The Dupes of Hazard: Occupational Health and Safety and the Victorian Sanctions Debate

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ABSTRACT

This paper takes issue with those who are currently arguing in favor of recourse to charges of manslaughter in some cases of occupational fatality. Such a step, it is argued, would effectively involve collusion with a protracted historical process which rendered occupational health and safety offences ambiguous with regard to their criminality. This historical process is summarised and the use of sanctions in this area of Victorian legislation is reviewed. While sympathising with the objectives of those who support stronger action in the occupational health and safety field, the authors nonetheless argue that they have been duped into a position which, by treating *some* offences as unequivocally criminal, implies that the vast majority are not. Instead, it is suggested, an offence of causing death through violation of the Occupational Health and Safety Act 1985, should be created.

In September 1981, two Melbourne teenagers were killed as a result of being overcome by trichloro-ethylene fumes while cleaning out a degreasing vat. They had not been told how to carry out this task; they had not been warned about the dangers of such solvent fumes in confined spaces; their protective masks were totally inadequate, and indeed, according to police evidence at the subsequent coronial inquest, there had been 'a complete disregard for safety regulations' (*The Age*, 11 February, 1982). At the same time, the same police evidence reported that 'there were no suspicious circumstances surrounding (the) deaths' (ibid), and following court proceedings, the company was fined less than $2 000. In his 1981 Maitland Oration, 'Work — How Much a Health Hazard', Bob Hawke later expressed his outrage at this sequence of

events, and suggested that charges of manslaughter would have been appropriate (Hawke, 1981).

In making such a response to what has now become a celebrated case, the then still to be Prime Minister was displaying a not uncommon reaction to the frequently egregious gap between the enormity of industrial injuries and the paltry sanctions subsequently imposed upon those responsible for their occurrence. In more recent times, a series of incidents — notably an explosion at Simsmetal Ltd in Melbourne which killed four workers — has provoked similarly controversial remarks. Thus, for example, Dr. David Neal, a member of the Victorian Law Reform Commission, has advocated prosecution for manslaughter under the Crimes Act in cases of serious negligence resulting in the death of employees, which in slightly more ambiguous vein, a former legal officer of the ACTU has opined that 'in cases where there has been a death, then authorities ought to look at the criminal laws' (*Age*, 18 May, 1988). In September 1989, the Victorian Minister for Labor, Mr Pope, was quoted as saying that 'the Government would consider bringing charges under the Crimes Act, as well as charges under the Occupational Health and Safety Act in some cases (*Age*, 20 September, 1989). Recognising the difficulties which securing conviction on manslaughter charges might entail, Mr. John Halfpenny, secretary of the Victorian Trades Hall Council, has called for the creation of new offences analogous to culpable driving in appropriate instances (*Age*, 16 May, 1988); This particular suggestion finds a close academic counterpart in Andrew Hopkins' argument for the establishment of an offence of causing death by regulatory violation, a step which he claims would help to close the gap between public sentiment and legal reaction in cases of what he calls 'industrial homicide' (Hopkins, 1988, 17.).

Unimpeachable as the moral integrity of such calls for a greater measure of social justice in the distribution of criminal justice may be, they do not, however, lack their broader difficulties. On one plane, to which we shall return later, for example, these arguments for the most part seem implicitly to accept that offences under the occupational health and safety legislation somehow or other are *not* already criminal. Thus the ACTU official quoted above seems to be implying that in looking to the criminal laws, the authorities would be looking to something that is in this sense different from occupational health and safety legislation. Similarly, Mr Halfpenny's call is couched in terms of the need for equality of treatment with offences like negligence causing injury on the road, 'which is punished under the criminal law' (*Age*, 16 May, 1988), again appearing to accept implicitly that current occupational health and safety legislation is something else. When Dr. Neal argued against the creation of new offences, he did so on the grounds that the area was already sufficiently covered by 'existing occupational health and safety

legislation and the criminal law' (*Age*, 18 May, 1988). Again, the two seem to be perceived as different animals.

