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CORPORATE VIOLENCE, REGULATORY AGENCIES AND THE MANAGEMENT AND DEFLECTION OF CENSURE

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CONTENTS

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ABSTRACT

This thesis offers a sustained and detailed analysis of the complex of discursive and material practices that generate and support a perception of work-related corporate violence as 'non-crime'. It begins by considering growing pressures for the criminalisation of corporate illegality and violence in the UK, and the state's response to these pressures. This, and further evidence within the literature of a significant public intolerance towards corporate crime and corporate deviance raise two related questions which the thesis seeks to address. First why, given potential public support for the labelling of culpable work-related deaths and injuries as crime, do the majority of these harms continue to escape formal criminalisation; and second, *how* is this criminalisation avoided? What, in other words, are the specific processes and forms that underlie and preserve the non-labelling of corporate violence as 'crime'. In attempting to answer these questions, the role of regulatory law and enforcement in particular is explored. First, an attempt is made to describe the ways in which a general, and routine minimisation and 'demoralisation' of corporate violence and corporate responsibility is produced through both the form and content of regulatory law, and through the representational practices of regulatory and state bodies. Second, case study data provides an opportunity to explore how attempts by the victims of corporate illegality to mobilise the support of the criminal law against corporate offenders may be thwarted by the combined resistance of business and the regulators. In this way the thesis attempts to understand decriminalisation in both its general and in its specific forms - first, by identifying the forms and justifications that produce an ideology of corporate violence as 'non-crime', and second by documenting and exploring how a specific instance of corporate violence is decriminalised in an enforcement context.

ABBREVIATIONS

ACOP	Associated Code of Practice
ADR	Adverse Drug Reaction
ARCA	Asbestos Removal Contractors Association
AEEU	Amalgamated Engineering and Electrical Union
CAWR	Control of Asbestos at Work Regulations 1987
CBI	Confederation of British Industry
CPS	Crown Prosecution Service
DETR	Department of Environment, Transport and the Regions
DPP	Director of Public Prosecutions
DTI	Department of Trade and Industry
EHD	Environmental Health Department
EHO	Environmental Health Officer
HSC	Health and Safety Commission
HSE	Health and Safety Executive
HSWA	Health and Safety at Work etc. Act 1974
IPCS	International Program on Chemical Safety
MHSWR	Management of Health and Safety at Work Regulations 1992
MSF	Manufacturing Science Finance
NHS	National Health Service
OHSA	Occupational Health and Safety Act 1985
OSM	US Office of Surface Mining
RWA	Regional Water Authorities
SME	Small-to-Medium-Sized Enterprise
TGWU	Transport and General Workers Union
TUC	Trades Union Congress
UCATT	Union of Construction, Allied Trades and Techinicians
WHO	World Health Organisation

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INTRODUCTION

The literature on health and safety violations overwhelmingly illustrates that corporate violence is under-criminalised. This thesis therefore seeks to explore the complex processes involved in the non-criminalisation of work-related corporate violence. The thesis also investigates the apparent disjunction between this systematic 'non-criminalisation' of work- related corporate violence and community demands - encompassing the struggles of workers, residents' groups, campaigners, trade unionists and academics - to define this violence as 'crime'. These groups constitute a critical audience 'from below' (Green and Ward, 1999), whose censure of corporate violence as illegitimate and deviant has turned regulatory and criminal law into a site of conflict and struggle. More specifically, however, this study attempts to show that the criminal law is not simply the terrain on which struggles over the meaning and moral status of corporate illegality are played out, but that legal forms, institutions and enforcement practices may *themselves* play a central role in the process of decriminalisation through certain representational practices and the management and deflection of dissent. The following chapter begins by considering pressures - both within and without academia - for the criminalisation of work-related death, injury and disease within the UK. Subsequent chapters will first, consider more specifically the broad ideological and material processes involved in both criminalisation and non-criminalisation and second, explore through a systematic analysis of case-study data, some of the ways in which pressures for the criminalisation of corporate violence are managed and deflected by state institutions in an enforcement context.

Some explanation of the terms used throughout the thesis is necessary here. The term 'criminalisation' refers to two distinct processes. It refers first to the *legislative* proscription of a particular type of hypothetical behaviour, or class of behaviours, and

second to the actual selection of real acts or events into the criminal justice system through the enforcement practices of various state institutions. This second process, then, involves the *practical* application of the criminal label to an actual individual, or group of individuals and their acts as opposed to the, often broad and rather general, labelling of hypothetical acts as 'crime' at the legislative level. Corporate illegality and deviance typically escape both processes of criminal labelling (Carson, 1970a; Box, 1983).

Criminological studies of corporate violence have shown that corporate illegalities leading to physical harm or death avoid criminalisation through the enforcement of extant laws in two ways. Swigert and Farrell demonstrate the first way in which this happens:

> In order to understand the changing definition of corporate liability, it is important to recognize that the parameters of criminal law are both statutory and culturally implicit... Culturally implicit parameters of law are also evident in the case of homicide. A fatal argument between friends following a Saturday evening of drinking, for example, would leave little doubt as to the applicability of criminal statutes. Fatal bodily harm, however, may just as easily be a product of dangerous factory conditions, polluted air, or unsafe motor vehicles as it is of bullet wounds, knifings, or beatings. The latter fall clearly within the cultural meaning of homicides; the former do not. The distinction is an implicit one. There are no statutory exemptions from criminal responsibility accorded those whose damages to human life occur within the context of the manufacture and sale of consumables. Rather, they have enjoyed a de facto exemption which has become institutionalized in the law.
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> (Swigert and Farrell, 1980: 162-163).

A number of criminological studies (Foley, 1990; Bergman 1991; 1994; Perrone, 1995; Wells, 1995; Slapper, 1999) have looked at how the deaths of, and injuries to, workers and members of the public arising out of industrial activity are excluded from the compass of *conventional* laws on murder and manslaughter because they fail to fit the culturally implicit parameters of the law. The second strand of research within white-collar criminology has sought, following Carson, to study 'the specially constituted administrative agencies to which the enforcement of criminal laws governing business

and professional behaviour is frequently entrusted' (Carson, 1970a: 387), and to discover the extent to which such agencies avoid enforcement through the criminal courts by employing 'a range of administrative alternatives' (Carson, 1970a: 387). This is a quite different process since in this case corporate illegality does not escape prosecution through the existence of certain implicit assumptions about the nature of the criminality in question. In this case laws are specifically created to address business behaviour, but in practice are rarely formally enforced with most regulatory activity taking the form of informal bargaining with, or attempts to persuade the offending company to comply with the law (see for instance, Carson, 1970a and 1979; Cranston, 1979; Bardach and Kagan, 1982; Richardson *et al.*, 1982; Hawkins, 1984; Braithwaite, 1985a; Hutter, 1988; Weait, 1989; Cook, 1989; Croall, 1989 and 1991; Clarke, 1990; Pearce and Tombs, 1990). However, both strands of research are part of the wider project of discovering those 'processes whereby subsequent to the enactment of criminal legislation some and not other law-breakers are formally designated as criminal' (Carson, 1970a: 386).

The term *corporate violence* is used deliberately, and 'against the grain' of prevailing representations of criminal violence, to highlight the fact that the industrial poisoning, maiming and killing of workers and members of the public may be a form of criminal violence even though the protagonists and ways in which violence is inflicted on workers' bodies do not fit stereotyped notions of what constitutes an assault, wounding or murder (Hills, 1987; Bergman, 1991a and 1993; Wells 1993: 12;). Thus the term 'corporate violence' seeks to draw attention to the fact that, historically and now, the activities of corporations have killed, maimed and poisoned large numbers of people, yet this physical suffering is not - or at least rarely - defined as the consequence of criminal conduct, despite the fact that such violence was avoidable in the sense that it could have been, and frequently was, foreseen as a consequence of corporate conduct. For example, in 1931 the UK government introduced the Asbestos Industry Regulations. These regulations imposed duties on employers to reduce, through the implementation of 'general engineering controls, plant design features and specific work practices',[1] the amount of asbestos dust in their factories under 'a critical limit of dust concentration below which workers may be employed without injury to health'.[2] These regulations were the sole statutory protection afforded workers exposed to asbestos until they were replaced by the

[1] Castleman (1990: 225).
[2] Chief Inspector of Factories, cited in Wikeley (1992: 368).

1969 Asbestos Regulations.[3] In 1949 Dr Robert Murray, a medical inspector of factories, inspected an asbestos mill owned by Cape Asbestos at Hebden Bridge. After inspecting the factory, Dr Murray wrote to company management that:

> Conditions as they are now are likely to exercise some influence on clinical appearance in the future (that is they will cause asbestos diseases)...In general conditions at the factory are good...Once you are over your teething troubles the factory should be a very good one.[4]

Despite this clear warning from the Factory Inspectorate, workers from the factory reported that Cape Asbestos continued to violate the asbestos Regulations, exposing workers to illegal concentrations of asbestos dust. Brian Schnake worked at the factory between 1954 and 1959 and remembers that "The extractors were blocked most of the time. We often stood in the blue dust a foot deep." Ron Slattery who worked at Acre Mill for four years in the 1950s said, "How this firm got away with their dust exposure was really criminal. I have seen, in the Sectional Department, the dust extractors blowing it back seven or eight times a day...of course they said we had to wait till the weekend before the ducts would be cleaned."[5] Cape Asbestos thus continued to expose its workforce to illegal concentrations of asbestos dust despite the existence of practicable dust control measures and the clear knowledge that lack of effective dust control in the factory would cause workers to develop, and die from, asbestos-related diseases. The full consequences of this exposure began to emerge in the 1970s. By 1979 it was estimated that twelve per cent of the workforce had developed, or died from, some form of crippling asbestos-related disease (Dalton, 1979: 9). Yet Cape Asbestos's illegal poisoning of its workforce has never been officially defined as 'criminal'.

Nor was this knowing exposure of workers to illegal concentrations of asbestos dust by employers, and the non-enforcement of legal standards, exceptional. Wikely has observed that 'Subsequent litigation in the civil courts has shown that the 1931 regulations were widely ignored in practice', but that 'such evidence as there is suggests that prosecutions were the exception rather than the rule. Certainly, between 1964 and 1970 only two firms

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[3] In the event, these regulations proved wholly ineffective in affording workers protection from the hazards of exposure to the 'magic mineral'. See Wikeley (1992) and Dalton (1979).
[4] Cited in Dalton (1979: 90).
[5] Both men are quoted in Dalton (1979: 11-12).

were prosecuted.' (1992: 373).[6] Studies by Gunningham (1987) and Musk *et al* (1992) exploring the extent of employers' and state knowledge in Australia confirm a similar pattern of violations flouted and unenforced. Brodeur (1985) and Castleman (1990) have documented in painstaking detail a conspiracy between American asbestos manufacturers to jointly fund research into the health hazards associated with asbestos in order to exercise control over publication of this research, and subsequent decisions by manufacturers to systematically suppress information regarding the true nature and extent of the toxicity of asbestos to human health. Castleman (1979; 1981) has also revealed how asbestos multinationals have relocated manufacturing processes to developing countries in order to exploit lower or non-existent protective standards, and thereby knowingly exposed workers in these countries to levels of asbestos dust deemed illegal and unsafe in the United States and Western European countries.[7]

Although the death and disease consequent upon the activity discussed above was avoidable and foreseen by the asbestos manufacturers, not all of these instances of corporate violence would be subject to criminal sanction. For instance, asbestos multinationals relocated to developing countries specifically in order to avoid the legal consequences of exposing workers to asbestos that should result in developed countries (although they frequently do not). Whilst criminal prosecution under the Asbestos Regulations was extremely rare in this country, and prosecution under conventional criminal statutes unheard of, in Italy in 1996 a Turin court found nine owner-managers of an asbestos factory guilty of murdering 32 workers and causing the occupational disease of a further eleven workers. The managers were ordered to pay £6 million in compensation and were given prison sentences of between seven months and eight years

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[6] Also, W.H. Thompson in his evidence to the Robens Committee, states: 'The Central Asbestos Company... operated two factories in Bermondsey in flagrant breach of the Asbestos Industry Regulations 1931 and with the full knowledge and acquiescence of the Factory Inspectorate from at least 1953 until 1967. By their defiance of the law they cause about 10 or 15 and possibly 20 men to become seriously ill, to suffer much pain and distress, and to face a premature and tragic death. They were prosecuted for certain offences in 1964 and fined £170. For the deaths which they caused they have never been prosecuted at all.' (Robens, 1979b: 663).

[7] The exposure to asbestos of workers in developing nations by the British-based multinational Turner & Newall was also the subject of a transmission of *Face The Facts*, broadcast by Radio Four on 14 October 1993. This programme discovered that T & N did not even introduce dust sampling equipment to determine levels of exposure in overseas subsidiaries until 1972. In addition, once such measures were introduced, readings indicated that fibre levels were well in excess of those permitted in the United Kingdom. Nevertheless, T & N claimed in annual reports that it was their policy "to apply the current British standard in our factories throughout the world. We do this even when no local regulations exist overseas."

(*Workers Health International Newsletter*, Winter 1996/97: 1). Thus, we can begin to see that the precise legal status of different instances of harmful corporate activity is a product - not of any inherent or qualitative difference between these acts - but of contingent differences in countries' legal and political systems and histories. However, whilst there are undoubtedly important differences between the legal responses of different countries to white-collar offending (Nelken, 1997: 892-893), it is nevertheless the case that corporations are not regularly prosecuted under criminal statutes in *any* country. And the lack of priority accorded to white-collar offending by different countries is revealed by the fact that 'white-collar crimes are not included in the official [crime] statistics' of most countries (Nelken, 1997: 891). So whilst prosecutors in the US, for example, appear more willing to bring prosecutions against companies under conventional criminal statutes,[8] this is still a rare occurrence.

Since, Sutherland (1940) first popularised the concept of 'white-collar crime' in the sociological literature, the meaning of the differential treatment of individual (mostly working class or unemployed) offenders and business offenders under the criminal law has been the subject of fundamental and continuing disagreement within academic debate. On the one hand evidence of this differential treatment has been interpreted as evidence of the ability of economically and politically powerful groups to minimise the state's interference in their activities.[9] On the other hand, there exists within certain academic studies of the separate administrative bodies charged with the regulation of business activity, a (sometimes implicit) denial that the manner in which this distinct body of law is enforced is evidence of bias[10] or, at least, a denial that this differential treatment is the effect of the social and economic power of the population regulated.[11] A number of academics have considered what issues might underlie the persistence of particular disputes within the field (Croall, 1992; Friedrichs, 1996; Pearce and Tombs, 1998; Slapper and Tombs, 1999; Nelken 1997). Pearce and Tombs contend that,

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[8] See Bergman (1994: 5) for some recent examples.

[9] See for instance, Sutherland (1949); Pearce (1976); Carson (1979 and 1982); Clinard and Yeager (1980); Snider (1980 and 1991); Box (1983); Calavita (1983); Glasbeek (1984); Kramer (1984); Cullen *et al.*, (1987); Mokhiber (1989); Pearce and Tombs (1990 and 1998); Bergman 1991 and 1993); Slapper (1993); Wells (1993); Coleman (1994); Green (1994); Reiman (1995); Friedrichs (1996); Punch (1996); Woolfson *et al.* (1996); Tombs and Whyte (1998).

[10] See for instance, Bardach and Kagan, (1982); Reiss (1984); Hawkins and Thomas (1984); Kagan (1984); Kagan and Scholz (1984); Shapiro (1984 and 1990); Hawkins (1984 and 1990); Clarke (1990).

[11] For example, Shapiro (1990); Croall (1989)

> Definitional disputes are not merely - or perhaps even - semantic. Essentially, such disputes can be reduced to one issue: namely, how the incidence of white-collar crime is to be explained (that is, these are disputes about causation). This fundamental question bears upon the way in which this form of crime should be measured, regulated, sanctioned, prevented, represented, and so on. Further, disputes around this issue of causation entail disputes about values, politics, theory, epistemology and methodology, even if these issues are not made explicit. (1998: 105).

Thus the persistence and intensity of unresolved disputes within and around white-collar crime scholarship are fueled by fundamental disagreements about the nature of crime and the proper priorities of the criminal law. Underlying these disagreements are divergent views concerning the nature and legitimacy of the society we live in and the nature and legitimacy of the laws that organize and regulate that society.

I do not propose to undertake a conventional review of the white-collar crime literature. Current and past disputes, and developments within the discipline have been critically reviewed and summarised by a number of other writers.[12] Indeed, one of the characteristics of the white-collar crime literature is the frequent and explicit references that are made to these debates and to the history of the discipline. Instead, I propose to review much of the relevant literature in the course of developing the main arguments of this thesis. Since this thesis is specifically concerned with developments and struggles within the UK, there is less detailed analysis of the substantial American literature on white-collar crime. This is partly for reasons of time and space, and partly because there are significant differences between the regulation of occupational health and safety in the UK and in the US.[13] I will however, explore some of the Australian literature on workplace hazards since Australian states have adopted a British Robens-style approach to the regulation of occupational health and safety (Carson and Heneberg, 1989). Clearly I will also be considering in depth the UK literature and research focusing on work-

[12] For comprehensive reviews of these debates see, for instance, Croall (1992); Friedrichs (1996); Nelken (1997); Tombs and Slapper (1999).

[13] However, the work of three American theorists, Bardach, Kagan and Scholz will be critiqued in some detail. This is because their research is referred to extensively in the work of a number of British socio-legal theorists at Oxford working on the regulation of business activity.

related corporate violence in the UK. This research will be examined in the second and third chapters of the thesis where I hope to critique the arguments of those both within and without the academic communities who would deny that the differential treatment of business offenders is an effect of their greater economic, social and political power.

Chapters 2 and 3 of the thesis, then, constitute an 'oblique' review of the literature. Defenders of a conciliatory approach to the regulation of business illegality tend to justify their position by arguing first, that the state's differential treatment of business offenders simply reflects the fact that the public does not see business offending as 'real crime', and second, that the state's response to business crime reflects inherent differences between corporate and 'conventional' illegality. In response to these arguments the second chapter presents evidence from the UK to suggest that - at least in relation to occupational health and safety crime - non-criminalisation cannot be explained in terms of a general moral indifference. Further it argues that various institutions of the state continue to deny the relevance of criminal laws and criminal sanctions *despite*, and in the face of, significant pressures for change. Chapters 3 and 4 consider the extent to which differences between corporate and conventional crime can 'explain' the conciliatory approach taken within regulatory regimes governing business activity. It will be argued that rather than laws and enforcement mechanisms reflecting the 'ambiguous' nature of corporate criminality, this ambiguity is in fact produced within the formal definition of offences and the enforcement practices of regulatory bodies.

The final chapters of the thesis are based on a case-study analysis of events surrounding residents' exposure to asbestos dust, during major construction work on a local housing estate. This case study demonstrates how the attempts of local residents to mobilise the law in order to protect themselves from the risks of further exposure to asbestos dust were thwarted by a refusal of both the Environmental Health Department and the Health and Safety Executive to define regulatory breaches as serious violations of the law. Thus, the actions of regulatory agents in this case study, and their power to define events, decriminalised what was, I will argue, a straightforward breach of health and safety regulations with very serious implications for residents on the estate.

2

CONFLICT, CONSENSUS AND THE CRIMINAL LAW

Gild the reputable end of it as thickly as we like with the cant of courage, patriotism, national prestige, security, duty and all the rest of it: smudge the disreputable end with all the vituperation that the utmost transports of virtuous indignation can inspire: such tricks will not induce the divine judgement... to distinguish between the victims of these two bragging predatory insects the criminal and the gentleman.

(George Bernard Shaw (1922), cited in Carson, 1970a).

CRIMINOLOGY AND THE MARGINALITY OF CORPORATE CRIME RESEARCH

In Nelken's contribution to the second edition of *The Oxford Handbook of Criminology*, he writes 'Much of the literature on white-collar crime continues to be concerned to demonstrate the seriousness and diffuseness of such offending, and to show that its costs and damages dwarf those of conventional, or ordinary, crime' (Nelken, 1997: 893). Whilst this is rarely the central or only argument of discrete studies, it is true that much of the published literature begins by demonstrating that the financial impact of only a few instances of corporate crime far exceed the costs of conventional crimes of theft, and that the negligent, reckless and intentional acts and omissions of corporations annually cause more death, injury and disease than all acts of street violence.[1] In highlighting this

[1] See, for instance, Pearce (1976); Conklin (1977); Glasbeek and Rowland (1979); Box (1983); Henry (1986); Mokhiber (1989); Brown and Chiang (1993); Green (1994); Reiman (1995); Friedrichs (1996); Punch (1996); Slapper and Tombs (1999) for examples of this kind of argument. See also, Box (1983) and Slapper and Tombs (1999) for a review of these estimates;

characteristic of white-collar crime research, he observes simply that white-collar criminologists must 'hope in this way to influence the social definition of such conduct.' (*Ibid.*, 894). Whilst it is true that many white-collar criminologists have sought to transform public, criminological and legal definitions of specific instances of corporate and state harm,[2] this observation begs the question of why it is that white-collar crime scholarship has had little success in moving itself from the margins to the mainstream of criminological concern, let alone in transforming public definitions of various instances of corporate and state harm (Slapper and Tombs, 1999: 9-10). Nearly a century has passed since the sociologist Edward A. Ross identified the 'criminaloid' of the business world and over fifty years since Sutherland exposed the fallacies of, and class biases inherent in, social scientific 'explanations' that took as their object 'the crime problem' as defined by the state. Yet, as Weisburd and Schlegel acknowledge, whilst the challenges and lessons of white-collar crime research 'are much noted, they have not translated into substantial theoretical or empirical concern among criminologists about the problem of white-collar crime' (1992: 352).

We can conclude, then, that the frequent 'rehearsals' that one finds by way of introduction to the specific concerns of a particular piece of white-collar crime research - rehearsals of the extent and seriousness of corporate and state deviance - can be 'read' as more than a desire to transform dominant definitions of 'the crime problem'. Such repetition also signifies the continued marginality of white-collar crime research to the discipline of criminology and the need to repeatedly justify the researcher's choice of these harms as an object of criminological investigation. This is particularly true of the criminological establishment in Britain, attested to by the fact that Nelken's is the only essay among thirty-two in *The Oxford Handbook of Criminology* dealing with white-collar crime. Furthermore, as Green and Ward point out, 'the 1,267 page *Oxford Handbook of Criminology* devotes *one sentence* to the crimes of "the army, police or government bureaucracies"' (Green and Ward, 1999). The apparent imperviousness of both the criminal law and the discipline of criminology to the critiques of white-collar crime scholarship can be a source of some frustration. Sumner reserves his exasperation for an

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and Slapper and Tombs (1999) and Tombs (1999) for a discussion on the problems of 'counting and costing' corporate crime.

[2] Some examples of those who have explicitly sought to transform the state's and mainstream criminology's definition of the 'crime problem' are Sutherland (1949); Schwendinger and

endnote where, after arguing that the categories of criminal law are revealed as ideological constructs once we understand that they 'are not adequate behavioural categories' and have only 'a loose and selective proximity to their supposed empirical referents', he comments 'Of course this is stupendously obvious, but why does criminology around the world still proceed as if legal categories were scientific? Indeed, why does popular opinion still often see them that way?' (Sumner, 1990b: 16-17, endnote 1).

At one level the reason for mainstream criminology's continued imperviousness to the critiques of white-collar criminology is obvious. Mainstream criminology - by and large - continues to tie itself to the crime, law and order issues as they are defined and prioritised by the state, even if, as Garland (1992) contends, the findings of criminological studies are not always functional for the state. So whilst business activity and its regulation have been subject to increased state scrutiny and intervention over the past two decades (Tombs, 1996; Burrows and Woolfson, forthcoming 2000),[3] this interest has not been reflected by an increase in criminological research since the state does not construct these as questions of crime, law and order. Instead, the kinds of offences committed by corporations which were the subject of Sutherland's original groundbreaking research (1949) continue to be differentiated from 'real', or 'street' crimes through the existence of a distinct body of laws and their 'slow, inefficient and highly differential implementation' (Aubert, 1952: 265). By contrast, a post-Watergate crisis of legitimacy in the United States during the 1970s, resulted in a (short-lived) 'social movement' against white-collar crime (Katz, 1980; Braithwaite, 1985b: 15). This was accompanied by a marked surge in criminological studies of white-collar offending - partly accounted for by the fact that government records and funds were opened up to support academic research in this area.[4] Funding opportunities aside, it is not immediately clear why criminology should slavishly follow state definitions and the state's law and order agenda. This question is particularly pertinent in relation to corporate offences against occupational health and safety legislation, and environmental and consumer protection legislation since these constitute

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Schwendinger (1977); Glasbeek and Rowland (1979); Katz (1980); Geis (1982); Pearce and Tombs (1992); Green (1994); Green and Ward (1999);

[3] See also, recent publications from the Regulatory Impact Unit, and the twenty-five year 'review' of the work of the HSE by the Environment Select Committee.

[4] See, for instance, the *Foreword* in Shapiro (1984) where Stanton Wheeler decribes the research programme funded by a branch of the US Justuce Department. Shapiro was given access to internal records from the Securities and Exchange Commission.

violations of the criminal law and, as such, pose no problem for 'the sociological and legal sycophants of science' (Carson, 1970a: 384) who insist that criminological research must not stray beyond the bounds of legalistic definitions.

Nelken provides an explanation of sorts for the apparent lack of anxiety, both within and without academia, surrounding white-collar offending. He seems to suggest that the differential labelling of, for instance, corporate illegality as 'regulatory', rather than 'real', crime can be explained in terms of a self-perpetuating circle of social definition.[5] Noting that '[d]espite all this evidence [of harm] white-collar crimes are still subjected to very different interpretations' (Nelken, 1997: 893), he then writes, 'It might seem odd that sociologists familiar with Durkheim's argument that society considers dangerous those behaviours it responds to as criminal, rather than the other way round, should keep trying to prove that white-collar crime is really criminal simply because it causes great harm.' (Nelken, 1997: 893-894). Such an observation suggests that the 'public', including a majority of criminologists, interpret the harms caused by corporations differently from the harms caused by individuals, despite the fact that the reckless or negligent behaviour of corporations is potentially far more dangerous than that of individuals, simply because they 'see' these harms through the definitions and responses of the criminal law. It is important to note that in doing this he posits the existence of a high degree of correspondence between public perceptions and sentiment and the response of the institutions of criminal justice and the state to different kinds of offences and offenders. It is interesting that a number of writers appear to hold this view, namely, that the absence of widespread public condemnation is a factor determining the differential treatment accorded to particular instances of corporate illegality and deviance by the state. Such a

[5] Such a perspective may explain why, in another article, Nelken asserts that the importance of white-collar crime research lies in its potential 'to unsettle familiar schemes of thinking in [mainstream] criminology' (Nelken, 1992) thus envisaging white-collar criminology as being ever at the margins - disrupting but never displacing criminology's central concerns. In spite of the celebration of marginality in post-structuralist discourse, to have this kind of value imputed to white collar crime research may not be entirely satisfactory to those criminologists who hope to make some practical intervention and prefer not to have to wait for 'divine judgement'. The purpose of much white-collar crime research was, and is, not simply to draw academic attention to the fact that the state's present demarcation of certain socially harmful behaviours as 'serious crime' excludes those forms of behaviour 'which objectively and *avoidably* cause us the most harm, injury, and suffering' (Box, 1983). The purpose of such research is also to argue for increased social control of the harmful activities of corporations and states by means, amongst other strategies, of effective criminalisation and sanctioning (Glasbeek and Rowland, 1979; Pearce and Tombs, 1990; Bergman, 1991a; Pearce and Tombs, 1992). At the same time some of this

view is, moreover, shared by writers who are otherwise in fundamental disagreement over the legitimacy of treating white-collar offences as 'regulatory' rather than real crime. For instance, Sutherland wrote:

> [T]he public does not have the same organized resentment against white collar crime as against certain of the serious felonies. *The relation between the law and mores, finally, tends to be circular.* The laws, to a considerable extent, are crystallizations of the mores, and each act of enforcement of the laws tends to re-inforce the mores.
>
> (Sutherland, 1949: 51, emphasis added)

Similarly, Hawkins writes, 'Ambivalence poses a crucial problem of enforcement for regulatory agencies and their field staffs, because *their authority is not secured in a perceived moral and political consensus about the ill they seek to control*' (1984: 12-13). However, whilst Sutherland recognises that any lack of 'organized public resentment' is partly an effect of a low level of formal enforcement and the consequent 'invisibility' of much corporate crime,[6] this is something that Keith Hawkins fails to acknowledge in his research. As Braithwaite points out in his review of *Environment and Enforcement*, Hawkins's contention that 'societal moral ambivalence toward pollution offences constrains the way field officers deal with' corporate illegality overlooks the fact that it is this very lack of prosecutorial activity that contributes to the impression that pollution offences are not 'real crime' (Braithwaite, 1987: 570). As we shall see, this difference has important implications for criminological research. However, both writers posit a widespread consensus around the formal and practical grading of offences that exists within the criminal law. Jock Young relies on a similar argument to explain criminology's (and new realism's) prioritization of 'conventional' crime. Although the self-styled 'left realist' criminologists initially committed themselves to researching 'crimes in the suites', as well as 'crimes of the streets', they have in practice concerned themselves almost exclusively with 'the crime problem' as defined by the state (Pearce and Tombs, 1992). Jock Young suggests this may be justified since 'the major crimes, *as presently defined by the criminal law*, are agreed upon by the mass of the population' (Young, 1987: 355). In

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research has stressed the political, historical and cultural difficulties of such an endeavour. For example Snider (1991).

[6] For a more detailed analysis of those factors contributing to the non-visibility of corporate crime see Tombs (1998).

saying this Young effectively implies that the 'non-definition' of regulatory offending as major crime may also be subject to widespread consensus. However, as Sumner points out,

> [I]f criminal law here means statutes, the position merely deals with abstract prohibitions and vague approval of them, and not with what is treated as crime in police practice... It therefore glosses the murky social reality of crime as a practical social censure. What Young calls the 'rational core' of criminal law is therefore for us merely its abstract component, a feature which tends to conceal its practical reality and which therefore can be described as its ideological character. It is not so much 'a realistic basis for consensus' (Young, 1987), in our view, as an unrealistic obstacle to practical and theoretical insight, and abstraction more likely to yield a superficial and shared misunderstanding... (1990a: 4).

A consideration of the legal treatment of workplace deaths and injuries illustrates Sumner's point well, and also illustrates the implications of his argument for criminological research. Research is beginning to reveal the extent to which crimes that are prosecuted under 'regulatory' law, could actually be prosecuted under conventional criminal statutes (Bergman, 1994; Perrone, 1995; Wells, 1995; Slapper, 1999). This work shows that where prosecutions do take place, they are brought for offences against the Health and Safety at Work Act 1974, rather than for manslaughter, murder or offences under the Offences Against the Persons Act 1861. In other words, companies are prosecuted for regulatory breaches rather than for causing the death, disablement or poisoning of workers. Bergman's investigation of the circumstances and official treatment of twenty-eight, randomly chosen, workplace deaths that occurred in the West Midlands between 1987 and 1992 shows that, on the evidence available, fifteen *per cent* of these cases 'should have resulted in a manslaughter prosecution' and that a further twenty five *per cent* ought to have been 'referred to the police for criminal investigation and subsequently to the Crown Prosecution Service (Bergman, 1994: 90). None of these deaths were referred to the CPS, and despite the claim in 1989, by the then Director General of the HSE, that HSE inspectors would refer cases to the CPS and the police whenever there was evidence that manslaughter charges might be appropriate, Bergman discovered that there had *never* been such a referral in the West Midlands before that

time. Similarly, in their analysis of all workplace fatalities that occurred in Victoria, Australia during the period 1987-1990, Perrone and other researchers determined that there was evidence in 25 cases, or 12.3% of the sample, of extreme company negligence. 'The degree of negligence here was considered sufficient to establish the criminal culpability, whether intentional or reckless, necessary to sustain a manslaughter prosecution under the *Crimes Act* 1958" (Perrone, 1995: 87). Despite this, none of these culpable killings were prosecuted under the *Crimes Act* 1958, and in fact only 47.8% of cases involving extreme levels of negligence were prosecuted under the *Occupational Health and Safety Act* 1985, with 52.2% escaping prosecution altogether. In this way corporate illegalities - involving a criminal level of culpability and resulting in death or bodily harm - are diverted away from the processes through which criminal prosecutions for serious crimes of violence could result. Consequently, such offending (if it is processed at all) is seen, not as 'real crime', but as mere technical illegality, as *mala prohibita* rather than *mala in se* (Carson 1970a, 1970b and 1979; Glasbeek, 1984; Perrone, 1993 and 1995; Slapper and Tombs, 1999).

Thus, whilst a general prohibition against killing may well be supported by the mass of the population, out of the vast range of behaviours which could conceivably be encapsulated within this prohibition, only certain behaviours - namely, those most likely to be committed by young working-class men living in poor neighbourhoods, or political killings threatening the interests of the state - will be labelled as murder or manslaughter (Box, 1983; Green, 1994). However, it could be argued that the correspondence between public perception and the criminal law is actually more specific than this - that the image of murder that exists within the popular imagination 'as a particular act involving a very limited range of stereotypical actors, instruments, situations and motives' (Box, 1983: 9) reflects precisely the kinds of killing that the state labels as 'murder' or 'manslaughter'. It is probably fairly safe to say that most people *do* envisage murder or manslaughter as an act perpetrated by an individual possibly involving a weapon and the direct application of force. However, Young's proposition leaves in question whether the mass of the population would support the de-selection of culpable workplace killings from the category of 'major crimes' if they were aware of the circumstances of those killings. In other words, in so far as a consensus exists around the criminal law, Young fails to question the nature of this consensus and the extent to which it might be rooted in mystification and misunderstanding (Box, 1983). In this way we can see that although

both Sutherland and Hawkins propose a close correspondence between public morality and the definition and enforcement of criminal laws, their different understandings of the nature of this relationship allows for very different conclusions to be drawn about the legitimacy of criminology's marginalisation of white-collar offending. For although both posit a 'circular', mutually reinforcing, relationship between the law and public morality, to have any explanatory power such a relationship must have been preceded by some prior, determining factor. For Sutherland, this is 'class bias', but for Hawkins this is the rational democratic consensus - rational because popular opinion accurately reflects real, qualitative differences between 'regulatory' and 'street' crime. For Sutherland therefore, criminology's marginalisation of white-collar crime is unjustified since it tends to reproduce class bias and mystification, whereas for Hawkins the treatment of corporate offending as something distinct from conventional or street crime is justified on the basis of a posited moral consensus.

CRIMINAL LAW AS A SITE OF STRUGGLE

However, Sutherland, Hawkins and Nelken may have overestimated the extent to which a public consensus exists around the 'differential' interpretation and labelling of white-collar offences.[7] Their respective positions echo, to greater or lesser extents, Durkheim's notion that the criminal law reflects and reinforces, or reconstitutes, a particular society's consensual moral order - what Durkheim calls its *conscience collective*. However, the notion of a framework of shared moral values, which criminal law reflects, has been questioned both theoretically and empirically. For instance, Garland writes:

> In all but the most simple formations, different social groups have struggled with one another to realise their own vision of social life and its proper organisation. The forms of social relations and moral beliefs that come to dominate in any society are thus the outcome of an ongoing process of struggle and negotiation... If a particular form of society and collective sentiment becomes established at a point in history, this must be seen as the (perhaps temporary) outcome of the

[7] Hawkins partly concedes in a later article that a morally ambivalent attitude towards 'regulatory' violation is neither immutable nor necessarily uniform across the different spheres of regulatory activity (Hawkins, 1990: 456).

> struggle between competing powers and forces, rather than the 'appropriate' or 'functional' condition for such a social type... So instead of depicting the *conscience collective* as an emergent property of 'society-as-a-whole', we ought to conceive of a dominant moral order which is historically established by particular social forces. This is precisely the sense of the terms 'dominant ideology' and 'hegemony', which have been developed, primarily in the Marxist tradition, in order to deal with this issue...
>
> (Garland, 1990: 51-53).

Of course, the meaning of the term 'ideology' is itself contested, not least within the Marxist tradition (Eagleton, 1991). Very briefly, I am using the term 'dominant ideology' to signify dominant sets of ideas, meanings, and beliefs which misrepresent, and thus produce a distorted understanding of, the world and which benefit the interests of a dominant political power and/ or legitimate the status quo. Dominant ideologies typically conceal the material basis of social power and social relations. They 'are ideas that express the "naturalness" of any existing social order and help maintain it.' (Rose *et al.*, 1984: note at 3-4). Within a Marxist framework, dominant ideas in western democratic societies about the nature and operation of the criminal law - that the criminal law proscribes the most serious and culpable forms of harm, that the criminal law protects all citizens equally, that the law apply to all citizens equally and will be administered 'without fear or favour' - are said to be 'ideological' since they obscure the fact that the physical and financial harms perpetrated by powerful groups and states escape censure and criminalisation. These ideologies are important in producing a consensus around, and consent for, the institutions and the legislative categories of the criminal law. Thus our 'fear and loathing' is directed at relatively powerless groups and individuals who make up the typical targets of criminal justice agents, whilst the socially injurious activities of corporations and states retain the guise of legitimacy/ legality. This is an extremely simplified and crude sketch of the way in which academics have conceptualised the operation of ideology in relation to the criminal law, but it will do for the moment. The important point is that academics have shown that social consensus may be the product of a particular set of distorted ideas that are produced and reproduced through a complex of institutional and representational practices (Hall *et al.* 1978).

However, I suggested above that such a perspective, and the positions of Sutherland, Hawkins and Nelken - theoretically distinct as they are - may overemphasise the degree to which a consensus exists around the criminal law. For whilst it is undoubtedly true that a set of powerful and widely held beliefs, meanings, discourses and assumptions exist around the institutions and exercise of criminal laws, Raymond Williams argues that, 'no mode of production and therefore no dominant social order and therefore no dominant culture ever in reality includes or exhausts all human practice, human energy, and human intention' (1977: 125). Thus,

> The reality of any hegemony, in the extended political and cultural sense, is that, while by definition it is always dominant, it is never either total or exclusive. At any time forms of alternative or directly oppositional politics and culture exist as significant elements in the society.
>
> (Williams, 1977: 113).

In other words, no ideological hegemony can ever be monolithic or 'complete'. Thus, if the contradiction between, for instance, the rhetoric of justice and legality and the actual operation of the law (McBarnet, 1983) becomes apparent then the criminal law may lose the consent of a particular class fraction or group in society. The criminal law then becomes a potential site of conflict and resistance, in which alternate meanings, morals and values are fought over and negotiated. Research by Calavita *et al.* (1991) provides evidence of a *non-correspondence* between public sentiment and the response of the legal institutions of the state in relation to corporate killing. Through their analysis of the legal fate of two dam disasters - one in Italy and one in the United States - they show that although both disasters were followed by intense public anger and censure of the companies and public officials held to be responsible for the devastation caused by the dams collapsing, 'restitutive' sanctions prevailed over penal sanctions. They conclude that, since the legal outcomes of both cases could not be explained in terms of public indifference, 'Durkheim over-estimated the role of public sentiment and failed to take account of the vital importance of the power discrepancy between competing forces in shaping the juridicial process' (1991: 407).

Further evidence of a non-correspondence between public opinion and legal responses to white-collar offending can be found in a growing body of research which suggests that

the public *do* view a number corporate crimes seriously, and that this holds true on a cross-national basis (Scott and Al-Thakeb, 1977; Grabosky *et al*, 1987; Braithwaite, 1987). Numerous surveys have found that the public are particularly likely to rate corporate crime as 'serious' when physical harm results (Evans *et al*, 1993) and also that the public rate as 'serious crime' instances of corporate activity resulting in physical victimization *even when it is not officially proscribed by the criminal law*.[8] Thus, when given the opportunity to contribute to definitions of crime and criminality 'the public' have, on some notable occasions, shown themselves willing to subvert the conventional application of the criminal label. One celebrated instance of this was when an inquest jury, in determining how 192 people died when the *Herald of Free Enterprise* capsized off the coast of Zeebrugge, returned a verdict of 'unlawful killing' against the express direction of the coroner who had advised the jury to return a verdict of 'accidental death'. (Crainer, 1993).[9]

Furthermore, a lack of consensus around the proper boundaries of the criminal law is evident beyond the results of public surveys and unexpected jury verdicts. For, *contra* Sutherland, it is simply not true to say that business activities resulting in harm have not aroused *organized* public resentment (Katz, 1980; Swigert and Farrell, 1980; Calavita, *et al*., 1991). Social movements, like academics, have been involved in struggles over the

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[8] See for instance research by Scott and Al-Thakeb (1977) who found that respondents from eight countries judged that the case of a drug company executive allowing his company to market a drug 'knowing that it may produce harmful side effects for most individuals' was almost as serious as, or more serious than, rape and murder. Yet this behaviour would not constitute an offence under criminal law. See also Braithwaite's comments on these findings (1984: 6-7).

