class has been devastating. Elsewhere, we have shown how the HSE Field Operations Directorate—the division of HSE that carries out the vast majority of inspections of workplaces in the United Kingdom—had, in the last decade of Labour Governments, reduced their planned inspections to over a third (a fall of 69 per cent) of the previous total (Tombs and Whyte 2010*a*; 2010*b*).[2] The velocity of this decline is explained partly as a result of declining resources, and partly as a result of a shift to a 'targeted intervention' strategy. The years between 1999/2000 and 2009/10 also saw a 49 per cent decline in the investigation of major injuries—and, by 2012, only one in 20 major injuries were even investigated by HSE (O'Neill 2012)—as well as a 29 per cent fall in the number of all types of enforcement notices issued by HSE, and all health and safety prosecutions almost halved (Tombs and Whyte 2010*a*; 2010*b*).

This rapid decline in enforcement activity represents a very explicit abandonment of any principle of general deterrence. We refer here to the classic binary distinction made between 'general' and 'specific' deterrence effects. As Davis notes in relation to UK health and safety law:

> The general deterrent effect depends on employers anticipating that they are likely to receive an inspection/investigation and are likely to be punished in the event of non-compliance. The higher the expectation of detection and punishment the greater the general deterrent effect will be. The second type of deterrent effect is specific to the firm that has been inspected. As a consequence of this 'specific' deterrent effect, individual firms will take action following a negative inspection possibly through the fear that a failure to comply with inspectors' requests will result in future prosecution. (Davis 2004: 44)

In so far as the narrative accompanying the collapse of inspection and enforcement regimes in the United Kingdom during the first decade of this century stressed a renewed 'targeted intervention' strategy which sought to target the minority of recalcitrant offenders, what was proposed in this period was a shift towards a model of specific deterrence.

But even any ideal of specific deterrence is now more illusory than real. If the data on regulatory activity in the decade up to 2010 display a remarkable consistency—dramatic downturns in inspection, investigation and formal enforcement action, including prosecution—it appears yet more remarkable that all major political parties went into the 2010 General Election promoting the still-consensual view that businesses remained overburdened by health and safety law and its enforcement. Within two

[2] Incidentally, a comparable trend in the Environment Agency shows a decline in inspections at a similar rate (Whyte 2010).

years of government, and following several key policy documents and inquiries (for a discussion, see Tombs and Whyte 2013*a*; 2013*b*), the Coalition had announced that funding for the HSE would be cut by a further 35 per cent over five years. Then, in March 2011, the Department for Work and Pensions announced that the 'HSE will reduce its proactive inspections by one third (around 11,000 inspections per year)' (Department for Work and Pensions 2011: 9). Those targets, introduced explicitly as an encouragement to business and entrepreneurship, are to be achieved by a formal extension of the Labour government's risk-based targeting strategy. This extension involves the removal of businesses captured by a broad definition of 'low-risk' work from HSE inspection regimes (see Tombs and Whyte 2013*a*). A widening range of industrial activities have been defined as 'low-risk' by government ministers, including work in agriculture and docks—traditionally industries with some of the highest fatality, injury and illness rates. Only a small core of government-defined hazardous industries are likely to remain under the scrutiny of HSE inspection regimes. The same DWP call for reduced inspections applied also to Local Authorities, which also enforce health and safety law; here, downturns have been even more dramatic, with an 86 per cent decline in numbers of inspections from the DWP's 'baseline year', namely from 118,000 in 2009/10 to 16,176 inspections for 2012/13 (Health and Safety Executive/Local Authority Enforcement Liaison Committee 2013: 2). In short, what this means is that where Labour's emasculation of the regulatory regime sought at best a specific deterrence in the case of a minority of bad apple offenders, the current government have abandoned—in the majority of workplaces—even this specific deterrence principle that sought to intervene against the few.

In short, it seems difficult—at best—to sustain any claim that there is a credible threat of enforcement in UK workplaces. Any attempt at generating a principle of general deterrence through law has all but disappeared. Yet, this remarkable absence of law enforcement remains barely acknowledged in the burgeoning volume of research on regulation.

This is one further observation that we can make about the enforcement of workplace safety law in the United Kingdom today. We have shown elsewhere that the second Labour Government of 2001–05 embarked upon a renewed reform of regulatory enforcement which was based upon an aggressive assault upon 'red tape' in order to remove 'burdens on business'. Yet, throughout this period, the key statute that protects workers, the Health and Safety at Work Act, remained untouched. Thus, as Carson's (1979; 1980*a*; 1980*b*) work on the emergence of the Factories Acts demonstrated, it was not the process of parliamentary law reform, but the fractious *implementation* of the Factory Acts that was decisive in shaping the *form* of law. If the process of law creation in Parliament was an exercise in ensuring a viable class society, then its implementation laid bare the class character of the form that the law would take. And the class character of the law was most clear in the *enforcement* of the law rather than the symbolic introduction of measures that were often necessary in order to preserve the law's legitimacy.