What the confusion evidences, as much as anything else, is the crucial element of ambiguity that constitutes one of the central characteristics of white-collar crimes such as violation of occupational health and safety laws (Aubert, 1952, 64). The protagonists in the Victorian sanctions debate are heirs to a protracted history of concrete social processes which have rendered such law ambiguous *vis à vis* its status as criminal law. Moreover, they are caught up in what is almost certainly a continuation of those processes — the 'natural' disconnection of occupational health and safety crime from real crime did not finish somewhere in the middle of the last century — and in so being, they might do well to reflect upon the concrete, structural and other factors responsible for maintaining this momentum.

Yet this is precisely what they do not do. Indeed the debate in its current form must surely fall in the category of what Elling, in his recent book on the struggle for workers' health, sees as a search for alternatives which is disembodied from the socioeconomic, political and cultural contexts in which it is embedded (Elling, 1986, 42). It is as if the sanctions debate, as is all too often the case with the official enquiries into the horrific events to which they might or might not be applied, is one to be conducted in isolation from the political economy of the social context which structures it and, at least to some extent, determines its outcome. In this respect, it is fair to note that even Hopkins' analysis is restricted to a call for contextualisation of sanctions in terms of some vague notion of 'societal values' (Hopkins, 1988, 19). At the most basic level, there is a failure to appreciate that how offences are going to be conceptualised — whether as crimes warranting the full force and opprobrium of the criminal process, or as mere, quasi-criminal, regulatory violations to be conventionally tolerated under pain of minimum penalty — hinges on much more concrete and material forces than the relative rhetorical strength of academics, union officials and law reformers. Such interventions, to be sure, are neither irrelevant nor inconsequential; but neither are they the only sanctioning determinants which those who would like to think they can make history, regardless of circumstances not of their own choosing, would have us believe. In Victoria, as elsewhere, the occupational health and safety debate over the use of criminal sanctions, revolving as it must around the issue of the criminality involved, lost sight of the conceptual vision provided by Raymond Williams more than a decade ago:

> 'When the most basic concepts — the concepts, as it is said, from which we begin — are suddenly seen to be not concepts but problems, not analytic problems either but historical movements that are still unresolved, there is no

sense in listening to their sonorous summons or their resounding clashes. We have only, if we can, to recover the substance from which their forms were cast' (Williams, 1977, 11).

Elsewhere, one of us has attempted at length to recover the substance from which the crucially ambiguous criminal form of occupational health and safety violations was originally cast (Carson, 1980). Basically, it was argued, that during the development of British manufacturing, the the early nineteenth century, there was an internal thrust towards regulation within capitalist production, itself. This was driven by a number of very concrete and identifiable reasons such as reduction of competition, the creation of a healthy, disciplined workforce, and not least, the legitimation of the class relations of early capitalism. In that context, moreover, it was essential that there should be some attempt to enforce the relevant legislation, if it and the whole legal framework of which it was part, were not to be revealed as a sham. As two critics of this earlier work put it, thereby inadvertntly hoisting themselves with their own petard, the earliest inspectors played a crucial part in creating 'a viable class society' (Bartrip and Fenn, 1979, 185).

What accomplishing any or all of the above objectives involved was some form of regulation without the unambiguous criminalisation of offenders. For one thing, any strategy which involved the latter would have entailed designating as criminal a very large proportion of a powerful and prestigious class, so widespread was contravention. By extension, such an approach would moreover, have pushed the perceptible moral contours of the nation out of line with its social structure, a socially unsustainable lack of fit even in the short-term. The result was an uneasy compromise involving an ambiguous system which attempted to impose controls and tried to show itself as actively regulating, but which effectively disconnected the criminality of the behaviour in question from 'real' crime.