[9] There have been a series of less well-known, but nevertheless extraordinary, examples of unexpected jury verdicts that demonstrate a more general rejection of the morals and values implicit in dominant criminal definitions and their enforcement. These have involved the trials of individuals charged with criminal damage to military equipment and property, both in this country and the United States. See for instance *The Law*, Issue 8, 1996 on the case of Angie Zelter, and Shaw (1999) who reports on the acquittals of eight nuclear armament protesters in the US who had been charged with disorderly conduct. One of the jurors commented: "If the Government is making (nuclear weapons), then they're committing the bigger crime." Similarly, Baird (1996) has discussed the circumstances surrounding, and legal implications of, the acquittals of the Ploughshares women in 1996. This case involved three women who, on 29th January 1996, entered a British Aerospace hanger at Warton and damaged the weapons system of a Hawk fighter jet. When charged with criminal damage they claimed a defence under Section 3 of the Criminal Law Act 1967, which states that 'a person may use such force as is reasonable in the circumstances in the prevention of crime'. The women claimed 'they believed that they were stopping the Hawk, however temporarily, from being used as a weapon of genocide in East Timor' (Baird, 1996). In acquitting them, the jury were implicitly accepting that it was reasonable conduct for these women to have damaged the Hawk jet and that British-made fighter aircrafts, being sold to Indonesia with the approval of the British government, were being used by the Indonesian military for a criminal purpose - namely the genocide of the East Timorese.

meaning and status of the harms caused by corporations. Nor is this an historically new phenomenon. Arguments for the criminalisation of certain forms of corporate harm predate the criminology of Sutherland, the sociology of Ross, and the campaigns of the twentieth-century work hazards movement, consumer advocate groups, and environmental campaigners. The idea that the activity of corporations or businessmen could be a legitimate and proper object of criminal regulation and prohibition was, as documented by Carson (1979), explicit in the approach to factory regulation advocated by the Ten Hour Movement during the development of early factory legislation in nineteenth-century Britain. Not only was the argument made that criminal law was an appropriate apparatus for controlling some of the harmful consequences of industrialisation, but 'a very clear attempt was made to establish some symbolic identity between the offending factory occupier and the ordinary criminal, often by means of a call for fairly draconian penalties', including 'imprisonment, and flogging, and pillory' (Carson, 1979: 41). It is arguable that reformers contemplated that the criminal law might function, not just as a utilitarian device, but also as a vehicle for the symbolic and practical expression of moral disapproval and anger.

In the event, Carson documents how 'this attempt to break down the distinction between factory offenders and other criminals was not substantially successful, even at the legislative level' (Carson, 1979: 41).[10] Nevertheless, since that time contemporary movements have continued to challenge dominant definitions of corporate illegality that kills, maims and poisons workers as 'regulatory' or merely technical offending. For instance, attempts to challenge the Factory Inspectorate's continued refusal to act as 'industrial policemen' are found in evidence submitted to the Robens Committee between 1970 and 1972. The task of the Committee when it was appointed in May 1970 was to 'review the provision made for the safety and health of persons in the course of their employment....and to consider whether any further steps are required to safeguard members of the public from hazards... arising in connection with activities in industrial and commercial premises.' (Robens, 1972a: xiv). The evidence of the TUC to the Committee stated: 'there is, in our view, a strong case for holding that what is needed is a more vigorous prosecution policy directed against [health and safety] offences, without waiting for an accident to happen.' (Robens, 1972b: 686). A more explicit argument in

favour of responding to health and safety offences as 'proper' criminal offences was made to the Committee by the solicitor W.H. Thompson. Thompson proposed that 'every serious accident and every substantial contravention of the law' should be reported to, and prosecuted by, the police rather than the Factory Inspectorate (*ibid.*) which, Thompson argued, had shown itself 'unwilling and unfit to deal with this aspect of the matter'. Thompson was here objecting to the existence within the Inspectorate of a strong organisational culture that had grown out of, and in response to, the social, economic and political forces which existed at the time the Factory Inspectorate was first formed (Carson, 1979). This organisational culture included a continued and persistent refusal to administer the Factories Acts as though they were *criminal* statutes, and a denial that health and safety offences were 'real crime' or offending companies 'real criminals'.

Efforts by contemporary movements, activists and individuals like Thompson to break down the distinction between 'legitimate business' and the common criminal have been resisted by the State just as the efforts of the Ten Hour Movement were resisted. Similarly, the analysis in later chapters of a case-study involving the uncontrolled exposure of residents to asbestos demonstrates the ways in which these residents attempted to mobilise the law against the companies responsible, and how these attempts were resisted by the regulatory bodies. Despite arguments from some quarters to the contrary, the Robens Committee concluded that 'the traditional concepts of the criminal law are not readily applicable to the majority of infringements which arise under this type of legislation... In such circumstances the process of prosecution and punishment by the criminal courts is largely an irrelevance.' (Robens, 1972a: 82). The Robens Report thus confirmed and legitimated the approach to enforcement previously adopted by the Factory Inspectorate. Such an approach, the Report argued, is justified on the basis of the fact that offences against health and safety legislation are *qualitatively* different from offences against conventional criminal statutes and, consequently, a punitive response to such offences is neither merited nor useful (*ibid.*, 80-83). The HSE is explicit about the fact that it continues to approach corporate safety crime as a type of illegality that is quite different from 'normal' criminal offending. Thus in 1990, the then Director General of the HSE, John Rimington stated to the House of Commons Employment Committee in March 1990 that he would 'not subscribe to the view which went in favour of treating

[10] Even the 'more modest proposals, advanced by Ashley and embodied in an abortive Bill,' (Carson, 1979: 42) of punitive fines of up to £200 and imprisonment for up to a year in cases of

health and safety at work offences as normal criminal offences'. He later stated in an interview that 'it's impossible to approach employers or to approach the courts on the basis that what they're trying to deal with is some species of criminal offence in the ordinary kind of way. It belongs to the administrative law for very obvious reasons.' (Cited in Bergman, 1991a: 36-37). The specific arguments for treating this as an area of administrative law rather than an area of the criminal law will be dealt with below. For the moment it is important to note that such sentiments demonstrate a remarkable continuity in the enforcement of health and safety law over a period of nearly one hundred and seventy years. For instance Alexander Redgrave, summing up the approach of the Factory Inspectorate from the mid-nineteenth century wrote:

> 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 offence which he is told to detect. We have endeavoured 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.
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> (Report, 1876. Cited in Carson, 1979: 52).

Whilst the adoption by the HSE (and the Factory Inspectorate before it) of an advisory, as opposed to enforcement, stance in relation to the regulation of business activity has always provoked antagonism (particularly from trade unions) and was disputed at the time of the Robens Report, the 1980s saw a proliferation of grass roots community and worker organisations campaigning around issues of health and safety, despite the unfavorable economic and political climate (Dalton, 1992). The campaigns of the local Hazards Centres, individual trade unions, the Construction Safety Campaign, and the Centre for Corporate Accountability have included explicit demands for an increased use of criminal prosecutions and sanctions, particularly in the event of work-related deaths and serious injuries. Public campaigns and activism around work-related death, injury and disease have mounted a continuing challenge to the official interpretation of safety crimes as 'administrative' offending. They have, like the Ten Hour Movement in the early

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persistent violation were rejected.

nineteenth century, sought to establish an identity between 'the criminal' and 'the gentleman' - or rather, the twentieth-century version of this figure, the businessman. So, for instance, unions such as AEEU, MSF and UCATT, as well as the Construction Safety Campaign, have demanded that individual company executives are made personally liable for breaches of health and safety law and be given jail sentences in serious cases (Labour Research, November 1994). The Construction Safety Campaign, in particular, has been very active since its formation in 1987 in organizing protests around the high rates of injury, disease and death suffered by construction workers (Foley, 1990), and in pressing for more punitive sanctions against the companies and individual managers or directors involved. Similarly, the Work Hazards Campaign has called for a response to work-related bodily harm that more closely resembles a conventional criminal justice response. For instance, the campaign calls for the establishment of a 'specialised investigation and prosecution unit...to investigate workplace deaths, serious injuries and industrial diseases'. To facilitate prosecutions it calls for changes to company law specifying the responsibility of individual managers and directors for health and safety failures and demands that custodial sentences are available for a greater number of offences under HSWA 1974. Finally their Charter uses the language of international human rights and calls for the establishment of 'an independent inquiry into worldwide asbestos genocide... with those responsible for this industrial genocide indicted and brought to court and convicted of crimes against humanity (Hazards Campaign, 1999: 6, 16).

In addition to these grassroots worker organisations, and as a consequence of the series of disasters that occurred in this country from the mid-1980s through to the late-1990s, a number of campaigning groups were formed by the relatives of those killed with the objective of pressing for criminal charges to be brought against the companies involved.[11] Yet, despite the development during the nineteenth and twentieth centuries of a concept of corporate liability under the criminal law,[12] these campaigns have resulted in a number

[11] For instance following the transport disasters at Kings Cross, Clapham, Southall and now Paddington, the capsizing of the *Herald of Free Enterprise* and the sinking of *The Marchioness*, the explosion of Piper Alpha, the tragedy of Hillsborough, relatives of those killed have expressed the desire, and actively campaigned, to see the companies involved held criminally responsible for the deaths. See also Wells, 1995.

[12] The pressure for this development came not from a perception of the illegitimacy of the effects of uncontrolled business enterprise on human health, safety and welfare, but from the exigencies of commercial activity and its dependence on an uninterrupted and predictable infrastructural

of failed prosecutions. Mr Justice Turner directed the jury to acquit P&O European Ferries of manslaughter charges following the *Herald* disaster in 1990;[13] a private prosecution against South Coast Shipping following the *Marchioness* disaster reached committal proceedings in June 1992 but 'came to an end there' (Wells, 1995: 120); relatives of those who died in the Piper Alpha explosion dropped attempts to pursue a private prosecution against Occidental when the rig company was sold by its parent company (Wells, 1993: 145); and on 2 July 1999 Mr Justice Scott Baker called for manslaughter charges against Great Western Trains to be dropped following the Southall rail crash, and criticised the government for failing to introduce legislation that would have given effect to the Law Commission's proposals for a new offence of corporate manslaughter. (Hall, 1999). The effect of these failures, and the inability of relatives to persuade the Crown Prosecution Service (CPS) to bring manslaughter charges against companies responsible for the deaths of individual workers,[14] has been a renewed impetus behind a loose coalition of campaigning and survivors groups pressing for the criminalisation of negligent companies causing death or injury to workers or members of the public. This informal coalition includes local Hazards Centres, the Construction Safety Campaign, the Relatives Support Group, Disaster Action, the Herald Families Association, the Simon Jones Memorial Campaign and the Centre for Corporate Accountability.

The brief history outlined above provides some evidence to suggest first, that modern industrial democracies are fundamentally riven by conflicting groups with conflicting perpectives and moralities, but also that even where a consensus - or majority opinion - exists, the criminal law may fail to reflect this. For instance, Wells writes that 'The trend

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development (Slapper and Tombs, 1999: 27). See Slapper and Tombs generally (1999: 26-35) for a discussion and analysis of this development

[13] The judge held that 'one of the individual defendents who could be "identified" with the company would have himself to be guilty of manslaughter', and '[s]ince there was insufficient evidence on which to convict any one of those individual defendents, the case against the company had to fail' (The Law Commission's Report, 1996: 83).

[14] See for instance Elvin (1995) on the death of Paul Elvin; Bergman (1994) on the deaths of Frank Warren, Nicholas Scott, Michael Brennan, Tony Fishendon, and Jasbir Singh. All of these cases were referred to the CPS as a consequence of unlawful killing verdicts being returned by inquest juries, pressure from families on the Attorney General to force the CPS to reconsider the possibility of manslaughter charges, or coroners referring cases prior to an inquest. None of these cases resulted in a manslaughter charge being brought against the companies involved. Finally, following the death of Simon Jones in April 1998 in Shoreham docks and the decision of the Crown Prosecution Service not to bring a manslaughter prosecution against the employers,

towards responding to disasters in terms of corporate manslaughter seems to have begun with the capsize of the *Herald of Free Enterprise* at Zeebrugge in 1987' (1995: 112), and that the use of the concept in legal proceedings was, despite the collapse of the trial, 'a clarion call in subsequent disasters' (*ibid*, 114). It could be argued in fact that one of the effects of these campaigns has been to create a social consensus concerning the need for negligent managers to be held criminally accountable for work-related deaths. Thus, following the jury's verdict of 'unlawful killing' at the inquest into the deaths of those killed when the *Herald* capsized, the *Daily Mail* wrote:

> It's been laid down in law that the people responsible in such matters are those directing the minds and policy of the company. Develin and Ayers were responsible for the safety of the company fleet. If a system of positive reporting has been introduced, this disaster would not have happened.
>
> (cited in Crainer, 1993: 94).

And in June 1989 an editorial in *The Times* stated even more categorically that 'Recklessness by jeopardising public safety should be a crime, whether tragedy ensues or not. And the law should not make it too difficult to prove' (cited in Crainer, 1993: 120). Nevertheless, despite evidence of such a consensus, a decade has passed and we still have no law of corporate killing which overcomes the specific obstacles faced by the prosecution in the P&O trial.

In addition to the mismatch that presently exists between popular and legal conceptions of corporate manslaughter (Wells, 1995), there also exists a gap between public expectations and legal outcomes in relation to the state's response to workplace violence more generally. For instance, the public and the media frequently perceive prosecutions resulting in large fines as being for the deaths of workers when they are in fact imposed for technical breaches of health and safety legislation (Hutter and Lloyd-Bostock, 1990). Moreover, whilst Hutter and Lloyd-Bostock refer to a public expectation that serious injuries to, or deaths of workers will trigger a punitive response from the state (*ibid.*, 418), they fail to mention that only a small proportions of major injuries are ever investigated, let alone prosecuted, and that when prosecutions do take place they are

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Simon's family decided to challenge this decision and are seeking a Judicial Review in the High Court.

mostly heard in the Magistrates Courts and that the level of fines imposed could hardly be described as 'punitive' (Centre for Corporate Accountability, 1999). These gaps, in themselves, do not necessarily refute consensus or pluralist theories of law and society. For instance Hawkins writes that 'public attitudes in Britain to the environment and its protection have almost certainly changed in the twelve years since I conducted the bulk of the fieldwork for *Environment and Enforcement*, which (to speculate) might well work through towards greater support for, and practice of, sanctioning strategy.' (1990: note 32 at 456). In other words, if there currently exists a mismatch 'between the cultural meaning and the legal construction of the term "corporate manslaughter" ' (Wells, 1995: 109), Hawkins would argue that the law (albeit slowly) will move to close the gap. However, it will be shown below that although some concessions may have been won at the symbolic level, there is very little evidence to suggest a real, or sustained, shift towards increased criminalisation of, or punitiveness towards, corporations that maim, poison and kill.

CLOSING THE GAP SINCE ZEEBRUGGE?

The failed prosecution of P&O European Ferries for corporate manslaughter was, arguably, significant in marking a change in the way corporate responsibility for human suffering was publicly represented and articulated (Wells, 1995). The collapse of the trial in 1990 seemed all the more significant since it occurred against the backdrop of a number of widely-publicised disasters and damning public inquiries, highly critical of senior management in each of the respective disasters. In March 1987 the *Herald of Free Enterprise* capsized off the coast of Zeebrugge. Between that time and the collapse of the trial, a further 31 people died in November 1987 in the King's Cross fire; 167 workers died when the Piper Alpha platform exploded in the North Sea in July 1988; 35 died in December 1988 in the Clapham Junction rail crash; 96 people died in April 1989 at Sheffield Wednesday's Hillsborough ground and in August 1989 51 people died when a pleasure cruiser, the *Marchioness,* was hit by a dredger and sunk. Tombs has argued that 'these disasters 'impressed' upon the public consciousness that occupational accidents did not have their effects confined within 'the factory fence'; public and worker safety became linked and were politicized.' (Tombs, 1995a: 352). Thus the trial of P&O European Ferries took place in the context of a growing public awareness of the risks that inadequately controlled corporate activity could pose to the general public. Moreover, the

widely-reported nature of the trial ensured that the concept of 'corporate manslaughter' obtained a kind of cultural currency, seeming to open up new possibilities for holding corporations to account.

Following the collapse of the prosecution, the Law Commission 'decided to devote special attention' to the question of 'corporate liability for manslaughter'. (Law Commission, 1996: 4). It is interesting that the report of the Law Commission refers not only to 'public disquiet' in relation to the disasters in the decade preceding the report but also to the prevalence of workplace deaths and the arguments of Bergman and Wells (*ibid.*, p 4 and footnote 21). This tends to provide support for Tombs's argument that 'public and worker safety became linked and were politicized'. In fact the Law Commission was quite explicit in explaining the decision to consider the offence of 'corporate manslaughter' in terms of this combined public pressure:

> In this report we have decided to devote special attention to corporate liability for manslaughter, for three reasons. First, as we will show, a number of recent cases have evoked demands for the use of the law of manslaughter following public disaster, and there appears to be a widespread feeling among the public that in such cases it would be wrong if the criminal law placed all the blame on junior employees who may be held individually responsible, and did not also fix responsibility in appropriate cases on their employers, who are operating, and profiting from, the service they provide to the public, and may be at least as culpable. Second, we are conscious of the large number of people who die in factory and building site accidents and disasters each year: many of those deaths could and should have been prevented. (Law Commission, 1996: 4).

The Law Commission published their proposal for a new offence of corporate manslaughter in 1996. By removing the need to identify the corporation with the state of mind of one of its controlling officers, the Law Commission's proposals, if implemented, would remove one of the obstacles to prosecution in the *Herald* case. The incoming Labour government failed to act on the recommendations immediately, but following the Southall rail crash in September 1997 and an emergency resolution passed by the Labour Party conference in October 1997, it was publicly stated that Jack Straw was planning to introduce a new offence of 'corporate killing', with the Deputy Prime Minister, John

Prescott, giving 'his strong backing to the measure.' (Brown, 1997). Thus, the fact that the Crown Prosecution Service brought a prosecution for corporate manslaughter in the first place, the Law Commission's recommendations and the new Labour government's pledge to implement those recommendations did appear to indicate the beginnings of an acceptance that, in certain cases, corporations should be held criminally liable for causing deaths.

Prior to the P&O prosecution, the only successful manslaughter prosecution following a work-related death was the prosecution of Norman Holt, a Director of David Holt Plastics Ltd, who pleaded guilty to manslaughter and was given a suspended sentence, following the death of an employee George Kenyon in May 1988. George Kenyon 'was cut up by a 20 to 50 inch blade, moving at 12000 revs per minute, when his body was dragged head first into a machine which "crumbled" plastic' (Bergman, 1991a: 23). The Court was told how the machine had been tampered with 'so that it could operate with the lid open and double production' (*ibid.*), and that both directors were aware of this and therefore condoned this hazardous operation. Such a prosecution was wholly exceptional and was not the consequence of any initiative on the part of the HSE, but rather 'the macabre nature of the death and the small size of the company led a police officer at the scene of the fatality to refer it to the CID' (Bergman, 1994: 10).

However, in 1993 the HSE instituted a more formal policy whereby HSE field inspectors were to refer deaths to the Crown Prosecution Service when they thought there was a prima facie manslaughter case (Centre for Corporate Accountability, 1999). Between 1993 and 1999 this resulted in the referral of 84 deaths (*ibid.*). In addition, the Health and Safety Executive, the Crown Prosecution Service (CPS) and the Association of Chief Police Officers also agreed, in March 1998, a protocol for liaison in the event of work-related deaths (HSE, 1998a). This document acknowledges the possibility that workplace deaths may involve the crime of manslaughter or corporate manslaughter and formalises the arrangements between the HSE, the CPS and the Police in the event of an investigation or prosecution. Since the 1988 prosecution of Norman Holt, there have been two further successful manslaughter prosecutions following work-related deaths, one of these for corporate manslaughter.[15] In December 1994 the managing director of an

[15] There was a additional manslaughter prosecution in March 1996 when Joseph O'Connor, the managing agent of the *Pescardo* was sentenced to three years imprisonment after the boat sank in

activity centre was found guilty of the manslaughter of four teenagers on a canoeing trip in Lyme Bay and given a three-year prison sentence. His company, OLL Ltd., was also successfully convicted of corporate manslaughter (Labour Research, April 1998: 15-16). In September 1996 Alan Jackson, managing director of Jackson Transport Ltd, was found guilty of manslaughter and imprisoned for one year following the death of an employee (Dix, 1999).

In addition to signs of an increased willingness on the part of the HSE to refer, and the CPS to bring, potential manslaughter prosecutions following workplace killings, there are indications that the Courts and the Government may be taking a more punitive approach to breaches of the Health and Safety at Work Act. This development has been publicly welcomed by the Health and Safety Executive, who state that they have 'long been concerned that the general level of penalties imposed by the courts does not reflect the seriousness of the cases before them given that lives can be put at risk and unscrupulous companies can profit from flouting health and safety law' (HSC, 1998a: 30). The average fine per conviction in 1989/90 was £739.[16] By 1997/98 this had risen to £3,886[17] (HSC, 1998a). In the case *R v F Howe & Sons* Mr Justice Scott Baker stated that 'Disquiet has been expressed in several quarters that the level of fine for health and safety offences is too low. We think there is force in this and that the figures with which we have been supplied support the concern'... The Magistrates Courts have recently been given the power to impose exemplary maximum fines of £20,000 in specified cases, and Lord Irvine, the Lord Chancellor, has stated that the present Government intends to extend this maximum fine in the lower courts to most other offences under health and safety legislation. He has also stated that the Government intends to enable courts to impose a prison sentence for most health and safety breaches (Irvine, 1999).[18] In January 1996 the first prison sentence was served for breaches of health and safety legislation. Roy Hill, a

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1991 killing all six crew members. However his conviction was overturned in February 1997 on a technicality (Labour Research, April 1998: 16).

[16] This figure excludes one exceptional fine of £100,000. If this conviction is included the average fine for 1989/90 was £783.

[17] This provisional figure excludes four separate exceptional fines of £150,00, one for £175,000 and four of £100,000. If these convictions are included the average fine for 1997/98 was £4,785. Figures relating to the total number of 'informations laid' by HSE inspectors for 1997/98 were not available. However, for the year 1996/97 the total number of informations laid by the HSE was 1490 - a 16% decrease compared with the previous year (HSC, 1998b: 63)

[18] At present, imprisonment is only available as a sanction for a limited number of offences under health and safety law - namely, contravention of a prohibition notice or breach of certain licencing conditions.

company director, was given a three-month sentence for breaches of The Asbestos (Licensing) Regulation. This was followed by the imprisonment in April 1996 of Colin Barker and Knox Kerr, directors of Calder Felts for failure to comply with a prohibition notice issued in respect of a machine that was not properly guarded. The company's continued use of the machine resulted in a young employee having his arm ripped off. And finally, in 1997, Frank Allum was given a three-month prison sentence after pleading guilty to charges of unlawful management of asbestos waste (Labour Research, April 1998: 16).[19]

Do the events and developments outlined above constitute evidence in support of Hawkins's contention that a growing public intolerance of workplace deaths caused by management negligence 'may well work through towards greater support for, and practice of, sanctioning strategy.' (Hawkins, 1990: footnote 32 at 456)? A closer examination of these and other developments from the late 1980s and throughout the 1990s suggests that the extent to which these changes represent an increased willingness on the part of state institutions to articulate and respond to instances of corporate culpability as 'crimes' may be more apparent than real. Whilst the government has again confirmed that it will introduce a new offence of corporate killing (Whitty, 1999) Jack Straw's original pledge was first made after the Southall rail crash and, as Bergman dryly points out, two years have passed 'and we don't even have a consultation document' (Bergman, 1999a). The lack of priority that the Government has accorded to this seems extraordinary, particularly in the light of the speed with which other criminal justice matters have been legislated when the targets of that legislation are relatively powerless sections of the community.[20] Because of this neglect, and following the Ladbroke Grove rail crash on 5 October 1999, we now face the prospect of yet another rail company escaping criminal prosecution for manslaughter since the loophole that the Law Commission's recommendations aimed to close remains. Nevertheless it does seem as though the Government will have to respond to mounting public pressure and in October 1999 Straw publicly announced that the Home Office would be publishing a consultation document the following month (Brown and Clement, 1999). Whether or not the new law on corporate killing will be enforced in practice is a different matter. To assess the

[19] See Tombs (1995: 352-353) for further evidence of 'general signs of a criminalization of occupational safety offences'.
[20] The Crime and Disorder Act 1998, and the powers to impose curfews on young people, is a good example of this.

likelihood of this we can look at the extent to which the law of corporate manslaughter was enforced following the attempted prosecution of P&O - for although the prosecution failed, the Court confirmed in 1990 that the offence of corporate manslaughter exists in English law.[21]

Manslaughter Prosecutions following Work-Related Deaths

There are three key 'gate-keeping' institutions that could obstruct, or facilitate, the prosecution of companies for manslaughter following workplace deaths - the HSE, the coroners courts, and the Crown Prosecution Service. Although these three institutions have their own distinct organisational ethos and working practices, it appears that at each stage of the process these institutions all contribute to the non-criminalisation of culpable corporate killings. In considering first whether 84 referrals from the HSE to the CPS (following workplace fatalities since 1993) marks a growing willingness on the part of the HSE to initiate prosecutions for corporate manslaughter, we must note that Bergman's analysis of 28 workplace deaths in the West Midlands provides evidence to suggest that at least four of the deaths (that is, fifteen *per cent*) could have resulted in successful manslaughter prosecutions of the companies or senior executives involved under the law as it then stood (Bergman, 1994). Bergman's research is supported by two further studies. The first is an Australian study which found that in 12.3 *per cent* of all work-related deaths occurring in Victoria over a four-year period there was evidence of a level of company negligence sufficient to sustain a manslaughter prosecution under the Australian *Crimes Act* 1958 (Perrone, 1995: 87). The second piece of research involved a three-year study by Gary Slapper. Slapper concluded from his research that about 20 *per cent* of work-related deaths 'present good prima facie cases for charges of manslaughter to be brought against the employers responsible'. (Milne, 1999a). Extrapolating from his findings, Bergman estimates that there should have been around 64 manslaughter prosecutions nationally each year between 1987 and 1992, and a *further* 108 cases annually which should have been referred to the CPS (Bergman, 1994: 93).

[21] Up until 1993 a senior company officer with safety responsibilities would be guilty of reckless manslaughter if it was proved beyond reasonable doubt that a deceased worker was exposed to an obvious and serious risk of physical harm, and that the accused's failure to avert this risk was a significant contribution to the death. After 1993 the test for manslaughter was changed from one of 'recklessness' to 'gross negligence'.

Although the fatality rate has dropped overall since 1992 (and so annual figures would be slightly smaller) I would argue that, far from representing a new willingness to construe workplace fatalities as possible crimes, the 84 referrals and 3 attempted prosecutions over a period of six years probably indicates a continued *resistance* on the part of the HSE and the CPS to criminalizing workplace deaths. Indeed, it will be argued below that the response of the Government and other state and legal institutions to public and worker pressure to criminalise companies can be understood largely as 'symbolic action' (Calavita, 1983). This interpretation is all the more persuasive when we consider that a breakdown of HSE figures shows that out of the 84 cases referred to the CPS, *only twenty four* of these related to potential evidence against a senior company officer who could be said, in legal terms, to represent the company (Centre for Corporate Accountability, 1999). In other words, only twenty-four, out of eighty-four cases referred to the CPS, related to a possible corporate manslaughter charge or prosecution of a senior company executive.[22] This amounts to just four corporate manslaughter referrals each year. In 1996/97 there were a total of 654 work-related deaths (including deaths to the self-employed and members of the public) recorded by the HSE. (HSC, 1998b). According to all available independent research the number of corporate manslaughter referrals for that year should have been somewhere between 78 and 130 (Perrone, 1995; Slapper, 1999). Thus we can see that, even on the most conservative estimate (Perrone, 1993), the HSE are only referring a tiny fraction (approximately five *per cent*) of the total number of deaths where there exists a prima facie case of corporate manslaughter.

The HSE are not the only route by which work-related deaths may be referred to the CPS. Cases involving work-related death may also be referred to the CPS by the police, coroners and, in exceptional circumstances, the Attorney-General - although in practice such referrals have been rare. However, following the creation of a new protocol for liaison, agreed by the HSE, the CPS and the police, the responsibility for referring possible manslaughter cases to the CPS has shifted from the HSE to the police. From March 1998, 'a police detective of supervisory rank should attend the scene of [every] work-related death... and should make an initial assessment about whether the circumstances might justify a charge of manslaughter, or other serious general criminal

offence, in which case the police will commence their investigation.' (HSE, 1998a). Whether or not this initiative results in a greater number of prosecutions will in part depend, not just on the willingness of the police to refer cases to the CPS but also on the willingness of the CPS to institute criminal proceedings. The likelihood of this will be considered below, but first we must turn to a consideration of the role that has been played by the second gate-keeping institution - the Coroner's court.

Very little research has looked at the part that coroners play in the non-criminalisation of workplace deaths. However, Bergman's (1991) study is seminal in documenting the failure of the inquest system in uncovering the existence of a criminal level of negligence in relation to workplace deaths. All work-related deaths will be subject to a coroner's inquest. Bergman writes that, 'Not only is it the sole public forum to enquire into the cause of a workplace death - and indeed one of the few arenas in which corporate activity can be publicly scrutinised - but it provides, through its verdict of 'unlawful killing' a possible mechanism by which the police can be forced to investigate for manslaughter.' (*Ibid*, 5). However, juries almost invariably return a verdict of 'accidental death' following inquests into work fatalities. Bergman's examination of over 20 inquests held between 1988 and 1990 suggests that this is because coroners and lawyers acting for the families of those killed are crucially failing to question witnesses in such a way that evidence establishing the culpable responsibility of employers is discovered. Lawyers and coroners were frequently failing to establish in the course of the inquest what the legal responsibilities of senior managers were in relation these 'accidents' and whether those duties had been adequately fulfilled. In most cases, senior managers and directors were not called for questioning and it was often the case that individual companies were not even named in the course of the inquest. Bergman accounts for these failures in terms of a general preconception held by coroners that 'workplace deaths are "accidents" and can never be the result of serious criminal conduct... Their attitude seems to be that since the verdict is going to be 'accidental death' anyway, there is no point in wasting time on extensive examination.' (*Ibid*, 62).

However, it may be the case that the decisions of coroners to limit the inquest 'to the narrowest enquiry about "how" the worker died' (*ibid*, 62) are not simply, or not always

[22] The other referrals presumably related to lower level managers or to individual workers. This is despite the fact that the HSE almost invariably locates responsibility for hazardous work

just, a function of coroners' unspoken assumptions about the nature of workplace deaths. Although systematic research has not investigated this question, there is some circumstantial evidence to suggest that what is usually an unthinking assumption on the part of coroners may turn into a conscious and active resistance to attempts by families and their legal representatives to raise questions of criminal responsibility. For instance when the inquest jury in the *Herald* case returned the verdict of 'unlawful killing', this was unexpected and unusual for two reasons. First, as Bergman has documented, such verdicts are unusual in the context of work-related deaths. Second, the verdict went against the express advice of the coroner in the case. The jury, therefore, returned an unlawful killing verdict despite what appeared to be efforts on the part of the coroner to prevent lawyers representing the families from raising issues of company responsibility. Stuart Crainer, commissioned by the Herald Families Association to write a book on the disaster and the subsequent attempt to prosecute P&O, relates how lawyers acting on behalf of the families at the inquest 'wanted the jury to have a chance to decide whether the company itself was guilty of corporate manslaughter.' (Crainer, 1993: 92). The coroner in this case, Richard Sturt, was aware that the families' lawyers were pushing for evidence to be allowed which would implicate senior company executives and support a charge of corporate manslaughter. However, he refused a request made by the families' lawyers to call five directors of the company 'on the ground that they were too distant from the actual events for their evidence to be important'. Thus, without having allowed any actual evidence to be heard relating to the involvement (or non-involvement) of P&O directors, Sturt felt able in his summing up to express the opinion that Townsend directors were 'too remote from what happened to be accused of gross negligence' (*ibid*, 93), and that he considered 'that a verdict of unlawful killing may not necessarily be found by the jury' (*ibid*). In addition, he directed the jury that the concept of corporate manslaughter was at that time unknown to the law - this, in spite of a previous ruling by the Divisional Court of the High Court in relation to the *Herald* case that 'given the right circumstances a limited company could be guilty of manslaughter' (*ibid*, 92).

Similarly, after the Clapham Junction rail crash and the DPP's decision not to prosecute British Rail, Dr Paul Knapman, the coroner at the inquest into the rail crash, instructed the jury in 1990 that, 'The chain of events of causing these deaths is of almost infinite length... I rule that if you are minded to return a verdict of unlawful killing and name

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conditions with management, for failing to maintain safe systems of work.

British Rail as the perpetrators, as a matter of law I direct you that it is not open to you.' (Crainer, 1993: 93). This direction was given despite evidence at the public inquiry relating to British Rail's 'bad workmanship, poor supervision and poor management' (Hidden Report, 1989). The practice of removing 'unlawful killing' verdicts from the jury in cases of workplace death, or at least of discouraging the jury from such a verdict, appears to be commonplace. At the inquest into the King's Cross fire, 'the jury was forbidden by the coroner to return a verdict of 'unlawful killing'. ' (Bergman, forthcoming 2000). Since the inquest was held before the Public Enquiry Report was published and because the inquest (lasting less than a week) only presented the jury with evidence from the narrowest range of witnesses, Bergman argues that a verdict of accidental death was almost inevitable (*ibid.*). Foley (1990) also documents how the coroner presiding over all seven inquests into the deaths of Channel Tunnel workers effectively precluded any possible verdict other than one of 'accidental death' in every case.[23] At the time, the Channel Tunnel death rate was 'running at three times the national average for the building industry', and whereas the French workforce was twice the size of the British workforce working in the tunnel, 'only' two French workers as compared to seven British workers had been killed by July 1990. (Foley, 1990: 12-13). This strongly suggests that safety management on the British side of the project may have been inadequate. Such an interpretation is confirmed when we consider the circumstances that led to the deaths of David Simes and Keith Lynch. David Simes was killed in February 1989 because Trans Manche Link (TML) had failed to provide an adequate and organised system of banksmen within the tunnel boring machine. The company was prosecuted under health and safety legislation and fined £40,000 for this failure. In January the following year Keith Lynch was killed because the company had still not put in place an organised system of banksmen despite this failure having already caused the death of David Simes (Bergman, 1990a). In the case of Keith Lynch at least there would have been a clear prima facie case of manslaughter. It was clear that a 'guiding mind and will' of the company (that is, one or several directors or senior managers) would have been aware, or should have been aware, that an obvious and serious risk of injury existed because of their failure to implement an adequate system of banksmen since the company had been recently prosecuted for this very failure. Bergman's discussion of two other Channel Tunnel deaths demonstrates that in both cases it was at least arguable that senior management had failed 'to avert "an obvious and serious risk" of a worker suffering from

[23] See also Bergman, 1990.

physical harm, and the failure [was] a significant contribution to the death.' (Bergman, 1990a: 1108). However, at each inquest coroner Sturt withdrew 'the option of an unlawful killing verdict from the jury leaving them no alternative but to return a verdict of accidental death. In the last three inquests he told them that since they could only return one verdict they did not really need to leave the court to discuss it among themselves.' (Foley, 1990: 20). After attending three of these inquests, the Construction Safety Campaign 'claimed that there was sufficient evidence to bring reckless manslaughter charges against [Trans Manche Link] and its directors' and called on the DPP to refer the deaths to the police for criminal investigation. This call was ignored by the DPP and the Crown Prosecution Service (Foley, 1990: 18-19).

In considering the approach of the Crown Prosecution Service (the third and final gate-keeper) towards work-related deaths both before, and after, the P&O prosecution, it is important to understand that the attempt to prosecute three directors and P&O for the Zeebrugge deaths was a consequence - not of some change in the CPS's approach to prosecuting workplace deaths - but of a set of exceptional circumstances. Bergman writes that,

> a cumulative effect of many factors - the huge toll on the lives of the public, the ensuing publicity, a damning public inquiry report, and a concerted campaign by the bereaved families - was sufficient to overturn the entrenched institutional approach of treating such deaths primarily as "accidents" or as "regulatory crimes".
>
> (Bergman, 1990a: 1108).

The attitude of the legal establishment and various institutions of the state towards prosecuting companies and their senior officers for work-related fatalities at the time of the Zeebrugge disaster was very much the same as it had been at the time of the Aberfan disaster in 1966.[24] Both disasters were the subject of reports that lay clear responsibility for the loss of lives on the failures of company management in each case (Sheen Report, 1987; Edmund Davies Report, 1967). Yet in both cases, and despite these damning

[24] In which 116 children and 28 were buried in slag when a coal tip engulfed a village school.

reports, 'the coroners and the relevant law officers[25] displayed the same resistance to the idea of translating [company] negligence into criminal liability' (Wells, 1995: 113-114). After Aberfan, although it was acknowledged that it would have been possible to institute criminal proceedings, the Attorney-General decided against such a course of action, explaining to the Commons 'that those implicated "have suffered enough by their own neglect".' (*Ibid*, 114). The crucial difference between the two cases - pivotal in determining their very different legal fates - was the pressure for criminalisation from the families of those killed in the *Herald* disaster. Wells notes that after Aberfan, 'the Aberfan Parents and Relatives Association decided that they did not want to pursue prosecutions' (*ibid.*). By contrast, and although the Sheen Report had not raised the issue of criminal liability, 'by the time of the inquest this was clearly at the forefront of the Herald Families Association's agenda' (*Ibid.*). By raising issues of corporate responsibility and culpability at the inquest, the families' lawyers paved the way for the jury to return a verdict of unlawful killing. This forced the DPP to pass the case on to the police for investigation - eight months after the disaster.

Since 1988 there have been three unsuccessful[26] and three successful[27] manslaughter prosecutions following work-related killings. To my knowledge, there has been no systematic study of the role of the CPS in relation to work-related killings. However, it is important to consider the fact that no criminal proceedings were initiated by the CPS against companies or their senior officers following the Kings Cross fire, Piper Alpha, the Clapham Junction rail crash, Hillsborough or the *Marchioness* disaster, although there were attempts by relatives to launch private prosecutions in the case of the Marchioness disaster and the Piper Alpha explosion. Information in the possession of relatives groups in relation to the CPS's role in these tragedies suggests that the CPS, like coroners, may actively resist attempts by relatives, their representatives and pressure groups to force the criminal justice system to label and proceed against work-related fatalities as possible

[25] These were, the Attorney-General after Aberfan and the DPP after the Zeebrugge disaster (Wells, 1995: note 25 at 114).
[26] The three attempted manslaughter prosecutions were: the attempted prosecution of P&O and senior company officers for the manslaughter of 192 people; the conviction of Joseph O'Connor, the managing agent of the Pescardo, for the manslaughter of six crew members which was later overturned on a technicality; and the attempted prosecution of a train driver and Great Western Trains following the Southall rail crash.
[27] The three successful prosecutions were: the conviction of Norman Holt, a director of David Holt Plastics Ltd, for the manslaughter of an employee; the conviction of Peter Kite and his company,

manslaughter cases. In each case there was no criminal investigation into the companies[28] by the police. Yet decisions were made by the DPP, and by the Lord Advocate in Scotland in relation to Piper Alpha, that there would be no manslaughter charges laid against the relevant companies. In the case of the Kings Cross fire, this decision was taken in spite of 'independent legal advice, obtained by the King's Cross Family Action Group and provided to the Crown Prosecution Service, which concluded that the evidence before the Public Enquiry itself was sufficient to provide the basis of a corporate manslaughter prosecution' (Bergman, forthcoming 2000). Wells's discussion (1995) of an attempt by relatives of those killed in the *Marchioness* disaster to bring a private prosecution against South Coast Shipping reveals that the CPS played a rather strange and obstructive role in relation to this prosecution. When the Director of Public Prosecution made it clear that there were no plans to charge South Coast Shipping,[29] a private prosecution was launched by the relatives of those killed on the *Marchioness*. Wells relates how this 'prompted the unusual move of the D.P.P. asking for papers from the private prosecutor's solicitor with a view to taking over and dropping the prosecution. Such action before committal is almost unprecedented' (Wells, 1995: 119). In the event, the private prosecution was not committed for trial. However, over the next few years new evidence emerged (known to the police but not followed up in their investigation) which more clearly established that failures to operate a safe look-out system on the *Bowbelle* were the direct cause of the collision. This evidence was presented at the inquest, which finally took place six years after the disaster, and the jury returned a verdict of 'unlawful killing'. However, no new police investigation was ordered and the CPS announced that no new prosecution would take place. (Bergman, forthcoming 2000).

In relation to the deaths of workers, a consideration of some cases that have, unusually, been referred to the CPS by the coroners courts suggests that the Crown Prosecution Service continues to exhibit what Bergman (1990a: 1109) has described as a 'seemingly embedded resistance' to considering work fatalities caused by gross company negligence

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OLL Ltd, for the manslaughter of four teenagers; and the conviction of Alan Jackson, managing director of Jackson Transport Ltd for the manslaughter of an employee.

[28] Although there was an immediate police investigation after the sinking of the *Marchioness*, the investigation was concerned with the culpability of the Captain of the *Bowbelle* and not with any possible criminal culpability on the part of South Coast Shipping. Similarly, the police investigation following the Kings Cross fire was directed towards discovering whether a member of the public had committed arson. There was no independent investigation into the criminal culpability of London Underground. (Bergman, 1999c).

[29] The owners of the dredger, the *Bowbelle*, that had sunk the *Marchioness*.

as unlawful homicides,[30] despite the fact that the CPS has now successfully prosecuted a company for manslaughter.[31] For example, in September 1990 two teenage brothers and another worker were killed after being exposed to hydrogen sulphide when they were employed to unblock drains in Watney Market. 'According to evidence given at the inquest, they were given no training, no safety equipment and no instructions' (Bergman, 1991a: 15). In a statement released immediately after the deaths the HSE stated that "The necessary precautions were well known, widely publicised and straightforward... Anyone involved in such work must anticipate the possibility of danger, make the requisite tests and provide both training and proper equipment for the job." (cited in Bergman, 1991a: 29). Yet the HSE did not refer this case to either the CPS or the police for further investigation. Consequently, when the case came before the St. Pancras coroner, he took the highly unusual step of adjourning the inquest and referring the case to the CPS for consideration of a prosecution for manslaughter (Bergman, 1991a: 29). The CPS decided not to proceed. They made this decision on the basis of the evidence discovered in the course of an HSE investigation and without passing the case on to the police for further investigation (*ibid.*). A similar pattern emerged when another coroner took the unusual step of adjourning an inquest in order to refer the case of two workplace deaths to the CPS. Frank Warren and Nicholas Scott were killed during the demolition of a bridge in South London in June 1992. The Crown Prosecution Service, on receiving the case from the coroner prior to the inquest, decided not to prosecute on the basis of the initial HSE investigation. A further development in the case made this decision all the more questionable to those observers who considered that there had been sufficient evidence to proceed with a criminal prosecution.[32] At Southwark Crown Court in October 1993, an inquest jury returned a verdict of 'unlawful killing' thus compelling the coroner to re-refer the case to the CPS (Bergman, 1994: 10).[33]

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[30] See for instance Bergman (1990a: 1109-1129) in relation to the killing of George Kenyon and the prosecution of Norman Holt who argues that 'the manner in which the CPS conducted the proseuction reveals how reluctant they were in prosecuting a director - not present at the time of the death - for manslaughter...The CPS...accepted a non-guilty plea by David Holt, who according to evidence given at the Crown Court hearing, knew as much about the machine as his younger brother. The judge himself seemed to find the CPS's acceptance of David Holt's plea surprising.'