The dynamic of deterrence always has a class character. We would argue that this class character permeates all forms of crime control, but here confine our comments to tracing out how this character reveals itself in the field of corporate regulation. The following section begins to do this by asking what the place of workers is in the context of deterrence.

Class and Struggle: A Further Absence

The role of workers in guaranteeing regulatory outcomes is rarely remarked upon in the dominant regulatory literature (the 'orthodoxy'). Yet, there is overwhelming empirical evidence beyond the mainstream regulation literature which testifies to the centrality of this role. This evidence shows that the safest workplaces are those workplaces that have active and well-organized collective representation (James and Walters 2002; Reilly *et al.* 1995; Walters *et al.* 2005). This suggests that the relative strength of workers in the workplace is the key factor in the amelioration of harms to which they may be exposed, often illegally. This does not equate to saying that the work of external inspectorates is relatively insignificant. In fact, we might more usefully view collective organization at the level of the workplace and external regulation as being mutually supportive—that is, there is a 'positive synergy and mutual reinforcement' between legal and social regulation (Dicken 2012). Thus, we might say that the level of regulation and its enforcement are produced dialectically.

To fully understand how the process of workplace safety regulation actually works, it remains crucial also to explore regulation and enforcement as sites of ongoing struggle. Again, this is a feature which is absent from most studies of regulation: rarely does one find any sense of pro- and anti-regulatory forces engaged in struggle over the existence and shape of the law, or indeed of health and safety law in particular (for notable examples, see Snider 1987; Tucker 1990; Bittle 2012). All too often, one encounters references to 'the public', alongside a sense that law emerges as if naturally or relatively spontaneously in relation to a political and legal problem which somehow—often autonomously—simply demand resolution. In Almond and Colover's (2012) discussion of the Corporate Manslaughter and Corporate Homicide Act 2007, there is reference to 'politicians and the public', but not to victims, campaigners, trades unions, divisions within political elites, branches of government or the state, business organizations or regulators themselves (though, on the latter, see Almond 2004). Written out of this brief, historical back-story is any sense of partisanship or struggle[3]—an observation which may seem tangential, but which is ultimately very revealing. The Act had in fact been the subject of a long (13-year) intense struggle (Tombs and Whyte 2003; Tombs 2013). The consequence of this long period of contestation was that many of those pro-regulatory organizations which had campaigned most vehemently for the law were highly critical of the form in which it was ultimately passed. As the Bill passed through to enactment in 2007, Families Against Corporate Killers[4]—a group of families bereaved by work-related death, established in 2006—were scathing of it for its omission of directors' duties, its reference to senior management and the limited range of penalties then envisaged to follow from convictions under it (Families Against Corporate Killers 2006).

The energetic challenges to this 'reform' process—in effect a renewed struggle over the minutiae of the organization of production (Szasz 1984)—by trade unions, rank-and-file workers organizations such as Hazards and campaign groups such as Families

[3] In fact, there is passing, vague reference to 'influential lobby groups'—though no sense of who these were—and to the 'trade union constituency' (Almond and Colover 2012: 1000).

[4] FACK seeks 'urgent government action to halt the complacency about deaths at work and decent laws with will bring dangerously negligent bosses to justice. fack wants a review of the way work-related deaths are investigated and the way families are treated. And it believes workers and safety reps must be given more rights to protect themselves against exposure to unacceptable risks to their lives and health' (www.hazardscampaign.org.uk/fack/about/index.htm).

Against Corporate Killers has been conducted below the surface of visible debate. The struggle for this Act may have galvanized a number of social and workers' movements into taking collective action, and this legacy will certainly continue. Yet, any collective action to make the Corporate Manslaughter and Homicide Act work will proceed on the basis that it has done more to undermine, rather than strengthen, the deterrent effect of the law in this field.

If the role of workers or their organizations is rarely a primary concern for regulation scholars, this is not to say that such considerations have been entirely absent from such work. Notably, Ayres and Braithwaite emphasized that the most fruitful context for effective responsive regulation is a regulatory context characterized by tripartism (see also Wright and Head 2009), within which organized countervailing interests to corporate power are genuinely empowered (Ayres and Braithwaite 1992: 54–100). Such interests include organized labour. Tripartism fosters cooperation in regulatory encounters in a way that both minimizes capture and corruption and is likely to generate higher levels of compliance with law. The modern UK system of health and safety regulation is indeed founded on tripartism, both at policy level, through the HSE Board which comprises employer and employee representation, as well as at workplace level through the safety representatives and safety committees system which at least guarantees employee representation in occupational health and safety in workplaces where trades unions are recognized.

But this system of tripartite regulation seems now, not least in the context of the empirical trends noted above, to be in a state of virtual disrepair (Tombs and Whyte 2012; 2013*a*). The retreat of proactive inspection and enforcement clearly brings the regulatory significance of the day-to-day regulatory functions of workers themselves, the monitoring role of worker organizations and the safety management role of systems of workplace safety committees into sharp focus. Ominously, it is likely that more generalized attacks on workers' rights under conditions of austerity in the United Kingdom will certainly restrict the ability of workers and their organizations to fill the emerging regulatory vacuum in health and safety.