This is not the place to rehearse at length the details of what was involved in this important process of creating ambiguity. Crucially, however, it involved the development of a system of enforcement which in the main, treated occupational health and safety violations as normal, conventional and not to be exposed to the full rigours of strong criminal sanctions. Thus, for example, as early as 1833 the suggestion that manslaughter charges should be laid against employers whose negligence led to death was rejected. The grounds, Mr Hawke *et. al.* might be interested to know, were that such 'penal clauses . . . are of a nature so vexatious and so arbitrary as . . . would create a serious objection to the investment of capital in manufacturing industry' (Carson, 1983, 7)! As for the more routine offences, the emergence of strict liability in the 1840s led to the elision of *mens rea* and moral culpability from their

public adjudication, as well as to the effective fracturing of any connection between notions of intention and features of how the labour process might be organised. By the 1850s, the inspectors were bringing *exceptional* evidence of intention to buttress appeals to magistrates for maximum penalties (BPP, 1852–3, ZL, 8). More commonly they were countenancing a 'natural' disconnection between factory crime and real crime, while still using *competitive* arguments to justify calls for support from magistrates:

> It is not unnatural that magistrates should have some difficulty in associating the idea of CRIME with working young persons and women 11 hours a day instead of 10. . .but there is no part of the Factories Regulation Acts that I am so often called upon by mill-owners themselves to enforce with rigor. . .They say, and most justly, that it is of the first importance that all who sell in the same market should be upon one footing as to time, and that those who strictly obey the law should be protected against the unfair competition of those who transgress it [B.P.P., 1851: XXIII, 5 ff emphasis in original].

This shadow-boxing with the concept of crime, together with the penetration of considerations other than independent legal principles into the processes of interpretation and sanctioning, was a central feature of the British system in the years preceding its export to Victoria in 1885. In the crucial case of *Ryder v. Mills*, for example, Lord Parke upheld the legality of a loophole, one commonly exploited by employers, on the grounds that the 1844 Act imposed penalties and must therefore be strictly construed; yet, just a week earlier, with delightfully injudicious indiscretion, he had told none other than the Attorney General that, despite his certainty as to the intentions of Parliament, 'as it is a law to restrain the exercise of capital and property, it must be construed stringently' (Carson 1980, 169). Above all, however, the process was one which saw law enforcement in the occupational health and safety area moving inexorably away from the connotations of crime control. As one Chief Inspector put it in 1876:

> In the inspection of factories it has been my view always that we are not acting as policemen. . .that in enforcing this Factory Act, we do not enforce it as a policeman would check an offense which he is told to detect. We have endeavored not to enforce the law, if I may use such an expression, but it has been my endeavour . . . that we should simply be the advisers of all classes, that we should explain the law, and that we should do everything we possibly could to induce them to observe the law, and that a prosecution should be the very last thing we should take up [Thomas, 1948, 41].

This brief excursus into history is important because it alerts us to the fact that the occupational health and safety sanctions controversy currently under way in Victoria is tied up with a history that stretches right back to another place and another time. Nor is this mere antiquarianism. As Williams again observes, serious cultural analysis is impossible

without a developed consciousness that *has* to be historical, a consciousness which among other things, has the effect of 'forcing us back from so much that seemed positive and available — all the ready insertions into a crucial argument, all the accessible entries into immediate practice' (Williams, 1977, 11). Current Victorian proponents of resort to the Crimes Act, to charges of manslaughter and the rest of it might have been better advised, we will argue, to share this sense of hesitation born of awareness of their place in an as yet incomplete history and a still unresolved historical movement. Had they done so, it will be suggested, they might not so readily and paradoxically have become unwitting dupes of social processes which we believe will result in the further decriminalisation of occupational health and safety crime. For people can, we believe, make history more effectively if they are cognisant of the unchosen and historically given circumstances under which they are attempting so to do.

AMBIGUITY IN AUSTRALIA

The enactment of the Victorian *Factories and Shops Act* 1885 was the first major initiative of an Australian colonial government in the legal regulation of occupational health and safety. Although the Act was amended and consolidated in subsequent years, its basic approach to the statutory regulation of occupational health and safety remained unchanged until 1985. The Act was very much in the British tradition, and all of the relevant occupational health and safety provisions, particularly those relating to the fencing of machinery, sanitary requirements, and the powers of inspectors, were lifted almost verbatim from the British Factories Act of 1878. Indeed, Mr Deakin, in his second reading speech, noted that 'the Bill is largely a copy of the English Act' (Victorian Parliamentary Debates, 1885:1439). Mr Wrixon commented that:

> We cannot go far wrong if we follow the great English Act . . . That Act is one of the greatest monuments of legislative beneficence and ingenuity known to the world. Nothing can exceed the benevolence of its design, or the minuteness and exactness of the machinery for carrying out that design. It is a great monument of legislative labour. By following that Act . . . we will no doubt avoid, in our factory system, the abuses which have marked the factory systems of older countries — abuses which have been submitted to, in those countries, quietly enough, although they are serious and great . . . Those abuses, by our early adoption of the British Factory Act, we will be able to prevent growing up here, because the manufacturers of the colony will have to accommodate themselves to the law (Victorian Parliamentary Debates, 1885, 1440).