[31] See note 27 *above*.

[32] The Construction Safety Campaign considered that both British Rail and the contractor. Tilbury Douglas, had been 'manifestly and grossly irresponsible' (Bergman, 1994: 1).

[33] For further examples where the CPS has resisted pressures to criminalise workplace deaths see Bergman (1994: 10) and Elvin (1995). See also Milne (1999b) for details of the Simon Jones case and the statement made by Labour MP George Galloway on 3 March 1999 in the House of Commons on Simon Jones's death. Galloway stated that "If the CPS will not prosecute for

It could of course be argued that laypeople and campaigning groups such as the Construction Safety Campaign would *like* for companies to be held criminally liable in some instances of work-related death but that CPS personnel, who are legally trained, are making correct decisions about whether or not criminal charges are applicable in the cases referred to them. There are two preliminary observations that could be made here which, whilst not conclusive, tend to undermine this explanation for the seemingly overcautious approach of the CPS. First, in relation to the mass deaths caused by the series of disasters following Zeebrugge, there were no adequate police investigations of the companies involved. This was in spite of the fact the CPS had been forced to direct the police to investigate P&O following the inquest jury's 'unlawful killing' verdict. In the case of the King's Cross fire, it seems that both the CPS and the police were aware that questions of corporate liability might arise since the police included in their final report to the CPS a section on 'the issue of corporate manslaughter'. However, Bergman (1999c) states that this section of the report was a 'composite' report which included evidence in relation to the police's investigation of whether an arsonist was responsible for starting the fire, evidence that the police had given at the Coroner's inquest and evidence that the police had given at the Public Enquiry. There was no separate police investigation into the possible criminal liability of London Underground, despite their awareness that this issue might be raised. Thus the CPS could claim that they were not going to lay charges against the companies involved because of a lack of evidence, when in fact this lack of evidence was the product of the failure of the police to investigate the companies in each case and only cursory consideration of other evidence.

The second point relates to the CPS's claim that there is insufficient evidence to prosecute for manslaughter in relation to most workplace deaths. Now on one level this claim may be justified since Bergman has shown that HSE investigations, whilst meticulous in identifying the immediate technical causes of workplace deaths, are failing to uncover facts about a company's history which would constitute the evidence needed to establish corporate liability for manslaughter. This is not because such evidence does not exist, it is simply that the HSE do not look for it (Bergman, 1994). However, on another level, such a claim is disingenuous since it appears that in the majority of cases the CPS have

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corporate manslaughter in this case, it is difficult to believe they will do so in any case." (cited in Milne, 1999b).

decided not to prosecute on the basis of an HSE investigation *without requesting a further police investigation* (Bergman, 1994: 10). Since it is acknowledged by all concerned that 'The HSE *cannot investigate* or prosecute for general criminal offences such as manslaughter' (HSE, 1998a, emphasis added), the CPS appear to have been making their decisions on the basis of investigations which were not directed towards discovering whether or not the crime of manslaughter had taken place. It is therefore highly questionable whether the CPS would have enough information about each case to make even a preliminary assessment of whether a workplace death was the consequence of manslaughter or not. In relation then to the disasters discussed above, and the failure of the CPS to prosecute for corporate manslaughter following the deaths of workers that are referred to them by the HSE and by the Coroners' courts, any lack of evidence obstructing prosecution appears to be a product of the failure of the CPS to demand that these killings are adequately investigated. Furthermore, it appears that even where the police do investigate work-related fatalities, the approach taken - under the direction of the DPP - has been unusually 'flexible'. For instance during the police investigation of the Captain of the *Bowbelle* after the sinking of the *Marchioness*, Bergman relates how a 'request for records of safety meetings went unanswered for three months, [yet] powers of search and seizure were never used.' He goes on to report that, 'One of the senior police officers in the investigation said that the Director of Public Prosecutions decided to, "do it in a more gentlemanly way; he felt they were dealing with honourable people".' (Bergman, 1999a).

It will be argued that it is precisely this representation of the business sector as 'honourable' or generally law-abiding that constitutes a fundamental justification for the maintenance of the status quo in relation to the regulation, and non-criminalisation, of occupational health and safety crimes. For whilst there have been signs, during the late 1980s and 1990s, of an increased punitiveness towards negligent workplace killings as a consequence of the public campaigns and struggles (Tombs, 1995a), what at first sight appears to be a more punitive 'mood' on the part of the state is, on closer inspection, seen to be selective and rare in its application and thus essentially a rhetorical response.

Prosecutions for Health and Safety Offences following Workplace Injury and Death

Whilst initial responsibility for deciding whether a workplace death might justify an investigation for manslaughter has shifted to the police, the HSE are still responsible for prosecuting regulatory breaches of health and safety legislation causing death or injury. In considering whether a gap exits between public expectation and sentiment following workplace deaths and serious injuries and the actual response of the state, it is interesting to consider the research of the Oxford socio-legal scholars. For whilst Hawkins has argued that a sense of moral ambiguity attaches to regulatory violations (Hawkins, 1990), he has found that 'there is a marked tendency in the [Factory Inspectorate] to prosecute after an accident' (1989: 380). Hawkins then refers to the opinions of the factory inspectors he has interviewed, who explain this in terms of a public expectation that some retributory action will be taken when harm has actually occurred. Similarly, Hutter and Lloyd-Bostock argue that,

> Emotions are aroused by news of serious injury or tragic death, especially when there are large numbers of victims. The power of accidents to command attention and arouse emotions in turn has social consequences. Accidents create expectations and demands for action. Not only must some response be made; it must be seen to be made.
>
> (1990: 410).

Given that Hutter and Lloyd-Bostock believe that 'accidents' resulting in mass death and serious injury create a strong public expectation that action will be taken, it is interesting to dwell on the fact that at the time their article was published there had been a series of public disasters, claiming many lives, none of which resulted in any criminal conviction - either under health and safety or under common law - except for the Clapham Junction rail crash (Bergman, forthcoming 2000). Yet there were clear expectations on the part of the survivors and relatives of those killed in these disasters that the companies responsible would be legally held to account in some way. Moreover, the demand for some kind of legal response by the state was not restricted to those immediately affected. There also appeared to be a broad consensus amongst the news media that these companies should be held to account. Nor, as the public enquiries made clear, was the fact that the HSE failed to institute proceedings for violations of health and safety legislation following these disasters due to a lack of evidence regarding the respective

failures of company management to maintain safe systems of work. It is rather extraordinary, then, that Hutter and Lloyd-Bostock, writing at the time that they do, fail to make any reference to these disasters, their social consequences or their legal outcomes. If they had, they might have been forced to confront what appears as an extreme disjunction between public sentiment and expectation and the actual role played by the state.

More generally, in relation to single, rather than multiple, deaths occurring in a work-setting Hawkins (1989) and Hutter and Lloyd-Bostock (1990) are in agreement that 'the power of accidents to command attention and arouse emotion' has an important impact on the propensity of the HSE to prosecute violations of health and safety legislation. First because, according to regulatory agents, it is easier to obtain a conviction following an injury or death (Hawkins, 1989: 380; Hutter and Lloyd-Bostock, 1990: 418) and the penalty handed out is likely to be greater thereby increasing the prosecution's deterrent value. And second, because a strong 'public expectation that punitive action' will be taken would be expected to exert a positive and powerful influence on HSE inspectors. So for instance, Hutter and Lloyd-Bostock write that:

> [A]ccidents and dramatic events again display a power to command attention and action. Risk comes to life. The law itself responds to evidence of injury: it is generally acknowledged to be easier for inspectors to prove a breach of the Health and Safety at Work Act when an injury has actually occurred. Where there has been a fatal or potentially fatal accident, inspectors respond to a public expectation that punitive action of some kind may be appropriate when serious damage or injury had been caused.
>
> (1990: 418).

However, a failure on the part of these researchers to focus on the overall disposition of cases results in some highly distorted and misleading assertions about the nature of HSE's prosecutorial activity. For instance, Hawkins asserts that there is a 'marked tendency' to prosecute after an accident and supports this by citing a field inspector who claimed "If there's been a fatal accident, it's very difficult not to take action if the evidence is there and there's a breach there", (Hawkins, 1989:380). Yet if the public do indeed anticipate a punitive response towards workplace deaths and serious injuries, then the quantitative

evidence (as opposed to unsubstantiated statements from HSE personnel) suggests that this expectation is only satisfied in a minority of cases. The prosecution rate following workplace fatalities for the relevant period (that is, 1987-1988) was around 14 *per cent*. This rate in extremely low, particularly in light of the fact that the HSE had, during the 1980s, conducted a series of investigations into the causes of workplace deaths and estimated that management was responsible in between 60 and 73 *per cent* of cases (HSE, 1985; 1986; and 1988). In addition, although the HSE claimed to select for investigation very serious injuries and those 'where a breach of the regulations is apparent' (Hutter and Lloyd-Bostock, 1990: 415), Hutter and Lloyd-Bostock report that, at the time of research, only '1 *per cent* of investigations lead to prosecution' (*ibid*, 417). Thus, Hutter and Lloyd-Bostock, and indeed Hawkins, fail to address what is a rather remarkable contradiction within their own data. For, given a set of circumstances in which prosecution is argued to be the expected response, why is it that the opposite situation exists - that is, that prosecutions are rare, even following fatalities and very serious injuries that are the consequence of regulatory violation?

Nor does the gap between HSE enforcement practice and public expectation appear to have closed over the last ten years. Marcia Davies, a regional Head of Operations in the HSE, has recently stated 'Those who are injured and the public generally on their behalf are increasingly expecting to see blame apportioned and retribution, especially when it is members of the public and young people who have been hurt', (Davies, 1998). Yet despite this evidence of HSE awareness of growing public intolerance of workplace deaths which are the consequence of inadequately controlled risks, HSE prosecutions under health and safety law following these killings do not appear to have increased over the period. The HSE do not publish statistics relating to numbers of prosecutions taken following a workplace death, but Labour Research requested figures for these for the years 1988/89, 1989/90, 1990/91 and 1992/93. They reported that fourteen *per cent* of fatalities led to a prosecution for health and safety offences in 1988-89, fifteen *per cent* in 1989-90, twenty-one *per cent* in 1990-91 and sixteen *per cent* in 1992-93 (Labour Research, November 1994: 12). Bergman discovered that between 1996 and 1998 nineteen *per cent* of workplace deaths resulted in a prosecution for health and safety offences (Centre for Corporate Accountability, 1999).[34] This means that for a ten year

[34] This figure masks considerable variation between regions. For instance Scotland had the lowest prosecution rate following workplace deaths at 12.8%. Whilst the Midlands had the highest at

period between 1988 and 1998 prosecutions following workplace deaths appear to have fluctuated between about fourteen and twenty-one *per cent*, but have certainly not shown a consistent upward trend.

Whilst the HSE might argue that this fluctuating prosecution rate mirrors the incidence of cases involving a criminal level of corporate culpability, this is an unconvincing explanation. HSE investigations into the causes of workplace fatalities in a number of industry sectors during the 1980s (HSE, 1985; 1986; and 1988) and the conclusions reached have provided a basis for subsequent researchers to estimate levels of management culpability in relation to workplace deaths. For instance, relying on these reports and other data produced by the HSE, Tombs (1998) has argued that

> we can set these conclusions against the relevant legal test of responsibility, which is that management must do "all that is reasonably practicable" to eliminate a risk or prevent an accident/ injury. This standard of reasonable practicability... is the minimal duty of care that is required by health and safety legislation in the UK...Thus it appears, on best available evidence, that in the majority of "accidental" injuries examined by the HSE, most of them producing fatalities, management were in contravention of the General Duties (Sections 2 and 3) of the HASAW Act 1974.

Further evidence of the incidence of corporate responsibility for workplace deaths has come from independent research. An analysis by Anthony Scrivener of the circumstances surrounding 28 workplace deaths in the West Midlands between 1988-1992 indicated that 75% of these deaths should have resulted in *at least* a health and safety prosecution (Centre for Corporate Accountability, 1999). Finally, an analysis of work-related deaths in Australia over a four-year period found that '77.8% of the sample contained some degree of negligence', and that '44% of the sample contained negligence of a sufficiently high degree to occasion some level of prosecution'. The researchers caution that 'since not all of the 258 fatalities occurring in a corporate setting permitted detailed analysis, these figures are conservative estimates only which may very well understate the true extent of corporate negligence.' (Perrone, 1993). So we can see that, in comparison with available

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22.6% (Centre for Corporate Accountability, 1999). Nevertheless, even the highest rate is nowhere near to the estimate that the incidence of corporate negligence in cases of workplace deaths is

estimates of the incidence of company negligence in relation to work fatalities, HSE's prosecution rate following workplace deaths is extremely low. Since the HSE itself estimates that the incidence of corporate negligence in cases of workplace death is around 67% and since negligence is sufficient to establish liability under the Health and Safety at Work Act 1974, it is all the more surprising that the percentage of deaths which result in prosecution for a health and safety offence is around nineteen *per cent*. The reason for this high rate of non-prosecution cannot be found in HSE's formal enforcement policy since this merely states that:

> enforcing authorities will consider prosecution when: it is appropriate in the circumstances as a way to draw general attention to the need for compliance with the law and the maintenance of standards required by law, especially where there would be a normal expectation that a prosecution would be taken or where, through the conviction of offenders, other may be deterred from similar failures to comply with the law; or there is judged to have been potential for considerable harm arising from breach; or the gravity of the offence, taken with the general record and approach of the offender warrants it, for example apparent reckless disregard for standards, repeated breaches, persistent poor standards. (HSE, 1998b: paragraph 19).

Such a policy is so wide in its scope that it could, conceivably, result in the prosecution of most health and safety offences, and certainly those resulting in harm where first, one could argue that 'there would be a normal expectation that a prosecution would be taken', and second the fact that injury or death has taken place satisfies the requirement that there existed a potential for serious harm to result from the breach. A more workable test is laid down in the Code for Crown Prosecutors, by which HSE inspectors - in considering whether or not to pursue a prosecution - are also bound. First, inspectors must consider whether there is enough evidence to provide 'a realistic prospect of conviction'. As already discussed, research undertaken by Bergman concludes that in 75% of the cases studied there was enough evidence to sustain, at least, a conviction under health and safety legislation, and Tombs has suggested that HSE's own research indicates that evidence of management failure to discharge their duties under the Health and Safety at Work Act 1974 exists in around 67% of the fatalities they investigated. It is therefore

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between sixty and seventy three *per cent* (HSE. 1985; 1986; and 1988).

unlikely that the low rate of prosecution following work deaths can be explained wholly in terms of a lack of, or insufficient, evidence, although it is possible that the evidential burden will not have been met in a minority of cases. Second, inspectors must consider whether it is 'in the public interest' to prosecute. The Code for Crown Prosecutors states that 'The more serious the offence, the more likely it is that a prosecution will be needed in the public interest' and that an offence is likely to be considered serious when 'the victim...has been put in considerable fear, or suffered personal attack, damage, or disturbance'. It is hard to see, therefore, how culpable workplace killings could fail to satisfy the public interest test, especially since none of the criteria which might exempt an offence from prosecution are likely to apply in the case of culpable workplace killings except for cases where 'the offence was committed as a result of a genuine mistake or misunderstanding'. But even this is qualified by the prescription that such mitigating factors 'must be balanced against the seriousness of the offence'.

Any consideration, then, of the formal policies and codes which are supposed to guide inspectors' decisions only serves to underline the fact that cases of corporate illegality causing death which *could* be prosecuted with reference to formal prosecution criteria, are not being prosecuted. Second, to return to an earlier explanation for the non-criminalisation of corporate crime, the established pattern of non-prosecution is often followed in circumstances where (as Hawkins (1989) and Hutter and Lloyd-Bostock (1990) found) the public would generally expect and support prosecution. Thus the notion of some Durkheimian moral consensus does not explain the high rate of non-prosecution following workplace deaths. Indeed, if such a consensus exists it is clear that the state is seriously out of step since the available evidence suggests that the Crown Prosecution Service and the Health and Safety Executive are not prosecuting those cases where 'public opinion' would support, or - as has frequently been the case - demand, prosecution.

It could be argued, however, that from the late 1980s through to the 1990s intense deregulatory pressures on the HSE from successive conservative governments counteracted what would otherwise have been a natural tendency to increase the rate of prosecution following workplace killings and serious injuries in response to shifts in public perception. In addition, cuts to HSE funding in early 1980s and then again from 1993 resulted in the 'gradual erosion of the ability of the HSE to do that with which it is

charged.' (Tombs, 1996: 317). In fact, the HSE and some researchers have explained the HSE's failure to pursue a more active sanctioning strategy in terms of the fact that prosecutions are resource intensive and, at a time of finite and restricted funding, are not seen as producing the same paybacks as a compliance approach. (Hawkins, 1989; Eves, 1998; Bacon, 1999). In addition, Cosman, HSE's Head of Operations covering an area from Wrexham to Plymouth, suggests that the Conservative Government's ideological commitment to deregulation did indeed have an effect on inspectors' day-to-day enforcement practice. He stated at a recent conference that,

> A concern during the deregulatory period was that some inspectors who had not experienced a different political climate saw themselves as 'social workers' whose job was to advise and persuade but not to enforce. This small group of inspectors have needed some persuasion to become fully engaged in the regulatory process.
>
> (Cosman, 1998).

Correspondingly, in considering what effect the change of government might have on the agency's enforcement practice, the Director General of the HSE has recently stated:

> The time is right to push for changes. The political will is there, and is a welcome contrast, for HSE at least, with the previous 15 years or so when the main concerns were to reduce regulation - and the regulator; to keep European influence out; and to curb independent action by inspectors that had any whiff of being 'over-zealous' or business unfriendly.
>
> (Bacon, 1999).

Certainly the minister now responsible for the Health and Safety Executive and the Environment Agency, Michael Meacher, appears to favour a more punitive approach. Whilst Labour were in opposition Meacher stated,

> If we are serious about stopping the growing catalogue of death and maimings at work, the least we can do is ensure that the most serious health and safety offences go to the Crown court. I emphasise that responsibility for health and

> safety must be vested at the highest level of each organisation. Not underlings, but a few well-known white collars, should be prosecuted for gross negligence. (House of Commons, 1996: col. 898).

On Labour's election, Meacher asserted that the new Government was determined 'to promote compliance with the law through its effective enforcement, with severe penalties for those who break the law.' (Meacher, 1997). And indeed, the new government, but perhaps particularly Meacher's individual influence, appears to have effected changes in the enforcement practice of the HSE and the Environment Agency. The initiative for publicly 'naming and shaming' companies prosecuted for regulatory offences - a practice recently adopted by both regulatory bodies - came from Meacher.[35] In April 1998 the 'notice of intent' procedures,[36] introduced by the Conservative Government, were withdrawn and funding to the HSE has increased by 17 *per cent*. The number of prosecutions taken has increased incrementally each year since the Labour Government came to power, as have the number of formal enforcement notices issued. And finally, there are plans to increase the penalties available to the courts for health and safety offences (*see above*).

Nevertheless, whilst the deregulatory politics of the previous Government may have had some suppressive effect on sanctioning and enforcement practice, it would be difficult to argue that this fact can account for the discrepancy between current estimates of the levels of corporate negligence leading to workplace deaths (Bergman, 1994; Perrone, 1995; Slapper; 1999) and the actual (very low) rate of prosecution. It is important to keep in mind that prosecution has always been resorted to rarely by the HSE, and by the Factory Inspectorate before this (Carson, 1970a; Sanders, 1985). Furthermore, in considering what effect the chronic and continuous underfunding of the HSE may have had on the inclination of the HSE to prosecute offending companies throughout the 1980s and most of the 1990s, Sanders points out that 'institutions are not wholly passive in these matters', and goes on to argue,

> Dickson... has shown how in the United States the Federal Narcotics Bureau successfully initiated its own campaign in order to set its own priorities and gain

[35] Interview with Alan Dalton, Environment Agency Commissioner 23/09/99.

> extra resources. If the H.M.F.I. wish to draw attention to its under-resourcing by government, tying itself up in court through prosecution would be a very effective strategy. The important question is not 'why don't the H.M.F.I prosecute more?', but 'why don't the H.M.F.I. seek more resources which would enable them to prosecute more?'.
>
> (Sanders, 1985: 196).

As Tombs notes, far from resisting 'successive "efficiency gains"', the HSE seemed 'continually keen to meet, even surpass, government expectations' (1996: 317). Moreover, whilst the HSE resisted some of the deregulatory pressures of the previous government (Burrows and Woolfson, forthcoming 2000), its response to Meacher's push for a more punitive response to regulatory offending has been ambivalent. On the one hand, in relation to increasing financial penalties, the HSE has consistently supported calls for an increase in fines levied for health and safety offences. Even before 1997, signs of an upward trend in the average fine handed down following conviction for a health and safety offence, and a small number of exceptionally large fines, were greeted with approval by the HSE (Tombs, 1995a: 353-354). On the other hand, recent statements by HSE personnel indicate that the HSE will resist pressures to increase greatly the number of prosecutions it undertakes. For instance, David Eves, HSE's Deputy Director General and HM Chief Inspector of Factories, stated publicly at a conference in 1998:

> The change of government last year brought to the DETR, HSE's sponsor department, a minister who believed that we were soft on enforcement and that the number of prosecutions was too low. He wanted to know what numerical targets we set inspectors, and has indeed set these for other agencies. We believe it is inappropriate to set such targets, except that we are looking for an 85% success rate in our prosecutions to ensure cost-effectiveness. We aim to follow the Commission's enforcement policy... but this policy is about quality, not quantity of prosecutions.
>
> (Eves, 1998).

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[36] Which required regulators to give advanced written notification of an intention to take formal enforcement action and allowed companies to make an appeal against any intended action.

It appears then that whilst other enforcement agencies have responded to Meacher's desire to set numerical targets for prosecutions, the HSE have successfully resisted this. More generally, Jenny Bacon has stated that,

> There is scope for rebalancing use of resources. But some would have us carry out a different function - to act as an agent of the criminal justice system, getting justice for workers by bringing flagrant wrongdoers to book. This view sees prosecution as an end in itself. I don't. In the context of health and safety, I see criminal law's main value as deterrence, and punishment in flagrant cases. But it is an uncertain instrument, which can backfire, *and should be used selectively.*
>
> (Bacon, 1999. Emphasis added).

Thus, whilst the HSE appears to welcome a more punitive level of fines, Bacon, like Rimington before her, emphasises the distinctness of health and safety legislation from the rest of the criminal law and seems determined to deny the involvement of the HSE in the criminal justice process, despite the HSE's enforcement and prosecution responsibilities. These two tendencies suggest that whilst the HSE seeks to increase the symbolic impact of prosecutions, the organisation will continue to respond to regulatory violation 'almost exclusively by the use of formal administrative procedures other than the prosecution of offenders' (Carson, 1970a: 392). Moreover, whatever Meacher's personal priorities may be, it seems highly unlikely that the present Labour Government will force this issue with the HSE. Owen Tudor, the TUC's Health and Safety Officer, has recently made it quite clear that, as he understands it, this government does not intend to place any further legislative 'burdens' on business when this can be avoided.[37] The fate of plans to incorporate a concept of 'stakeholding' into company law seems to confirm this view. In February 1999 the government's company law review body published an interim report in which it proposed two distinct models for encouraging businesses to recognise the rights and interests of groups other than those of their shareholders. The first model was the "pluralist" model, which would explicitly incorporate the rights of specified stakeholder groups in company law and remove the dominance of shareholder interest. This - the more radical of the two approaches - was rejected in September 1999 by the steering group overseeing the work of the review body. Instead the steering group

[37] Tudor expressed this opinion during his speech to the Institute of Employment Rights conference 'Regulating Health and Safety at Work: the way forward', London. 2 December 1999.

preferred the second model - an approach described as ' "enlightened shareholder value" - which envisaged little change from the current position of shareholder supremacy' (Cowe, 1999).

This episode highlights what Burrows and Woolfson describe as 'a crucial ambiguity [underpinning] current government policy' (forthcoming 2000). On the one hand the government appear to accept that 'regulation is not only necessary but desirable in certain circumstances', whilst on the other it 'is as reluctant as its predecessors to interfere in business' (*ibid.*). There may always have been signs that the current administration would prefer the voluntary approach to change. For instance in Alistair Darling's contribution to a collection of essay on the concept of 'stakeholding' edited by Kelly *et al.* (1997), Darling refers simply to a need for 'cultural change' and stresses twice in his article that this does not require the introduction of new regulations. For instance, Darling writes:

> Creating a stakeholder economy is very much about creating a change of culture in the country. It does not rely on new rules or regulations or new acts of Parliament. There are not the essense of achieving real change, rather the stake holding philosophy should be about changing the way people think.
>
> (Darling, 1997: 16).

This approach is in contrast to many of the other contributers who are concerned to spell out possible legislative changes to company law. With specific reference to regulating the impact of business enterprise on people's health and safety, there are signs that the government wish to reaffirm the existing approach to regulation, which seeks to promote good practice through persuasion and encouragement rather than strict enforcement of the law. Evidence for this can be found in a speech by Lord Whitty, the Under Secretary of State for the Department of the Environment, Transport and the Regions, to the Institute of Employment Rights conference on 'Regulating Health and Safety at Work'. Reassuring those present that 'raising health and safety standards is central to this Government's social justice agenda', Whitty then proceeded to reiterate the old Robens approach in outlining *how* this would be done, stating:

> One of the resounding messages from the consultation is that we need to work harder to raise general awareness of health and safety issues - so that people

> actually change their behaviour. That means... stimulating greater discussion of health and safety issues among key stakeholders and the general population.
>
> (Whitty, 1999).

Underlying such an approach is an assumption that underpins the recommendations of the Robens Committee, namely that 'the most important single reason for accidents at work is apathy' (Robens, 1972a: 1). Such an assumption allowed the Committee to argue, as Whitty seems to be arguing, that raising standards is largely a matter of changing attitudes in industry. On the basis of such an assumption, it made sense for Robens to recommend that 'as a matter of explicit policy, the provision of skilled and impartial advice and assistance should be the leading edge of the activities of the unified inspectorate' (*ibid.*, 65) and that 'the process of prosecution and punishment by the criminal courts is largely an irrelevancy' (*ibid.*, 82). Similarly, in response to the Institute's proposals that the HSE adopt a more rigorous enforcement policy, including a greater emphasis on the use of prosecution (James and Walters, 1999: 141), Whitty asserts that:

> Punishment and deterrence must sit alongside prevention and raising voluntary compliance, raising the standards of the poorer performers towards those of the best, whilst encouraging innovation and competitiveness.
>
> (Whitty, 1999).

Since, this 'dual approach' to regulation - vigorous enforcement for 'flargant breaches' and the provision of advice and encouragement for the 'good apples' - has in practice allowed the HSE to eschew prosecution in most cases, then clearly Whitty is simply proposing a maintenance of the status quo with respect to the rate of prosection. At the same time, Whitty has promised that the Government will legislate to increase the penalties available to the courts for offences under health and safety law. Thus the positions of the Government and the HSE appear to have converged. Even Meacher seems to have moved closer to a position that reflects HSE priorities and practice. When asked, at a recent Select Committee hearing on the work of the HSE, whether he thought that the HSE should move away from an advisory focus towards 'a more rigorous prosecution stance', Meacher replied 'I think the emphasis must remain on prevention.... [O]ne does need a more rigorous enforcement policy... but not, I repeat, at the expense of compromising on

promoting voluntary compliance and a positive managerial culture...' (Environment, Transport and Regional Affairs Committee, 1999). Both the Government (Irvine, 1999) and the HSE (Eves, 1998) wish to increase the penalties consequent upon offending, but are not supportive of any significant increase in the use of prosecution against offending companies. In this way we can see that the response of the state to the growing disjunction between public expectation and legal outcome has been to increase the symbolic impact of those cases that are punished, whilst preserving the 'substantial immunity [of companies] at the operational level of "the law in action" ' (Carson, 1970a: 384). Thus, if the gap between public sentiment and the law in this area is being closed, it is being closed in such a way that has the least impact on business and as such may be seen as an example of 'symbolic action' (Calavita, 1983).

CONCLUSION

The events and developments discussed above suggest that, rather than assuming that criminal laws reflect some shared framework of moral values, we need to understand the criminal law as a site of conflict, struggle and negotiation. In relation to work-related injury and death this struggle over the precise meaning and moral status of business activities which maim, poison and kill workers, local communities and consumers has involved, at various times, academics, state institutions, workers organizations, survivors and community groups and, of course, business interests. Such an analysis would need to be able to account for the fact that despite present (and past) levels of grassroots organisation and activity, and despite a comparatively large body of quantitative and qualitative research,[38] the only kind of workplace violence that appears to be unambiguously recognised by the government as 'criminal' are assaults by individuals

[38] Most of the work on corporate violence in this country has focused on occupational health and safety. This is because, despite the usual problems of access and of interpreting official statistics (Tombs, 1997a), these problems are less pronounced in relation to work-related violence than they are in relation to, for instance, environmental harm or deaths and injuries caused by consumer products. Hazards associated with consumer products, if prosecuted, are generally prosecuted as 'trading offences' with no reference made to resulting harms (Croall, 1989). Figures of deaths and injuries connected to the consumption or use of consumer products are kept by the Department of Trade and Industry, but give no indication of whether or not the death/ injury was the consequence of a breach of any legal standard (personal communication with David Bergman, 9.8.99). There is more research that has been done on this area in the United States where Freedom of Information Laws and a more litigious culture facilitate the construction of such incidents as crimes. See for instance Nader (1971); Dowie (1977); Mintz (1985); Henry (1986); Fagin and Lavelle (1996).

against NHS and other public sector staff - in other words, conventional criminal assaults.[39] As will be seen, the 'official' response from government, the Health and Safety Executive and the legal profession to pressure from victims groups, trade unions, the work hazards movement and academics to criminalise the *whole spectrum* of harms resulting from the negligent or reckless (mis)management of workplace hazards has been a limited and partial one - separating off deaths caused by gross corporate negligence as a 'special case', and failing to acknowledge how other instances of corporate harm resulting in a continuum of physical and mental disablement might involve criminal culpability under conventional criminal statutes.

Insofar as these struggles involve conflicts around the interpretation of, and the language used to describe, corporate harm then these struggles are also ideological in nature. Yet, as Eagleton points out, 'Ideological power...is not just a matter of meaning, but of making meaning *stick*' (Eagleton, 1991: 195). A review of recent failures to prosecute companies for corporate manslaughter, as well as a broader look at the history of challenges to the non-criminalisation of safety crimes under health and safety and conventional criminal laws suggests that corporations and senior company officers are peculiarly resistant to the criminal label. This resistance demands investigation since, as I argued above, it cannot be explained in terms of the marginal, or minority, position of those demanding the criminalisation of harmful corporate activity. In the first place, the fact that initial pressures for criminalisation come from a minority group or small section of the community does not mean that such demands for legislative change will not be met. For instance, Bergman relates how the a small campaigning group, set up by the families of those killed by drunk drivers, was successful in changing legal attitudes and responses towards causing death by reckless driving. Whilst reckless drivers who killed were being prosecuted with minor summary offences when the Campaign Against Drink and Driving was set up, after five years of campaigning work the conviction rate for causing death by reckless driving had more than doubled (Bergman, 1991: 24). Thus a small group of people were able to substantially influence changes in the legal response to deaths caused by reckless or drunk drivers. Second, as Wells (1995) has argued,

[39] As a consequence of an HSE funded analysis of data from the British Crime Survey (HSE, 1999) the government recently announced a 'zero tolerance' campaign to combat assaults and threats by individuals against NHS staff: 'Mr Dobson said that NHS trusts would have to keep tabs on the number of attacks against staff, improve reporting methods to help police catch offenders

campaigns to hold corporations to account through prosecutions for the crime of manslaughter have had some success in challenging popular preconceptions of work-related deaths as accidents. The 'public' and the media are now more likely to construe work-related deaths as unlawful killings, particularly in the aftermath of large-scale public disasters. Even in the case of the less spectacular, routine deaths and serious injuries occurring on a daily basis in workplaces throughout the country, the research of Hawkins (1989) and Hutter and Lloyd-Bostock (1990) shows that regulatory agents are aware that victims, relatives and 'the public on their behalf' (Davies, 1999) expect a just measure of retribution from the state. Yet, despite an increased tendency on the part of the public to attribute responsibility for disasters and work deaths to corporations, campaigners have not been able to translate this shift in public sentiment and perception into substantial legal change - either at the legislative level, or at the level of the law in action.

This pattern of non-criminalisation following instances of corporate violence can partly be accounted for in structural terms. Bergman's (1991) analysis of the formal procedures that come into play after workplace deaths - involving the police, and the HSE and the coroner's inquest - demonstrates that these procedures tend to preclude questions being raised of possible criminal responsibility on the part of employers and companies. Similarly, Sanders (1985) analysed and compared the prosecution patterns and decision-making processes of the police with those of the Factory Inspectorate. He concluded that an institutional propensity to prosecute exists within police forces, and that this can in part be explained at a structural level as it is a consequence of, and operates through, the formal procedures and practices leading to a police prosecution. By contrast, a number of institutional procedures relating to how decisions are taken to prosecute within the HSE 'create the oppposite propensity to that of the police - a propensity not to prosecute' (1985: 189). He therefore states that 'Class bias is... a structural component of the formal procedures and actual practice of the prosecution process.' (1985, 193). However, as Sanders recognises, this does not explain *why* these agencies developed different procedures and policies in relation to prosecution in the first place.

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and set targets for reducing violence'. (BBC News, Wednesday, October 13, 1999. Published at 23:29 GMT 00:29 UK).

Furthermore, it is important to understand that whilst these institutional propensities impose structural constraints on the criminalisation of corporate violence, these structural constraints are not absolute. The traditional failures of the police and the HSE to consider whether workplace deaths may have been the result of the crime of manslaughter (Bergman, 1991a and 1994) are not inevitable. Responding to criticism of these failures, in 1993 the HSE instituted a more formalised policy for referring cases to the CPS when inspectors felt that there was prima facie evidence of manslaughter. Similarly, although the normal practices of the coroners courts with respect to workplace deaths tend to preclude questions of criminal responsibility, it is possible, as the Zeebrugge inquest made clear, to raise these issues if the victims' families and their legal representatives are determined enough. In addition coroners themselves have, albeit rarely, initiated the referral of cases to the CPS. Finally in relation to the institutional practices and decision-making processes which Sanders has argued create a propensity within the HSE *not* to prosecute - on closer consideration these processes are rather weak and do not constitute a sufficient explanation for the pattern of non-prosecution that research has discovered (Bergman, 1994; Perrone 1995; and Slapper, 1999). Sanders reports that whereas 'any one police officer (from inspector level upwards) can authorise a summons, but more than one have to agree if there is *not* to be a summons, in the H.M.F.I any one inspector can decide to *not* summons, but two must agree if there is to be a summons' (1985: 186). However, whilst having to seek approval by a principal inspector might provide some insurance against weak cases being prosecuted, these procedures would not *necessarily* lead to the extremely low rate of prosecution that characterises most regulatory agencies (Carson, 1970a; Cranston, 1979; Richarson *et al.*, 1982; Hawkins and Thomas, 1984; Sanders, 1985; Hutter 1988; Cook, 1989). It would be perfectly possible for such procedures to be in place but for there to be a more vigorous sanctioning strategy. In other words, of equal importance in determining the disposition of cases is the attitude of the principal inspectors, and the ethos of the organisation more generally, towards prosecution.

Thus, whilst decision-making processes and procedures within the relevant organisations may militate against the criminalisation of individual cases of corporate violence, it is clear that it should be possible to challenge and shift these tendencies towards prosecution. However, the events and developments discussed in this chapter begin to suggest that constraints on the criminalisation of corporate harm are not confined to

structural factors. For instance, even when new procedures are introduced which are meant to facilitate criminalisation, as happened with the HSE's manslaughter referral procedures to the CPS in 1993, we still find an apparent reluctance to prosecute. As already discussed, only twenty-four cases have been referred from the HSE to the CPS since 1993. This represents just a fraction of the total number of cases demonstrating a level of corporate negligence sufficient to sustain a manslaughter prosecution discovered by independent research. In addition, what some of the cases discussed in this chapter reveal is a conscious and active resistance on the part of regulatory agents, coroners and the CPS when 'outsiders' have attempted to represent workplace injuries and deaths as the consequence of serious criminal conduct. Thus, the routine operation of an unconscious, institutional or structural bias (Carson, 1970a: 392-393) can, when subjected to external pressures, become a conscious and active resistance to the adoption of a more punitive and criminalising enforcement practice. What is particularly remarkable about this resistance is that it occurs within the context of a generalised and growing public intolerance towards companies that, through their negligence, cause the deaths of workers and members of the public. Institutions of the state are certainly conscious of, and sensitive to, this intolerance, as the comments of the Law Commission in their review of the law of manslaughter reveals (*see above*). Furthermore, Tombs and Whyte (Tombs, 1995a; Tombs and Whyte, 1998) have argued that the disasters of the late 1980s, as well as the pressures exerted by the network of campaigning and victims organisations, created a crisis of legitimacy and a brief period during which 'pro-regulatory forces won ascendancy even in the face of groups of employers that had become used to the non-enforcement of existing standards and a government committed to deregulation of occupational safety and health.' (Tombs and Whyte, 1998, 78). But the way that the state (in the form of government and HSE policy initiatives) has chosen to respond to this aspect of public sentiment has, I have argued, been to increase the symbolic impact of prosecution whilst defending the very enforcement strategy that produces so few prosecutions of corporate crime. In fact it could be argued that these measures are at once designed to, and have the effect of preserving a strategy that is based on 'prosecution avoidance'.

Whilst not conclusive, the evidence presented in this chapter points to the existence of a generalised resistance on the part of various institutions of the state to the criminalisation of work-related death and injury. Moreover, the HSE has begun to respond to these

pressures by insisting that public opinion is misguided in pressing for a more punitive enforcement of the law in relation to health and safety crime. In this way we can see that the HSE have become quite explicit about their resistance to public pressure since they argue that if current enforcement practice fails to reflect popular sentiment and morality then this is defensible and ultimately positive since the public fundamentally misunderstands the nature of the problem that HSE are dealing with. So for instance, Rimington, the former Director General of the HSE, complained in 1991 that demands for increased prosecution of companies causing death and injury were 'blood thirsty',[40] and that the imaginations of those pressing for such changes are 'imprisoned, so it seems, in the police court and [their] notion of punishment is about as refined as the law of a tooth for a tooth'.[41] Similarly, Jenny Bacon has argued that,

> [T]here are some misunderstandings as to what it is we're supposed to be doing, and where we should put the resources. But we cannot put the resources into following up accidents primarily to seek retribution... when what we're supposed to be doing is preventing accidents and protecting workers.
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> (Fidderman, 1998: 265).

Bacon creates here a false dichotomy between prevention and prosecution. Such a dichotomy is commonly asserted by the HSE and government ministers[42] and will be examined at a later point. However, with respect to the HSE's adoption of an overtly oppositional position to pressures for increased criminalisation, it is interesting to speculate why it is that their legitimacy does not appear to suffer from a history of failures to translate public outrage and censure into an equivalent legal response. For it could be argued that the role played by the HSE in enforcing occupational health and safety law is low key and rarely subject to public scrutiny or criticism. Support for this argument can be found in the public debates that have followed the Paddington rail disaster. Whilst Railtrack, the operating companies and the government have been subjected to a fair amount of scrutiny and criticism, the role of the HSE in regulating the

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[40] Cited in Bergman (1994: 6).
[41] *Safety Management*, December 1991, p 6-8).
[42] See for instance Lord Whitty's speech to the Institute of Employment Rights conference (Whitty, 1999), and Meacher's oral evidence to the Environment Select Committee hearing on the work of the Health and Safety Executive (Environment, Transport and Regional Affairs Committee, 1999).

industry has effectively escaped comment.[43] Indeed, one would have been forgiven for thinking that Railtrack alone had responsibilities for regulating safety on the railways as the media repeatedly speculated that Railtrack's responsibilities for regulation might be removed. Whyte has argued that there was evidence that 'the HSE Railway Inspectorate [had] culpably failed to uphold standards of safety', and that though 'the HSE were aware of 23 signal blackspots that are passed at danger on a regular basis', they had failed to take any formal enforcement action at all with respect to these SPADs,[44] (Whyte, 1999: 10). However, this evidence was never highlighted in the news reports and investigations immediately following the crash.