Workers' struggles for deterrence are not undertaken naively. No workers' organizations in the United Kingdom have ever argued that state regulation—or the credible threat of law enforcement—is enough to protect them. But the removal of surveillance sends a message to employers that they might endanger workers' lives and livelihoods with greater impunity. It is clear in the public debates and texts produced both by the trade unions and by the rank-and-file Hazards movements that this message is heard resoundingly by workers and their representatives, *if not even more decisively that it is heard by their employers*. The significance of enforcement is mediated through an ongoing struggle within and around workplaces between capital and labour. The decline of enforcement does not indicate an absence of deterrence in any complete sense, but it does indicate a crucial weakening in the leverage of an alternative source of deterrence, namely organized labour, and the wider Hazards movement.

Conclusion

We can agree with the 'regulatory orthodoxy' that the historic (and, indeed, contemporary) level of regulatory oversight of workplace health and safety has made, and continues to make, anything approaching an effective system of more punitive and

interventionist regulation difficult. But, beyond this observation, mainstream regulatory scholarship is incapable of interpreting the reality of contemporary regulation because of the strange and contradictory fixation it has with deterrence theory. Contemporary regulatory scholarship simultaneously denies its own basis in rational choice and deterrence theory whilst at the same time down-playing the crucial shifts that are undermining any credible deterrence in neo-liberal social orders.

There are three points that we argue need to be accepted in order to develop a more dialectical understanding of the place of deterrence in contemporary regulation systems.

First, we do not accept that the fact of limited regulatory resources needs to be read as an existent reality, at worst forgotten and at best treated as an immutable organizing parameter for considerations of feasible regulation. Further, the various regulatory schemas of the 'orthodoxy' themselves are based upon a failure to scrutinize what constitutes a credible threat of enforcement. Thus, it is incumbent upon any set of arguments which are based upon, first, the threat of credible enforcement even as 'last resort' and, second, upon a level of regulatory intelligence capable of determining which workplaces are more or less hazardous to have some awareness of regulatory activity in terms of actual enforcement and levels of inspectorial coverage. Such data are notable for their absence from the regulatory orthodoxy. And this means that regulation scholarship is oblivious to the significant differences across groups of workers to protect themselves which are precipitated by changes in the resources allocated to enforcement. It is for this reason that contemporary regulatory scholarship remains unmoved by the current wholesale withdrawal of regulatory scrutiny from UK workplaces.

Second, however, what the low and declining level of inspectorial resources and activity points to is the need to identify other counter-veiling pressures and sources of information on employers and workplace conditions. Most obviously, as acknowledged, for example, by Ayres, Braithwaite and Fisse, in their claims that responsive and self-regulation work best in organizations with tripartite arrangements, the key counter-veiling force, in the halt context of safety and health, is workers, and more specifically organized labour. And so it is surprising that, for scholars in the regulatory orthodoxy, the decisive role of *workers as regulators of the workplace* barely features in texts that analyse occupational safety and health regulation. This is a telling omission.

The perspective that we have developed this paper has commonly been misread as a crude defence of enforcement as a totalising regulatory strategy (see, e.g. Braithwaite 2010); such a claim is generally couched within highly simplified dichotomies: self-regulation *versus* strict enforcement, consensus *versus* conflict or, for Almond and Colover (2012), an orthodoxy *versus* deterrence theory. Such binary approaches to understanding regulation can lead nowhere, because the question about regulation is never an either/or choice. Thirdly, then, from our perspective, regulation is a complex process of mediation, a struggle to negotiate a path between competing social forces; in advanced capitalist societies, it is a process which generally seeks to translate class conflict into the language and practice of liberal-democracy. Enforcement, or any other 'reactive' or 'proactive' regulatory activity, has precisely this purpose: it is a means of translating socially embedded social conflict into something that can be managed by the state. Thus, no one form of regulatory activity is any kind of magic bullet which can tame or sanitize business. But this does *not* mean that different regulatory strategies cannot

have very different material and symbolic significances: regulation is not only shaped by, but *also plays a role in shaping*, the balance of social forces. There is always something to struggle for through regulatory agencies, no matter how captured or weakened they appear to be by a particular interest or set of interests.

In its failure to engage with trends in law enforcement, with the scale of the problem it purportedly addresses or with alternative sources of deterrence, contemporary regulation scholarship is unable to recognize that enforcement of occupational health and safety law is the key site of contemporary struggle; and thus a watershed moment in the history of regulation passes, with barely a remark from the academy. We are not dewy-eyed about the rule and role of law. Regulation in capitalist societies has always given shape to the type of class society in which we live (Carson 1979). But that is precisely why debates about, and an understanding of, the realities of deterrence and law *enforcement* remain paramount—not least in a period in which we are experiencing an institutionalization of impunity for killing and injuring workers and members of the public.

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