The early Victorian inspectorate made constant reference to the

Reports of the British Factories and Shops inspectorate, particularly to the machinery guarding techniques devised by the British inspectorate (Annual Report, 1886, 4; 1887, 5–6; 1888, 3–4, 10; 1889, 1,4,15). Nor is it unlikely that it would have taken some note of the prosecution rates indicated by the statistics set out in the British reports.

A cursory analysis of the use of prosecution as a means of enforcing occupational health and safety provisions in Victoria in the century after 1885 suggests that the enforcement of the Victorian legislation strongly mimicked that of the British legislation. From the outset, the inspectorate was reluctant to prosecute, and the Chief Inspector remarked in an early annual report that 'legal proceedings are never instituted till every other means of enforcing the law has been tried' (Annual Report 1893, 7). From 1886 to 1899 there were 1571 informations prosecuted under the *Factories and Shops Act*. (Annual Reports 1886–1899) but only two for failing to guard machinery, and thirteen for diverse offences such as overcrowding, failure to report an accident, untidy factories, inadequate seating etc. Most prosecutions conducted by the Department of Labour were in relation to after hours shop trading, operating unregistered factories, and overworking women and children. According to the Chief Inspector those prosecutions placed extra work on the inspectorate and had the 'further disadvantage of bringing them into conflict with many persons engaged in retail trade' (1886 Report 8). Similarly, in the early years of the Act the inspectorate noted with dismay the antipathy of the magistracy to its provisions. In 1891 Chief Inspector Levey lamented that:

> It is to be regretted that in some Courts of Petty Sessions the officers of this Department do not receive more support and consideration from the justices of the peace before whom prosecutions for breaches of the Act are tried. On one occasion when I was conducting a prosecution a justice who was adjudicating took the opportunity as a suitable one to abuse the Act as injust and also insult me personally with regard to my position in relation to it. When such observations are made from the magistrate's chair it can hardly be expected that the general public will respect the law (1891 Report 10).

Table 1 Occupational Health and Safety Prosecutions in Victoria 1900–1986

Period	Total Infos	OH&S Infos	% Total	Dismissed	Convictions	Average Fine (% of max.)
1900–1919	7730	172	2.2%	15	154	24%
1920–1939	10603	335	3.16%	29	276	11%
1940–1959	7819	318	4.07%	13	299	14%
1960–1979	16077	1349	8.3%	77	1303	16%
1980–1986	3318	970	29.2%	24	760	14%

Sources: Annual Reports 1886–1986.

Table 1 summarises the position from 1900 until the middle of 1986. It shows how relatively infrequent resort to prosecution for occupational health and safety offences was prior to the advent of the *Occupational Health and Safety Act* 1985, both in absoloute terms and in relation to the total number of prosecutions conducted by the Department, although the beginnings of a change in this latter respect is evident in the Eighties. Moreover, these prosecution statistics record the number of *informations* prosecuted, and it should be noted that many, if not most, cases involved more than one information, so that the figures expressed in terms of informations obviously overstate the number of *defendants* taken to court.

The inspectorate's principal means of dealing with breaches of the occupational health and safety provisions prior to 1986 was by imposing 'requirements', usually orally, upon employers to remedy contraventions. These 'requirements' would then be 'followed up' by inspectors. In 1983, for example, there were 19 903 'requirements' issued in relation to safety matters (Annual Report 1983, 77). There were, however, only 134 informations issued for breaches of machinery guarding provisions. That same year, a task force of eleven inspectors conducted inspections of 22 factories in 8 industries in the Geelong district and identified 3,000 safety breaches of safety regulations, relating to 1,000 different machines (Annual Report, 1983, 17). In the year from July 1984 to June 1985 the annual report shows that there were 63,658 'requirements' on employers to improve safety, and only 140 informations issued for all types of occupational health and safety offences enforced by the occupational health and safety inspectorate (Annual Report, 1884–5, 97–8). Clearly, the preferred method of dealing with contraventions of the legislation was through the giving of advice to employers, and through attempts to persuade them to carry out the will of the legislature by issuing of 'requirements'.