To understand the relative 'invisibility' of the HSE within the news and popular media, it is useful to compare the HSE's relationship with the press with that of another law enforcement body - the police. Whilst the police consciously began to foster a closer relationship with the press from the 1970s in order to produce, as Sir Robert Mark, Commissioner of the Metropolitan Police put it, 'a better understanding on [the part of the media] and that of the public of the force's problems and policies',[45] it does not seem as though the HSE have experienced this need to legitimate their role to the lay public in the same way. An analysis of the HSE's press releases over the past two years[46] shows that the majority of these are aimed, not at the general public, but at a business audience. Most of the press releases communicate technical information and are directed towards specialist publications. In a conversation with Peter Johnson[47] from the HSE Policy Unit it became clear that even press releases relating to prosecutions were largely aimed at a business audience. Johnson stated that the HSE would aim to publicise prosecutions where, for example, the size of the fine might be expected to send a 'warning signal' to industry, or where the HSE wished to raise awareness around a particular safety issue. These messages were clearly meant for a business, as opposed to a general, audience. In fact, it could be argued that most of the concerns the HSE has regarding its image and

[43] I am grateful to Dave Whyte for drawing my attention to this omission in the debates following the rail disaster.
[44] Signals Passed at Danger.
[45] Cited in Schlesinger and Tumber (1994: 111).
[46] A content analysis of all HSE press releases relating to either HSE prosecutions or workplace deaths and injuries between December 1997 and September 1999 was undertaken. See the section on 'HSE's Media Strategy and the Avoidance of Censure' in Chapter 2 for further details of this analysis.

standing are concerns about how it is perceived by the business community, not the general public. The reason for this is to be found, I believe, somewhere in the fact that workplace health and safety is not ordinarily represented as a pressing social issue, despite the fact that it affects a significant section of the population.[48] And this is partly because - although 'pro-regulatory forces' (Tombs, 1995a) and those pressing for criminalisation have had some success in mobilising concern and censure around workplace death and injury and in ensuring that 'the concept of corporate manslaughter entered popular vocabulary' (Wells, 1995; Tombs, 1995a) - workplace health and safety is still not widely perceived as a law and order issue. Thus, unlike the crimes of burglary and assault for instance, the illegal and negligent killing, maiming and poisoning of workers and the public is not perceived, or constructed, within media or political discourse as a significant social threat. The illegality that the HSE encounters is barely perceived as 'illegality' at all. It does not arouse our fear and loathing, nor does it resonate with the kind of social significance that is imputed to other forms of law violation. Thus, it is as though the fact of non-criminalisation - the fact that the majority of workplace killings and injuries are not formally labelled as crimes - takes the wind out of the sails of public outrage.

Such a perspective begins to uncover what may be at stake in the application of the criminal label and touches on important questions raised by the preceding consideration of intermittent attempts over a span of nearly two centuries to establish an identification between 'the criminal' and 'the gentleman'. First, why is it that reformers and radicals have approached the criminal law and its institutions as a potential medium through which to achieve specific social transformations, and why do their attempts appear to be so vigorously resisted by governments, enforcement bodies, and by corporations themselves?[49] There is little direct consideration within the white-collar crime literature

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[47] Personal communication with Peter Johnson from the General Policy Branch of the HSE's Policy Unit, 18/08/99. Peter Johnson currently has responsibilities covering a range of areas including enforcement policy, reactive briefing, prosecutions, penalties and manslaughter charges.

[48] The true scale of the problem is unknown. However, research suggests that over a million employees (around 4% of the workforce) suffer a work-related injury each year; that over two million people (or around 5% of the population of workers and ex-workers) suffer from an illness which they believe was caused by or made worse by work; and that over 25,000 workers are forced to leave the workforce each year because of a work-related injury or ill-health (James and Walters, 1999: xii).

[49] Wells has argued that one of the lessons that may be drawn from the legal maneuvering surrounding the attempt to bring a private prosecution against South Coast Shipping following the *Marchioness* disaster is that "corporate bodies appear to fear criminal proceedings and will make

of this question. Arguments for the criminalisation of corporate and state illegality and deviance are made on the basis of social justice (Bergman, 1993) and deterrence (Pearce and Tombs, 1990). Little explicit consideration, however, has been given to what distinguishes criminal from other forms of law except to point to its coercive power. Thus, Carson observes that 'the criminal law shares the state's monopoly on the legitimate use of violence' (1974: 71). Yet it is precisely this association of the criminal law with the legitimate infliction of violence and force that is put forward as one of the causes of the criminal law's being ill-adapted to address the problems of *corporate* deviance and harm (Robens, 1972a; Kagan and Scholz, 1984; Clarke, 1990; Hawkins, 1990). For whilst early factory reformers could argue for the 'imprisonment, and flogging, and pillory' of individual factory owners (Carson, 1979: 41), the violence of the criminal law is not something that can be exercised against corporations. Although unlimited, and therefore punitive, fines could be imposed by the Crown Courts, corporations cannot be physically restrained, imprisoned or subjected to other forms of legalised force, pain and humiliation. Hence, the oft-quoted 'no soul to damn and no body to kick'[50] and the response of Judge Andrew Brooks to a failure on the part of the HSE to charge individual directors, 'I can't send a company to prison, can I?' (Connett, 1993). Monetary penalties are a more neutral form of punishment and do not convey the same condemnatory sentiments as forms of physical punishment (Garland, 1990). Thus, it could argued that there can *never* be equal treatment for corporate and individual offenders under the criminal law.

I should make it clear that I do not endorse this reasoning. There are numerous imaginative and promising proposals within the literature for developing effective criminal sanctions for corporate offenders.[51] However, I would argue that for there to be even the remotest chance of these proposed sanctions being implemented, corporate

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strenuous efforts to prevent them taking hold", (Wells, 1995: 120). Similarly, Glasbeek has noted with respect to an attempt to prosecute the Ford Motor Company for criminal homicide, 'That the corporation saw the stigmatization of the criminal prosecution as serious can be gauged by the massive effort it put into its defence, one which vastly outweighed its legal resistance to civil law suits and regulatory actions.' (1984: note 103 at 429).

[50] Quoted in Coffee (1981).

[51] See for instance Braithwaite and Geis (1982) on the possibilities of corporate rehabilitation; Fisse and Braithwaite's (1985) and Fisse's (1990) discussion of adverse publicity orders; Fisse (1990) and Punch (1996)on equity fines; Bergman (1992b) who discusses a system of 'unit fining' for corporate offenders and the introduction of an enquiry report which would provide the court with relevant financial information; Bergman (1992b) also discusses 'corporate probation', as do

harms must be unambiguously labelled as 'crimes'. In other words, I would argue that the successful and unambiguous application of the criminal label is necessary to *justify* what would otherwise be seen, in relation to some of these proposals, as an illegitimate and excessive interference in the legitimate and proper operation of business. For it is through the definition of certain forms of behaviour as 'crimes', and the labelling of particular social actors as 'criminals', that the most coercive and extreme forms of domination and punishment are seen as justified and, indeed, socially useful. Moreover, aside from its justificatory function with respect to punishment, the criminal label is, in itself, a powerful ideological tool. For example, it was the ideological power of the designation 'common criminal' that was at issue in the Thatcher government's refusal to grant IRA prisoners political status in the 1980s. In denying IRA prisoners this status, the Government sought to redefine the meaning of IRA killings as 'murders' as opposed to political killings, thus obscuring the political, social and historical meaning of IRA violence, and following a general policy of criminalisation that had begun in the 1970s (Ewing and Gearty, 1990). This redefinition at the ideological level served an important hegemonic function in securing the support of non-republican, mainland Britain for the government's war against the IRA (Hillyard, 1993). The significance of this ideological battle for the IRA itself is evident in the fact that prisoners were willing to, and ultimately did, die to defend their status as political prisoners (Beresford, 1987). Thus, whilst issues of social justice and deterrence are of vital importance in relation to the criminalisation of corporate violence - especially for employees who have been, or risk being, injured or killed by their work - an area of equal importance that has been relatively unexplored within the white-collar crime literature is the potential role played by the criminal law in the formation and deployment of powerful 'social censures' (Sumner, 1990b). The implications of this role will be explored further in the following chapter.

The second question raised by this chapter's consideration of a general pattern of resistance to the labelling of corporate harms as 'crime' is this: *how* are certain pressures for the criminalisation of corporate harm managed and deflected? These pressures exist explicitly in the campaigns of the work hazards movement and the survivors groups discussed above, but also implicitly - in the form of a disjunction between the growing public awareness, and intolerance of risks associated with corporate enterprise (James

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Fisse (1990), Loftquist (1993) and Punch (1996); and Fisse (1990) on corporate community service. Many of these sanctions are already available to the US Courts.

and Walters, 1999; Beck, 1992) and the state's legal response to harms which are caused by the inadequate control of these risks. Previous literature has identified that some obstacles to the criminalisation of these harms are institutional and procedural (Sanders, 1985; Bergman, 1991a). However, it was argued that these institutional obstacles are not, in the face of pressures for criminalisation, a sufficient explanation for non-criminalisation. In addition, whilst Sanders (1985) and Carson (1979) both suggest that an institutional propensity on the part of the HSE towards prosecution-avoidance can be understood in historical terms, this does not explain why an institutional practice and culture formed and shaped in the nineteenth century should have survived so long, especially in the face of explicit pressure from campaigning groups over the previous decades, and a growing tendency to blame corporations and other institutions for the harmful consequences of their activities.[52] As suggested above, one reason for this is that, on the whole, corporate violence is still not generally seen as *criminal* violence. What, then, are the processes through which a representation of corporate violence as non-crime is preserved and reproduced?

Chapters 3 and 4 will begin to address the issues touched on above. First, I will consider what, precisely, may be at stake in the struggle over the labelling of corporate violence as crime. Second, I will consider arguments that regulatory violations are morally ambiguous and that this ambiguity 'explains' patterns of non-criminalisation. In Chapter 4 I will begin to explore how conflict around the moral and legal status of corporate violence is managed, and how a sense of ambiguity in relation to corporate illegality is reproduced in the face of dissent. We need, then, to recognise that the criminal law is a site of both conflict (Snider, 1987) *and* consensus. For whilst a conception of corporate killing is beginning to emerge within the public imagination, it is still the case that the dominant stereotype of murder as an interpersonal act of violence remains.

[52] It is argued by some researchers that regulatory agencies have developed what they term a 'compliance' approach to law enforcement because this approach is more effective in a regulatory context than the alternative, 'sanctioning' approach (Bardach and Kagan, 1982; Hawkins and Thomas, 1984; Kagan and Scholz, 1984; Reiss, 1984; Shapiro, 1984 and 1990; Hawkins, 1984 and 1990; Clarke, 1999). This argument will be questioned throughout the thesis.

3

CENSURE, MORALITY AND CORPORATE CRIME

The two chapters that follow are concerned to identify some of the processes involved in successful criminalisation on the one hand and (conversely) some of the processes that justify and support non-criminalisation on the other. As such these chapters constitute two 'parts' of a developing analysis of the production of moral ambiguity around corporate crimes, and the way in which this sense of ambiguity justifies the avoidance of a conventional criminal justice response.

CRIMINALISATION AND THE MOBILIZATION OF CENSURE

In *Punishment and Modern Society*, Garland is concerned to reconsider the importance of cultural meaning, morality and emotion in understanding the role of punishment in society. Garland argues that a society's 'changing forms of mentality and sentimentality' (1990: 249) help to determine that society's penal practices. Significantly, however, he also rehearses the argument that a society's penal practices and institutions themselves generate cultural meaning:

> Like any major social institution, punishment is shaped by broad cultural patterns which have their origins elsewhere, but it also generates its own local meanings, values, and sensibilities which contribute - in a small but significant way - to the *bricolage* of the dominant culture. Penal institutions are thus 'cause' as well as 'effect' with regard to culture.
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> (Garland, 1990: 249).

This observation is central to understanding why physical harms to workers and the public arising out of corporate enterprise are subject to a system of 'social regulation' as opposed to 'criminal labelling'. To the extent that the formal laws and the multiplicity of practices and discourses associated with different forms of legal regulation generate their own set of meanings and associations - and these meanings are then assimilated into dominant configurations of thought and explanation - then those forms of legal regulation may become their own justification. This is why Garland wishes to stress that (counter to a Foucauldian conception of modern punishment in which there are only the subjects and the objects of penal discipline) social theorists also need to consider crime and punishment's various 'audiences' (Garland, 1990: 260-265). Similarly, Sparks (1992) has asserted that 'it does not seem possible seriously to argue that crime and punishment as spectacle and as moral tale have vanished from modern culture' (35). In addition to reasserting the importance of 'signification' to penality, Garland reminds us that the extent to which these meanings and moralities 'resonate' within the wider culture depend, in part, on the extent to which 'audiences' can emotionally engage with them. In this way, we can see that securing emotional commitment may be an important prerequisite to winning consent for current, or new, forms of social and economic organisation, and the legal and political authorities that preserve/ manage these relations (Gramsci, 1971).

By paying attention to the respective meanings that are produced in relation to 'street crime' and corporate violence, and their 'emotional pull', we may be in a position to begin to answer the two questions posed at the end of the last chapter: first, what is at stake in struggles over the criminal labelling of corporate violence, and second, how are pressures which would support such labelling resisted? How, for instance, do the activities of 'squeegee merchants'[1] come to be represented as socially problematic, threatening and invasive - and thus a suitable target for moral condemnation and criminalisation - whilst the activities of companies who train their sales force in aggressive sales techniques do not? In the following chapters, then, I will begin to consider how certain institutions, practices and discourses of criminalisation manage and educate popular perceptions and

[1] See, for instance, Jack Straw's speech at the launch of the Lewisham Community Safety Strategy, in which he referred to "... the squeegee merchants who wait at large road junctions to force on reticent motorists their windscreen cleaning service", (Straw, 1995). The public debate on 'squeegee merchants', 'winos', addicts' and 'aggressive begging' (Straw, 1995) was accompanied by

emotions in relation to the meaning and moral status of 'conventional crimes' on the one hand, and 'regulatory offences' on the other.

In helping to articulate the expressive and emotional dynamics, and the processes of signification, that underlie criminalisation Sumner's concept of 'social censures' (Sumner, 1990a, 1990b and 1997) is of particular value. For if the criminal law is an expressive institution, then *what* it expresses is, first and foremost, censure. Of course 'censure' is not the sole sentiment or meaning that the law might seek to express. For instance, in the context of strengthening the hegemony of the existing ruling elites it has been important, in the context of particular historical periods, that the criminal law also signified 'mercy' and 'forbearance' (Hay, 1975). Nevertheless, the sentiments that are predominantly conveyed in contemporary ceremonies and discourses of criminalisation are those of moral condemnation and repulsion. Sumner's concept of 'social censure', however, does not simply describe a particular sentiment. Sumner conceptualises 'censure' as both a practice - the act or process of stigmatiziation and denunciation - *and* as a 'negative ideological formation'. A 'negative ideological formation' can perhaps be understood as a complex association of particular sets of belief, values, meanings, and images that support the 'designation' of behaviours or individuals as 'bad, unacceptable, criminal, wicked, mad, delinquent and so forth'. (Sumner, 1997: 499). The dominant, or 'hegemonic' censures of a society Sumner describes as 'social censures', and these can be understood as 'emotional-conceptual constructions largely framed within the ideological terrain of that society's hegemonic groups.' (1997: 499). Thus, 'social censures' are explicitly conceptualised as ideological constructs.

The concept of censure 'as both sign and practice' (Sumner, 1997: 499) is in some ways, I would argue, more useful than the more general concepts of 'morality' or 'public sentiment' (Garland, 1990) as a way of describing the criminal law's stigmatizing capacity and its hegemonic function,[2] and this is for the following reasons. In the first place, 'censures' give expression to particular moralities, but are more than those moralities and may also articulate cultural stereotypes, collective anxieties, and so on. Whilst social censures will always be constituted by dominant moralities they are, unlike morals,

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the revitalisation of an old (1882), bye-law in Sussex to control the practice of car windscreen cleaning at traffic lights (*Daily Mail* 1996).

[2] By the criminal law's hegemonic function, I mean the way in which the criminal law serves to legitimate both a particular social and moral order and the authority of the state.

always actively involved in the creation of specific social targets. They are, in other words, *directed* and aim to produce specific social effects. Thus we may begin to bridge an analytical gap between 'meaning' and effect. The sense of censures as 'directed' also reminds us that Garland's 'audiences' are not simply the passive recipients of meaning. Rather, their active engagement (the extent to which they express their approval and support) is crucial to the 'success' of any censure but can never be automatically assured. The concept of 'censure' also provides a useful analytical tool for tracing the weaving and interaction of criminal and non-criminal categories, definitions and values within public discourse - for unpacking, in other words, the complex ideological formations that justify and support criminalisation within legal, and non-legal discourse. Finally, behind Sumner's concept of 'social censure' is Gramsci's notion of 'hegemony'.[3] Thus, although Sumner is less clear in actually identifying, first, the processes and, second, the sites in which hegemonic struggles for the formation of dominant social censures are located we can draw on both Gramsci's work and other research within criminology that has applied and developed Gramsci's concept of 'hegemony' to 'fill in the gaps'. For instance, as with the formation and negotiation of other hegemonic ideologies, we can speculate that the following institutions are similarly involved in the formation and deployment of social censures: political institutions (for example, hegemonic censures are produced, reproduced and transformed through Home Office policy, Parliamentary debate, Select Committee recommendations, and so on); schools; religious institutions; and the news and popular media. In modern industrialised societies the public 'participate' in these processes largely through the media (for example, through the news media's reporting of parliamentary and other public debates; through 'women's' - and the new men's - magazines; through the didactic elements in 'nature programmes'; soap operas; talk

[3] Thus, Sumner writes: ' Hegemonic projects are... vital to secure the constitution of the state as a political and moral force... These projects tend to be attempts to address and resolve, in favour of the directive or ruling groups, ideological conflicts arising from deep tensions or antagonisms within the social relations which structure concrete economic, political or cultural practices. If they are successful they give the state a certain power to create societal effects or, in other words, to codify, order, and regulate social practices in ways which are legitimized as societally or generally beneficial. On this basis, it can easily be seen why the social censure of crime remains a vital part of the very constitution of the state and thus the political constitution of the society: the definition, identification, marginalization, and exclusion of practices which structurally challenge, oppose, obstruct, discomfort, or irritate the material or ideological foundations of the state, or, importantly practices which offend groups of citizens whose support the state needs or wishes to cultivate, should, if handled with political sensitivity, not only reinforce the articulated raison d'etre of the state but work constantly to define and redefine it. The crucial proviso to this conclusion is that these social censures must usually be spoken or written in the grammer of

shows, and so on). The media is an institution that mobilises and expresses censure in its own right, but it also acts as a 'channel' through which other institutions, particularly the 'primary definers' (Hall *et al.*, 1978), attempt to mobilise public censure by imposing their definitions on particular forms of behaviour or events.

This consideration of the 'sites' of hegemonic struggle for the mobilisation of social censures demonstrate that, whilst the criminal law and its institutions may be one of the most powerful mechanisms for the production, articulation and application of dominant (hegemonic) censures, it is quite clear that the processes of criminalisation and censure are distinct. 'Criminalisation' refers both to the general designation of a particular type of behaviour as criminal at the legislative level, and to the practical formal application of the criminal label in an enforcement context. Censure, on the other hand, as both 'practical process' and 'negative ideological formation', can exist outside of the institutions and processes of criminalisation. Thus, in understanding the relationship between 'criminalisation' and 'censure', we must recognise that particular acts and behaviours may be routinely criminalised, without the simultaneous mobilisation or articulation of censure.[4] Conversely, institutions of criminal justice and 'social regulation' may publicly censure particular acts and their perpetrators without a concomitant application of the formal criminal label. So for example, the Chief Inspector of Railways, Vic Coleman, has publicly criticised the failures of Railtrack and some of the train operating companies to manage the railways safely,[5] but these criticisms have not been accompanied by a corresponding increase in the use of formal sanctions, nor in the punitiveness of the Railway Inspectorate's regulatory response (Whyte, 1999).

Whilst it is clear that the process of criminalisation and censure are distinct, the social practices of criminalisation and censure are, nonetheless, ultimately mutually supportive and strengthening. On the one hand, the criminal law, more than any other medium, is ideally suited to the deployment of social censures - structured as it is by rituals of humiliation, subordination, denunciation, exclusion and punishment (Garland, 1990). On

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rational universalism not the angry rhetoric of group or individual self-interest.' (Sumner, 1997: 507-508).

[4] For example, the routine criminalisation of women for the non-payment of their television licences (Pantazis and Gordon, 1997).

[5] See for instance, Harper (1996 and 1998).

the other hand, the social censures of crime that saturate media and political discourse[6] may be pivotal in mobilising and organising consent around the institutions of criminal justice and the administration of criminal laws (Hall *et al.*, 1978). It also appears to be the case that, in certain instances, the mobilisation of public censure against certain (usually minority or politically marginalised) groups at once anticipates, and is necessary to, the introduction of new laws - or the new application of old laws - to their activities. For example, negative media treatment of certain 'social problems' often provides space for, or actually stimulates, a limited public debate and is then frequently followed by the introduction of increased techniques of social control, generally involving some form of criminalisation (Young, 1971; Cohen, 1973; Hall *et al.* 1978; Muncie, 1987; Goode and Ben-Yehuda, 1994). This pattern can be observed in relation to the public demonization of 'squatters' and travellers by Conservative ministers in the mid-1990s followed by the introduction of the 1994 Criminal Justice and Public Order Act; or the repeated, discrete moral panics that have been generated around young people in relation to their supposed involvement in 'gangs', truancy, delinquency, drugs, crime, and (most recently) underage sex and pregnancy. These moral panics have often become focused around particular, highly-publicised 'cases' (for example, the killing of James Bulger) and have culminated in a range of criminal justice interventions (see, Muncie 1999). Thus the mobilisation of public censure appears to play an important role in the production of consent around specific moments of criminalisation.

In considering the relationship between the criminal law and 'social censure' I have hoped to highlight the importance of public support for specific projects of criminalisation. By understanding that struggles over the criminal label are also struggles over the legitimacy of the state, and the illegitimacy of those it criminalises, we may begin to uncover some of the characteristics of the criminal law that would start to explain the nature of its attraction for both academics and non-academics who have been involved in present, and past, social movements against white-collar and corporate crime (Katz, 1980). We can now consider in more detail some of these characteristics. In the previous chapter I argued that the criminal label, in addition to justifying the imposition of coercive measures of social control, also serves an important ideological function in determining the meanings and status attached to a variety of acts, actors and events. Not only this, but

[6] See, for instance, Reiner (1997) for a review of the literature that has looked at the proportion of media content devoted to crime, law and order news. See Sparks (1992) for an analysis of crime

the ideological and material formations that support and surround the application of some (and the qualification is important) criminal labels appear to elicit a powerful emotional commitment to, and support for specific moments of criminalisation (Carson, 1974).

In the first place, to the extent that dominant censures simultaneously create their targets, the most powerful social censures and the most powerful criminal labels purport to define a person's very being. They resonate and have effects beyond their legal confines or immediate context. This is the stigmatizing power of dominant censure and criminal labels. Sumner suggests something similar when he says that, 'different censures have a different implication for social status, and... only the strongest social censures automatically and totally reconstruct the recipient's social status' (Sumner, 1990b: 25). Although it is not automatically clear what Sumner means when he refers to 'the strongest social censures'[7], one could consider, for instance, how a conviction for dangerous driving does not confer on a person a particular identity in the way that behaviour that comes to be prosecuted as a sexual offence, or under the Prevention of Terrorism Acts may result in the definition of an individual as a 'sex offender' or a 'terrorist'. Similarly, the possibilities for being labelled a 'drug addict' are dependent upon which drugs a person is addicted to and whether they are proscribed by the criminal law. So, someone addicted to nicotine does not acquire the social status of a 'drug addict', and someone addicted to alcohol is defined as someone who 'has a drink problem' or, at worst, as 'an alcoholic'.

Second, the criminal law is not simply a mechanism for locating and apportioning responsibility. Other areas of law can do this just as well. It also 'moralises' responsibility, and can transform the site where responsibility has been judged to reside into a locus for blame, censure and anger. In addition it could be argued that, whilst the criminal law has the capacity to function as a powerful apparatus for the deployment of social censures, the rituals of the criminal law serve to actually *strengthen* condemnation and opposition. Thus, in considering what may be at stake in struggles to criminalise corporate crime, clearly this capacity to consolidate and strengthen public resentment against corporations

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stories in the entertainment media.

[7] Having argued for the ways in which a concept of 'social censure' is analytically valuable for criminology, it may be that we are in need of finer distinctions to be able to articulate the differences between, on the one hand, the act of censuring in the sense of merely blaming or

that kill, maim, poison and pollute would be an extremely useful political weapon in the struggle over the meaning and status - not just of concrete instances of corporate illegality and deviance - but also of the legitimacy and value of present economic, social and political configurations.

However, this does not help us to understand precisely *how* dominant censures are first constructed, and then mobilised against particular acts or behaviours that are selected for criminalisation in practice. In other words, we need to understand in turn, how consent is secured around these hegemonic censures - how they become 'dominant'. Eagleton summarises the Gramscian theory of 'hegemony' in the following terms:

> Very roughly, then, we might define hegemony as a whole range of practical struggles by which a dominant power elicits consent to its rule from those its subjugates. To win hegemony, in Gramsci's view, is to establish moral, political and intellectual leadership in social life by diffusing one's own 'world view' throughout the fabric of society as a whole, thus equating one's own interests with the interests of society at large.
>
> (Eagelton, 1991: 115-116).

However, no ruling elite is able to simply impose its own 'world view' on society. It must negotiate, and to an extent accommodate, both the conflicting interests of other fractions of a ruling economic class, and the interests and values of subordinate groups (Eagleton, 1991). Thus, Garland writes:

> When ascendent social elites legislate their preferred categories into laws and institutional practices, they do not, except in exceptional circumstances, ignore the moral culture of the mass of the people. To do so is to invite deep resistance and hostility, and undermine the degree of voluntary co-operation that all stable authority requires... But if legislative elites cannot afford to ignore or overturn those values which have a place in the hearts of the citizens, they are usually in a position to transform them in certain ways or to give them particular inflections. In effect, politics becomes a matter of working upon existing social relations and

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disapproving of someone or some act, and on the other hand those censures that wholly and negatively define a person's being.

> moralities so as to lead them in new directions and reshape them in accordance with a particular politics.
>
> (Garland, 1990: 53).

For example, to the extent that the public supports the criminal law and its institutions, it could be argued that this support is based upon a series of distortions. What Garland refers to as 'transformations', I have called 'distortions' to convey the sense that our emotional commitment to the priorities of the criminal law may involve a kind of 'false consciousness'. First, Hall *et al.* (1978) have argued that our emotional response to 'crime' may be a product of a *displacement* of more general fears and anxieties - anxieties around, for instance, social problems and dislocations like unemployment and increased job insecurity, the widening of social divisions, the threefold increase in poverty, and the break-up of families and communities. These more general anxieties may be displaced, by media and political discourses, onto and expressed as concern about a limited and more narrow range of issues - that is, the officially defined 'crime problem'. Second, as Box (1983) argues, the offences represented as the 'core' criminal offences, and the main object of the criminal law's coercive power (murder, assault, rape, burglary) are in practice enforced and interpreted in such a way that only some instances of culpable killing, and only some acts of sexual violence and abuse, are labelled and punished by the criminal justice system. Third, media representations of crime often focus on the extraordinary and unusual, and lavish the most attention on those crimes that are committed *least* according to official statistics or other estimates (Katz, 1987; Grabosky and Wilson, 1989; Schlesinger and Tumber, 1994). Thus, the ritual abuse of children and 'paedophilia' rings get more press coverage than the sexual abuse of children in their own homes by family members, and stories in which the safety and privacy of the home is threatened or violated by an intruder are thought to have special resonance (Katz, 1987; Schlesinger and Tumber, 1994). These stories play on *real*, but often remote, 'worst' fears for the safety of our children, our families, our friends and ourselves, and may actually redirect or reconstruct those fears.[8]

Although the precise relationship between public fear and public discourses around crime is unclear (Sparks, 1992; Schlesinger and Tumber, 1994), it is at least arguable that the

persistent amplification of certain threats over others may cause our perception of the sources of danger to be temporarily, or permanently, transformed. We come to fear less for our children's safety when they are crossing, or near to, a road than we fear that our children might be abducted. Parks, shopping centres and school playgrounds populated by strangers become 'dangerous places' for our children even though, statistically, children are more likely to be abused by someone they know, in their own homes (Hotaling and Straus, 1980; Creighton and Noyes 1989; Kelly *et al.*, 1991). Thus, to the extent that media and other public discourses around 'crime' *amplify* and *exaggerate* certain threats - whilst other, perhaps more imminent, sources of danger are downplayed or overlooked - these discourses are ideological distortions which produce a distorted emotional commitment. Such an analysis draws on the work of Hall *et al.* (1978) and seems highly relevant to the question of how potential censure of harmful corporate activities might be preempted and forestalled. Indeed it will be argued that many of the processes that have been identified in the criminological literature as components of a moral panic[9] are inverted in most cases of corporate illegality and violence. So, whereas in relation to conventional crime, the threat posed by particular activities are frequently 'talked up', in the case of corporate criminal violence a number of factors combine to obscure or diminish the public's sense of the scale of the threat posed by particular corporate activities. For example, the danger to the individual of using illegal drugs, and the threats that drug-taking and addiction pose to 'the rest of society' is a frequent 'item' on political and media agendas. Yet despite the fact that estimates of the health risks associated with the legal use of tobacco, alcohol and pharmaceutical drugs[10] dwarf the known risks of illegal drug use, these 'legal' risks are not represented, or responded to, as significant social problems. In addition the actual - as opposed to relative - threats of illegal drug use may be exaggerated. For instance, in defending the Government's plans to introduce mandatory drug testing of all those arrested by the police and the further

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[8] The extent to which we may feel unsafe will, of course, also depend on other material and personal circumstances. See for instance, Schlesinger *et al.* (1992) and Schlesinger and Tumber (1994).

[9] See, for instance Cohen (1973); Hall *et al.* (1978); and Goode and Ben-Yehuda (1994).

[10] For instance, Goode and Ben-Yehuda relate: "According to the Surgeon General of the United States, in the US the use of tobacco cigarettes is responsible for well over 400,000 premature deaths each year, while alcohol use causes some 150,000 deaths; a crude extrapolation from hospital and medical examiner's data yields premature acute deaths for illegal drugs (or the illegal use of prescriptions drugs) in the 20,000 or so territories." (1994: 44). Moreover, if we compare this last figure of approximately 20,000 deaths in the general population due to illegal drug use with the latest estimate that in 1994 there were 106,000 deaths from adverse reactions to medicinal

denial of bail for those testing positive for heroin and cocaine, Jack Straw informed the Labour Party Conference in September 1999 that "in some of our cities half of those arrested test positive for heroin." In this way, Straw sought to imply that a major cause of crime was drug addiction. However, Travis (1999) reports that, 'The latest published home office research contradicts this, saying that on average 18% [of those arrested] were found to have heroin in their bloodstream...[The] most common drugs abused by those arrested are not heroin but cannabis and alcohol.'

In the following chapter I will begin to consider how the opposite process to the process outlined above occurs in relation to corporate violence. It will be argued that certain institutional practices, discourses and the formal definition of regulatory offences obscure, mute or minimise the impact and threat of corporate harm and that, as a result, moral condemnation of, anxieties around, or anger at acts of corporate violence are routinely preempted, deflected and defused. In this way it could be said that the present forms of legal regulation that apply to business activity and the dominant representations, explanations and images of corporate illegality that are generated combine to produce a 'moral un-panic'. First though, I will explore some of the arguments of academics and regulators who suggest that the State's differential response to conventional crime and corporate crime can be understood in terms of inherent differences between the nature of the populations regulated, the contexts in which offending occurs, the kinds of acts that are proscribed and, finally, in terms of a distinction between the public response to conventional crimes on the one hand, and corporate crime in the other.

JUDGEMENTS OF LEGITIMACY AND THE SOCIAL CONSTRUCTION OF A 'LAW AND ORDER' ISSUE

Wells (1993) and Tombs (1997a) have both referred to the difficulties of speaking of corporations and their acts as 'criminal'. Wells writes that

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drugs in hospitalised patients *alone* (Lazarou *et al.*, 1998), then we begin to have some idea of the size of the threat posed by the legal use of pharmaceutical drugs.

> 'Mugging', 'joyriding', 'shoplifting', 'glassing', and 'vandalism' are examples of the many colloquial terms in use for conveying the social meanings of behaviour... The social vocabulary for corporate harms is less well-developed. The word 'accident' frequently appears: 'accidents' at work; road 'accidents'.
>
> (1993: 12)

Similarly, Tombs (1997) writes that 'One key contributing factor to the collective ignorance regarding corporate crime... is that this requires speaking of business organisations as (potential) offenders. There are important obstacles to such speaking.' In attempting to explain why we lack a ready vocabulary with which to talk about corporate violence as 'crime', Tombs writes:

> First, the legitimacy of business organisations is often represented as standing in contradistinction to those objects of "traditional" crime concerns; most of those who end up being processed through the criminal justice system are treated as some form of burden upon society in a way that business organisations are not. This is intimately related to the second point. Where business organisations engage in criminal activity, then this is represented and/ or interpreted (not least by many academics) as side effects of their core, legitimate activities...
>
> (1997).

The Concept of the Socially Responsible Corporation

The notion that corporate violations of regulatory law are unlike behaviour that contravenes traditional criminal laws is central to the arguments of those (both within and without the academic community) advocating a 'compliance approach' to the enforcement of health and safety law. The first argument of compliance theorists, as outlined by Tombs in the last quote, holds that enforcement agencies are essentially dealing with a 'legitimate' population going about its 'legitimate' business. It would be inappropriate and counter-productive, advocates of this approach assert, to use traditional policing techniques to regulate compliance with health and safety law in the workplace. The perception of 'legitimacy' in relation to corporations and their activities in any given context is not determinate and is subject to historical shifts. Generally, a perception of 'legitimacy' in relation to corporations today seems to entail two main beliefs: first, that

corporations operate within the law and second, that they are, in the main, societally beneficial. Thus, a belief in the legitimacy of corporate capital is not only dependent on a belief that corporations act in accord with their legal rights and duties, but also depends upon a perception that the substance and purpose of their activity corresponds in some way with wider social and moral imperatives.[11]

In this way we can see how popular acceptance of the legitimacy of corporate capital is never completely secure. In the first place, a growing realisation of the dangers and 'dis-benefits' associated with corporations' exploitation of technological advances undercuts the image of the corporation as the motor of the economy and source of rising standards of living (Beck, 1992; Pearce and Tombs, 1996). Moreover, there seems to be a growing scepticism regarding the 'good intentions' of the business sector and its representatives, and distrust of the influence that the big corporations may wield over government. In the UK this is evidenced in, for example, continued public criticisms of the level of directors' pay - particularly in the newly privatised industries - and perhaps even more clearly in the recent controversies over the growing and selling of genetically modified food. For instance, in a poll taken by Mintel in September 1999 just under 40 *per cent* of respondents felt that GM foods had been inadequately researched and almost a third of the sample 'said they did not feel they could trust the government on food safety issues' (Gregoriadis, 1999a). A poll by the Consumers' Association in August of the same year showed that 85 *per cent* of people questioned thought 'ministers [were] denying them vital information about goods ranging from digital television to GM food' (Quinn and Hencke, 1999). In the US a public opinion survey carried out in June 1996 and commissioned by the Preamble Center for Public Policy found that,

> Between 70% and 80% of the public recognize serious problems "in the way corporations put the interests of their executives and shareholders ahead of their employees and society, and identify greed" as the motivation behind new waves of corporate layoffs and downsizing, rejecting the corporate argument that such actions are necessitated by competitive pressures.
>
> (Preamble Center for Public Policy, 1999: 1).

[11] This concept of legitimacy draws on the discussion in Green and Ward (1999), who develop the concept in relation to the activities of the State.

Similar episodes, during which confidence in the legitimacy of the corporation and the capitalist economic system is undermined, have occurred periodically over the last century (Clinard and Yeager, 1980; 200-204; Glasbeek, 1988) and before (Glasbeek, 1988: 363-364 and footnotes 1 and 2). It is interesting to note, therefore, that the necessity of maintaining a sense of the moral 'superiority' and uprightness of the early factory owners was one of the main obstacles to effective enforcement of the law faced by the first Factory Inspectors. Carson writes that in the years following 1836 illegality was so widespread that,

> Thoroughgoing enforcement through the medium of the courts in these years of economic difficulty would have involved a degree of collective criminalisation which extended far beyond some morally opprobrious minority. Indeed it would have embraced many employers of considerable status, social respectability and, particularly in the wake of the 1982 franchise reform, of growing political influence. The moral contours drawn by such an approach would have been badly out of line with the structural contours of the emerging order.
>
> (1979: 48).

During the period of factory inspection with which Carson is concerned, a perception of 'legitimacy' in relation to the business community was maintained despite widespread and routine violation of the Factory Acts, but this representation that the majority of employers were essentially law-abiding was fragile and difficult to maintain. Carson writes that,

> Inspectors...very rapidly discovered that violation was widespread and, indeed, pervasive. As the period progresses... we find them encountering more and more difficulty in sustaining a distinction between the respectable employer who would never break the law, and the corps of less reputable, mostly smaller mill-owners who had previously been held out as the main offenders, as rotten apples in an otherwise wholesome barrel. Time and again, the reports of the English Inspectors and their comments to committees etc. evidence ambivalence almost to the point of contradiction on this score. On the one hand they attempt to maintain the view that there really was a solid body of manufacturers above reproach; on the other, time and again they are driven to admit that they did

> encounter frequent violations on the premises of even the "respectable" employers.
>
> (1979: 47-48).

Today, assertions regarding the legitimacy of the business community (and, therefore, the inappropriateness of a sanctioning strategy) are similarly founded on a supposed distinction between the majority of employers who are, on the whole, essentially law-abiding and a small minority of 'bad apples' who intentionally flout the law (Bardach and Kagan, 1982). So, for instance, the Parliamentary Under Secretary of State for the DETR, Lord Whitty, justifies the adoption of a persuasive and educative role for the HSE on the basis of a belief that, 'those with good intentions... account for the vast majority.' (Whitty, 1999). Similarly, the *Financial Times* reported that Jenny Bacon, Director General of the HSE, believes 'there are only a small number of cowboy firms' (Taylor, 1996: 6).

Thus, whilst the notion of the corporation as a 'good citizen' appears to be rather fragile, it nevertheless underpins current (and past) enforcement practice of the laws regulating business activity. Later chapters will demonstrate how the notion of the socially responsible corporation was central to structuring HSE enforcement practice on a single construction project. More generally, the notion of the socially responsible business underlies the emphasis placed on self-regulation within the Robens Report (1972a) and, subsequently, within HSE and government policy. So the concept of 'good corporate citizenship' is pivotal, not just in terms of understanding the day-to-day decisions made by inspectors as to how they will respond to particular breaches, but also in terms of explaining the overall style of business regulation. Indeed a consideration of some regulatory trends suggests that the HSE may be moving yet further away from their 'policing' role, and reorganising regulatory practice so that their role as 'advisors to industry' is increasingly emphasised. For instance, the Director General's Foreword to the 1995-96 Annual Report states that the HSE 'are developing and extending the use of other approaches to secure compliance, for example contacting large multi-site employers on a company-wide basis, which has proved very effective. Other initiatives include mailshots, seminars, workshops and publicity programmes.' However, rather than supplementing traditional inspections, these new forms of 'regulatory contacts' were intended to replace inspections. Thus Bacon wrote, 'we have reduced the number of

planned inspections while stepping up other forms of contact'. (HSC, 1996: xvi). Nor has this trend been arrested by the election of a Labour Government supposedly committed to 'a more rigorous enforcement policy' for the HSE (Environment, Transport and Regional Affairs Committee, 1999). The HSE have now introduced a new 'output and performance measure' which they call 'regulatory contacts'. These include advisory visits and 'visits in connection with special projects',[12] and we are advised that the HSE have also set up a project to 'evaluate the effectiveness of other contact techniques, such as mailshots and seminars aimed in particular at small firms' (HSC, 1997/98). Clearly these forms of contact further remove the HSE from a policing or law enforcement role, and must therefore be based on a belief that most employers can be trusted to comply with the law and maintain safe systems of work in the absence of third party oversight so long as they are given the necessary information.[13]

This assumption - commonly asserted, as we have seen, by both government ministers and regulatory agents - is given the gloss of academic validity by a group of academics who support the existing 'compliance approach' to the enforcement of laws regulating business activity. For instance, Bardach and Kagan write,

> The distribution of good and bad apples with respect to any particular regulatory standard obviously has implications for appropriate enforcement strategy. For analytic purposes, assume that the bad apples make up about 20 per cent of the average population of regulated enterprises in most regulatory programs. The other 80 per cent would be arrayed over a spectrum of borderline to moderate to really good apples. This distribution almost surely overestimates the proportion of bad apples in most regulatory programs, but it does square roughly with what commentators have said and with much regulatory practice.
>
> (1982: 65).

Academics like Bardach and Kagan argue that, since the majority of firms are 'good apples' who want to comply with the law but may need guidance or advice, the adversarial approach to enforcement would be both unnecessary and counter-productive

[12] References to these are in HSC (1997/98: 15 and 27).
[13] It appears that the impact of inspections might also be diluted since inspections may now be undertaken by 'workplace contact officers' who are not trained as HSE inspectors nor are they required to possess any technical training or expertise (Fidderman, 1998: 12-13).

as such an approach risks alienating, and thereby losing the co-operation of, industry.[14] Related to the supposed legitimacy of the regulated population is an assertion concerning the legitimate purpose of corporate enterprise. Nelken explains this argument in the following terms:

> A further claim concerning the supposed distinctiveness of white-collar crime is virtually true by definition. The criminal aspects of business or occupational activities under consideration are often *secondary* or *collateral* features, both in priority and in the succession of events, of an undertaking pursued for other, legitimate purposes.
>
> (1997: 908)

Distinguishing 'Legitimate Acts'?

Whilst it is clear that there may be important differences between 'crimes in the suites' and 'crimes on the streets',[15] the question is whether such differences justify a radically different approach to law enforcement. Arguments that these differences *do* explain differences in enforcement strategies tend to be made on the basis of two different assertions. First, that the context of corporate offending creates insuperable *practical* obstacles to the deployment of a conventional policing strategy, and second, that the distinctions between regulatory and traditional crime are essentially moral in character and thus invite different approaches. An example of the first line of argument is found in Shapiro's suggestion that the low level of prosecutorial activity against corporate offending can be explained in terms of the invisibility of much corporate crime. The business context is said to be significant because it obscures and hides illegality. Thus, Shapiro writes that,

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[14] See for instance, Hawkins (1984 and 1990); Vogel (1986); Hutter (1988); Kagan (1984); Kagan and Scholz (1984);

[15] As there are between the vast range of behaviours that may bring individuals, groups or communities in contact with the police. One would not want to imply that domestic violence, political demonstrations and protests, theft of a motor vehicle or being 'drunk and disorderly' were qualitatively similar. However, debates regarding the similarities or dis-similarities between corporate and conventional crime, tend to assume that conventional crimes constitute a homogenous category of behaviour. See for instance, Kagan (1984).