This pattern of enforcement was explained by Paul Prior, the former head of the Department of Labour and Industry in Victoria as being based on the inspectorate's view that 'any inspector who constantly has to launch prosecutions in order to gain compliance' is a failure, because inspectors see the legislation they administer as being 'remedial in nature i.e. they are there to improve the conditions of work, not to make the employer or employee suffer penalties for breaches of the law'. This approach is justified by Prior on the grounds of 'time/cost effectiveness'. It takes very little time to advise an employer of what should be remedied, whereas the preparation and conducting of a prosecution is extremely time consuming, and usually results in 'a minimum or token fine' (Prior, 1985, 54).

This evidence would seem to confirm that the Victorian inspectorate

has perpetuated the perception of most occupational health and safety violations as customary, conventional, and not really to be regarded as criminal. The evidence of penalties imposed by the courts suggests that this view would appear to be shared by magistrates. Indeed, most of the magistrates interviewed during the course of research into the role of the courts in the enforcement of the occupational health and safety legislation in Victoria did not consisder that employers who contravened the occupational health and safety legislation were 'criminal', but saw the offences as 'quasi criminal offences'. One indicated, for example, that he thought that the offences 'were social offences, rather than criminal offences', and that occupational health and safety offences only approximated 'crimes' when they were 'blatant'. Another indicated that he did not consider occupational health and safety offenders to be 'criminals in the strict sense', particularly for their first offence. If, however, 'these people come back a second time, the courts would think of them as criminals who just happen to be employers rather than just as straight employers'.

All this suggests that the 'natural' disconnection of occupational health and safety crime from 'real crime' indeed did not finish in the middle of the nineteenth century, but has been part of the institutional practice of courts and inspectorates in Victoria right up to the present day.

THE 1985 ACT AND THE SANCTIONS DEBATE

The Victorian Occupational Health and Safety Act of 1985 brought a far-reaching set of changes to the régime pertaining to health and safety at the workplace in that State. Among other things, it established a tripartite Occupational Health and Safety Commission (s. 7), provided for the election of health and safety representatives at the workplace (s. 30), and gave trade unions, where present, the key role in the nomination and electoral processes involved (s. 30). The elected representatives were given a wide range of powers including those of inspecting the workplace, accompanying inspectors and accessing information held by the employer about actual or potential hazards (s. 31). Crucial and most contentious was the decision to give them the additional power to issue provisional improvement notices (s. 33) and, where faced with immediate threat to the health and safety of any person, to order cessation of work (s. 26). For their part, employers were subjected to a general duty of care (s. 21), and were required to establish health and safety committees at the request of the representatives (s. 37). Inspectors were empowered to issue improvement and prohibition notices (ss. 43 and 44), and were required to perform various adjudicative roles, particu-

larly in relation to disputes over provisional improvement notices and work cessations (ss. 35 and 26).

With regard to sanctions, a breach of any provision of the Act or regulations was an offence against the Act and liable to prosecution by the inspectorate (ss. 47(1), 48(1)). While breaches of the regulations were summary offences triable only in the Magistrates' Courts, breach of the provisions of the Act itself were indictable offences, which could be prosecuted in the County Court (s. 47(3)), although provision was made for the option of summary prosecution (*Magistrates' Court Act* 1971 s. 69(1)). The maximum fines were increased markedly from the $2000 maximum prior to 1985. Most offences against the Act were punishable by a maximum fine of $25 000 for a corporation, and $5000 for an individual (s. 47(2)). There were four more 'serious' offences which attracted higher maximum penalties. These were obstructing, assaulting etc. an inspector (s. 42), failing to comply with a prohibition notice (s. 44(3)), wilful repetition of an offence for which the wrongdoer had already been convicted (s. 53), and discrimination by an employer against an employee exercising a right or power under the Act or assisting in the implementation of the Act (s. 54). The penalties for these 'serious' offences were a minimum penalty of $5000 and a maximum of $50 000 where a corporation was involved, and a minimum of $1000 and a maximum of $10 000, or up to five year imprisonment, for an individual. Where an indictable offence was prosecuted summarily, the maximum penalties for all offences were reduced to $10 000 for corporations, and $5000 or two years imprisonment for individuals for 'serious' offences, and $2500 for individuals for all other offences (*Magistrates Court Act* 1971 s. 69(6)).

The Minister of Labour has issued inspectors with prosecution guidelines as required by the Act (s. 48(5)). These guidelines envisaged that prosecutions would be brought for a failure to comply with a prohibition, improvement of provisional improvement notice, for an alleged breach of the Act which resulted in a 'serious accident' or fatality; for the wilful repetition of the same offence, for offences such as the assault or obstruction of inspectors, for discrimination against an employee, and where 'the issue of notice is not considered appropriate for ensuring compliance with the Act or regulations' (Guidelines, 1985).

What might be called the political economy of these developments has been explored at some length elsewhere (Carson and Henenberg, 1988). Two points, however, are particularly germane as part of the all too often forgotten backdrop to the current Victorian sanctions debate. In the first place, it must be remembered that this legislation was part of an integrated package designed quite explicitly to reduce the costs of workers' compensation premiums to the trade exposed sector of the

Victorian economy, with a view to the restructuring of that economy by manipulating the few factors within the control of the State government as opposed to that of the Commonwealth or of international market forces. The objective for the reformed system, in which the preventative prong comprising occupational health and safety legislation was to play a vital part, was that the number of accidents or diseases generating claims per employee should be reduced by 10 per cent within ten years (ibid). As a result, and whatever the law in books might have had to say about sanctions, the new law in action was one with an appropriately refurbished enforcement ideology, one preoccupied with 'getting claims down'. To this end, strategies like risk management, and inspection systems driven by highly dubious data from the Accident Compensation Commission (ACC) increasingly became the order of the day. To facilitate 'service delivery' a regionalisation process for the relevant department was put in train and the formerly ambiguous 'inspectors' were now enjoined to become 'advisors'.

The second background factor of importance to any understanding of the sanctions debate is the way in which, arguably or even plausibly, the Occupational Health and Safety Act of 1985 forms part of a broader pattern of corporatist developments such as were predicted by writers such as Clegg at the beginning of the decade for late semi-peripheral capitalism in countries like Australia (Clegg, 1980). As Leo Panitch comments, for example, 'progressive legislation' in areas such as this may 'constitute the new *quid pro quo* for wage restraint under resuscitated corporatist political structures' (1986,203). Under such arrangements, and leaving aside for the moment who gets excluded as opposed to included, there would be clear implications for the deployment of sanctions in terms of ostensibly cooperative and participative processes, as well as a bottom line drawn under the point at which cooperation might no longer be forthcoming.

What this all adds up to in terms of the Victorian sanctions debate is a background of developments conducive to further decriminalisation and ambiguity in the arena of occupational health and safety crime. Thus, there is no doubt that predeliction for service delivery, risk management and role redefinition in advisory terms has indeed further blunted the image of the relevant department as being in the business of law enforcement concerned with essentially criminal activity. A former senior member of the Department of Labour described in interview the impact which these considerations and the overarching concern about WorkCare costs had upon sanctioning practice:

> again you had the influence of ACC coming in and rather than stepping back and looking independently at the Act and saying 'What is the Act's purpose?' it was pushed into 'What is the purpose of WorkCare?' And so you were

losing; you couldn't sustain issues about prosecution policies in relation to what the philosophic intent of the Act was, when the major driving force was intervening in industry to get down the high cost industries in terms of their claims against WorkCare.