> Enforcers... are... stymied in discovering misconduct because the organisation of trust rarely leaves conclusive signs of its abuse like the jimmied door, bullet-riddled corpse, or rifled drawers left by so-called "common" crimes... Because principals often entrust agents to exercise discretion and to administer a process with contingent or uncertain outcomes, the output of trust relationships provides few red flags indicating violation... Self-dealing activities that exploit discretionary responsibility - making loans, purchasing supplies, choosing investments, giving grades, making arrests, etc. - look on their face the same as licit transactions conducted at arms length.
>
> (1990: 354)

The first point to make here is that Shapiro misrepresents the nature of much conventional offending to make her argument. Conventional crimes can take place behind the appearance of normal exchanges. For example, the definition of 'appropriation' in the Theft Act 1968 means that a theft need not involve any manifest illegality (Smith and Hogan, 1992: 499,501-2). Furthermore, Shapiro's analysis is based on financial corporate crimes. In fact her whole conception of corporate crime as the organisation and abuse of trust (1984 and 1990) is largely irrelevant as an analytical tool in the context of other kinds of corporate offending, such as environmental or health and safety crime. Thus, whilst Shapiro argues that because corporate illegality takes place in a business setting it is largely hidden and evidence scarce, Kagan argues precisely the opposite, stating that,

> Regulatory violations are often continuing and easily observable. If the landlord hasn't fixed the broken water heater or toilet, the effects are obvious until repaired, there for the inspector as well as for the tenant to see. The same continuing, transparent character adheres to a smokestack without a properly operating scrubber, to unrestored strip-mined land, or failure to have contracted for the "validation" of employment tests that tend to exclude minorities from hiring or promotion... With evidence of violations preserved and accessible, and with the identity of the corporate violator apparent, the inspector, unlike the police officer, needn't rush to the scene at a moment's notice, or attempt to reconstruct past events by finding and interviewing witnesses...
>
> (1984: 51).

Moreover, Kagan argues that it is precisely the 'obvious' nature of much corporate crime that explains the lack of prosecutorial activity:

> The enduring quality of many regulatory violations... means that the inspector can engage in extended personal contact with the violator... Inspectors in some agencies use their opportunity for conversation to act as consultants rather than cops...
>
> (1984: 52).

Thus, two opposite qualities are claimed to attach to corporate offending, and yet both are said to explain non-prosecution.

We can also look to Kagan to illustrate the second line of argument - that is, that the 'legitimate purpose' of business activity constitutes a qualitative distinction between corporate and traditional crime. He writes:

> The burglars, drunks, heroin peddlars, and other criminal offenders encountered by police officers are rarely engaged in what are thought to be socially useful occupations. In the case of regulated businesses, however, their offences, even if irresponsible or socially harmful in and of themselves, are more likely to be viewed as negligent, non-malicious side-effects of socially useful activities... A plant manager might consciously increase the risk of product-contamination in postponing the cleaning of a food-processing machine, but he does not intend an accident to occur in the same sense as a mugger or purse-snatcher intends to harm his victim'.
>
> (1984: 45-46).

This quote demonstrates how spurious the supposed distinction between legitimate and illegitimate populations are. In the first place the 'priority', or purpose, of the woman who shop-lifts to, for instance, provide her children with clothes is not to harm the shop but to clothe her children (a socially useful task - at least from her children's point of view). Similarly, the person who commits robbery and the manager who fails to provide adequate safety equipment may both act with the intention of gaining some monetary

benefit. Both may be indifferent as to whether or not someone is actually harmed, or both may hold a genuine (though tenuous) hope that no one is seriously hurt by their actions. Thus, contrary to Kagan's attempt to argue otherwise, it is clear that there is no *necessary* moral distinction between these acts simply because one takes place within a business context. Furthermore, Wells's (1993) discussion of the House of Lords decision in *Andrews* in 1937 demonstrates that judges may, in the process of interpreting and applying criminal laws, actually construct the boundary between legitimate and illegitimate behaviour - although there is an attempt within legal reasoning to conceal this and to suggest that the law simply reflects some prior distinction. The decision in *Andrews* was pivotal in ensuring that the common law crime of constructive, or unlawful act, manslaughter would not apply to those causing death by driving or 'while acting professionally' (Wells, 1993: 75). Under the offence a person could be guilty of manslaughter if they committed an unlawful act (robbery, for example) which then caused the death of another person. However, Lord Aitken tried to draw a distinction between,

> [Doing] an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would *ex necessitate* commit manslaughter.
>
> (Cited in Wells, 1993: 76).

Since health and safety offending, as well as other 'professional activities' are likely to be interpreted as 'doing a lawful act with a degree of carelessness which the Legislature makes criminal', an employer who commits a breach of the HSWA which causes the death of an employee would not, following *Andrews*, be guilty of the offence of unlawful act manslaughter. However, as Wells cogently argues:

> The criminal stereotyping involved in the *Andrews* doctrine conjures the image of a classic unlawful act of manslaughter occurring when a pub brawl goes wrong. Is there a sense in which this can be described as an intrinsically 'unlawful' activity, unlike careless, reckless or dangerous driving which is at base 'lawful'? It is true that brawling, unlike driving, is an activity with little if any social utility. But it is also true that going to pubs is a lawful social activity.

> Neither brawling nor careless, reckless or dangerous driving have social utility. The time-frame of criminal activity needs to be critically addressed: at what point does a pub visit turn into an unlawful activity? If it is only at the point at which an assault or battery is committed, then this does not seem very different from the point at which lawful driving becomes careless. Thus, it is not driving with which brawling should be compared but careless, reckless or dangerous driving.
>
> (Wells, 1993: 76-77).

Wells's critical discussion of the legal 'reasoning' in this case demonstrates that it is only by manipulating the time-frame within which we view different activities that the law is able to construct a distinction between two types of behaviour and then label one 'legitimate' and the other 'illegitimate'. Consequently, the law may erroneously distinguish behaviour that it regards as 'valuable', and grant those engaged in this behaviour or activity certain privileges and protections with respect to the application of the criminal label.

Distinguishing 'Legitimate Populations'?

Second, an attempt to justify radically different enforcement approaches to 'regulatory' and 'conventional' criminal offences in terms of the argument that regulatory offences are committed by a generally law-abiding population whilst conventional crimes are committed by the opposite is equally spurious. The research of both Sutherland (1949) and Carson (1970a) established that a majority of companies are 'habitual' offenders in the sense that they have more than one conviction. Furthermore, given that the enforcement practice of the Factory Inspectorate is geared towards non-prosecution, the formal enforcement records relating to businesses which have breached health and safety laws are likely to vastly underestimate the real rate of recidivism. On the other side of the equation, Sanders (1985) has found that the police, in comparison to H.M.F.I., are much more likely to prosecute an individual who has no previous convictions or cautions. In stark contrast to Carson's finding that only 1 *per cent* of employers with no previous record of offending were prosecuted (1970a: 392), Sanders found that out of 293 suspects with no previous 'significant' record 245 (83.6 *per cent*) were prosecuted and 30 cautioned by the police (1985: 192). Thus, it could be argued that the group of

individuals convicted for conventional criminal offences constitute a more 'law-abiding' population than those companies or managers convicted under regulatory laws.

However, there is a more interesting point to be made in relation to this argument that the 'legitimacy' of the regulated population determines the enforcement approach adopted by regulatory agencies. For, whether or not it is true that the majority of firms are 'good apples' - and this notion of 'good appleness' will be examined at a later point - in other contexts the fact that a majority of the population is 'law-abiding' does not stop particular social problems from being defined as law-and-order issues that require criminal justice intervention. There are a number of examples that one could use to illustrate this point. For instance, Solomos (1993) analyses the press and media responses to the inner-city riots which occurred between 1980 and 1981 and then again in 1985. He shows that after the 1980-81 disturbances a number of public and official accounts sought to explain the disturbances in terms of the social deprivation and political marginality of those involved in the riots.[16] However, by 1985 these explanations had effectively been overtaken by a discursive construction of the phenomena of inner-city disturbance as constituting, essentially, a crime, law and order problem. In fact, the construction of the riots as a law-and-order issue, calling for a law and order response, was achieved precisely through a distinction being made between a minority of young black criminals who were responsible for the violence and a law-abiding majority of residents. Solomos cites from the Dear Report on Handsworth to illustrate this construction of events:

> The majority of rioters who took part in these unhappy events were young, black and of Afro-Caribbean origin. Let there be no doubt, these young criminals are not in any way representative of the vast majority of the Afro-Caribbean community whose life has contributed to the life and culture of the West Midlands over many years and whose hopes and aspirations are at one with those of every other law abiding citizen, We share a common sorrow. It is the duty of all of us to ensure that an entire cultural group is not tainted by the actions of a criminal minority.
>
> (Dear, 1985. Cited in Solomos, 1993: 163).

[16] See, for instance, the Scarman Report (Scarman, 1981).

Solomos argues that the dominant 'explanation' of the 1985 riots as being instigated by the actions of a minority of 'criminal elements' served to '[distance] the riots from the social, economic, political and other grievances which had been linked to them by locating the cause outside of the social problems of inner city dwellers and in the simple greed of the drug barons.' (1993: 165-166). Yet despite the assertion in public debate that the riots involved a 'criminal minority' of the local populations, the opposite solution to the solution adopted to deal with workplace violence was proposed to deal with urban street violence. This solution saw a 'law and order' response as appropriate, despite the fact that only a minority of the population were said to have engaged in criminal behaviour. Thus, Douglas Hurd stated in an interview with the *Daily Telegraph* in September 1985 that,

> The sound which law-abiding people heard at Handsworth was not a cry for help but a cry for loot. That is why the first priority, once public order is secure, must be a thorough and relentless investigation into the crimes which were committed.
>
> (Cited in Solomos, 1993: 176).

Similarly, Fooks and Pantazis (1999) discuss how the social fact of 'homelessness' in the Charing Cross area is, in practice, treated as a law-and-order, rather than a social-welfare, issue and that this results in high relative rates of arrest and charge amongst the homeless population. This is despite the fact that the Charing Cross Homeless Unit within the Metropolitan Police was ostensibly set up to protect the majority of homeless people in Charing Cross, some of whom were said to have been victimised by a minority of homeless people who practiced 'taxing'. Another recent example where a law-and-order response has been judged appropriate despite the fact that only a minority of the group or community in question are said to engage in 'criminal' activity can be found in the Labour Government's response to so-called 'youth crime and disorder'.[17] Under Section 14 of the government's Crime and Disorder Act 1998, local authorities are given the power to impose local curfew orders on young people despite the fact that it is only ever a tiny number of young people who are perceived as presenting a problem for their communities. Moreover, the curfew orders are a response, not to youth *crime*, but to the problems of 'anti-social or *potentially* criminal behaviour', and any local authority

[17] This is the title of a section from the Crime and Disorder Act 1998.

proposing to implement a curfew may do so even though there are *no existing problems with youth 'disorder'* in the area.[18]

Social Status, Cultural Meaning and Villification

The examples discussed above should make it clear that whether a particular social group or community is represented as constituting a problem which calls for a law-and-order response is unrelated to whether or not only a minority of that population is allegedly involved in crime. Nor can this be explained in terms of the relative threat posed by a particular class, group or community. It is clear for instance, that the potential threat to life and health from industrial activity improperly controlled is far greater than the risks to the public posed by the homeless population of Charing Cross.[19] How then is widespread criminalisation or the adoption of coercive policing techniques for one population, and a 'soft' style of law enforcement (which relies predominantly on informal negotiation and advice) for another population justified? In other words, how is it that a particular social problem or phenomenon comes to be constructed, and widely accepted, as a law-and-order issue?

We can begin to answer this question in the case of the inner-city disturbances of the 1980s, by understanding that a series of prior ideological associations helped the Conservative government to respond to these forms of protest as 'criminal disorder'. First, urban disturbance was racialised (Solomos, 1993). This racialisation of urban protest made available to the government and ministers a stock of racial stereotypes from which they could construct an association between those involved in the protests and 'normal crime'. For instance, and as stated above, the 1985 riots in Handsworth and Brixton were widely held, by sections of the media and government officials, to have been instigated by local drug barons (Solomos, 1993: 165-166). More generally, once the protests had been racialised, the subsequent construction of these protests as crime, law and order

[18] A Guidance Document relating to the local child curfews states: "If the local authority has identified that there are specific problems caused by the activities of unsupervised children engaged in anti-social or potentially criminal behaviour in parts of its area, then it should provide details of the nature and scale of the problem. If no specific problem had been identified then the authority should indicate how it envisages using the local child curfew scheme to help maintain order." (Home Office, 1998: section 4.7).

[19] The majority of arrests of homeless people in the Charing Cross area, '79 *per cent* in total, were for begging, drunkenness and other 'minor offences'.' (Fooks and Pantazis, 1999: 139).

issues was facilitated by intermittent public debates that had taken place throughout the 1970s and that had constructed a series of ideological associations between 'crime', the young black male and a general drift into lawlessness, violence and social disintegration (Hall *et al.* 1978; Solomos, 1993). However, it is not just the use of *racial* stereotypes that may facilitate a law-and-order response. For instance, in one news story following the Broadwater Farm riots, the killing of PC Blakelock was said to have been 'ordered' by 'crazed left-wing extremists' (Solomos, 1993: 167). Thus, the discursive construction of a particular type of behaviour or event as 'criminal' frequently involves the creation of an association between that behaviour or event and a particular group that has previously been, or is simultaneouly represented as 'deviant', 'other' or 'the enemy within.[20]

The success with which public censure may be mobilised against a particular community, then, depends in part on the prior existence of sets of negative images, meanings, values and discourses that may be drawn upon (Fooks and Pantazis, 1999). Thus, the construction of a particular social phenomenon as one which constitutes a serious criminal threat may require more or less 'ideological work' depending on the 'aptness' of the available stock of images, values and meanings. For instance, Hall *et al.* write that,

> [The] 'criminalisation' of political and economic conflicts is a central aspect of the exercise of social control. It is often accompanied by heavy ideological 'work', required to shift labels about until they stick, extending and widening their reference, or trying to win over one labelled section against another.
>
> (Hall *et al.*, 1978: 190).

An example of the ways in which the discursive construction of a law-and-order issue, or the creation of a new target for censure and criminalisation, may be ideologically constrained can be found in Fooks and Pantazis's discussion of the policing of the visible homeless in the Charing Cross district. Both John Major as Prime Minister and Tony Blair as leader of the Labour Party, were widely criticised for suggesting that the public should be intolerant of homeless people living on the streets and of their activities. Thus, Fooks and Pantazis write:

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[20] This was the phrase that Thatcher used to describe the miners during the 1984 strike (Green, 1990: 110).

> This response to a deliberate attempt to mobilise support against rough sleepers affords a valuable insight into the meaning of homelessness. It is not that the homeless are wholly insulated from political assault, but more that they are not a group that can be unambiguously attacked or censured. This is precisely because the image of homelessness as victims of circumstance has become such a resonant theme within discourses of homelessness that is has come to form part of what it means to be a homeless person and, therefore, part of the meaning of homelessness.
>
> (1999: 127).

One of the ways in which this problem is circumvented in media and political accounts which seek to construct an association between 'criminality' and the homeless is through a discourse in which the targets of censure are not 'homeless people' but beggars, drunks, drug addicts, squeegee merchants, or squatters (Fooks and Pantazis, 1999). Thus the availability of other negative labels allows the cultural status of the homeless as 'victims' to be elided.

This discussion helps to explain the resistance of corporations to criminal labelling. For in contrast to the multitude of negative associations and images that have grown up in relation to economically and socially powerless and marginalised groups, the 'business' community is generally represented as a force for good: as the motor of the economy; the provider of jobs, goods and services; the source of rising standards of living and rapid advances in human knowledge and technology (Glasbeek, 1988; Pearce and Tombs, 1998). Moreover, this representation of the business community is currently explicitly invoked as a reason for limiting government intervention that would restrict or impede the delivery of these 'benefits':

> [For] eighteen years Britain has witnessed a generalised and often very conscious construction of a pro-business ideology, one of a very particular form within which the concept of free enterprise has been resurrected in the context of a struggle to reassert neo-liberal hegemony. An element of this is of course a particular version of law and order from which business offences are largely excluded. Here, the key phrase is not simply 'enterprise' but '*free* enterprise' - that is, business activity increasingly free from (illegitimate) regulation.

(Tombs, 1997).

Thus existing 'ideologies of business' (Tombs, 1997) are used to deflect general pressures for the legal control of business and, as will be seen, to deflect more specific pressures for the effective criminalisation and censure of harmful corporate activities.

To conclude, it is clearly *not* the case that certain populations and their activities automatically invite a law-and-order response, whilst others do not. In other words, it is not possible to maintain, as Kagan (1984) and Hawkins (1990) attempt to do, that differences between the state's response to conventional offenders and its response to corporate offenders is based on the legitimacy of one population and its activities and the illegitimacy of the other. To argue, however, that popular notions of crime and criminality cannot easily be made to 'fit' corporations and their activities (as Wells and Tombs do) is another matter altogether, since what is being asserted is not an essential difference between the 'corporation' and the 'criminal' but, rather, socially constructed notions of both. At the same time, there are limits to the range of meanings that can be generated in relation to any given phenomenon. It is not possible - even for the 'primary definers' (Hall *et al.*, 1978) such as the Home Office or the police - to construct *any* issue that they wish to as one which calls for a law-and-order response. As was clear from the 'mismanaged' attempt in the early 1990s to mobilise censure against the homeless population (discussed above), the success of certain representations - the ease with which they are able to invoke widespread censure or support for criminalisation - depends in part on the existence of a range of other (sometimes competing and sometimes supporting) images, stereotypes, explanations, anxieties and associations.

However, there are some important qualifications that need to be made in relation to the above statement. For certain populations at least (usually the most marginalised and economically powerless) the fact that they are *not* the targets of widespread censure does not necessarily protect them against criminalisation - though it may make their successful continued criminalisation a more fragile affair. Whilst non-payment of a television licence is not greeted with widespread disapproval or repugnance, nevertheless 'by 1994, 57% of all female criminal convictions related to television licence evasion.' (Pantazis and Gordon, 1997: 170). Thus, I am not suggesting that consent for criminalisation must always involve the mobilisation of censure. Consent may also be a product of the

'indifference' of 'respectable' people to the routine criminalisation of activity that poses no real social threat.

Nor am I suggesting that political and economic elites have unlimited power to produce whatever meanings they choose. As Pearce and Tombs have observed,

> [If] the workings of the capitalist system and its empowering of the major corporate actors is the omnipresent context of all political situations this does not mean that it is in total control of its own destiny. It does not automatically secure its economic, political or ideological conditions of exitence.
>
> (Pearce and Tombs,1992: 83).

Struggles over definitions are not always resolved in favour of powerful groups, for as we have seen other existing meanings, associations, practices and discourses will sometimes operate as limits or checks. Moreover, dominant meanings and explanations may be challenged and transformed.[21] How then is the general meaning of corporate violence as 'not real crime' preserved in the context of increased public awareness of the extent of the harm caused to the health of workers, consumers and local communities, and in the face of attempts by campaigners and some academics to challenge and transform this meaning? How, in other words, is a sense of moral ambiguity in relation to instances of corporate violence, and a general sense of the 'legitimacy' of corporate capital, preserved in the face of opportunities for, and attempts to mobilise, censure?

First the arguments of those who attempt to defend dominant interpretations of corporate violence as 'non-crime' will be considered in some detail. The 'defenders' of a compliance approach to the regulation of business activity include a number of academics,[22] the regulatory agencies, politicians and the business community itself. In opposition to these advocates of a compliance approach it will be argued that the ambiguous moral status of

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[21] Thus, although major disasters incurring a heavy loss of life are still predominantly defined as 'accidents' (Tombs, 1997), there has been, according to Wells (1995), a gradual 'sea change' in which the public and the media are, at least in this country, increasingly willing to blame corporations for the consequences of their activities, even if this responsibility is not yet unambiguously labelled as 'criminal'.

[22] See Pearce and Tombs (1990) who identify a 'compliance school' of academics in this country and in the US.

corporate illegality and corporate violence is an effect, or product of a complex of enforcement and legal practices

MORAL AMBIGUITY AND DEFENSES OF A 'COMPLIANCE APPROACH' TO CORPORATE REGULATION

As stated in the introduction, white-collar crime scholarship is plagued by unresolved academic disputes - with current disputes largely covering the same ground as the original Sutherland-Tappan debate over the proper object and limits of the discipline (Slapper and Tombs, 1999: 1). For instance, Tappan pointed out that much of the behaviour Sutherland sought to include within the concept of white-collar crime was 'within the framework of normal business practice'.[23] This argument - that the regulatory laws governing business activity are qualitatively different from conventional criminal laws because the moral status of the behaviour they address is often ambiguous - is still frequently made within the academic literature. Kagan, for instance, writes that whilst there exists in relation to 'conventional' crime 'a social consensus that the actions in question are evil - *malum in se*' (1984: 53), with respect to regulatory offenses,

> It is not at all clear how "bad" they are. While most people would agree that pollution is bad, and that the factory that does *nothing* to control its emissions is bad, there is disagreement about what precise level is bad for public health and, given escalating costs of abatement, what level of control should be required.'
>
> (Kagan, 1984: 53).[24]

There are two ways in which the ambiguity of corporate illegality is asserted. First it is argued, as Kagan does above, that under the laws regulating corporate activity moral ambiguity attaches to the proscribed act itself. Thus, it is argued, that the distinction between legal and illegal pollution emissions, for instance, is necessarily somewhat arbitrary, since it is generally a case of 'where do you draw the line?' and that the moral status of behaviour falling on the 'wrong' side of the line is consequently ambiguous. The second way in which the 'moral status' of corporate illegality is said to be ambiguous rests

[23] Cited in Slapper and Tombs (1999: 5).
[24] See also Hawkins (1984); Clarke (1990); and Croall (1991).

on an argument about the ambiguous nature of corporate responsibility for the harms that are caused. There are two aspects to this argument. First it is argued that corporate offending typically lacks intention and is therefore less morally culpable than 'ordinary' offending. Second, it is argued that real responsibility for a particular harm (the production and sale of an unsafe drug for example, or the death of a worker who falls from scaffolding on a construction site) is generally 'diffused' either amongst a number of individuals within a company or amongst a number of companies who are in contractual relations, and to this extent the responsibility of individuals or companies is diluted. Both these claims will be challenged and then an attempt is made to identify those process which, rather than reflecting some innate moral ambiguity, actually contrive to construct that sense of ambiguity.

The Ambiguity of the Proscribed Act

In the first place, and with respect to the ambiguity of the proscribed act, such a perspective assumes that the boundary between legal and illegal behaviour in the context of conventional crimes is always, or usually, self-evident. McBarnet writes in relation to tax avoidance that,

> The boundary between lawful and deviant behaviour... is not as clear as it might sound. In the first place transactions themselves may straddle the boundary, [tax] avoidance slipping into [tax] evasion or being permeated by it. Second, the location of the transaction on the right or wrong side of the boundary depends on how those enforcing the law decide to label it - classic labelling theory. Third, the boundaries can be stretched not just by regulators but also by the regulated.'
>
> (McBarnet, 1991: 321).

This is not just a characteristic of regulatory offending and enforcement. For instance, where the precise line lies between 'reasonable chastisement' of a child by its parent and 'assault' or 'unnecessary suffering' is not made explicit within the legal definition of offences under the Children and Young Persons Act 1933. And - as a series of recent cases, reported in the news media, have shown - the courts may be inconsistent in drawing this line. (Seenan, 1999a and 1999b; Boseley, 1999). Moreover, the recent case

of a teacher convicted of an offence after he smacked his daughter in a dentist's waiting room, and the controversy following this conviction (Seenan, 1999a), demonstrate that ambiguity may surround even 'conventional' cases of assault involving interpersonal violence. Thus, moral ambiguity in itself does not determine legal outcome since we have seen (in relation to the non-criminalisation of some instances of corporate violence) that where moral consensus exists the law does not always act, and likewise (in relation to the prosecution of individuals for non-payment of a TV licence) where moral ambiguity exists criminalisation may nevertheless follow. In practice the precise boundary between legal and illegal behaviour for both conventional and corporate offending is determined, in the first instance, by the enforcement practices and decisions of law enforcement agencies and the courts. Moreover, even where a consensus exists, this may be the consequence, not of any *real* moral distinction, but of cultural and legal convention (Swigert and Farrell, 1980).

The Ambiguity of Corporate Fault

The second claim that is made by those who defend the 'compliance approach' to the regulation of business activity is that the moral responsibility of companies for harms that are caused is, in practice, often ambiguous. Those who seek to justify or rationalise the routine failure of regulatory agencies to strictly enforce the laws governing business activity do so on the basis that those laws place more onerous responsibilities and duties on companies than conventional criminal statutes place on individuals. First it is argued that a regulatory offence may have been committed without the level of fault (the 'state of mind') that must be proved in relation to conventional criminal offences and thus, as with strict liability offences, liability may exist in the absence of any (or a significant degree of) fault. Second, it is argued that regulatory law places greater burdens on business than conventional criminal laws place on individuals because businesses are forced to bear sole responsibility for events which may, in practice, have been partly or mainly caused by the person suffering the harm. Thus Kagan writes,

> [Traditional] criminal law reflects a relatively uncontroversial assignment of responsibility for harmful acts. For most people, the burglar is to blame, not the homeowner who failed to install a burglar alarm, even if the homeowner is

> affluent and the burglar grew up in a ghetto... Workplace accidents are often caused, wholly or in part, by worker carelessness. Accidents in the home are often caused when consumers misuse a product, ignore warning labels, or neglect maintenance instructions. Many consumer deception complaints stem from sales practices that would deceive only the most ignorant or gullible consumer... Yet regulation often attempts to prevent harm by assigning all legal responsibilities to the business firm involved, on the theory that *it* is best able to afford (or be coerced into) preventative measures. The regulations mandate safety devices and warning labels that would make a workplace, product, sales practice or apartment safe for even the negligent or irresponsible worker, consumer or tenant.
>
> (Kagan, 1984: 53).

Third, it is asserted that responsibility for a particular harm caused (the injury of a worker, or the pollution of a river) may be diffused either within the corporation (amongst a number of individuals) or between a number of companies (for example, companies in a supply chain, or companies on a multi-employer work-site). Therefore, whilst each party bears some responsibility for the harm, each party's individual 'portion' of responsibility is too small to deserve prosecution. Thus it is argued that whilst regulatory inspectors appear to resort to formal enforcement action far less frequently than the police, the level of enforcement action taken reflects 'real' levels of fault either in terms of the 'attitude' exhibited by the offending company, or in terms of a realistic assessment of how responsibility should be apportioned between offender and victim, or between a number of offenders. Enforcement patterns are therefore rational and proportionate to the levels of fault discovered:

> Absent powerful bureaucratic and social pressures to "go by the book," the inspector will be tempted to react the same "forgiving" way a police officer does when an individual has violated the law "but it really wasn't his fault".
>
> (Kagan, 1984: 54).

Moreover, since prosecution under health and safety law is rarely resorted to (Carson, 1970a; Bergman, 1994; Centre for Corporate Accountability, 1999), the defences of the compliance approach outlined above must rest on an assertion that not only does some regulatory offending exhibit these characteristics, but that regulatory offending is

routinely less culpable than conventional criminal offending. This view of the nature of regulatory offending is often made explicit in the comments of many regulators, and was central to the recommendations of the Robens Report, which states,

> The fact is - and we believe this to be widely recognised - that the traditional concepts of the criminal law are not readily applicable to *the majority of infringements* which arise under this type of legislation. Relatively few offences are clear-cut, few arise from reckless indifference to the possibility of causing injury, few can be laid without qualification at the door of a particular individual. The typical infringement, or combination of infringements arises rather through carelessness, oversight, lack of knowledge or means, inadequate supervision or sheer inefficiency.
>
> (Robens, 1972a: 82. Emphasis added).

It seems important therefore to critically examine this orthodoxy.

The Diffusion and Dilution of Responsibility?

As stated, there are three ways in which corporate responsibility for harm, or the risk of harm, resulting from illegal acts is said to be diffused in the context of organisational complexity. First, it is argued that responsibility for safety is typically diffused amongst personnel, particularly in large and complex organisations. Such a dispersion of responsibility throughout the corporation was said to be one of the obstacles to establishing P&O's responsibility for the manslaughter of those killed when the *Herald of Free Enterprise* capsized off the coast of Zeebrugge. Whilst this was expressed within the trial as a problem of proving 'mens rea' - that is, of proving that senior managers or directors ought to have known that there was an "obvious or serious risk" of the ship sailing with its bow doors open (Bergman, 1990b and 1991b) - this problem only arises because corporations are currently able to determine how they allocate (or fail to allocate) responsibility for safety within the organisation. Thus, Bergman points to the irony at the heart of the *Herald* acquittals:

> Although the law places upon directors clear and stringent responsibilities with regard to fiduciary matters, similar duties are not imposed with regard to safety.

> The lack of clear definitions of individual roles - 'a vacuum at the centre' in the words of Mr Justice Sheen - not only contributed to the disaster but also assisted senior officers to escape conviction. They could successfully deny that certain conduct was their responsibility or that they should have had knowledge of certain matters concerning the company which formed the basis of the charge.
>
> (Bergman, 1993: 5).

The first point to make in relation to this supposed obstacle to prosecution for a conventional criminal offence (as opposed to prosecution under the HSWA 1974) is that such an obstacle was never insuperable and could have been addressed had the political will been there. Thus, the Law Commission's recommendations on a new offence of corporate manslaughter would allow companies to be prosecuted for manslaughter where the company's 'conduct in causing the death falls far below what could reasonably be expected' and that death was caused 'by a failure, in the way in which the corporation's activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities' (Law Commission, 1996: 110). A company could therefore be prosecuted for the *collective* faults of its personnel where those faults were the consequence of 'the way in which the corporation's activities [were] managed or organised', and without having to prove that an individual director of the corporation had, or should have, appreciated the risk of injury or death. Similarly, in relation to the question of being able to attribute clear responsibility to senior managers and directors for violations of health and safety offences, any ambiguity in this area is caused by a failure of the legislation to specify director's duties. In a recent speech at a conference organised by the Institute of Employment Rights, Lord Whitty indicated that the Government may be addressing this gap in the legislation, but signally failed to specify how this might be done, stating simply that, 'We must ensure that there is no room for doubt as to Directors' responsibilities' (Whitty, 1999). Whilst it might at first seem that the imposition of these further duties simply supports the position of those who argue that the criminal law currently places a more onerous burden on companies than the criminal law places on individuals, Braithwaite suggests that this gap in the law may have been intentionally exploited by corporations. He writes that,

> When corporations want clearly defined accountability, they generally get it. Diffused accountability is not always inherent in organisational complexity; it is

> in considerable measure the result of a desire to protect individuals within the organisation by presenting a confused picture to the outside world.
>
> (Braithwaite, 1984: 324).

The proposed reforms discussed above, though inadequate to fully address the problems of employers exploiting the organisational setting of corporate illegality, nevertheless demonstrate that clear delineation of managerial responsibility in the context of organisational complexity is not an impossible task. The fact that these reforms may now be implemented can probably be understood as a response to public pressure that has built up following the series of disasters discussed in the previous chapter and the manifest failure of the state to introduce legal changes which would allow the companies involved to be held criminally accountable. Non-action by any Government in such a situation would threaten the legitimacy of the state (Calavita, 1983).

The second point to make in relation to the argument that the dispersion of responsibility throughout the corporate body makes the finding of fault difficult, and - as a consequence of this - prosecution rare, is that the vast majority of companies that fall within the Health and Safety Executive's ambit of responsibility are not large, complex organisations. Small enterprises (that is, those with less than 50 employees) account for 99.1 *per cent* of all businesses in the UK. Of these small businesses, 64 *per cent* are categorised as 'size class zero' - that is, businesses made up of sole traders or partners without employees, with 25 *per cent* having less than five employees, and only 10 *per cent* employing between five and forty-nine people (DTI, 1998). Although not conclusive,[25] what these figures suggest is that the low rate of prosecution cannot be explained in terms of organisational complexity in the majority of cases.[26] Similarly, Bergman has argued in relation to the failure of the HSE and the CPS to prosecute companies for manslaughter that,

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[25] As an indicator of the number of actual cases in which 'organisational complexity' may prevent the HSE from being able to trace responsibility (or, at least, a sufficient degree of fault to justify prosecution), this does not take account of the share of work that large and complex organisations undertake relative to small firms. The closest indicator of this is turnover, or market share, but both indicators may be misleading since some work is likely to be more lucrative than other work and it is at least arguable that the work done by larger organisations will be more lucrative than that done by smaller organisations, thereby making their turnover disproportionate to their actual share of work.

[26] Unless, of course, one absurdly assumes that health and safety offences only occur in complex organisations.

> The difficulty that the prosecution had in proving that the P&O company officers should have been alerted to the risks of physical injury do not exist after typical workplace deaths. Most workplace deaths take place in smaller companies without a long chain of individuals between the shopfloor and the boardroom.
>
> (Bergman, 1994: 9).

Indeed, Bergman's own research provides extremely strong evidence to support the argument that the low rate of HSE manslaughter referrals cannot be explained in terms of difficulties in tracing management responsibility, but is rather a product of inadequate HSE investigations, which routinely fail to uncover the full nature and extent of management knowledge of, and responsibility for, the unsafe work practices and systems that lead to injury and death (Bergman, 1994).

The second way in which the nature of the business setting is said to preclude a conventional criminal justice response to corporate illegality is when the actions or omissions of more than one organisation are found to have contributed to a particular death or injury. In relation to such situations it is said that, not only can organisational complexity diminish each party's responsibility for events, it can also reduce the prospects of a successful conviction (Perrone, 1993). This diffusion of responsibility may be commonplace on, for example, large construction projects where a number of firms have health and safety responsibilities in relation to a single project. Let us consider this argument as Perrone (1993) presents it in relation to multi-employer work-sites. Perrone writes that,

> Organisational complexity of the worksite is a further variable taken into consideration. In situations of complex worksites, where operational procedures are under the control of two or more companies, law enforcers invariably encounter difficulties in ascribing responsibility for the fatality. It is often the case that each of the organisational players contribute in part to the overall pattern of culpability and negligence, but taken in isolation, negligence on the part of any one player is insufficiently extreme to support a successful prosecution, and legal proceedings are therefore not ordinarily instigated.
>
> (Perrone, 1993).

However, whilst multi-employer work-sites or projects are frequently said to present these problems, there is very little research that has either explored the consequences of this kind of organisational complexity in any detail, or attempted to estimate the proportion of cases where responsibility is diffused to the extent that it is actually diluted, or to the extent that it becomes impossible to ascribe fault at all. For the first point to be made in relation to situations where responsibility is shared by a number of firms is that the diffusion of responsibility for health and safety in relation to a single project does not *necessarily* entail an equivalent dilution of each company's responsibility. Indeed, it may be that this is simply assumed in relation to cases where the acts or omissions of a number of companies contributed to a death. For instance, whilst Perrone had access to official data[27] relating to all workplace fatalities that occurred in the state of Victoria in Australia for a four year period, the case chosen to demonstrate Perrone's argument is not, on the face of it, particularly strong. Perrone discusses the case of a piece of earthmoving equipment - the Toyota Skid Steer Loader - manufactured in Japan by Toyota which contained an inherent design fault that caused the deaths of three men over a three year period. The Toyota companies in Japan and their subsidiaries in Australia were made aware of the design defect yet continued to distribute the model. Perrone writes:

> The Toyota companies of Japan were obviously responsible for designing and manufacturing an unsafe piece of equipment, and continuing to distribute the equipment for sale once the design dangers had been brought to their attention. However, some responsibility must also be apportioned to the Toyota companies in Australia and Victoria for their continued sale of such equipment. Each of the deceased men were inexperienced and unlicensed operators who had hired the machinery from rental companies, and in each of these instances they had been inadequately instructed or warned by the hiring body as to the dangers associated with the operation of the equipment. Therefore, the rental companies must also shoulder some of the blame. Accountability for the fatalities was distributed amongst so many actors that legal action was not sought against any of the organisations involved.
>
> (Perrone, 1993).

[27] Mainly Coroners' Reports.

But it is difficult to see (without further information) how the distribution of responsibility in this case precluded either a prosecution for manslaughter,[28] or a prosecution under health and safety legislation. Specifically, when Perrone explains the regulatory authorities' decision not to prosecute this case, their decision would have involved a decision not to prosecute under health and safety legislation as opposed to the (more difficult) option of prosecuting for manslaughter.[29] Thus, the authorities would not have been prosecuting the companies involved for the deaths of the three men, but for breaches of their general duties under OHSA (the equivalent of the British HSWA). These general duties include the requirement that designers, manufacturers, suppliers and importers ensure that products supplied are free from risks and provide information and updates about the safe use of products and plant.[30] It is difficult to see how these duties - held by each of the parties involved - were diluted simply because they were replicated amongst the parties.

Empirical data relating to a single construction project that forms the basis of a case study analysis in later chapters provides evidence that organisational complexity is not an inherent obstacle to either the practical *or* moral allocation of responsibility between firms. Although this project involved the redevelopment of a single site, the site itself was divided up into several 'packages' of land, which were then separately sold off with construction work going on under the control of, and coordinated by, several different main contractors. First, and in relation to the argument that organisational complexity complicates the determination of where - and to what extent - particular duties that exist under health and safety legislation lie, most difficulties in locating and tracing responsibility for health and safety breaches on the site during the research were *not* inherent to the organisational complexity of the project. Rather, these difficulties were primarily a product of my position as a researcher with no official standing or rights to information in relation to these firms. Although interviews were secured with all the planning supervisors and all the main contractors that had been involved in the redevelopment up to that time, a dependence on their voluntary co-operation for information meant that the possibility of uncovering all the acts or omissions of each firm

[28] Providing the requisite mental and fault element could be shown, and there is nothing to suggest in Perrone's brief account of the case that these elements were not present.
[29] Perrone writes that all of the cases of workplace death that resulted in a prosecution were prosecuted under Victoria's Occupational Health and Safety Act 1985, and that there were no prosecutions for manslaughter under the Crimes Act 1958.

was limited. Thus the research was subject to the same kinds of methodological constraints that characterise the research of corporate crime generally. Tombs has observed that, 'Researching corporate crime often requires access to data that the offenders themselves possess, and jealously guard, be these internal financial or other forms of records, minutes, memoranda regarding safety standards or knowledge of health hazards, or knowledge of conversations.' (Tombs, 1997).

To reiterate, the practical difficulties that I faced as a researcher in uncovering responsibility for the regulatory offences committed by companies on the site would not have been faced by an HSE inspector who would have had access to company records detailing whether the requisite risk assessments and so on had been undertaken. Moreover, practical difficulties in locating responsibility within multi-firm projects have tended to reside in the lack of clarity with which the law has defined the allocation of legal responsibilities between firms, rather than in 'complexity' as such. The issue, then, primarily raises legal questions rather than moral ones and involves a consideration first, of whether a particular duty exists in law, and second, of where that duty lies. Thus, Barrett stated that the courts had 'yet to formulate a clear view as to the circumstances in which a contractor has to control the risks created by the employees of a sub-contractor' (Barrett, 1995). However, in 1994 the Construction (Design and Management) (CDM) Regulations were introduced precisely with the purpose of clarifying the responsibilities of various parties involved in large construction projects. As will be seen, contractors on the site studied had clear duties under the CDM Regulations, the Management of Health and Safety at Work Regulations 1992 (MHSWR) and the Control of Asbestos at Work Regulations 1987 (CAWR). Thus, this case study data provides further support for the argument that practical obstacles to the allocation of legal responsibilities are not impervious to legislative reform, so long as a political will exists on the part of legislators to recognise and clearly define these responsibilities.[31]

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[30] Section 6, HSWA 1974.

[31] See Fooks (1997) for a similar argument in relation to commercial frauds and Shapiro's claim that the organisation of trust relationships renders abuses of trust resistant to detection, investigation and prosecution by criminal justice agencies. Fooks writes that, 'Shapiro's argument ignores the improvements that can be made in the prosecution of abuses of trust. As the history of commercial fraud prosecution [in the UK] from the 1980s onwards suggests, the criminal justice process can be specifically adapted to increase the scope and penetration of criminal justice intervention - to make, in other words, trust relationships more vulnerable to detection, investigation and prosecution.' (1997: 226).