What is being pointed to here is the way in which an external set of constraints operated in such a way as to preclude any clear working out of the role which prosecution should play in the new system, despite the Guidelines earlier mentioned. Further ambiguity, if not confusion, was the result. Nor, in addition, did the broadly corporatist thrust of the legislation accord any heightened salience to the specifically criminal aspect of the legislation and its provision of sanctions. The Guidelines, as one very senior member of the Department explained in interview, made it quite clear that 'the number one priority is to try and get in (place) procedures for consultative practices'. Where these and other self-regulation mechanisms failed to produce the desired result, prosecution was to be by no means the next line of resort:

'The Department retains the right to initiate proceedings for any offence against the Act and regulations . . . However, generally speaking the principal instruments to be used for securing compliance with the legal standards set out in the Act and regulations will be Improvement and Prohibition Notices' (Guidelines, 1985).

Given such public undertakings, it is not surprising that capital and employers, at any sign of government reneging on the corporatist deal, would begin to entertain thoughts of withdrawing from the bargain. As Panitch again has pointed out, with reference to Australia as the 'new vogue' in the latest fashion of corporatist arrangements, there is no more reason here than elsewhere to suggest capital's willingness to remain at the corporatist party once any fundamental challenge is thrown down (Panitch, 1986, 35). While his primary concern in this respect was the effect of intrusions into managerial prerogative, the logic of the argument clearly extends to the question of sanctions. As one of the senior officials quoted earlier discreetly reported, publicising certain prosecutions during 1988 caused certain employers to 'attack the Department for changing the philosophy and for being pro-prosecution'. There had also been correspondence from at least one peak employer's group 'seeking assurances as to what the Government position is' in the light of the current sanctions controversy. And the Victorian Chamber of Manufacturers did not hesitate to foreshadow playing the ultimate card if the Government went ahead with plans to increase maximum fines for breaching the Act to $250,000 and to $500,000 for 'repeat offenders', what are called in conventional criminological terms 'recidivists' (Workers Compensation Report, 103, 1989,4).

'Such penalties do not focus on the real issue of encouraging better safety

practices and will only *deter investment and jobs from Victoria* (emphasis added).

Not that they had much to worry about in that respect, for the ambiguity engendered by the forces already described amply permeated legal proceedings under the new Act. This ambiguity was demonstrated on the one hand by the low fines imposed by the courts in prosecutions magistracy without conviction upon the defendant being placed on a 'good behaviour bond'. From 1986 until the end of 1988, for example, 42 per cent of informations where the charges have been proved were adjourned without conviction, and the average fine imposed for the remainder was 8.4 per cent of the maximum fine. In one case, heard in 1986, for example, a magistrate found a corporation guilty of an offence against the regulations which resulted in a worker being dragged into an unguarded machine by some loose twine, and her ankle broken in three places. The magistrate adjourned the matter without conviction upon the company entering into a recognizance of $10 000 to be of good behaviour, and at the same time ordered it to pay $8000 into the court box. The ambiguity was also apparent in the case which more than any other sparked off the sanctioning debate, the Simsmetal case, where a furnace in an aluminium smelter exploded when a quantity of sodium nitrate, instead of potassium chloride, was added to molten aluminium. Four men were killed, and seven suffered injuries of varying severity. Despite finding that the Act was 'significantly breached' by the company's officers, the court imposed fines of $15 000 (out of a maximum of $25 000) for each of three informations brought against the company under the *Occupational Health and Safety Act*.

On the other hand, the courts often retreat into construing the Act as penal when it suits them so to do in favour of defendants. For example, in one case decided in 1988 a magistrate had to determine which party had the onus of proving the 'practicability' of certain measures to comply with section 21 of the Act. He decided that the onus lay with the prosecution because, in his view, the Act, 'being a penal provision, must be strictly construed.' In upholding the magistrate's decision, a majority of the Full Court of the Victorian Supreme Court emphasised the fact that section 21(1) of the Act was an indictable offence, and that 'the criminality of such a breach is emphasized by s. 28 which provided that any contravention [of the general duty provisions of the Act] does not confer a right of action in any civil proceedings (*Chugg v Pacific Dunlop Limited*, 1989, 15). Put quite simply, in construing the provisions of the occupational health and safety legislation, the courts treat it as criminal legislation requiring a strict construction in favour of the defendant, but it is quite clear, both from the penalties imposed, and from interviews with magistrates, that the legislation is not regarded as 'criminal' legislation, but rather as 'regulatory' or 'quasi criminal'.