In relation to the second claim - that organisational complexity renders the allocation of *moral* responsibility difficult, this case study (as well as the case cited by Perrone above) demonstrates that although a number of companies may hold identical duties under health and safety legislation this does not then mean that responsibility is necessarily diluted. It is important to remember that companies prosecuted under health and safety legislation are not prosecuted for the harms they have caused but for a failure to supervise, for example, or undertake an adequate risk assessment. If companies have breached these requirements, and their breaches have contributed to the death or injury of a worker or member of the public, it is difficult to see why, morally, they do not 'deserve' to be prosecuted for their breaches simply because the acts or omissions of other companies may also have contributed to the harm caused. Furthermore, it is significant that Perrone found that the largest number of cases of workplace death involving the most extreme levels of *prosecutable* negligence were to be found within the construction industry (Perrone, 1993). In other words, in the estimation of the researcher the network of contractual relationships typical of the construction industry did not dilute responsibility. The third argument that is made in relation to the supposed dilution of responsibility in the context of organisational offending is that the victim, or the person injured, often bears some responsibility for his or her own injury (see the quote by Kagan, *p96 above*). The idea that it is workers who are mainly responsible for accidents and injuries is a common one (Tombs, 1991), and will be considered in more detail in chapter 7. Suffice to say that a proper sociological consideration of the nature of workplace relations and organisation has led a number of researchers to reject such an analysis.[32]

Intentionality and the Ascription of Moral Fault

Cranston (1979), Richardson *et al.* (1982), Hawkins (1984) and Weait (1989) all confirm that 'the perceived intent of the offending company is a factor of fundamental importance' in determining the response of regulatory bodies responsible for the enforcement of consumer and environmental protection legislation' (Weait, 1989: 63, note 8). Bardach and Kagan (1982) and Kagan and Scholz (1984) suggest that a similar exercise of discretion exists in relation to regulatory enforcement in the United States. The persistence of such an approach within the HSE today is confirmed by the comments of a Principal Inspector of the HSE who recently stated that the past record of the company

[32] See for instance, Nichols and Armstrong (1973); Wright (1986); Tombs (1989 and 1991);

was a significant factor in determining whether formal enforcement action would be taken, and that inspectors and their managers will consider whether they are dealing with 'an isolated failing by an organisation which normally has an excellent pro-active record or [whether] there [is] reason to believe that the company widely ignores requirements.' He goes on to state that, 'In the first situation notices or a warning may be deemed sufficient where in the second the same circumstances may lead to prosecution.' (Rothery, 1998). Similarly, Mike Cosman, Head of Operations within the HSE has stated:

> Another factor is the inspector's perception of the motives of the duty holder. A firm that are felt to be "villains" who are deliberately flouting the law will undoubtedly be treated more severely than somebody committing the same legal breach but through ignorance or error. The attitude of the company also plays a part. A co-operative firm who recognise their own failures and are prepared to act to remedy them may well receive a different response from someone who tries to deny the obvious and obstruct the investigation.
>
> (Cosman, 1998).

On the face of it then, current regulatory enforcement practice appears consistent with general principals of criminal liability for conventional offences, since a number of studies have shown that regulators generally only take formal enforcement action against a company where there is very strong evidence of a (usually high) degree of moral fault which approximates the criminal law's concepts of recklessness and intention (see, for example, Carson 1970b). Kagan and Lochner support this view of regulatory enforcement patterns as consistent, rational and proportionate when they state that,

> [Although] regulatory officials regard legal sanctions as justified when they are dealing with recalcitrant "bad apples", the same officials often argue that for most regulatory violations, the appropriate response is not criminal punishment but reform-oriented remedial orders'.
>
> (Kagan and Lochner, 1998).

Thus it is argued by regulators and some academics that if formal enforcement action is resorted to only rarely then this is because corporate offending typically lacks intention either in relation to the harm caused or in relation to the actual regulatory violation. For

instance Taylor (1996: 6) reports that Jenny Bacon, Director General of the HSE, believes that,

> Most employers are 'not malevolent' about health and safety matters, although she acknowledges they can often be 'ignorant' of what they can and should do to improve safety in their workplaces.
>
> (Taylor, 1996: 6).

Such an attitude on the part of senior HSE personnel is not unusual. The previous Director General of the HSE, John Rimington, argued that prosecution of companies for manslaughter would be inappropriate following the majority of workplace deaths since, 'in most cases we deal with, we're looking not at willfulness, but carelessness or forgetfulness'.[33] In such cases, it is argued that prosecution of offenders would be pointless since it cannot function as a deterrence (there is no conscious weighing up of the risks and benefits of illegality), and would, moreover, be unfair (since offending in such cases is not an indicator of 'recalcitrance'). Furthermore, it is warned, that an adversarial approach to enforcement it not just unnecessary but very likely to be counter-productive since regulators risk alienating and losing the cooperation of industry (Bardach and Kagan, 1982; Kagan and Scholz, 1984; Hawkisns, 1990).

However, whilst such observations appear to justify and rationalise patterns of regulatory enforcement, an analysis of Carson's data on prosecutions instituted by the Factory Inspectorate shows that a non-legal response to regulatory infraction was the norm *even in the face of repeated and persistent offending*. Since violations that were discovered for the first time in Carson's sample were generally followed by a written or verbal warning, violations detected for a second time represent continuing violations that management should have been aware of. In fact, Carson found that this was precisely how inspectors themselves interpreted continuing violations that followed an informal warning, and that previous warnings were 'taken as prima facie indications of "moral fault" '(1970b). Yet despite the fact that inspectors would infer knowledge on the part of company management in the case of offences detected for a second or third time, Carson found that only 2.1 *per cent* of offences detected for a second time were subject to prosecution and that offences detected for a third time, *or more*, were only prosecuted in 3.5 *per cent* of

cases (Carson, 1970a: 392). As Sanders (1985) points out, this is in stark contrast to the prosecution practice of the police. In comparing the prosecution patterns of the police and the Factory Inspectorate, he writes, 'Carson's findings still seem valid: firms with two previous warnings were three times as likely to be prosecuted as those with none. But only 4.5% of such firms were prosecuted...The police, on the other hand, prosecute most previous offenders, 718 out of 733 with 'significant' previous convictions' (1985: 192).

Furthermore, this difference cannot be explained in terms of offence seriousness. *Contra* Kagan and Lochner's (1998) assertion that, 'many regulatory violations (unlike most traditional crimes) do not entail any immediate, tangible harm to others', Carson found that out of the 3,800 offences recorded against 200 randomly selected firms over a four-and-a-half-year period, only 24 *per cent* were violations of purely administrative requirements. Sixty-eight *per cent* involved a risk of injury to workers or members of the public and the remaining eight *per cent* involved offences against health and welfare requirements (Carson, 1970a). Conversely, Sanders's analysis of police prosecutions shows that 'only 26.7% of prosecutions were of 'serious' offences, while over one-third were, by any standards, rather trivial' (Sanders, 1985: 190-191). On considering the nature and circumstances of offences prosecuted by the police and categorised as 'minor' in his sample, Saunders concludes that, if such cases are typical, *'the police probably prosecute more 'technical' cases than do the [Factory Inspectorate]*' (1985: 192, emphasis added), and that 'it is therefore difficult to accept that police and non-police prosecution policies differ because of a greater threat to society posed by 'normal' crime.' (1985: 191).

Carson's (1970a and 1970b) analysis of Factory Inspectorate files relating to a random selection of 200 firms showed that, on discovery of serious regulatory violation, inspectors avoided prosecution even when they themselves believed that the circumstances of the case demonstrated moral fault on the part of company management. The data Carson analysed covered a period between 1961 and 1966. However, the HSWA 1974 - whilst setting up a new enforcement body and a new statutory framework for regulating health and safety - did not, in terms of the approach taken towards regulatory offending mark a significant change. For instance, Nichols has noted that,

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[33] Cited in Bergman (1994: 8).

> [The] Chief Inspector of Factories stated in his *Annual Report*: "The Inspectorate has always preferred persuasion to the widespread prosecution of offenders... its resources have never made prosecution - a time-consuming exercise - very attractive". The Robens Committee was not, therefore, at all out of line in regarding extensive resort to legal sanctions as "counter to our philosophy". The "leading edge" of the Inspectorate's activities, as Robens saw it, was to be the provision of impartial advice and assistance. For Robens, too, the criminal law was seen as "largely irrelevant". As far as external enforcement is concerned, inspectors did not act like policemen before 1974, nor did they do so afterwards.
>
> (Nichols, 1990: 329).

There is nothing to suggest, therefore, that the pattern of non-criminalisation discovered by Carson in his analysis of Factory Inspectorate files has changed. In fact, the introduction of prohibition and enforcement notices as regulatory tools under the 1974 Act may have increased the tendency of inspectors to avoid prosecution. For instance, it is noted in a *Financial Times* supplement that,

> When the regime came into force with the passage of the 1974 Health and Safety at Work Act, twice as many prosecutions - almost 4,000 - took place as today, *despite a huge increase since 1974 in the numbers of workplaces covered by health and safety legislation.*
>
> (Rice, 1996: 6).

It is unlikely that this halving of the prosecution rate over the last twenty-five years is a consequence of a significant increase in compliance amongst employers across the industrial sectors.[34] Moreover, recent research analysing the rate of prosecution following workplace deaths reveals a similar pattern of routine prosecution avoidance, even in cases exhibiting high levels of company negligence. For instance, whilst only 19 *per cent* of workplace deaths resulted in a prosecution under health and safety legislation between 1996 and 1998 (Centre for Corporate Accountability, 1999), Bergman's (1994) study of twenty-eight randomly selected deaths in the West Midlands between 1988 and 1992, suggests that 75 *per cent* demonstrated a degree of company negligence that would have

allowed the HSE to have prosecuted under health and safety legislation. Of these cases, it was judged that 15 *per cent* could have resulted in a successful manslaughter prosecution under the law as it then stood. In a separate analysis of data relating to workplace deaths over a three year period, Slapper judged that there was prima facie evidence of manslaughter in about 20 *per cent* of the cases studied (Slapper, 1999). These British studies are further supported by research in Australia where enforcement of occupational health and safety legislation is styled after the British approach. Perrone (1993)[35] found that systematic analysis of data relating to all workplace deaths in the state of Victoria over a four year period revealed that, '44 % of the sample contained negligence of a sufficiently high degree to occasion some level of prosecution', and that in 12.3 *per cent* of the sample there was evidence of recklessness, or a level of company negligence sufficient to sustain a manslaughter prosecution under the Australian Crimes Act 1958. In looking at the proportion of cases *actually* prosecuted however, Perrone (1993 and 1995) found that 44 *per cent* of those cases containing 'an intermediate degree of negligence' and 52.2 *per cent* of cases involving 'extreme levels of negligence' escaped prosecution altogether.[36] Although the figures from Australia are slightly more conservative they still represent a very significant number of culpable workplace killings that are not being prosecuted.

Thus independent investigation of coroners' reports, HSE files and other data relating to workplace deaths reveals that, contrary to the claims of regulators themselves and their academic spokespeople, regulatory enforcement practice does not represent the operation of a kind of 'natural justice' in which the harsh effects of strict liability are mitigated whilst the morally culpable are prosecuted. The Robens Committee recommended that,

> [C]riminal proceedings should, as a matter of policy, be instituted for infringements of a type where the imposition of exemplary punishment would be generally expected by the public. We mean by this offences of a flagrant, willful or reckless nature which either have or could have resulted in serious injury.
>
> (Robens, 1972a: 82)

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[34] See Dalton (1998: 192-196) for information regarding continuing and widespread non-compliance with the Noise at Work Regulations 1989, and before this the non-observance by employers of Factory Inspectorate guidance on reducing noise levels at work.

[35] See also Perrone (1995).

The HSE claim - and it appears that this claim is widely accepted - that they faithfully follow the recommendations of the Robens Committee and will prosecute whenever they 'believe there has been a flagrant breach of the Act and where we regard it as extremely serious'.[37] However, it is apparent from the studies referred to above that a significant proportion of serious and intentional violations are not proceeded against. Moreover, even if the HSE did prosecute all cases of 'flagrant offending', or in all cases where they found evidence of a 'reckless indifference to the possibility of causing injury' (Robens, 1972a: 80 and 82), the actual offence for which they were prosecuted would consistently fail to reflect the serious nature of these breaches since health and safety offences make no reference to either the possibility of causing injury or death, or to 'reckless indifference'. Thus, any injustice lies, not in the existence of a body of law that specifies only negligence - as opposed to gross negligence - as the fault requirement, but in the fact that serious criminal offences committed by corporations are systematically mislabelled and thus escape stigmatization and censure. Thus the pattern implied by Hawkins is actually reversed. Hawkins states that the Regional Water Authorities (RWA) inspectors he interviewed were uneasy 'about using the stigmatizing apparatus of the criminal law in minor, routine violations of the pollution control legislation' (1990: 456). However, what we find instead - at least in the prosecution of companies under health and safety legislation - is that management illegality exhibiting a 'reckless indifference' to the possibility of causing injury or death is 'reconstructed' as minor or merely administrative offending since companies will be prosecuted, not for reckless indifference or causing the death of a worker but, for example, for a failure to supervise, or a failure to undertake an adequate risk assessment. Moreover, because prosecutions under health and safety offences appear administrative in nature they have little stigmatizing effect and are not generally perceived as properly criminal. Thus, the concern expressed by the RWA field inspectors interviewed by Hawkins that prosecutions would stigmatise companies are clearly misplaced.[38] It will be argued below that this systematic legal downgrading of corporate illegality is one of the main ways in which ambiguity in relation to corporate crime is produced and sustained.

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[36] See chapter 2 for a more detailed consideration of trends in HSE prosecutions following work-related deaths.

[37] Cited in Bergman (1991: 37).

[38] Hawkins later acknowledges this, thus tending to contradict his earlier suggestion that it would be unfair to use the 'stigmatizing apparatus of the criminal law'. Hawkins quotes an inspector who says 'We're dealing with legislation in matters which the general public doesn't really consider to be part of the criminal law' (1990: 456).

Before considering this question, there is one further way in which the whole question of 'intentionality' in relation to corporate offending can be seen as a red herring. In the first place, the absence of management intention or knowledge in relation to corporate illegality does not necessarily mean that senior managers are therefore blameless. For instance, as was argued above, lack of knowledge may simply be a product of legislative failure to adequately specify management responsibilities. For instance, in 1992 the West German authorities found themselves unable to prosecute Hoechst's Board of Directors over the non-reporting of adverse drug reactions (ADRs) in relation to their anti-depressant drug 'Merital' simply because the relevant legislation did not require the Board to review ADR data.[39] Moreover, in the absence of legislation specifying directors and senior managers' health and safety responsibilities, managers may not be particularly activist in searching out information regarding the illegal activities of middle and lower-level managers. Kagan and Scholz suggest that this may not be management's fault since information concerning illegal practices is often kept from top management. They write that,

> Managers were not told of and did not adequately monitor "short-cuts" taken by subordinates. Sometimes bad news and the illegal manoeuvres taken to cure it were actively hidden from superiors.
>
> (Kagan and Scholz, 1984: 81).

However, Kagan and Scholz discuss the concealment of illicit behaviour in organisations as though senior managers were powerless to prevent this. Whilst it is not being denied that 'corporate managers will fail from time to time to control all of their personnel' (Kagan and Scholz, 1984: 81), I would argue that managers are able to exert a great deal of control over employees when it suits them. For instance, Braithwaite quotes one quality control manager who stated that when a substandard drug was produced,

> The records are so good that we can pinpoint who it is. Everyone records what they do at every stage. We have a man full time on tracing back through the records sources of problems.
>
> (Braithwaite, 1984: 138).

[39] *Scrip*, 13 March 1992; page 5.

Moreover, developments in modern technology are allowing employers increased opportunities for a level of workplace surveillance that was unimagined in the past. However, studies suggest that such technologies are used almost exclusively by employers to discipline workers and monitor their productivity (Ford, 1998: 13). For instance, Michael Ford, a barrister specialising in labour law, public law and civil liberties, writes:

> It is probably true that surveillance of workers today is more widespread, more continuous, more intense and - here the position is less clear - more secretive than ever before... Surveillance has been especially associated with the growing use of computer technology, which provides a means of closely monitoring individual action. Those who use computers as part of their work are especially vulnerable, the more so if the work is not highly skilled. Computers can be and are used to count individual key strokes, to monitor time spent on and away from the keyboard, to check on the kind of work done, and to assess how quickly staff are dealing with their tasks. Some companies even place cameras on their computers... Workers at call centres... are another group especially vulnerable to intense surveillance. Companies record how long the workers spend on the phone, if there are any gaps between calls and how long workers are away from their workstations... Supervisors can listen in to any call at any time to check that a worker is appropriately chirpy... Closed-circuit TVs or under-cover staff feature at a growing number of workplaces. UNISON members at Guy's hospital discovered that surveillance cameras had been secretly placed in staff locker rooms.
>
> (Ford, 1998: 10-11).

Interestingly, workplace health and safety may become a pretext for the introduction of intrusive surveillance and monitoring techniques. For instance, a recent *Financial Times* supplement on 'Health in the Workplace', includes one article recommending that employers introduce routine drugs and alcohol testing in their workplaces, and another article recommending that employers set up a computerised absence monitoring system to tackle the 'problem' of employee absenteeism (Financial Times, 1995). The fact that

companies will spend money in order to increase surveillance of workers' productivity tends to confirm Braithwaite's assertion that 'when companies, for their own purposes, want accountability, they generally get it' (Braithwaite, 1984: 138), and suggests that management 'ignorance' is as much a product of management indifference as it is a product of lower-level managers 'concealing' illicit or unsafe activity. Moreover, senior managers can exploit their own failures to establish adequate lines of communication and supervision so that they are able to remain blissfully and 'innocently' ignorant of illegality that results from productivity goals (set by them) but which cannot be met by legal or safe means. In this way, and as Braithwaite has argued, senior managers are able to 'structure their affairs so that all of the pressures to break the law surface at a lower level of their own organisation or in a subordinate organisation' (Braithwaite, 1985b: 7),[40] and at the same time avoid formal responsibility for any resulting illegality.

Thus we can see that regulatory violations caused by 'ignorance',[41] 'carelessness and forgetfulness',[42] 'oversight, lack of knowledge or means, inadequate supervision, sheer inefficiency',[43] and 'blundering'[44] are not necessarily blameless since all of these may result from a culpable managerial indifference to workers' and public health and safety. Moreover, in *Caldwell*[45] the House of Lords sought to attach criminal liability to precisely this kind of indifference or 'carelessness' in the context of conventional crime. Kagan and Scholz (1984) do recognise at one point in their argument that 'organisational incompetence' may be rooted in the lack of priority accorded health and safety within management culture. They further recognise that lack of strict enforcement is likely to exacerbate this indifference since it tends to confirm that regulatory violations are not 'serious'. Thus they write:

> It could be argued of course, that corporations would be better managed and their internal control systems would be policed more carefully if enforcement agencies increased the threat of heavy legal penalties sufficiently. Many of our respondents acknowledged that corporate industrial hygienists and quality control

[40] See also chapter 7 below.
[41] Bacon cited in Taylor, 1996: 6.
[42] Rimington, cited in Bergman 1994: 8.
[43] Robens, 1972a: 82.
[44] Hawkins, 1990: 453.
[45] R v Caldwell [1982] A.C. 341 (House of Lords).

> enquirers acquired more status and influence within the corporation when regulatory agencies turned to aggressive enforcement and harsher penalties.
>
> (Kagan and Scholz, 1984: 82).

Now this is quite an extraordinary observation, given their general support for a compliance approach to regulatory enforcement. One would therefore expect them to have rather compelling reasons for continuing to support an approach which their own interview data suggests contributes to corporate illegality and disregard for workers' safety. However, what we find instead is that the three reasons they *do* give for not supporting a switch to a more aggressive style of regulatory enforcement are inconsistent in the extreme. First they argue that there is little point in going to the trouble of prosecuting a company for an offence under health and safety legislation when the courts impose such paltry fines. This argument is frequently used by regulators themselves. For instance, during the construction project that formed the basis of the empirical research for this thesis, an Environmental Health Officer visiting the site told one of the local residents that if the local Environmental Health Department 'tried to take legal action it would be months before it came to court and there would only be a small fine.'[46] However, the apparent reluctance of the courts to impose appropriate fines is not a reason for accepting a 'gentle' enforcement strategy - it is a reason for arguing that courts impose fines that are proportionate to the seriousness of the harm and the culpability of the corporate offender. Whilst the HSE might claim that they have been particularly vocal in calling for an increase in the level of fines handed down to convicted companies, it will be suggested in the following section that the HSE frequently play an important role in keeping the level of fines down.[47]

Second, Kagan and Scholtz assert that a regulatory strategy that is primarily based on a strict enforcement of the legislation will produce only limited results since 'specific legal requirements will often fail to anticipate and proscribe the most serious risks to the public' and therefore 'only a committed and alert management can maintain the spirit of concern, inquiry and aspiration that is needed' (1984: 82). As to the first part of this

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[46] Cited in a local newspaper (Davies, 1995: 3) and confirmed in an interview with the resident in question 18/3/96.

[47] They do this by resisting reform of health and safety offences which would make them look more like conventional criminal offences; by failing to argue for cases to be referred to the higher

argument, their concerns about the inability of prescriptive legislation to anticipate every workplace hazard are not as relevant to British legislation since many of the provisions of the HSWA 1974 are not constructed as specific legal requirements but are expressed as very broad, general duties. In fact, the scope of the general duties under HSWA are so wide it is arguable that *any* failure to maintain a safe and healthy workplace could conceivably be prosecuted as an offence. Similarly, new health and safety legislation introduced under HSWA and the implementation of European Directives have taken a form that is increasingly goal-setting in nature - in contrast with the prescriptive requirements under the old Factories Acts. However, whilst criminal statutes and laws that are widely, even vaguely, worded have been aggressively enforced by the police,[48] the opposite seems to occur with the general duties and proscriptions under health and safety legislation. My own empirical research suggests that the vagueness of the Control of Asbestos at Work Regulations and associated Codes of Practice and Guidance were used to exclusive, rather than inclusive, effect. Similarly, the Institute of Employment Rights has argued that, 'Numerous... examples can be given of... situations where overly general regulatory duties are supported by almost equally general supporting ACOP guidance' (James and Walters, 1999: 44), and have recently called for more prescriptive legislation to supplement the general duties, since researchers found that 'the shift towards goal-oriented duties has at times... been used to provide employers with unnecessary and, at least in the case of SMEs, confusing discretion' (1999: 44). What is important then is not whether legislation is broadly or narrowly drafted, but how it is interpreted and deployed by law enforcement agents, prosecutors and the courts.

In relation to the second part of Kagan and Scholz's argument, that the effective protection of health and safety depends upon an alert and committed management, this is unlikely to exist in the context of organisational incompetence where that organisational incompetence is caused in the first place by management's failure to prioritise health and safety. If it is the case that organisations are incompetent *vis a vis* health and safety because they are infected by a culture, transmitted from top management, that devalues workers lives and health (and Kagan and Scholtz themselves suggest that this may be the case), then regulators are unlikely to find the 'spirit of concern, enquiry and aspiration'

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courts for trial and sentencing; and for not presenting information regarding a company's past offending. See the more detailed discussion later in the chapter.

[48] Consider, for instance, the way that the police have used the SUS laws, the Prevention of Terrorism Act; the Vagrancy Acts; and their powers to arrest for a breach of the peace.

they say is needed. Nor is the development of these qualities likely to be encouraged by regulators adopting the role of educator and consultant in his or her dealings with the corporation since, in the absence of any compelling reason, managers will not choose to learn what they see no value in learning.

Kagan and Scholtz's final argument is that 'formal prosecution and legalistic penalties are clumsy tools. They cut too broadly, seem unnecessarily punitive and alienate potential allies inside the corporation rather than winning their co-operation' (1984: 82). Again, their argument here appears inconsistent. It is difficult to see how Kagan and Scholz can state that legalistic penalties are 'unecessarily punitive', when they have argued a few lines before this that courts were 'reluctant to impose very heavy legal penalties.' Whilst financial penalties imposed by British courts have been increasing, Bergman found in his analysis of 65 companies prosecuted between 1987 and 1993 that companies with profits over £10 million received fines which were only 0.002% of their profits (Bergman, 1994: 96). Furthermore, it is difficult to argue that such fines are 'unnecessarily punitive' in cases where breaches of health and safety legislation cause injury, disease and death. In terms of the act of prosecution itself, very little stigma attaches to a conviction under health and safety legislation. If companies' perceptions that prosecution and legalistic penalties are too punitive is not supported by the evidence, then why do Kagan and Scholtz insist that policy decisions regarding enforcement practice and style must be shackled to industry's perception of what is, and is not, reasonable? Kagan and Scholz's arguments for maintaining a conciliatory approach to 'blunderers', even when their blundering is caused by a culpable indifference towards the health and safety of their employees, is ultimately inconsistent and unconvincing.

It is important to note that the HSE rejects this interpretation of management 'oversight'. For instance John Rimington has asserted that the HSE finds most employers 'willing or anxious to fulfill their health and safety obligations and often looking to [HSE] for help and advice'.[49] However, in considering how realistic this (more optimistic) interpretation is, we need to have regard to the circumstances surrounding most regulatory breaches and workplace injuries. How do these circumstances reflect on employers' ignorance? Bergman writes,

> [In] a typical workplace situation, there is much more reason why directors and managers ought to have known about the risks. HSE publish a great deal of guidance and information to flesh out the more general duties of the Health and Safety at Work Act. It is assumed in law that managers should be aware of these duties. They would also be further alerted to the need for safety and the dangers of unsafe practices, by injuries and dangerous incidents, which if they have not taken place at their own company, do occur at others and are publicised by both the press and the HSE... Most workplace deaths, according to the HSE, relate to very basic safety breaches - such as failing to provide training, instruction or protective equipment - by senior management. Duties to provide these are clearly enshrined in the law.
>
> (Bergman, 1994: 9).

Bergman cites HSE's own research into the causes of workplace deaths to make his argument. These studies (HSE, 1985; 1986; and 1988) have shown that the majority of workplace deaths are caused by predictable and familiar hazards. For instance, the HSE's investigation into the causes of death in the construction industry confirmed that 'people are killed during simple, routine work... the basic causes of the deaths of the 739 people from 1981 to 1985 have not changed over the last ten years', and that 'in 70% of cases positive action by management could have saved lives' (HSE, 1988: 3-4). 52 *per cent* of these deaths resulted from falls. These falls were, in turn, caused by simple and obvious failures to safeguard workers' safety: failures to maintain protective equipment, failures to provide guard rails and toe-boards on scaffolds, failures to properly secure ladders, failure to properly train and supervise workers, and so on. Such a picture tends to undermine the argument that the majority of employers are 'anxious to fulfill their health and safety obligations' but simply lack the knowledge. Within the context of the construction industry, at least, it becomes difficult to either believe or excuse management 'ignorance'. Thus, the HSE's own research tends to undermine their assertions regarding the 'good intentions' of most employers. Furthermore, it is interesting to note that the HSE's new campaign and motto, 'Good Health is Good Business', rest on a strategy of persuading management that safe and healthy workplaces are good for business. Such a strategy implicitly acknowledges that employers would be less likely to 'forget' about health and safety if such 'oversights' cost them money.

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[49] Cited in Bergman (1994: 7).

To briefly review the argument, compliance theorists tend to assume that an absence of intention or knowledge renders the attribution of responsibility morally and legally problematic. It has been argued above that there is no automatic obstacle to ascribing moral fault to company management when their 'oversight', 'carelessness' or 'ignorance' arises out of a culpable indifference to the health and safety of workers or the public. It was also argued that an analysis of the circumstances surrounding most workplace violence suggests that, in the majority of cases, management 'ignorance' is inexcusable. Hawkins objects to Pearce and Tombs's (1990) criticisms of regulators' 'forgiving' approach to health and safety crime and argues that,

> We do not know either what percentage of those fatalities resulted from 'amoral calculation' - wilful efforts to cut corners because of low risk of sanction - as opposed to incompetence, breakdown of established safety routines (the organisation as incompetent), or a conscious judgement (perhaps erroneous in retrospect) that the risk stemming from non-compliance was remote
>
> (Hawkins, 1990: 454).

However, Hawkins fails to realise that even if we *did* know what percentage of fatalities result from 'amoral calculation' and what percentage from ignorance, this would not automatically resolve the question of whether or not those companies were morally responsible for the deaths. Nor, moreover, would it resolve the question of whether those companies were *legally* responsible since 'incompetence' that amounts to gross negligence is the basis - not only of liability under 'regulatory law' - but also of liability for manslaughter. Thus Hawkins seems to be arguing that companies should not be convicted of a regulatory offence that carries little or no stigma, in circumstances where they have exhibited a degree of fault that would be sufficient to convict an individual of manslaughter. This is why arguments around 'intention' are frequently a red herring,[50] and why Hawkins's objection to Pearce and Tombs's (1990) characterisation of the corporation as an amoral calculator misses the point. One does not need to show that senior managers sat down and cold-bloodedly worked out the costs and benefits of compliance - as they did in the Ford Pinto case (Dowie, 1977) - to argue that they could

[50] See Wells (1993) chapters 3 and 4 for a persuasive and much more comprehensive consideration of these issues.

be, or should be, held criminally liable for the harms that result from their acts or omissions. This is not the sole basis of liability for individuals, so it should not be for either companies or their senior directors.

In the preceding section I have attempted to argue that any moral ambiguity attaching to corporate offending does not arise from qualities that are inherent within, or exclusive to, corporate illegality. Moreover, I have argued that 'moral ambiguity' cannot explain the differential response of the state to corporate crime on the one hand, and conventional offending on the other. Instead I have attempted to show that ambiguity may surround conventional criminal justice intervention in relation to a particular social group or act, but that this ambiguity is frequently either suppressed (as occurred in relation to certain politicians' attempt to mobilise censure against homeless people), or ignored (as happens with the routine prosecution of individuals for non-payment of their TV licence). In the following chapter I hope to demonstrate how the sense of moral ambiguity that is said to surround corporate offending is produced and reproduced through the forms of regulatory law, and through the practices and discourses of legal institutions and enforcement bodies.

4

WHAT'S IN A NAME?
THE CREATION OF A 'MORAL UN-PANIC'

"If you poison your boss a little bit each day it's called murder; if your boss poisons you a little each day it's called a Threshold Limit Value."

(James P. Keogh, M.D. cited in Castleman, 1990)

It is one of the arguments of this thesis that, whilst previous research has found that the Home Office and legal and criminal justice agencies and personnel are frequently involved in mobilising censure against 'traditional' criminals and their acts,[1] the censure of companies breaching health and safety legislation (and other 'regulatory' offences) is consistently deflected. Subsequent chapters of this thesis are based on empirical research which demonstrates that the actions of regulatory agencies, and their position as 'primary definers' in relation to the local media, were pivotal in deflecting and managing public criticism of and anxieties around the harmful and illegal activities of a number of companies involved in a single construction project. Before considering this data, however, I hope in this chapter to demonstrate that a *routine* 'demoralisation' takes place more generally, and on a number of fronts, in relation to corporate offending against laws that are meant to protect workers and the public from (some of) the harmful effects of corporate enterprise. What follows is not an exhaustive account of the production of moral ambiguity and the deflection of censure in relation to corporate crime. What I hope to do in this chapter however, is to provide a kind of overview, or summary, of those processes and factors that are fundamental to maintaining a perception of corporate

[1] See for instance, Hall *et al.* (1978); Kettle (1980); Grabosky and Wilson (1989); Garland, (19990: 260-265); Schlesinger and Tumber (1994); Kalunta-Crumpton (1998).

violence as *mala prohibita*, or as 'non-crime'. Parts of this discussion will draw on previous research. For instance, a discussion of the structure of regulatory offences and the appearance that this lends to corporate illegality draws on Wells's (1993) consideration of these issues. Similarly, I draw on Tombs's (1997) discussion of, and consideration of the reasons for, a 'collective ignorance regarding corporate crime'. Other arguments are based on qualitative data which, whilst not conclusive, strongly suggest that legal and regulatory personnel are able to use the notion of the socially responsible corporation to minimise the seriousness of, and obscure the criminal nature of certain offending.[2] In this sense, then, this chapter marks the start of an examination of how - in a number of different legal and regulatory contexts - certain selected meanings are constructed and fixed in relation to corporate illegality and other, alternative or competing, meanings are deflected and suppressed.

THE PRODUCTION OF MORAL AMBIGUITY AND THE DEFLECTION OF CENSURE

In the debate between Pearce and Tombs (1990) and Hawkins in the *British Journal of Criminology*, Hawkins writes that,

> The decision to prosecute is heavily influenced by the environment of moral and political ambivalence within which regulatory agencies like the RWAs work. It is precisely the moral and political ambivalence surrounding regulatory rule-breaking, as it acts on the regulatory agencies and their inspectors that determines the level of use of prosecution and the kinds of cases that are selected for prosecution.
>
> (1990: 448).

However, in the second chapter of this thesis, I sought to demonstrate that, contrary to Hawkins's assertion, there appears to be a growing public intolerance and censure of,

[2] For instance, the discussion of how judges may explicitly deny intentionality on the part of corporate offenders is based on some court cases that came to my attention in the course of the research, but it cannot be claimed that these are necessarily a representative sample.

companies whose negligent and unsafe work practices cause death, injury and disease. Moreover, in some instances (particularly in relation to large-scale public disasters) this has taken the form of a growing consensus that such companies should be held criminally liable for the harms they cause. Nevertheless, I noted that the popular perception that regulatory offending is unlike 'real crime' appears to persist. I then set out in the previous chapter to argue that the persistence of such a perception cannot be explained in terms of any real moral distinctions between regulatory and conventional crime. I also sought to argue that many people's perceptions of and emotional responses to conventional crime may be subject to a number of distortions since much of what we 'think' and 'feel' about crime is, if not determined, at least shaped by the representations of crime and criminals that we come across in the news media (Cohen, 1973; Chibnall, 1977; Hall *et al.*, 1978; Schlesinger and Tumber, 1994), crime drama (Sparks, 1992), the official criminal statistics (Bottomley and Pease, 1986) and political discourse. Whilst the whole question of to what extent, and why, 'the public' might have a distorted perception of crime and criminals is the subject of frequent debate within mainstream criminology, the question of how public perceptions of corporate crime may be distorted has received less systematic analysis within the literature. For instance, whilst there exists an already substantial, and growing, body of literature analysing media representations of conventional crime, less attention has been paid to media representations of corporate crime. For example, Tombs - referring to Schlesinger and Tumber's (1994) research - notes that,

> It is instructive that a recent text examining 'The Media Politics of Criminal Justice' contains one half-page consideration of 'white-collar crimes', and at least one other one-line reference to these crimes amongst it almost 300 pages.
>
> (1997: endnote 6).

In considering what processes shape public perceptions of corporate crime, Reiman simply refers to, 'the role of legal institutions in shaping our ordinary moral beliefs', and speculates that 'if the criminal justice system began to prosecute - and if the media began to portray - those who inflict *indirect harm* as serious criminals, our ordinary moral notions would change on this point' (1995: 68-69). But Reiman fails to specify *how* the discourses and practices of legal, and other institutions shape our perceptions of corporate illegality and corporate violence. In the following section I want to argue that, as with

conventional crime, we 'view' corporate violence, illegality and deviance through a number of distorting 'lenses'. We tend to see corporate violence through the public statements of politicians and regulators, the public data that is released by regulatory bodies, the media interpretations and labelling of instances of corporate harm, the language and assumptions of the courts, and, finally, through the representations of companies themselves. Thus, whilst the criminological literature has shown in relation to moral panics how the incidence and threat posed by deviance and criminality is amplified (Young, 1971; Cohen, 1973; Hall *et al.* 1978; Muncie, 1987; Goode and Ben-Yehuda, 1994), I want to argue that the reverse happens in relation to corporate violence. In other words I will argue that the scale and nature of the threat posed by corporate illegality is routinely obscured and muted, that censure is deflected and that - in contrast to the folk devil (Cohen, 1973) who serves as the target of dominant censures - regulatory, academic and political discourse promotes the myth of the socially responsible corporation. These processes of diminution and de-amplification combine to produce and sustain a 'moral un-panic' around corporate crime and corporate violence.

Public and Legal Definitions, and the Obscuring of Corporate Violence

Box has suggested that a 'collective ignorance' exists in relation to corporate crime (1983: 16). Reflecting on this 'ignorance', Tombs (1997a) and Slapper and Tombs (1999) have considered some of the processes that first, render corporate crime 'invisible' to the public and second, create a problem for researchers attempting to uncover the nature and extent of corporate safety crime and the harm that results from this. The following discussion draws on some of these observations. First we should note the 'absence' of corporate crimes from political and official discourses on the 'crime problem', including the exclusion of corporate crime from the criminal statistics published annually by the Home Office. Since these debates and discourses, as they are relayed through the news media, largely define our perception of 'the crime problem', the absence of corporate crimes from these discourses partly explains why many people do not perceive corporate violence as a form of assault (Slapper and Tombs, 1999). Tombs also considers the role of the mass media in perpetuating a collective ignorance regarding corporate crime. He notes first that a survey of contemporary 'crime dramas' confirms their overriding 'preoccupation with "cops and robbers", that is, with various aspects of (albeit fictionalised) street crime'

(1997). In relation to non-fictional programmes, Tombs suggests that whilst greater attention has been paid to various forms of corporate crime in programmes such as *Dispatches* and *Panorama*, 'any focus on corporate crime is vastly outweighed by the steady stream of non-fictional treatments of traditional crime issues'. Finally in relation to the news media, Tombs's preliminary analysis of the crime reporting of a number of national newspapers over a six-week period revealed that, even within the broadsheets, 'corporate crime reporting has a lesser profile than that of conventional crimes'. Moreover, when corporate illegality and corporate violence *is* reported, it is rarely reported as *crime*. For instance, white-collar crimes are frequently described as 'scandals', and work-related corporate illegality and corporate violence are predominantly defined as 'accidents' - a term which implies that no one was to blame (Tombs, 1997). Acts of corporate violence are even defined as 'accidents' in cases where companies have been convicted of offences which led to death or injury, and where the issue of corporate liability for manslaughter is discussed.[3]

The HSE's Media Strategy and the Avoidance of Censure

The following discussion is based on a content analysis of all HSE press releases relating to prosecutions and workplace deaths and injuries between December 1997 and September 1999. The discussion of 'naming and shaming' is based on internal documents obtained from the Environment Agency and the HSE, relevant press releases (*see Appendix 1*). Whilst media treatment of corporate violence can partly be explained in terms of the persistence of existing cultural assumptions about the nature of work-related deaths and injuries, I would argue that the HSE plays a positive role in perpetuating the predominant image of workplace deaths and injuries as 'accidents'. In the first place, the HSE itself uses the language of 'accidents' to describe the consequences of corporate illegality. For instance, a review of press releases relating to deaths, injuries and dangerous occurrences on the railways between December 1997 and September 1999 reveals that these are, almost without exception, described by the HSE as 'accidents' even where the HSE is detailing how these incidences were caused by the failures of Railtrack or the train operating companies to rectify known and continuing violations. For instance an HSE

[3] See, for example reports by Hall (1999) and Harper (1999) covering the Southall Rail crash and the charging of Great Western Trains with manslaughter.

press release[4] describes as an 'accident' an incident where seven wagons of a 19 wagon freight train derailed whilst the train was travelling across a bridge that passed over Bexley high street. Four members of the public were injured. Yet the same press release lays responsibility for this 'accident' squarely on the shoulders of Railtrack, its contractors and the train operating company, stating that:

> South East Infrastructure Maintenance Company Ltd had identified the bridge timbers as needing urgent repair but had not arranged for repairs to be made; Railtrack knew about the unsafe conditions of the track but took no action to remedy it; Southern Track Renewals Company Ltd failed to make adequate arrangements to ensure that wagons were not overloaded; the training of the driver of the train was inadequate and no reassessment of his training had been made by Connex South Central; and the arrangements for inspection, maintenance and calibration of the locomotive speedometers were inadequate.

Moreover, Railtrack and two of its contractors were prosecuted for regulatory breaches - yet the damage caused by these companies' illegality was still defined by the HSE in terms that imply that the event was unpredictable and therefore beyond the control of any individual or organisation.

Second, HSE press releases tend not to detail the violence of corporate illegality nor dwell on those it victimises. In this way the harm and suffering that is caused by some instances of corporate offending is frequently obscured, minimised or neutralized. Herman and Chomsky (1994) demonstrate how the selection and organisation of information by the news media contrives to construct 'worthy' and 'unworthy' victims of violence. 'Worthy' victims are constructed through, for instance, a full and detailed reporting of the violence and damage inflicted on the victim, and through the inclusion within the report of numerous 'personal details' which humanize the victim for the reader. In this way, news reports seek to maximise readers' empathy with, and outrage over, a given victim's suffering. Random and unexpected acts of violence against 'innocent' people also have 'news value' (Chibnall, 1977; Katz, 1987). Yet whilst the police will select and construct the stories that they feed to the media according to their understanding of newsworthiness (Schlesinger and Tumber, 1994), an analysis of HSE

[4] Press Release EO52:99 - 10 March 1999.

press releases relating to workplace deaths and prosecutions between November 1997 and September 1999 reveals that the HSE fail to construct these cases as newsworthy. The language of the press releases is typically undramatic, understated and non-censorious. Only the briefest details are given as to the nature of the injuries sustained by the victims of corporate violence and no personal details are given beyond the victims' names and occasionally their ages. Consider, for instance, the following extracts, which are typical of the sample of HSE press releases relating to workplace death and injury:

> The £600,000 fine was imposed in Friskies Petcare (UK) Ltd today for breaking workplace health and safety law. An employee was electrocuted while repairing machinery in a meat silo at their Southall factory, which produced 'Felix' catfood. (Press Release 151: 99 - 30 July 1999).

> On 20 September 1996, dumper truck driver Alfred Lyons was moving spoil from the foundation trenches to a spoil heap elsewhere on the site. He drove onto the top of the spoil heap, the dumper track rolled over the edge and he was killed. There was no real need for dumpers to drive up the spoil heap, and there was nothing to stop the vehicle from driving over the edge. (Press Release E125:98 - 5 June 1998).

> A gas fitter and two landlords... were given custodial sentences today at Norwich Crown Court after being found guilty of causing the death by manslaughter of a tenant, Paul Foster, aged 19, in Ipswich on 24 February 1996. A gas fire provided for Mr Foster in a house in Bramford Road, Ipswich, has a flue that had been capped with concrete and he died of carbon monoxide poisoning as a result. (Press Release E31: 98 - 20 February 1998).

> The prosecution followed the death of Scott Dixon, a 29-year old employee, from Kingstanding, Birmingham, on the 28th April 1998. Mr Dixon was killed when he became entangled in heavy machinery at Dunlop's Erdington site in the West Midlands. (Press Release EO50: 99 - 5 March 1999).

Each of these extracts contains the full extent of any details given about the injuries, the deaths or the victims in each of these cases of workplace violence. Compare the brevity of these details to the following press release issued by the Metropolitan Police:

> The assault took place in the early hours of 9/12/97 at the home of the Paul family in Stafford Road, Ruislip. The family were woken up by a knock at the front door. Three men then forced their way into the house before assaulting Narender Paul and his wife Kiran with a broken bottle. One of the men then went upstairs and stabbed 16 year old Michael Paul several times with a knife... The officer in charge of the investigation, DCI Norman Kelly, said: "This was a calculated and brutal attack on a defenceless family in the middle of the night. They were left badly injured and shocked by the unprovoked attack."
>
> (Metropolitan Police, 1998).

Whilst this was clearly a hideous and frightening assault, the victims of workplace violence also suffer frightening, excruciatingly painful and often fatal injury. It would be quite possible for the HSE to highlight this harm. In fact, there was one notable deviation within the HSE press releases analysed to this pattern of providing only the barest details of physical harm, and these all related to deaths within agricultural and related industries. There were four such exceptions out of a total of 20 press releases relating to workplace deaths[5] and they are distinct from the other press releases because there is a (albeit limited) sense of outrage about them. For instance, one was titled 'HSE highlights "carnage" caused by unsafe paper balers' (Press Release E218:98 - 6 October 1998).[6] Another issued in July 1998 refers to the 'violent nature of the deaths' within the agricultural sector, and goes on to describe some of the most shocking cases (Press Release E163: 98 - 7 July 1998). A common concern within all four of these press releases was the number of child deaths within the industry, and this might help to explain why more attention is paid to the tragedy of these deaths. For instance, the third press release, issued in July 1999 states: 'Once again, the range of ages of the people killed makes shocking reading. Three children under the age of 16 were killed, bringing the total of children killed in the industry since 1986 to 71. The youngest victim was just four years old - crushed under the wheels of the tractor in which she had been riding.'

[5] This is not including the press releases of the Railways Inspectorate.
[6] Although note that the word 'carnage' was placed in inverted commas.

(Press Release E125:99 - 6 July 1999). However, the fact that children are harmed or killed does not guarantee that these cases will automatically be dealt with any more emotively. For instance, in a press release recounting the recent prosecution of two brothers who used inadequately protected teenage boys to strip asbestos, this outrageous, cynical and criminal exposure of children to a toxic and potentially lethal substance merits just one sentence.[7]

Another significant difference between police and HSE press releases relates to the kind of statements given by individual officers from the respective agencies. For instance, in the statement by the Metropolitan police officer in the case of the Ruislip assault he is concerned to express his sympathy for the victims of the assault and his condemnation of the assailant. Whilst HSE inspectors commenting on a particular case will often refer to the seriousness of a breach in the press releases reviewed, they almost never directly condemned the offending companies. Inspectors are more concerned to highlight a particular risk or the technical cause of the death as a general lesson to be learned by industry. For instance, in relation to the prosecution of Dunlop Tyres following the death of Scott Dixon (see above), the HSE inspector responsible for the investigation is quoted as saying:

> "This case highlights yet again the very real dangers from the use of heavy machinery in industry and the need for high standards of guarding, safe systems of work, training and supervision. It re-inforces the necessity for management not only to assess risks and devise appropriate safeguards but to also take steps to ensure their proper implementation and use on a day-to-day basis." (Press Release EO50:99 - 5 March 1999).

Another example can be found in a press release containing information on the large fines imposed on three companies following three unrelated prosecutions. These prosecutions involved the deaths of nine people, in total - all caused by the negligence of these companies, yet Bacon is simply reported as saying: "These fines show that the Courts really are treating health and safety offences with the seriousness they deserve. They are a clear message to all employers - it is lack of safety that costs money, not managing safety properly." (E151: 99 - 30 July 1999). This 'demoralised' assessment of the

[7] See Press Release EO79:99 - 16 April 1999.

consequences of corporate illegality - stressing the costs to industry as opposed to the huge human costs involved - is typical of HSE discourse and literature. Offending companies are neither censured, nor characterised as 'criminal'. Indeed, what is most notable in a comparison of HSE with police and CPS press releases is that the language of criminality is missing. So, for instance, police and CPS press releases are peopled by 'killers', 'fraudsters', 'drug dealers', 'muggers', 'terrorists' and their respective 'victims'. They relate the activities of these 'criminals', and the consequences of those activities, in a moral and clearly censorious language.

As the news media's primary routine source of information regarding occupational health and safety offending, the failure of the HSE to label and censure health and safety crime as *crime*, plays a decisive role in perpetuating a perception of corporate violence as distinct from conventional kinds of assault. Moreover, the failure of the HSE to highlight what is 'newsworthy' about their cases, or to humanize the victims of corporate violence, contributes to a general muting and de-amplification of the nature and extent of threats posed by corporate illegality. The adoption of this understated approach to the release of public information regarding corporate illegality and the obscuring of its violent consequences is not inevitable. Evidence that a change of approach could have a profound effect on the media reporting of occupational health and safety crime can be found in the news media's response to conscious efforts on the part of both the Serious Fraud Office in the early months of 1995, and the Environment Agency in March 1999, to effect a change in the nature of media reporting on business fraud and environmental crime. For example, following negative press coverage of the SFO's prosecution activity, the SFO dramatically changed its communication strategy with the news media, and attempted to ensure that in future news reporting of its successes were highlighted over its failures. The new communication strategy developed within the SFO sought to ensure that the news media prioritised information released by the agency over information obtained from representatives of the defendents. In this way, the SFO sought to construct itself as a 'primary definer' in relation to the news media's treatment of serious fraud investigations and prosecutions. In order to achieve these objectives the SFO began to brief the press in such a way that, where possible, features of the case that were considered newsworthy were emphasised. This included the presentation of cases in a way that personalized the stories - giving a greater emphasis to the deserving nature, and the loss and suffering of the victims of fraud. This had two effects: first, it attracted media

coverage where convictions had been secured, thereby counterbalancing SFO failures.[8] Thus criticism of the SFO seemed more muted than it had previously been. Second, the new strategy transformed, or at least shifted, what was newsworthy in relation to the SFO. Whereas media reporting had previously focused on the agency itself - its costs and its failures - it began to focus more on the consequences and victimising effects of serious frauds.[9]

The second example of a regulatory agency changing their communication strategy with the news media, and thereby effecting a change in the way that business crime is reported relates to the adoption by the Environment Agency of a 'naming and shaming' policy in relation to convicted companies. In March 1999 the Environment Agency released a 'league table' of corporate offenders - 'businesses found guilty during 1998 of offences against the environment',[10] and called it the 'Hall of Shame'. Whilst it was unusual for a regulatory body to publicly censure and draw attention to individual companies in this way, what was most remarkable about this policy was the way in which it used the language of criminality and condemnation. The press release accompanying their table was entitled 'Environment Agency's Hall of Shame Points the Finger at Guilty Polluters'. Following this press release and publication of the league table, the Environment Agency's Press Office sent out an internal memo which noted that: "the extent of the broadcast coverage, both nationally and regionally,... is probably the greatest media impact the Agency has achieved on a single story".[11] In terms of television broadcasting alone, information concerning the league table of convicted polluters was covered by ten separate national news programmes, and thirty-six regional news programmes on one day. The story was also covered in all the national broadsheets, with headlines tending to reproduce the language of the press release. For instance, *The Independent* led with the headline 'ICI tops list of Britain's filthiest companies' (Gregoriadis, 1999b), and the *Evening Standard* wrote: 'Filthy drugs giant ICI told to clean up' (Lister, 1999).

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[8] This was particularly important for the SFO in the context of the failed Maxwell prosecution in January 1996.
[9] Personal communication with Gary Fooks 12/10/99, Research Consultant to the SFO. See also Fooks (1997).
[10] Environment Agency Press Release 028/98 - 22/3/99.
[11] Environment Agency Memorandum for Board Members Re: Hall of Shame Media Coverage, 15 June 1999.

A willingness on the part of the Environment Agency (at least in this instance) to publicly condemn individual companies is not indicative of a more aggressive approach to regulation by the agency or a greater willingness to invoke criminal sanctions (Fineman, 1998). However, what this episode demonstrates is the potential power of regulatory bodies to *change* public perceptions regarding the nature and significance of the activity they were set up to regulate. This suggests a quite different picture from the one presented by Hawkins (1984) and Weait (1989) for example, who tend to represent regulatory agents as though they were fundamentally restricted by the shackles of 'public opinion' and 'public sentiment'. Instead, we can begin to see the way in which individual inspectors and regulatory agencies may act as *opinion formers*. The attitude of the HSE towards the public censure of individual companies is illuminated by an internal HSE discussion paper[12] prepared by the HSE's Policy Unit which presents arguments for and against the publication of a league table of convicted companies. It is important to point out that the idea of 'naming and shaming' offending companies originally came from the Environment Minister, Michael Meacher.[13] Once the Environment Agency had adopted this practice, however, it is likely that the HSE was under some pressure to follow suit. In addition, on 6 May 1999 Channel 4's *Dispatches* programme presented its own league table, which was based on HSE enforcement and prosecution records, showing the 'top ten corporate health and safety criminals'. The HSE discussion document makes reference to this, and it is possible that the programme contributed to a sense that the HSE would have to make a decision regarding the question of publicly naming and shaming companies. Reservations were expressed in the discussion document about the practice on the grounds that publicising details of convictions could be 'oppressive and unfair' since 'some of the offenders may, aside from the incident(s) giving rise to the prosecution, have good health and safety policies and practices'. It was also argued that such a league table 'could harm investment and contract success (especially in relation to SMEs)'. The other major reservations all concerned the reaction of industry to such a practice, and how this might affect relations between industry and the HSE. For instance it was stated that 'the approach risks general criticism and a bad reaction from industry... on the basis that we are fostering a culture of blaming employers and pursuing them in an oppressive manner', and that, 'to adopt such an approach could sour relations with

[12] HSE discussion document for a meeting of the Board on 20 October 1999, 'Naming and Shaming Offenders: The Preparation of League Tables of Those Prosecuted', Paper Number: B/99/222. Paper File Reference: PU/BREB/1060/98.
[13] Interview with Alan Dalton, Environment Agency Commissioner, 23/09/99.

companies who currently work well with us'.[14] Considering these reservations it is not surprising that the HSE ultimately opted for the option least likely to generate publicity and therefore least likely to upset industry.[15] Rather than publishing a league table which ranked offenders, they decided to publish convictions on a continuous basis on their website. Such a practice hardly entails a public 'shaming' of the companies involved. Moreover, the fact that the largest corporations - household names like Tarmac, Wimpey and British Steel - dominate any league table of prosecutions will be obscured since there is to be no aggregating of companies and their various subsidiaries within the published data.

Thus a consideration of the HSE's approach to the media demonstrates that it plays a crucial role in perpetuating a sense of moral ambiguity around corporate crimes of violence. Not only this, but as a general rule the HSE appears to avoid censuring individual companies. In this sense, whilst other criminal justice agencies mobilise censure against conventional criminals and their acts, information publicly released by the HSE tends to downplay the consequences of corporate violence, and so contributes to the deflection of potential censure of corporate illegality.

HSE Statistics, Legal Definitions and the Disassociation of Cause and Effect

One of the single most significant facts about official public information on, and the legal definition of, occupational health and safety crime is that it artificially divorces corporate illegality from its harmful consequences (Wells, 1993; Tombs, 1997a). Thus, whilst the HSE produces tables of statistics analysing injuries, deaths and dangerous occurrences

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[14] This would have been a consideration for the HSE if they had chosen to rank offenders according either to size of fine (as the Environment Agency did) or according to number of convictions (as the *Dispatches* programme did). Either of these methods for ranking offenders would have produced a list headed by the largest firms in the UK. For instance the *Dispatches* league table of recidivist companies listed the top ten offenders as Tarmac, AMEC, BICC, John Laing, British Steel, Wimpey Costain, Mowlem, BET, British Gas and BPB. Given the tripartite structure of the HSE this would mean that representatives from the companies that had been publicly labelled as recidivist organisations' would be sitting on the various industry and advisory boards of the HSE.

[15] The discussion document presents five possible options for compiling a league table of offenders. These are: a simple list of cases that produce the biggest fines; an aggregated listing, as used by the Environment Agency, where each companies yearly fines are totaled; a listing of companies based on number of convictions per year; an index in which any of the three foregoing measures is divided by an indicator of size of the company; an alternative to a league table

according to industry sector, age and gender of the victim, what part of the body was injured (head, arm, leg) and so on, none of this statistical information on injuries, deaths or occupational diseases tells us what proportion of these harms resulted from management breaches of occupational health and safety legislation. Conversely, figures on prosecutions taken and notices issued annually give no information about the *nature* of these offences, that is, whether and what harm resulted and which regulations were breached. Moreover, since formal enforcement action is rarely taken on discovery of regulatory violations (Carson, 1970a), the incidence of corporate offending against health and safety law cannot be discovered by reference to HSE's enforcement statistics. It is thought that the annual number of prosecutions and notices issued vastly under-represents the incidence of corporate illegality brought to HSE's attention either through reporting, inspections or investigations. But there is no way of knowing the precise extent to which these are under-recorded (Tombs, 1997a). Furthermore, the HSE currently only investigates 10 *per cent* of reported major injuries (Centre for Corporate Accountability, 1999). Thus whilst discovered illegality is clearly under-represented in the HSE's enforcement statistics, there is likely to exist a further vast 'dark figure' of corporate illegality resulting in major injury which, although reported, is never subject to any kind of official investigation.

Whilst methods of data collection and compilation vary across regulatory arenas, in terms of allowing us to assess the physical impacts of corporate illegality all public information is equally obfuscating in that it divorces illegality from its effects. For instance, figures for deaths and injuries connected to the consumption or use of consumer products which are kept by the DTI give no indication as to whether or not the recorded deaths and injuries resulted from a breach of legal standards.[16] These 'gaps' in official information are crucial to the production of a 'moral un-panic' around corporate crime, since they render invisible both the harmful consequences of corporate illegality and the extent of victimisation. Moreover, a significant proportion of this 'dark figure' of corporate violence is a consequence not of under-reporting nor of 'systems capacity' (Calavita and Pontell, 1995), but of decisions regarding the compilation and presentation of public data. This presentation of the data has the twin effects of first 'decriminalising' that proportion of workplace death, injury and disease caused by corporate illegality, and second

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involving the publication of convictions on a continuous basis on the HSE website regardless of size of company or penalty.

'demoralising' that proportion of corporate illegality which posed a threat to human health since the harm caused is rendered invisible.

Ambiguity is also produced in relation to corporate safety crime through the formal 'demoralisation' that characterises the construction of health and safety offences. At the level of formal definition, health and safety offences do not 'look like' conventional criminal offences which sanction other forms of violence and assault. Unlike most conventional criminal offences, health and safety offences are not structured according to grades of culpability or to the levels of bodily harm caused or risked. Wells writes, 'it is often observed that whereas so-called conventional offences are defined in relation to a specific harm (causing death, causing grievous bodily harm, damaging property, and so on), regulatory offences use an inchoate mode. Health and safety offences, for example, do not refer to the result which the unguarded machine might engender, they prohibit the failure to guard.' (Wells, 1993: 6). As Wells point out, a consequence of this is that companies prosecuted under health and safety legislation are not prosecuted for the injuries, death or disease they inflict on workers or the public, they are prosecuted for failing to guard machinery, for failing to train employees or supervise sub-contractors, or failing to ensure that toe-guards are fixed around scaffolding. Corporate illegality is thus *formally* disassociated in law from the actual harm it causes, and in this way the serious consequences attendant on corporate illegality are not properly reflected by the offence.

Once again we find that most 'regulatory' law has this characteristic. For example, offences under the Food and Drugs Act, the Medicines Act, and environmental health legislation are concerned (though not exclusively) with the protection of public health (Croall, 1992). Yet legislation prohibiting the adulteration of food and drink, for instance, similarly fails to advert to the harm caused, or to the potential for harm. The failure of these regulatory offences to advert to harm is justified by reference to the fact that they are primarily concerned with prevention rather than retribution - that is, they enable intervention to take place before harm has occurred, rather than punishing it after the fact. For instance, it is frequently implied by those who insist on the distinctness of regulatory law from normal criminal statutes, that the aims of criminal justice are somehow incompatible with the aims of a regulatory system whose declared purpose is the prevention of occupational accidents and ill-health. So, for instance, it is stated in the

[16] Personal communication David Bergman. 09/08/99.

Robens Report that 'the criminal courts are concerned more with events that have happened than with curing the underlying weaknesses that caused them. The main need is for better prevention.' (Robens, 1972a: 80). Similarly, an ex-Director General of the Health and Safety Executive has stated in relation to the (non) prosecution of health and safety offences that 'There is justice to firms and individuals to be done, not just revenges to be executed, and if pain is to be reduced there is a deeper aim which is to prevent the incidents that lead to accidents' (cited in Bergman, 1994: 6). More recently the present Director General of the HSE, Jenny Bacon, has stated that 'I think there's a straight conflict here between the demands of...the criminal justice system in which people want their accident investigated because they want... retribution; and with what's needed under health and safety laws...which are mainly concerned with protection as opposed to prosecution and punishment' (Fidderman, 1998: 14).

However, as Wells points out,

> There are many examples of offences which themselves take the inchoate mode, but it is unusual for them not to be one of a pair, one of which is result-based... Regulatory schemes differ in that they often stop at the inchoate stage, so that there is no offence which reflects seriousness of harm which actually ensues as opposed to the risk of that harm.
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> (Wells, 1993: 6).

If one puts to one side the issue of resource allocation, there is no inherent contradiction between, on the one hand, persuading companies to take preventative or remedial action on the discovery of certain regulatory violations and, on the other, prosecuting companies who negligently or recklessly cause death and injury. In other words, it would be quite possible, without undermining the preventative character of the legislation, to incorporate into existing legislation a group of offences graded according to levels of culpability and the potential for harm.[17]

[17] So for instance, one could supplement the duty to guard machinery, as it presently exists under the Factories Act 1961, with two further offences of failing to guard and thereby creating an obvious and serious risk of injury, and of recklessly causing the death or injury of a person through a failure to guard machinery. More general, 'goal-setting' duties such as the duty to ensure, so far as reasonably practicable, a safe and healthy workplace (HASAWA s2(1), 2(2)) could also be supplemented by further offences, for instance an offence of causing the death or injury of an

In fact Bergman, amongst others,[18] has already proposed legislative reform which would create 'a series of additional offences in the [1974] Act which are linked to the harm caused, and if committed by an individual could result in imprisonment' (Bergman, 1999b). Significantly, such suggestions are resisted by the HSE, who argue that "Health and safety offences stem from the potential for harm - it is often a matter of chance whether injury, or even death, follows an accident".[19] However, as Bergman (1999b) points out, such an argument could be made in relation to *all* result-based offences under the general criminal law - including murder, manslaughter and causing grievous bodily harm. So, although the justification for structuring health and safety legislation as a series of inchoate offences is that, like other inchoate offences, such legislation is concerned primarily with preventing harm before it occurs, *unlike* other inchoate offences these are not 'supplemented' with a series of (more serious) result-based offences. In this sense it can be claimed that health and safety legislation violates a declared principle of the criminal law which is the principle of 'fair labelling'. This principle requires that legislative definitions should reflect, as closely as possible, 'the nature and degree of the law-breaking' to enable a proportionate response on the part of the institutions of criminal justice (Ashworth, 1991: 71). Moreover, a disjunction exists between public perceptions and health and safety legislation since researchers have found that the public believe that companies prosecuted under health and safety legislation following a death or injury are being prosecuted *for* the harm caused (Hutter and Lloyd-Bostock, 1990: 418).

Whilst the HSE seek to defend this peculiarity of regulatory law, their arguments on this issue are contradictory and inconsistent. The HSE seek to argue that death and injury arising from regulatory violations are 'fortuitous' or 'chance' events (Bergman, 1999b), and that health and safety law should be concerned with 'risk' and not with outcomes.[20] But the concept of risk has no meaning if it is not related to outcomes. In fact the concept of risk *encompasses* outcomes in the sense that 'risk' refers not just to the likelihood of harm occurring but also to the degree and nature of the harm that is threatened.

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employee through the failure to ensure, so far as reasonably practicable, a healthy and safe workplace.

[18] See for instance the Hazards Campaign Charter 1999.

[19] Cited in Bergman (1999b).

[20] Personal communication with David Bergman 09/08/99.

Moreover, in different contexts the HSE use 'outcomes' as an indicator to judge 'seriousness'. For instance, in a telephone conversation with Peter Johnson, from the HSE's Policy Unit, on the issue of whether the HSE would publish a league table of health and safety offenders, Mr Johnson spoke about some of the problems with the measure used by the Environment Agency to rank the 'worst' polluters. The Environment Agency used as a measure the total amount that each company had been fined in the year. However, as Mr Johnson pointed out the size of the monetary penalty imposed would not necessarily reflect just seriousness but would also reflect the offenders ability to pay. When I asked what measure would reflect seriousness he stated that one would have to look at outcomes, that is, numbers of accidents, injuries, deaths and so on that arose from, or could have arisen from, the regulatory breach. He stated 'Finally that's what you're looking for. If you're going to rank companies you would need to look at outcomes'.[21] Similarly, the HSE are more likely to prosecute a company if their illegal acts or omissions resulted in an injury or death (Hawkins, 1989; Hutter and Lloyd-Bostock, 1990). Inspectors are thus operating according to an *informal* distinction between offences that result in harm and offences that don't, but continue to object to the *formal* signaling of this distinction within the structure of regulatory offences.

Ambiguity and obfuscation also results from a failure to grade culpability under health and safety legislation according to degrees of fault. Again, this characteristic of regulatory law stands in contrast to conventional criminal statutes where distinctions are made between levels of awareness (*mens rea*), and reflected in the grading of available sanctions for each offence. This then is a further way in which the present structure of health and safety legislation creates problems for representing, or labeling, corporate violence as 'real crime'. Since regulatory offences do not grade culpability in terms of actual or potential knowledge we do not know what proportion of offences prosecuted, or notices issued, involved grossly negligent, reckless or intentional illegality by company management. As noted earlier, the Health and Safety Executive conducted a series of investigations into the causes of workplace fatalities in the 1980s (HSE, 1985; 1986; and 1988). In the course of these investigations the HSE judged management to have been responsible for between around 60% and 73% of the deaths. However, as Bergman points out, 'the vagueness of the report's case studies and conclusions do not assist in making

[21] Telephone conversation on 17/08/99 with Peter Johnson, General Policy Branch, Policy Unit, HSE.

any firm analysis. The judgement that, "positive action by management could have saved lives" is not synonymous with the commission of a criminal offence. And it is certainly not possible to determine from the reports how many of these deaths are the result of reckless conduct.' (1994: 11). However, independent research has shown that the majority of cases prosecuted by regulators involve 'willful' and 'flagrant' breaches of the legislation (see discussion above), and since this is what regulators themselves claim, it appears that companies which recklessly or intentionally violate health and safety legislation, knowing that their acts or omissions may lead to injury or death, are prosecuted for offences that are widely perceived as being morally neutral.

In this way we can see that far from 'strict liability' offences imposing an onerous standard of liability on industry as is sometimes asserted, the structure of regulatory law actually obscures the criminal culpability of companies. As Carson has pointed out,

> By dispensing with the requirement of intention, strict liability may impede the emergence of any shared understanding of the behaviours in question as morally opprobrious or truly criminal... It is possibly significant that in a recent case involving drugs, strict liability was held to be inapplicable because, among other things, 'a stigma still attaches to any person convicted of a truly criminal offence'... In my view, this decision should be interpreted as indicative of resistance to any 'decriminalization' of drug offences through extension of the doctrine of strict liability. The determination of 'true criminality' being both legally and sociologically problematic, the judge's statement could be taken to mean that the offence in question is and should remain a 'truly criminal' one, and that the issue of intention should not therefore be permitted to become irrelevant. (1974: 87, note 19).

Because of these formal characteristics of regulatory law, campaigners in both this country and Australia[22] have urged that cases of corporate violence should, where possible, be prosecuted under conventional criminal statutes. Bergman, for instance, discusses the possibility of prosecuting companies which cause serious injury or illegally expose their workforce to toxic substances and materials under the Offences Against the

[22] See for instance, the Hazards Campaign Charter (1999); Bergman (1999d) and the Centre for Corporate Accountability (1999). In relation to Australian campaigns see Perrone (1993).

Persons Act 1861 (Bergman, 1999d). Again it is significant that the HSE have resisted this suggestion. Bergman writes,

> Why is it that the HSE and the police do not work together to consider the possible commission of crimes under the 1861 Act? The HSE has said very little in public on this subject, but private discussions indicate that the HSE does not think that the offences in the Act apply to the standard workplace major injury situation.
>
> (Bergman, 1999d).

Yet this was, up until 1993, what the HSE used to say about prosecuting companies for manslaughter. A handful of legal cases and a number of studies (Bergman, 1994; Perrone, 1995; Slapper, 1999) have shown that there is nothing *inherent* about workplace violence that makes it an unsuitable target of conventional criminal laws. If corporate violence does not 'look like' the kinds of assault that are prosecuted under conventional criminal statutes, this has less to do with real differences between these forms of violence and more to do with the way in which corporate violence is defined and represented within regulatory law, official statistics and other public and official contexts. Moreover, the HSE appears to actively resist developments that would make regulatory violations look more like 'real crimes'.

Ambiguity and the Problems of Researching and Representing Corporate Violence

It is worth noting at this point that the creation of a separate body of law to regulate areas of economic and industrial activity has two contradictory effects for criminological research. On the one hand, the fact that health and safety legislation is subject to criminal sanctions means that 'little difficulty attaches to the definition of violations as crime' (Carson, 1970a: 388). Consequently, occupational health and safety law and enforcement should be a legitimate object of criminological study. On the other hand, the legislative form and wording of offences under health and safety legislation, the way they are enforced and the way violations are recorded, cause distinct problems for criminologists who want to argue that safety crimes are as 'serious' as conventional crimes of violence.[23] First, researchers face a series of methodological problems or, as Tombs has put it,

'problems of knowing' (1997). We simply do not know the true extent of corporate illegality nor the precise nature and scale of the harms caused. Whilst this is also true of 'conventional' or 'street' crimes, under-recording and under-reporting are likely to be particularly extreme in relation to corporate offending. Crucially, we do not know the full extent and nature of the harm caused by corporate violations of health and safety legislation, *even in the case of those violations which are detected and recorded*, since published data relating to prosecutions taken, and notices issued, contain no information about whether the violations proceeded against caused any harm. Likewise, although statistics are published on reported deaths, injuries and diseases, no information is given as to whether or not these injuries were the consequence of regulatory violation. Nor, as we have seen, does the published data tell us anything about the *quality* of corporate offending. By this I mean the precise degree of culpability exhibited by offending companies.

Second, these methodological problems, or 'problems of knowing', create for white-collar criminologists an additional set of problems that I have termed 'representational' problems. First, there are problems attached to selecting instances of white-collar offending that might be 'representative' of corporate criminality and from which we can make certain generalisations (Slapper and Tombs, 1999) and second, there are problems attached to representing corporate violence as *criminal* violence. As Slapper and Tombs (1999: 52) have observed, much time, space and intellectual argument is expended in the process of deconstructing the official categorisation of corporate violence as 'administrative offending', and then reconstructing it as 'crime'. Moreover, as Nelken has noted (1997: 893), critical criminologists have attempted to show that, not only can corporate violence be seen as 'crime', it is in addition more serious in its effects, and more prevalent than forms of street violence. To this end, criminologists have tended to rely on two kinds of data on corporate violence. To demonstrate the incidence and extent of corporate harm they have used official figures for deaths, diseases and injuries arising in a work setting (Box, 1983; Reiman, 1995). But because such information contains nothing that gives us any sense of the quality of corporate offending, the specifically 'criminal' nature of corporate violence is demonstrated through a discussion of case studies for which more detailed information on company knowledge or negligence is available. However the source materials for such case studies tend to come, not from

[23] See Slapper and Tombs (1999) chapters 3 and 4.

regulatory agencies, but from civil actions, public inquiries and investigative journalism. The use of both forms of data to found general propositions about corporate crime is open to criticism. For instance Hawkins has written,

> Pearce and Tombs... cite figures showing that there are large numbers of violations and many appalling accidents; that many large firms, over a period of time, commit many violations; and that threequarters of fatal accidents were linked with regulatory violations...The *post hoc* finding that workplace fatalities are linked to violations proves only that some violations may have serious consequences. Their point does not address the question of how likely the fatality was to follow the violation. (Risks posed are a matter of the likelihood that harm may occur, as well as the gravity of the harm that may occur. A violation may or may not be serious. A violation may or may not lead to harm, and if it does lead to harm, it may be anything from very minor to very grave harm). (1990: 453-454).

However, the inability of researchers to make these distinctions is a consequence both of the structure of regulatory offences and of the way data is presented. We do not know what proportion of violations result in actual physical harm because the statistics do not tell us. We do not know what proportion of offences are 'serious', nor the levels of culpability involved in management responsibility for workplace deaths because offences are not graded accordingly. Furthermore, Hawkins does not question why the character of health and safety legislative and agency recording practices should be so obfuscating in relation to these questions/ issues. Nevertheless, it must be conceded that such data cannot provide an index of the extent and seriousness of corporate criminal violence. Similarly, the use of case studies has been questioned by both Croall (1989) and Shapiro (1983) on the basis that such cases are not representative of either the bulk of corporate offending or the majority of corporate offenders. For instance, Shapiro writes,

> I am troubled by the kinds of data used in many of these works to illustrate or support theories about white-collar illegality. One might gather from the writers that there has been only a handful of corporate crimes in American history. One was the Ford Pinto affair... Others were the price-fixing conspiracy in the heavy electrical equipment industry, bribery by Gulf Oil and Lockheed Corporations,

> Hooker Chemical Company and the Love Canal, and the Equity Funding securities fraud... But these scandalous offences are distinctive and atypical in their enormity, impact, scope, complexity, and usually in their legal outcome and the economic prominence of their perpetrators. They are the deviant cases of corporate crime. I know, because I have seen a fuller distribution of the much larger number of violations that escape public notice because of the insignificance of their actors or the routine character of their acts. (1983: 305).

Whilst it may be true that large-scale disasters are less frequent than the routine deaths of workers, and that these deaths may not have involved the level of conspiracy evident in the Ford Pinto case or the price-fixing conspiracy in the heavy electrical equipment industry, neither Shapiro nor Croall fully acknowledge the ways in which their own data sets fail to escape the problem of distortion. Both Shapiro and Croall take as their data those offences that have been discovered and proceeded against by regulatory bodies. The problems this raises with respect to Croall's analysis and the conclusions she draws will be explored in greater depth at a later stage. Suffice to say that such data will be subject to a number of enforcement biases. Braithwaite refers to this 'elusiveness of adequate data', arguing that, 'The nature of white collar crime - its complexity, the power of its perpetrators - means that only an unrepresentative minority of offences is detected and officially recorded.' (1985: 5). Research by Lynxweiler *et al.* (1984) suggests that regulators have considerable influence over the outcome of cases, even where regulatory discretion is reduced to a minimum as in the case of the US Office of Surface Mining whose inspectors are legally obliged to record every regulatory infraction they observe, and are subject to 'a uniform policy of detailed, legalistic mandates' (1984: 149). The researchers found that 'even though the Act and the OSM's regulations were designed to eliminate agency discretion, small mining companies pay higher fines than larger companies without committing violations of increased seriousness. Stated differently, our analysis reflects a differential advantage for the more powerful sectors of the industry.' (1984: 153). Thus, enforcement practice and bias will also affect the published data relating to corporate violence, producing another 'obstacle to knowing'.

Goal-setting, Negotiable Standards, Economics and 'Demoralisation

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Finally, in relation to any moral ambiguity that surrounds regulatory law, it is important to consider the ways in which field inspectors' approach to, and use of, the legislation 'demoralises' occupational health and safety law. A number of researchers have noted that regulatory agents adopt a 'flexible' approach to the enforcement of regulatory laws. What this means in essence is that inspectors and managers see regulatory requirements as negotiable rather than absolute. For instance, Fineman's study of enforcement action by Environment Agency inspectors found that there was 'a tendency for regulators to see fairness in environmental control as a matter for negotiation rather than an absolute value', (Institute of Development Studies, 1999).[24] The fact that health and safety legislation is moving further away from specifying minimum standards for compliance (even within its ACOPs)[25] and is becoming increasingly goal-setting contributes to this sense that the standards themselves, and not just the means of achieving those standards, are negotiable. The existence within regulatory law of what are essentially economic tests, such as the 'Best Available Techniques Not Entailing Excessive Cost' (BATNEC) test for environmental legislation and the 'So Far as is Reasonably Practicable' (SFAIRP) for health and safety legislation, exacerbates this problem since these are inherently elastic rubrics.

Moreover, the practice of consulting industry and the involvement of industry representatives within the tripartite structures of the HSC and the HSE mean that negotiation over legal standards takes place even during the standard setting process itself. For instance, in March 1992 the HSE published the consultative document on the draft Safety Case regulations for the Offshore oil industry. Woolfson *et al.* write that,

> Between the March 1992 publication of the consultative document... and the final November 1992 publication of the regulations and accompanying guide to the Safety Case, the HSE met with the [United Kingdom Offshore Operators Association (UKOOA)] on a regular basis. It also met the International Association of Drilling Contractors (IADC) and British Rig Owners Association (BROA) representing the drilling-rig owners.
>
> (1996: 331).

[24] See also Fineman (1998).
[25] James and Walters (1999).

In the course of negotiations between the HSE and the industry associations the HSE ceded ground and agreed to industry demands that requirements respecting the provision of a 'temporary safe refuge' were made less prescriptive and more flexible. The resulting regulations were 'flexible' enough for some offshore operators to argue that 'in certain circumstances a lifeboat could fulfill the function of temporary refuge' (Woolfson *et al.*, 1996: 332). Thus, Woolfson *et al.* conclude that the new requirements,

> [Offered] flexibility in adapting to different installation requirements. However, as with the concept of 'goal-setting' itself, such flexibility also created space within which the operators could redefine safety parameters more freely and interpret regulatory objectives with greater discretion as to their cost implications. There, as elsewhere, what UKOOA was effectively seeking was the creation of a zone of compliance discretion within the new regulatory regime. (1996: 332).

Thus, industry is able to negotiate standards during the law-making process, as well as within an enforcement context. Yeager argues that this practice of 'bargaining' over standards 'demoralises' health and safety legislation. I have quoted him below at some length because his argument is extremely important to a consideration of the causes of moral ambiguity surrounding regulatory law and enforcement.

> In the implementation of such law, there is commonly a basic shift in moral emphasis: from the normative, often passionately held values that motivated the legislation to a 'demoralized' focus on technical problems and solutions... This is the case, for example, in environmental regulation, in which implementation and enforcement of law commonly give way to deliberations between governmental and corporate experts over such matters as the costs and benefits of various degrees of pollution control and levels of compliance. Here industry's technical input on such issues as technologies and feasibility takes precedence. Typically excluded are the citizens' and public-interest voices most likely to urge the broader ethical bases of regulation (such as environmental imperatives), but which often lack the money and information needed to participate in complex bureaucratic decision-making. The consequence is regulatory results well short of the law's intended (and arguably feasible) reach... There is also a more subtle

> consequence. The process reinforces business's perception that much regulatory law itself is (at best) morally neutral or ambivalent, which in turn strengthens the limited, utilitarian moral calculus that emphasized the 'moral' imperative of capital accumulation over other considerations.
>
> (Yeager, 1995: 159).

Firstly we should consider how this understanding of the processes of law-making and law enforcement reflects on Kagan's assertion that laws controlling pollution emissions necessarily possess this morally ambiguous quality because there is 'disagreement about what precise level is bad for public health' (1984: 53). First, there is invariably a line to be drawn between legal and illegal behaviour, and this line will not always be clear for conventional offences either.[26] Morover, the disagreement over 'safe' levels of pollution is not a *moral* disagreement, but a scientific one. The moral disagreement occurs over the question of whether, and to what extent, human health should be sacrificed to the economic interests of particular industries. Moreover, this disagreement does not create moral ambiguity - there is no ambivalence in the opinions and values of a community who object to the siting of a chemical factory producing phthalates next to their local primary school. Their priorities and values are clear. However, as Yeager states, it is rarely these values that are ultimately enshrined in legislation. What creates moral ambiguity is the use of an economic criteria in setting occupational health and safety standards and the implicit agreement between industry and the state that some lives can be sacrificed to the accountant's sheet. For instance, this official 'balancing' of human life against profitability is to be found in the fact that legal occupational exposure limits for asbestos were never 'safe' limits. According to the HSE's own estimates, the current exposure limits for work with asbestos would lead to a 0.5% excess of lung cancer deaths in workers exposed at the limits (HSE, 1993a). In setting 'maximum exposure limits', the Advisory Committee on Toxic Substances were not charged with determining safe limits, rather the Committee was set the task of balancing 'risk to health against the cost and effort of reducing exposure' (HSE, 1993b: 2).

Moral ambiguity, therefore, is produced by the terms in which the debate is cast, and the factors which are allowed to determine how such debates are resolved. If a demoralised

[26] Consider for example the debate currently going on around the physical punishment of children and what constitutes 'reasonable chastisement'. (Hall and Ward, 2000).

assessment of costs weighted against benefits to human health determines how standards are framed, then those standards will appear to be morally ambiguous. Thus, we have a regulatory framework of negotiated legal standards, which are then seen as negotiable by employers and regulators in the enforcement context. As Yeager points out, this has the effect of further confirming for industry that the laws governing their activities are morally neutral. The implications of this for 'compliance' will become clear in the following chapters.

Deflecting Censure: Mistaken Intentions and The (Mis)application of the 'Good Citizen' Label

It was argued in the preceding section that official public representations of corporate violence (within public debate, HSE publicity and media reporting, statistics and other official data sources); the legal construction of offences; the technocratic language of regulatory control, and the official processes of law making and enforcement create and sustain a series of lenses through which occupational ill health, injury and death appear to be unlike 'real crime'. However, challenges to this perspective are occasionally mounted and must be addressed. In a sense, it could be argued that the settings of the inquest and the trial preclude a wholly demoralised approach - particularly when a death or deaths have occurred which are clearly the consequence of some corporate failure or course of conduct. In addition, since the purpose of the trial is to establish criminal guilt or innocence, a peculiar dilemma arises for those wishing to argue that corporate violence is not 'real crime' when corporations are actually convicted of criminal offences (albeit that these are regulatory offences). In such cases, an attempt may be made to deny the criminality of corporate conduct in one of two ways. First, it is argued that the company did not *intend* to commit the offences with which they are charged. As we have seen, the structure of regulatory law facilitates this informal defence since the offences do not require *mens rea*. Second, if evidence is presented that company management was aware of a particular violation, evidence may be given as to the company's *general* good character. In other words, attempts to deny the identification between 'the criminal' and 'the gentleman' are often based on a claim that the company standing trial is a 'good corporate citizen'.

Denying Intentionality

Companies may deny the 'criminality' of their acts or omissions through a contention that senior personnel in the company never intended or foresaw the harm that occurred, or that they did not know of the circumstances giving rise to the risk. This denial of intention and knowledge is, as we have seen, central to academic, regulatory and business arguments that certain corporate omissions or commissions do not amount to real crimes, even when those acts or omissions are proscribed by the criminal law. The reason why the presence or absence of intention assumes such importance in debates concerning the nature and meaning of corporate crime becomes clearer when we consider Norrie's contention that the criminal law is primarily concerned with determining the moral status of an act, but is denied an adequate language with which to make moral distinctions. He writes,

> The criminal law is involved in a process of moral judgment, but uses a particular "neo-moral" or simulacral language to do so which can be described as cognitivist, subjectivist, factual or descriptive. This is the dominant language of the courts and mainstream academic opinion, but it is inadequate to capture real moral distinctions. Hence much legal argument is a kind of moral shadow-boxing or ventriloquism which deals with moral issues, but at one remove.
>
> (Norrie, 1999: 543).

The language that was given to the law to 'stand in' for 'subjective moral judgement' was the legal language of fault - mainly articulated through the categories of *mens rea*. The form that this language took derives from an 'orthodox subjectivist tradition which holds that the identification of cognitive states of mind is itself the basis for moral judgements in a particular Kantian way' (Norrie, 1999: 541). Norrie points out that a conception of morality that is based on subjective states of mind is not the only, nor necessarily the most effective, way of articulating moral distinctions. In the first place, such a philosophy 'ignores the substantive moral differences that exist between individuals as they are located across different social classes and according to other relevant divisions such as culture and gender' (Norrie, 1999: 541). However, what I am concerned to demonstrate here is the way in which the Courts use the language of intentionality to construct moral

distinctions between corporate and conventional offenders. These judicial statements are then used by companies to deny the significance of their convictions.