The proponents of use of the Crimes Act, manslaughter charges and so on are, then, attempting to swim in some pretty deep analytical waters, waters in which it is difficult enough to stay afloat if the dive has been deliberately taken, much less if you have inadvertently fallen in. Had they been able to pause at the edge, they might have been able to reflect at somewhat greater length upon the nature of the historical process into which they were essaying such a crucial intervention. Moreover, upon such reflection they might have recognised that their actions could, ironically, leave them in the unenviable position of colluding in the very developments they were attempting to forestall. Such unintended consequences of social action are often said to be the very stuff of which sociology is made.

It is now more than a decade since E.P. Thompson made his spirited and highly controversial defence of the rule of law as a positive good. Therein, he argued, the legal order may indeed mask inequality, class relations and the rest of it, but an essential pre-condition of its success in these respects is that 'it shall display an independence from gross manipulations and shall seem to be just' Thompson, 1975, 263). Where Thompson shot himself in the foot with this argument, so to speak, was of course, that displays can sometimes be just that, impressive appearance rather than substantive reality. And herein, too, we would argue lies the danger with calls for resort to the Crimes Act and manslaughter charges in relation to occupational health and safety. For a very few such dramatic charges, as it would obviously turn out to be, would surely make an impressive display of just appearances; but this would do nothing to halt what seems to us to be the inexorable slide of all those other thousands and thousands of occupational health and safety offences into further ambiguity and decriminalisation. Indeed, and contrary to the wishes of those involved, it might even distract attention from the process, thereby masking even further the real extent to which class relations, inequalities and the rest of it penetrate the field of health and safety at the workplace.

What then should we be doing? It seems to us that although we have no objection to the use of consultation, negotiation, notices and so on within the present Act (might these have some greater part to play in other areas of criminal law?), the criminal connotations of offences against occupational health and safety legislation should be emphasised both in principle and in practice. In the latter context, this would mean much more frequent recourse to prosecution in the criminal courts when the whole gamut of self-regulation, negotiation and notice procedures has been run without success. It would also entail a 'graduated enforcement response' such as that proposed to the Department of Labour in a policy paper prepared by the research team which carried out the

research upon which this paper is partly based, a response system involving a much more automatic process of escalation towards court action without curtailing a proper element of inspectorial discretion. It would also involve a program to educate magistrates in particular with regard to the principle that what they are dealing with really *is* crime, and indeed very serious crime since the case will only have arisen either out of very serious incidents of injury, or out of protracted intransigence that has exhausted the Act's other and more conciliatory procedures.

As far as deaths arising from employer negligence are concerned, we are firmly of the view that these must be dealt with *inside* the framework of the Occupational Health and Safety Act itself. A general offence of 'causing death by regulatory violation' is not, we believe, sufficiently specific to meet what is required in terms of the *re* criminalisation of serious occupational health and safety offences, and we would therefore propose amendment of the 1985 legislation to include the offence of causing death through violation of the Act itself, or of its attendant regulations. Alternatively, the offence of Industrial Manslaughter could be incorporated into the Act. Appropriate penalties, both corporate and individual should be applied. In this way, we believe, greater justice in the administration of occupational health and safety legislation could be achieved without running the risks involved in taking these issues out into some other and purportedly more criminal arena.

CONCLUSION

In this paper we have taken issue with those participants in the Victorian sanctions debate who would resort to the Crimes Act and charges of manslaughter in relation to occupational health and safety offences. We have not done so because we disagree that the offences in question should be regarded as criminal. Rather, we have taken up this position because, we believe, the proposed strategy would have the contrary effect with regard to the vast bulk of occupational health and safety offences. By prising out a few cases for treatment under separate, criminal auspices, the criminal status of what is left is rendered even more ambiguous than it is already becoming under the impact of the continuing historical and structural processes which we have outlined. The objective, which we share, is better achieved by recognising occupational health and safety offences as much more unequivocally criminal, and by creating an occupational health and safety offence specific to the enormity of the criminality involved when employer negligence leads to death at the workplace.

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