This is illustrated by the circumstances surrounding the prosecution of SmithKline Beckman by the US Justice Department in 1985. SmithKline Beckman pleaded guilty to 34 charges of failure to report to the Food and Drug Administration (FDA), within the obligatory period, evidence relating to the hepatotoxicity of their drug Selacryn and of failure to reflect this risk in the product's labelling.[27] Federal Judge Edward Cahn stated that "there was no criminal wrongdoing in the ordinary sense". SmithKline Beckman was ordered to contribute to charity and was placed on probation for two years. Following the trial and the Judge's remarks, SmithKline Beckman's president and CEO, Henry Wendt, stated, "This experience has been a profoundly sad one for all of us, but we take consolation from the fact that it has been resolved in a way that will benefit Philadelphia... and is in keeping with our corporate tradition of public service. An exhaustive investigation by several governmental agencies, lasting for more than four years, produced absolutely no findings that the company or its employees acted intentionally, recklessly or for a commercial motive'.[28]

A further example from the pharmaceutical industry can be found in the prosecution by the US Justice Department of the pharmaceutical company Eli Lilly over their non-steroidal anti-inflammatory drug Opren. The FDA had originally requested that the Justice Department determine whether Lilly was guilty of 'intentionally scheming to conceal important information from the agency'. The charges finally brought against Lilly by the Justice Department were 'criminal information' charges. They were criminal charges, but classed as 'misdemeanour' rather than the more serious 'felony' charges. As in the prosecution of SmithKline above, no charge of intent to deceive or defraud was brought against the company.[29] This was despite evidence that Eli Lilly had falsified submissions to the FDA on drug-related deaths.[30] Nevertheless, commenting on the fact

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[27] The FDA-approved information provided to physicians by the drug companies relating to the proper uses, and possible adverse effects, of a particular drug.
[28] Reported in *Scrip World Pharmaceutical New*, March 4 1985, p 17.
[29] The charges eventually brought against the company were that Lily had failed to provide adequate warnings concerning possible liver and kidney reactions on their product labelling, and that Lilly was late in filing reports to the FDA of ten liver or liver and kidney reactions following the FDA's approval of the drug.
[30] For instance, Eli Lilly registered on drug-related death as having occurred on 5 September 1982, when company records show the death as having occurred on 5 January 1982. This death was not

that the charges laid against the company (following a 14-month grand jury review) were not the more serious felony charges, Lilly chairman Richard Wood was able to claim that,

> The Department's action confirms Lilly's position, consistently maintained throughout this controversy, that the company did not withhold medically significant information to expedite the FDA approval of the drug and that Lilly did not intentionally violate any FDA regulation in its handling of Oraflex. The Department's decision puts to rest any speculation regarding intentional misconduct by the company or its employees. It is a clear repudiation of the charges leveled at the company at the height of the controversy in 1982.[31]

In his summing up, the Indianapolis district court judge hearing the case commented:

> I have studied the government case and while I find it factual, it does not reveal some other aspects that are relevant to this case. *It is obvious that an ethical company like Eli Lilly would be idiotic to jeopardize their reputation by deliberately withholding information of possible deaths to get the product on the market.*'[32] (Emphasis added).

Thus, the Judge in this case appeared to give more weight to Eli Lilly's reputation than it did to the 'factual' evidence contained in the US federal government's case. Second, he appeared to accept Lilly's claim that they did not have to report the deaths because there was inconclusive evidence that these deaths had been caused by the drug. However, if we consider the 'factual' evidence, the Judge's insistence that Eli Lilly was an 'ethical' company and therefore could not have done anything 'criminal' becomes even more difficult to comprehend.

Consider for instance, two of the justifications proffered by Lilly for their failure to report deaths associated with Opren to the FDA. First, the company argued that US regulations did not require the reporting of adverse drug reactions (ADRs) associated with *foreign marketing* prior to US approval. In other words, Eli Lilly claimed that, although it had not

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reported within the requisite period, so it is likely that the date of death was changed to conceal this fact (Abraham, 1995: 172).

[31] Reported in *Scrip World Pharmaceutical News*, August 28 1985, p 9.

[32] Reported in *Scrip World Pharmaceutical News*, August 28 1985, p 9.

provided crucial information on the possible hazards of Opren to the FDA prior to their decision to approve the drug for marketing in the US, it had not *technically* violated the regulations. These were hardly the actions of the ethical company that Lilly claimed itself to be, even if they are judged by their own stated standards since Lilly chairman, Richard Wood, has stated that:

> [FDA regulations are] a minimum set of standards. They are in written form, but beyond that you have an ethical code of conduct that scientists recognize as doing the right thing, and being completely honest, open and above board at all times.
>
> (Cited in Abraham, 1995: 172).

Second, Eli Lilly defended their non-reporting of a number of ADRs by claiming (as outlined by the Judge above) that there was insufficient evidence to conclusively link the deaths that were known to the company with the drug. For instance, Richard Wood stated in a letter to Lilly shareholders that Lilly had acted reasonably in marketing the drug in the US because "The information concerning the liver-kidney reactions available to the company at the time the drug was introduced to the US market was not sufficient to assess the significance of the reports." (Cited in Abraham, 1995: 168). Yet Wood later stated in a letter to Lilly shareholders that,

> Serious [benoxaprofen] adverse reactions known to the company that occurred abroad consisted primarily of reactions that were known to be associated with NSAIDs as a class. Some of those reactions were fatal. Except in a few instances, none were reportable under Lilly policy because they were typical of reactions common to the drugs of the class to which *Oraflex* belongs and were consistent with the adverse reactions profile developed for *Oraflex* during clinical trials.
>
> (Cited in Abraham, 1995: 174).

Yet, as John Abraham points out,

> This totally abandons his argument that the company had not reported those deaths because the precise cause of death had not been determined. For if deaths were not reported because they were an expected outcome of NSAID treatment,

then there must have been an assumption, on Lilly's part, that the drug *did* play a key role in the cause of death.

(Abraham, 1995: 174-175).

Moreover, in arguing that the company did not have to report drug-related deaths caused by ADRs that were a known and expected outcome of treatment with non-steroidal anti-inflammatory drugs, Eli Lilly executives were again simply exploiting a lack of clarity in the regulations and could not be claiming to have acted ethically. Nevertheless, following the trial Eli Lilly produced, and distributed widely, materials pointing out that it was not convicted of *intentionally* doing anything illegal, and arguing that it had pleaded guilty so that they could put the matter behind them and avoid the heavy legal costs of continuing controversy.[33] Thus, we can see that companies are easily able to deny intentionality even when there is evidence that management were aware of the specific risks attached to a product or work practice. Moreover, Judges may be predisposed to accept these denials when they come from 'legitimate' companies.

Claiming Good Citizenship

However, it appears that even when companies admit knowledge, or knowledge is proven, judges are willing to accept a company's claim to good citizenship. Paul Elvin, a trainee window fitter with GBR Windows, was electrocuted when a long aluminium pole that he was carrying touched a 25,000 volt overhead cable. Cawberry Ltd, the company that had subcontracted the work out GBR Windows, was prosecuted under the Health and Safety at Work Act following Paul Elvin's death. The company had failed to ensure that Paul Elvin was warned about the presence and dangers of the overhead cables. Other safety failures on the part of British Rail contributing to the death did not result in any action being taken against BR. Judge McMurray said in her summing up:

> [I]n a case such as this no amount of sympathy, no number of pleas of guilty, and no words of the court can bring consolation and comfort to the friends and relatives of somebody who has lost his life. One thing that can be said... is that nobody can suggest, or ever have suggested, that Mr. Elvin himself did purposely anything which could be criticised and which even led to his death. *Equally it is*

> *not appropriate in this place for me to seek to appoint blame to others, not before this court, even if I thought that it was appropriate. These defendents have pleaded guilty to a very serious charge, on the basis that they knew, through their site agent, they had failed to do what [they were] required to do* by British Rail, namely to supply to each person working on that site, whether directly or sub-contracted or independent labour, with a copy of the Track Safety Handbook, an easily read, easily understood document pointing out in the clearest possible terms (which should have in any event been obvious to anybody) the dangers of working near and approaching cables carrying 25,000 volts of electricity, and they did not. *They are a proper and responsible company and they have accepted that by that failure they are guilty of an offence to which they plead guilty.* So far as the penalty is concerned, *this was of course, with its tragic consequences, a serious breach of the health and safety regulations. If I was not satisfied that as, a general rule, this is a highly respectable company with a good record of safety and co-operation with safety inspectors and so forth, I would take a more serious view than I do.*
>
> (Cited in Elvin, 1995: 79. Emphasis added).

Thus, although evidence was heard that the company had failed to pass crucial information on to a worker - despite their awareness of the grave risks involved in his work, and despite the fact that this reckless behaviour caused the death of Paul Elvin - the judge was able to conclude that Cawberrys was 'a highly respectable company' and refused to censure or 'blame' them for Paul Elvin's death. Similar sentiments were expressed in the prosecution of Keltbray Ltd in September 1999 in Southwark Crown Court following the deaths of two employees. The Court heard that certain items of safety equipment had not been supplied to the workers who fell 100 feet to their death through a 'well hole' they had been cutting. The work had not been supervised and although the men had been provided with safety harnesses, there was nowhere for them to fasten them. Company management has been made aware of, but ignored, warning of precisely those dangers which caused the fatalities in a risk assessment of the site. Yet despite this damning evidence, and despite asserting that Keltbray Limited's breach of the HSWA

[33] Reported in *Scrip World Pharmaceutical News*, September 16 1985, p 16.

amounted to the "grossest negligence", Judge Elfer, QC, also stated that he "took pleasure" in the company's previous safety record.[34]

It is not being suggested that all judges are inherently sympathetic to business. For instance, in 1992, Judge Andrew Brooks criticised the HSE for failing to bring charges against the directors of a demolition company whose negligence had led to the death of a worker. The company had gone into liquidation making the fine a meaningless penalty (Connett, 1993). The point is that the formal procedures of the trial allow companies to present evidence of their good character. The purpose of this evidence is to persuade the court either that, whilst the defendant did commit the offence, this was done innocently or excusably or that the offence was out of character (Walker and Padfield, 1996). This is something open to all defendents, and research by Wheeler *et al.* (1988) suggests that the level of penalties incurred for white-collar crime depends on the normal criteria for other crimes: prior record, seriousness of offence, the degree of harm to the victim and the degree of the defendant's culpability as judged by the court. But companies appearing before the courts may have an advantage over the majority of individuals charged with conventional offences since there is strong evidence to suggest that the HSE are failing to challenge representations made by prosecuted companies to the Courts that they are 'good corporate citizens' who do not usually break the law.

For instance, in the case of prosecutions following workplace deaths there would be three reasons why a case would not be referred to the Crown Court either for trial or for sentencing. First, the Court would not consider the offence (or the act or omission) serious enough (this might be the case with an administrative failure for instance). This is unlikely to be the case since Bacon contends that the HSE only prosecute in serious cases.[35] Second, the Court may not perceive company management as being greatly at fault. Third, a company may claim, as Keltbray Ltd did, that the offence in question was a peculiar failure and not generally representative of company practice. Thus, we may take referrals to the Crown Courts as an indicator of how successful a company has been in representing itself either as a good corporate citizen or as lacking moral fault (usually expressed as 'intent'). As noted, Bergman found that between 1996 and 1998 just 18.8 *per cent* of workplace deaths resulted in a prosecution for health and safety offences. Of

[34] *BBC News* report 08/09/99.
[35] HSE Press Release C49:98 - 16 November 1998.

these, 72 *per cent* were heard in the magistrates court (Centre for Corporate Accountability, 1999). Now this is rather remarkable when we consider first, that these prosecutions follow fatalities; second, that the breaches would all have been - in the opinion of the HSE - serious; and third, that there is likely to have been a history of repeated offending (since research shows that the HSE generally only prosecute after repeated failures to achieve compliance by other means).[36] Although decisions regarding referrals to the Crown Court are made by magistrates themselves, HSE inspectors are entitled to make 'submissions' where they recommend that a case is referred to the higher courts. The factors outlined above would increase the likelihood of a case being referred to a higher court so it is up to the HSE inspector to include this information in their submissions[37] to the magistrate that trial or sentencing should take place in the Crown Court. The Centre for Corporate Accountability argues that:

> The HSE had consistently told this committee that they have little control over the question of which court cases are heard in - this is not the case. In our opinion (though no research has actually ever been done into this question) the low Crown Court prosecution/ sentencing rate is directly the result of HSE inspectors failing to argue their case persuasively to the magistrates courts. It is not clear whether this is due to lack of HSE policy or legal inexperience or incompetence of HSE inspectors who are not trained in court procedure and who have little experience of "mode of trial hearings".
>
> (Centre for Corporate Accountability, 1999).

Thus, the high rate of cases that are heard in the magistrates courts, even following workplace deaths, indicate that the HSE are not challenging companies that represent themselves as 'well intentioned'. Since the HSE generally only prosecute as a last resort,

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[36] Carson (1970a).

[37] Bergman explains how this information may become relevant at various points in the trial. He writes: "Since 1996, if the company plead guilty, the inspector has an opportunity to inform the court of "any aggravating features or particularly serious aspects of the case which leads [the inspector] to believe it is more suitable for trial on Indictment." Where the court decides that the case should be committed to the Crown court, the company can make a submission. If a submission is made the HSE inspector is then entitled to "bring to the attention of the court all relevant aspects of character and antecedents, including relevant previous convictions". If the company pleads not guilty (a minority of cases), and wants the trial to take place in the magistrates court, the inspector can ask that the case be heard in the Crown court and provide reasons (though not mentioning previous convictions) including previous advice and history" (Centre for Corporate Accountability, 1999).

it is unlikely that the majority of these companies *are* in fact 'good corporate citizens', or that their violations were unprecedented 'blips' on an otherwise clean sheet. Internal HSE documents provide some support for this conclusion. For instance, for a recent *Dispatches* programme, researchers had access to HSE documents relating to all prosecutions against Tarmac over the last ten years. HSE claims that it will inform the courts of any previous convictions of individual companies within a group, since these are relevant to any claims by the company to 'good character':

Interviewer: Can you guarantee that on every occasion every conviction against that company is made clear to the court before they sentence?

David Eves:[38] That is certainly our intention, that in the case of a particular company where it is possible to refer to previous convictions we will do that.[39]

However, in 1995 Tarmac Construction Ltd. was prosecuted and sentenced in the magistrates court following the death of a worker, Adrian Byrd. Adrian Byrd's skull was crushed when a dumper truck he was driving fell over the edge of a trench because Tarmac had failed to provide a 'stop lock' or barrier at the lip of the trench precisely to stop mobile plant from falling over the edge. The need for such protective edging is well-known in the industry. During the trial, the prosecuting inspector from the HSE told the court that "Tarmac have no previous convictions in this area",[40] but HSE records show that in the seven years before Adrian Byrd's death Tarmac Construction Ltd. had been convicted of health and safety offences 22 times. Moreover in the previous ten years the company had been issued with 114 notices, including 2 prohibition notices issued by the HSE in the six months prior to Mr Byrd's death relating to Tarmac's failures to provide adequate edge protection preventing the fall of people and mobile plant. Tarmac was fined £10,000.

Further evidence that the HSE fail to provide crucial information to the courts is to be found in a Law Commission working paper in 1970. The Law Commission state:

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[38] Deputy Director General of the HSE and HM Chief Inspector of Factories.
[39] 'Bosses in the Dock', *Dispatches* 06/05/99.
[40] 'Bosses in the Dock', *Dispatches* 06/05/99.

> In a typical case where the defendant firm pleads guilty... the defendents lawyers will put in a plea of mitigation, explaining how anxious the firm is to comply with the law, what a good past record it has on safety matters and how sorry it is about this isolated contravention... [The] resulting picture for the magistrate in a typical case will be a firm with a good safety record which, for one reason or another, has failed to comply with one or two statutory requirements... In one case, for example, arising out of a fatal accident on a construction site, the magistrates were informed that the firm had no previous conviction and a good accident record, though it was known to the Inspectorate that in the space of a year there had been three other fatal accidents on the firm's sites, one of which led to the submission of a prosecution report, though no proceedings were taken.
>
> (Law Commission, 1970).

Although this report applied to the Factory Inspectorate, the evidence already discussed suggests that nothing has changed. This is not surprising since the approach to enforcement recommended by Robens (1972a), and subsequently embraced by the HSE, was largely based on the approach of the earlier Factory Inspectorate.

Thus, in contrast to conventional criminal trials, where prosecutors attempt to portray the accused as a 'bad' character in order to undermine their credibility as a witness, the available evidence strongly suggests that the HSE fail to challenge the claims to good character made by companies in court trials even when they are aware that such claims are false. In relation to conventional criminal trials, Kalunta-Crumpton's (1998) study of the claims-making practices of barristers prosecuting black defendents for drug offences, demonstrates that barristers seek to construct a criminal identity for the accused by drawing upon racial stereotypes and cultural assumptions about the links between black people, prostitution, drugs, violence and crime. Her research, then, suggests that the outcome of a court case may depend on the success with which a criminal identity can be constructed for the defendant (or, alternatively, the success with which a criminal identity can be denied). Whilst companies present evidence in court cases to represent their distance from a criminal identity, it appears that prosecuting HSE inspectors do not attempt to counter these claims even when they have ample evidence with which to do this. Crucially, it appears that HSE inspectors are failing to present evidence of a company's history of offending in the majority of cases.

CONCLUSION

I have attempted in these last two chapters to 'unravel' the processes of both successful criminalisation, and the converse of this - that is, the successful *avoidance* of criminalisation in cases of corporate illegality and violence. Within this analysis I explicitly reject the idea that the criminalisation of conventional crime simply reflects the moral sentiments and values of the majority, whilst the routine non-criminalisation of corporate offences reflects the moral ambiguity that is felt by the majority of the population in relation to these offences. Instead, I have tried to show that our emotional commitment to the criminalisation of particular social actors and their acts may be *produced*. Whilst not every instance of criminalisation involves the creation of a 'moral panic', an understanding of the processes that are identified in the literature as fuelling moral panics - the amplification of the threat posed by the behaviour in question, the creation of the folk devil, and the mobilisation of censure - helps us to see how the opposite of these processes function with respect to corporate offending. Thus I have attempted to show how the incidence of corporate offending is routinely under-represented in the media, in political and regulatory discourse, in court figures, in HSE statistics, and so on; how the harm that is caused by corporate offending is obscured through the artificial dissociation of cause from effect in the forms of regulatory law; how the regulators' and industry focus on technical means and costs further 'demoralises' regulatory law; and how, where the folk devils of conventional crime unsettle and haunt us, the figure of the socially responsible corporation is routinely invoked to reassure us. Moreover, I have attempted to show how, at each stage, legal and regulatory policy and practice are central to this process. In other words, I have attempted to look at the ways in which the law educates and manages popular censure, sentiment and morals. In the following chapters, case-study data is used to examine this process more closely in a regulatory context. This research shows how public struggles over the meanings and status of corporate offending are negotiated in an enforcement context, considers the role of regulatory agents in this process and demonstrates the significance of the power of business to determine how their illegality is publicly perceived.

5

ASBESTOS EXPOSURE ON FIRELANDS WOOD ESTATE

"I would say that this kind of work goes on all the time, every day. It's not unusual. You know, people go 'aahhh, asbestos!' but it's all over the place, it's being carried on all the time. So we wouldn't necessarily be concerned about it."

(HSE Inspector visiting the Firelands Wood Estate).[1]

Exposure to chrysotile asbestos poses increased risks for asbestosis, lung cancer and mesothelioma in a dose dependent manner. No threshold has been identified for carcinogenic risks... Some asbestos-containing products pose particular concern and chrysotile use under these circumstances in not recommended... Construction materials are of particular concern.

(International Program on Chemical Safety, 1998).

The following chapters are based on research conducted over a five month period in 1996. This research involved the collection of data relating to a case in which residents of a local housing estate and workers were illegally exposed to asbestos dust and other hazards from the unsafe management of construction work taking place on their estate.[2] (See Appendix 1). This data forms the basis of a case-study analysis of non-compliance and regulatory failure. However, it is important to situate this case within the context of a *history* of regulatory failure to recognise, and take steps to control, the health hazards posed by the introduction and use of asbestos materials in our workplaces, our homes, and our schools. This history will be discussed briefly below since it is illustrative of the HSE's general approach to health hazards arising

[1] Interview 19/04/96.

from industrial activity, and contextualises the approach taken by the inspectors who visited the estate. It also helps us to understand how, and why, asbestos cement has been treated by the HSE as a low-risk material. This is significant since the 'grading' of asbestos cement as 'low risk' was exploited by the construction companies, the HSE and the local Environmental Health Department to obscure the real risks faced by the residents and dismiss their fears. More specifically, then, this case provides an opportunity to explore in more detail how regulatory agents may play a key role in deflecting censure and under-emphasising or obscuring the threat posed by corporate illegality.

ASBESTOS - A HISTORY OF REGULATORY FAILURE

The history of the state's response to the health risks associated with exposure to asbestos dust has repeatedly been a tale of too little, too late. This is in spite of the fact that, as Alan Dalton asserts, asbestos is arguably "the most well-known, investigated and legislated hazard after radiation." (1995b: 8-9). Exposure to asbestos fibres can cause any or all of a number of asbestos-related diseases (ARDs). First, it can cause asbestosis - a disabling, and ultimately fatal, fibrosis of the lungs that increasingly restricts the sufferer's capacity to breathe. Second, asbestos is a carcinogen that can cause either lung cancer or mesothelioma - a rare cancer of the lining of the abdomen, lung or heart associated almost exclusively with asbestos exposure. Mesothelioma is extremely painful and always fatal, with sufferers generally dying within two years of the disease being diagnosed. Finally, there is evidence of an increased risk of gastrointestinal cancers and cancer of the larynx following exposure to asbestos (London Hazards Centre, 1995). Although it was known by HM Factory Inspectorate in 1898 that asbestos causes lung disease (Wikeley, 1993: 93), the first regulations governing work with asbestos were not introduced in this country until 1931. Since that time, and with each subsequent set of regulations, state officials, manufacturers and sections of the medical and scientific establishment have been predicting an end to – or at the very least a decrease in – deaths resulting from exposure to asbestos in the workplace. For instance, an article published in the Lancet in 1934 stated:

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[2] The names of the companies and company personnel; the housing associations; the residents; the local newspaper; the local reporter; the HSE inspector; and the parish councillors have all been changed, as has the name of the estate itself.

> The picture of pulmonary asbestosis is that of pneumoconiosis occurring in a factory in which few precautions have been taken to protect the workers from a danger, the gravity of which was not realised. Happily these conditions are now a thing of the past and elaborate precautions have been taken to protect the workers. There is thus good reason to believe that the disease is now under control.
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> (Cited in Wikely, 1992: 372).

Such optimism proved to be tragically misplaced. The death rate from ARDs currently stands at around 3,000 per year,[3] with many of these deaths occurring amongst workers exposed to asbestos whilst the 1931 regulations were in force. Subsequent regulations introduced in 1969, 1983 and 1987 were again expected to reduce the toll of death and suffering. However, the most recent official prediction of the future incidence of asbestos-related deaths has once again shown that previous official research into the risks associated with asbestos exposure grossly underestimated the dangers (Peto *et al.*, 1995).

The question then arises as to why regulatory standards and regulatory agencies have consistently and dismally failed to prevent the suffering and death of hundreds of thousands of workers. In the HSE press release[4] publicising Peto's 1995 research findings, a senior health policy official from the HSE laments: "It has taken a long time to learn the lessons of this tragic legacy". But why should this be the case when unions and campaigning groups presented evidence to suggest that official estimates were inaccurate ten years before (see below). There appear to be two immediate reasons for this regulatory failure. Available evidence suggests that the first immediate reason for the failure to achieve a drop in the ARDs death-rate was widespread violation of the existing regulations coupled with a persistent failure on the part of regulatory bodies to take action against offending companies (Wikely, 1992: 373; London Hazards Centre, 1995: 70-73). Second, occupational exposure limits and related safety measures have been based on methodologically flawed scientific research and assumptions. This has resulted first in the setting of exposure limits that were inadequate to protect health, and second in the promulgation of regulations that were too narrow in their application, leaving workers who were regularly exposed to high levels of asbestos dust unprotected by the law. The

[3] Health & Safety Executive Press Release E38:95 - 2 March 1995

persistent underestimation of the hazards of asbestos can be partly accounted for by the fact that the asbestos industry was successful in suppressing and controlling information relating to the hazards of asbestos, particularly that evidence relating to the carcinogenic properties of asbestos (Castleman, 1990).[5] The industry were aware that asbestos might have been a carcinogen since research sponsored by the asbestos manufacturers). However, researchers have also argued that alternative evidence existed which was known to, but ignored by, state officials (Dalton, 1979, 1995a; Castleman, 1990; Wikeley, 1992, 1993; Greenberg, 1994).

What needs to be understood, then, is the process by which the 'evidence' of certain groups is preferred over that of others and accorded the status of 'truth'. Certainly in the case of asbestos, its is clear that the asbestos industry was remarkably successful in securing official acceptance of, first, their own (mis)assessment of the hazards of asbestos exposure, and second their assessment of what control measures were feasible. For example, in 1955 Doll's study establishing a link between asbestos exposure and lung cancer was published (Wikeley, 1993: 115). However, no change was made to the US asbestos guidelines despite the fact that the carcinogenic properties of asbestos were accepted in the UK. In deciding *not* to lower the threshold limits applying to work with asbestos, the American Conference of Governmental Industrial Hygienists (ACGIH) relied on the representations of Anthony Lanza, consultant to Johns-Manville and other asbestos companies, who somehow managed to persuade the Chairman of the Committee on Threshold Limits that asbestos acted as a carcinogen in England but not in the United States. Egilman and Reinert state that,

> Lanza managed to create a controversy around a relationship that most scientists accepted. This artificial controversy and ACGIH's indifference to evidence concerning the carcinogenic potential of asbestos prevented downward revision of the asbestos guideline.
>
> (1995: 689).

Thus government agencies and officials were willing to accept the research conclusions of industry scientists and doctors, even when those conclusions

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[4] Press Release E18:95 - 6 February 1995

[5] Asbestos manufacturers were aware that asbestos was likely to be a carcinogen from 1943 when industry-sponsored research found an 81.8 *per cent* incidence of lung tumours in mice exposed to asbestos as compared to an incidence of only 18.8 *per cent* amongst mice exposed to other dusts (Wikeley, 1993: 116).

contradicted accepted scientific knowledge. Industry has also been able to influence the nature and level of controls specified in legislation. For instance, Wikeley (1992) relates how, during government consultations with industry and the TUC prior to introducing the 1931 asbestos regulations, the TUC recommended that the regulations should be extended to cover workers involved in the removal of old boiler insulation containing asbestos. The TUC made this suggestion because they had first hand knowledge of a shipyard worker who had developed asbestosis from stripping lagging. However, the Factory Inspectorate had already decided that such work would be excluded. In making this decision they were influenced by the shipbuilding industry's insistance that it was impossible to install exhaust ventilation when reconditioning a ship. An internal letter to the Chief Inspector of Factories stated:

> You will notice that certain exceptions are made as regards application, in particular the work on board ships has been found to present such great difficulties in the way of adequate protection that we have thought it better to omit it altogether from the present Regulations pending further enquiry as to what action can be taken.
>
> (Cited in Wikeley, 1992: 370).

Since, on the basis of this previous experience, the Factory Inspectorate thought it inevitable that industry would raise objections to the application of the regulations to the shipyards, it was decided to postpone a decision on the possible hazards to this group of workers. Thus, simply anticipating industry's objections had the effect of convincing regulators that certain trades would have to remain unprotected.

Wikeley (1992) argues that as protective legislation the 1931 regulations failed in three crucial ways. First, they were based on a premise that only heavy and prolonged exposure to asbestos dust posed a risk to health. Early warnings during the 1930s about the possible carcinogenic properties of asbestos were ignored (Wikeley, 1993: 114-115). This was significant, since had asbestos been recognised as a carcinogen this would have raised the question of whether there was in fact a 'safe' level of exposure to asbestos. Second, the regulations did not protect *all* workers exposed to asbestos, but only those employed in the asbestos factories. This was despite the fact that reports in the medical literature showing a link between exposure to asbestos and lung cancer during the 1940s included studies of all types of workers and not just those working in the manufacturing industry (Ozonoff, 1988: 203). Third, Wikeley (1992) points out the regulations failed to control the risks of environmental

exposure.[6] This 'gap' was also based on an assumption that only heavy and sustained exposure to asbestos caused lung disease. Wikeley goes on to argue that these failures were partly caused by the fact that official researchers did not 'examine the risks to workers in other trades' (1992: 373). Thus they were never forced to recognise the nature of the risks to other workers and the fact that these risks existed at a much lower level of exposure than previously thought. In subsequent decades, although it rapidly became clear that risks to workers in other trades did exist, and that a previous reliance on data obtained from a cohort of workers employed in just one type of work had led researchers to make a series of false assumptions, these mistakes were repeated in official research on asbestos hazards up until the 1990s.

In 1985 Richard Doll and Julian Peto undertook research for the HSE which, whilst it confirmed that no safe limit exists for exposure to asbestos, predicted a peak of 2,000 to 3,000 deaths per year from ARDs occurring sometime in the 1990s. After this, they predicted that the death rate would drop as a consequence of the tighter controls that were being proposed (London Hazards Centre, 1995).[7] The *Sunday Times* reported these predictions under the headline: *Asbestos Panic Can Stop*. However, in 1995 Peto was forced to revise these estimates. Research undertaken by Peto and others at the Institute of Cancer Research for the HSE showed that the death rate of men dying from mesothelioma had continued to rise, and his new projections indicated that this would reach a peak of between 2,700 and 3,300 male mesothelioma deaths annually in 2020 (Peto *et al.* 1995). Since it is estimated that there are about two asbestos-related deaths lung cancers for every one mesothelioma death, this means that the ARDs death rate will be somewhere between 5,000 and 10,000 per year by 2025 (Dalton, 1995a). Explaining why previous research has underestimated the continuing threat posed by asbestos to such an extent, Peto *et al.* (1995) explained that UK estimates of risk from working with asbestos had been based on the incidence of ARDs contracted by workers in the production industries only. In other words, workers in the construction industry, for instance, who had low or intermittent exposures had not been studied. An HSE scientist justified this methodological 'myopia' by stating that it was 'in part due to the difficulty in monitoring episodic exposures, where it must be known in advance that the worker will be disturbing an

[6] That is, those risks arising from exposure to asbestos dust other than within an occupational setting.
[7] And that were eventually introduced in the 1987 regulations.

asbestos containing material and the equipment to sample must be in the right place at the right time'.[8]

Whether or not such studies present particular methodological difficulties, the subsequent decision to ignore the risks that these workers might have been facing was a political decision and not a scientific one. It was, moreover, a dubious decision at the very least since there was evidence *from the HSE's own data source* that the 1969 Asbestos Regulations only extended to a *minority* of those workers actually at risk. Peto *et al.* themselves refer to this evidence in their paper:

> In 1971, the Medical Services Division of HMFI established a prospective mortality study of men in a limited number of workplaces which were covered by the 1969 Asbestos Regulations, subsequently extended to cover most fixed workplaces, and in 1986 to all individuals having statutory medical examinations under the Asbestos Licencing Regulations. 183 mesothelioma deaths occurred in this cohort from 1971 to 1991. Over the same period. 10,985 mesothelioma deaths occurred nationally; this figure suggests that the vast majority of workers actually at risk from asbestos were not employed in occupations where this risk was recognised.
>
> (1995: 538).

However, what Peto *et al.* fail to make clear, is that the figure of 10,985 deaths comes from the HSE's own Mesothelioma Register which lists all deaths for which mesothelioma is mentioned in the death certificate and which the HSE had maintained since 1968. Since mesothelioma is almost exclusively associated with exposure to asbestos[9] the discrepancy in the numbers involved should have alerted government scientists to the limited nature of their investigations as well as to the inadequacies of the legislation then in force. As campaigners from the UK work hazards movement point out: "For 20 years the HSE has only been looking closely at 1% of those at risk. They did not study the vast majority of workers dying from asbestos." (London Hazards Centre, 1995: 14). Thus, the HSE did not 'discover' the nature of the risk associated with low and intermittent, or infrequent, exposures simply because they decided not to look for it, even though it should have been clear

[8] HSE Press Release E133:95 - 12 September 1995.

[9] There is thought to be a 'background rate' of one or two cases per million people per year (Wikeley, 1993: 128). However, it is arguable that mesothelioma is *exclusively* caused by asbestos, but that some mesothelioma deaths are not recognised as having been caused by asbestos simply because the source of exposure could not be discovered.

that workers were dying from such exposures. This failure to investigate the risks of asbestos exposure to a large number of workers has also had consequences for the public, since most environmental exposures will be limited, or occur at a low level, and the HSE has failed to investigate the risks of such exposures. Yet this approach to industrial and environmental hazards is not exceptional. It has been called a 'generation game' in which new chemicals (or even old chemicals) are assumed to be safe until enough workers have died to satisfy the standard of proof required by governments before they will act. Even when evidence of a health hazard begins to emerge, the HSE will give industry the 'benefit of the doubt'[10] over workers and communities. Thus Jenny Bacon has stated:

> [The] concept of prudent avoidance, ie that it is better to be safe than sorry, had taken hold in a number of American States... In occupational health we take a different approach. Whilst we cannot wait for absolute scientific certainty, we do at least require reasonably robust scientific evidence of harm and a plausible cause/ effect relationship. But the strength of the evidence of harm needed depends on the scale and severity of the risk and on the costs of remedial action.
>
> (Bacon, cited in *Hazards*, 60, Oct/ Nov 1997: 2).

Thus it is clear that the HSE and government require 'robust evidence of harm', as opposed to robust evidence of safety. But even this may be overstating the degree of protection afforded to workers and the public from potentially toxic substances, since the HSE and government researchers appear to ignore certain kinds of evidence, even when it is compelling. For instance, the Society for Prevention of Asbestosis and Industrial Diseases (SPAID), a campaigning and research organisation, argued in 1982 of the impending reduction in the occupational exposure limits for asbestos that: "SPAID does not accept that to halve the amount of dust which workers are allowed to inhale will halve the number of cancer deaths... cancer, especially mesothelioma, attacks those with slight, short and/ or intermittent exposure to asbestos, and non-smokers and the very fit do not escape".[11] SPAID supported this claim by reference to a study undertaken by them at Hackney Hospital in 1982. This study identified that young electricians, carpenters and roofers using asbestos cement were suffering from

[10] See also Abraham (1995) for evidence of the way in which the Medicines Control Agency in the UK and the Food and Drug Administration in the US routinely given the pharmaceutical industry 'the benefit of the doubt' in cases where uncertainty exists around the safety of a particular drug product.
[11] *New Statesman* 24/09/82.

mesothelioma. This evidence was presented to Parliament in 1982.[12] The epidemiologists Doll and Peto were, at that time, aware of SPAID's research and in contact with representatives from the asbestos industry about it. A Mr Marks of TBA Industrial Products wrote to Professor Doll that:

> SPAID, in pursuit of their laudable objectives frequently appear to adopt an uncompromising and extremist stance without taking into account current conditions in the asbestos industry today, nor the overall balance of risk in modern industrial society (13/10/1982).[13]

Doll and Peto replied (rather less circumspectly):

> Far from being 'more up to date' or 'more accurate and detailed', SPAID's information is so biased and selective that it is worthless for the purpose of assessing the magnitude of the risk in particular occupations. (19/10/1982).[14]

Tragically, SPAID was proved correct. Peto *et al.*'s (1995) study shows that those at highest risk between 1971 and 1991 were carpenters, electricians, plumbers and gas fitters. Yet despite SPAID's and other warnings (*see below*) during the 1980s, Peto expresses "surprise" at their findings, and states that "Building workers ought to be a bit more paranoid than they are now" (cited in Webb, 1995).

Asbestos Exposure in the Construction Industry

It is now officially acknowledged that the next 'wave' of asbestos-related deaths will result mainly from exposures to asbestos dust occurring in the construction industry now. Construction workers involved in the repair, maintenance and demolition of buildings are now amongst those most at risk of uncontrolled exposure to asbestos dust. This is extremely worrying, as the present character of the construction industry – the extensive use of sub-contracting, the fact that workers and firms move from site to site, the low levels of unionisation – mean that it is particularly hard to regulate give the current under-funding of the Health and Safety Executive. In addition the construction industry already has a poor health and safety record, with high rates of

[12] See *Hazards*, 50, Spring 1995: 8-9.
[13] Reproduced in London Hazards Centre (1995: 18).
[14] Reproduced in London Hazards Centre (1995: 18).

death and injury. For example, the construction industry has the highest fatality and injury rate per worker. In 1996/97 the combined fatal and major injury rate for construction workers was 411.2 per 100,000 employees, as compared to 207.7 per 100,000 employees for manufacturing and 319.3 per 100,000 employees for the extractive and utility supply industries (HSC, 1998).

After the First World War, as manufacturers developed more uses for asbestos, the construction industry rapidly became the main consumer of asbestos products, accounting for 80% of raw imports (Wikelely, 1993: 17). Asbestos was widely used in building materials during the 1950s, 1960s and 1970s. Up to 3 million tons of asbestos fibre was imported into this country between 1925 and 1980 and there is over 1 *billion* tons of asbestos roofing material in the UK (TUC, 1995). Homes, public buildings, schools, hospitals and industrial premises built at this time generally contain a number of asbestos products. Moulded asbestos-cement containing chrysotile was, until recently,[15] used for cold water tanks, external rainwater pipes, guttering, decking and roofing tiles, lining under eaves and flue pipes. Asbestos insulating board was used for fire protection, heat insulation, ceiling tiles and as a building board.[16] Asbestos insulation blocks, insulating board and asbestos paper have been used in some warm air heating systems. Asbestos insulation board and asbestos-cement were sometimes used to line heater cupboards and ducting. Less commonly, asbestos was also used in plastic floor tiles, cushion flooring, textured plasters and paints. Asbestos lagging was used for insulating pipes and boilers. Sprayed asbestos was used for protecting structural steelwork and was used in some steel-framed houses and in the communal areas of flats.[17]

The main use of asbestos was the use of chrysotile ('white asbestos') in cement products. 70 *per cent* of asbestos in Western Europe has been used for reinforcing cement in construction materials. Cement is mixed with between 10 and 15 *per cent* asbestos fibre to make lightweight, but extremely durable, products. Its principle advantage for construction companies was its cost: it saved them money on the amount of cement used and decreased transportation costs because of its lighter weight. Ironically, it was also the fact that employees in the construction industry worked so frequently with *asbestos cement* products (as well as their intermittent

[15] On 24 November 1999 the new use of chrysotile and products containing chrysotile became illegal throughout the UK.
[16] Asbestos insulation board was manufactured in the UK up until 1980, and insulation board containing asbestos has been impored into the UK from other countries since 1980.
[17] "Asbestos In Housing – Advice to Householders". Pamphlet produced by the DoE. D5NE

exposure) that allowed regulators, employers and the asbestos industry to argue that there was little risk involved in their work. This is because asbestos cement has traditionally been treated by the HSE and by industry as a low-risk material for the following reasons.

First, a consensus within the literature that the two amphibole forms of asbestos - crocidolite ('blue' asbestos) and amosite ('brown' asbestos) - present greater risks in relation to the development of mesothelioma allowed industry scientists to argue for three decades[18] that chrysotile did not cause mesothelioma. This interpretation of the data allowed the asbestos industry to peddle the myth that white asbestos is 'safe' with respect to the risk of developing cancer (Wikeley, 1993: 130). However, such an intepretation has been disproved by subsequent studies. Wikeley reports that, 'Firm evidence that chrysotile can cause mesothelioma has now appeared in Australia in a study of all mesothelioma deaths between 1980 and 1985... This identified 25 out of 221 of the cases studied in which there was no amphibole asbestos content in the lung' (1993: 131). Similarly a 1982 HSC report by Doll and Peto states: 'The four types of asbestos that have been used in industry to any material extent, the common chrysotile... and the three amphiboles, all produce pulmonary fibrosis, cancer of the lung, and mesothelioma of the pleura and peritoneum in animal experiments'.[19] Furthermore, the association of chrysotile with asbestosis and lung cancer has long been established. Thus, it is a nonsense to represent chrysotile as 'safe', and a serious distortion of most people's perception of acceptable risk to represent chrysotile as 'safer' than amosite or crocidolite. In a strict sense there may be a smaller risk of developing mesothelioma after exposure to white asbestos, but this does not mean that people will happily and voluntarily take that risk.

Second, it is argued that asbestos cement is a low risk material because the asbestos fibres are 'locked in' and therefore the risk of fibre release is much less than in the case of insulation material which is extremely friable. However, this is only the case so long as the material is undisturbed, and never applied to its use in the construction industry where it would be cut, drilled, broken and crushed. Moreover, the official treatment of asbestos cement as a low risk material is disputed by campaigning groups and undermined by some research. For instance it is reported in the *Asbestos Hazards Handbook* that "Evidence using electron microscopes shows that asbestos cement products release fibres into the air under normal wear and tear conditions. A

[18] Between the 1950s and the 1980s.

1980 study showed that the asbestos in the air within 20 inches of a 17-year-old weathered asbestos cement tile, was ten times higher than the background level found 100 metres from the same wall," and, "At Ackland Burghley School, London, asbestos boards were gnawed by vermin. There were fibre levels of 0.5 fibres/ ml, 50 times the clearance limit and 1,000 times the government's estimated background level." (London Hazards Centre, 1995: 101-102).

Notwithstanding Peto's assertion that building workers ought to be 'a bit more worried than they are', building workers *had* expressed their concerns about the effects of asbestos in the 1970s. But their fears were dismissed both by the regulators and by UCATT's Executive:

> In 1976 the building workers' trade union, UCATT, passed an emergency resolution that called for a complete ban on asbestos use. The resolution was moved by Vic Heath, then convenor of Camden Direct Labour Organisation (DLO) Shop Stewards Committee... It was prompted by information about the deaths of South African asbestos miners. It was not well received by the UCATT Executive at that time. They brought in a speaker from the Health and Safety Executive who trotted out the official myths of the day: some asbestos is not so dangerous; there is only about 2% in most construction products; it is sealed in;...
>
> (London Hazards Centre, 1995: 16).

This history echoes events that occurred in relation to attempts by dockers to ban the handling of raw asbestos in the docks ten years before. Dalton (1979) relates how in 1967, following the 'banning' of asbestos in Surrey Docks, TGWU dockers working in the London Docks moved to ban the handling of asbestos unless it was palletised and wrapped in polythene. Workers had previously handled asbestos bagged in hessian which created huge amounts of dust. The dockers had become concerned by reports of deaths from asbestosis amongst work-mates and also at news that women and children living near Rhodesian mines were dying from asbestosis (Dalton, 1979: 148). TGWU officials brought in the TUC's Chief Medical Adviser, Dr Robert Murray, to a meeting with the London dockers to reassure them that the asebstos was safe. Dr Murray and the Port Medical Officer then produced a leaflet stating that methods for the handling and storage of the raw asbestos fibre in the docks presented

[19] *Science*, 1982, 216: 1410.

'no unacceptable risks' and that, 'Dockers may proceed with confidence in the handling of asbestos cargoes' (Dalton, 1979: 90). This leaflet was published by the Asbestos Information Committee, an organisation funded by, and representing the interests of the asbestos industry.

What is interesting about these cases is that it is clear that workers' knowledge and fears were not simply dismissed, but 'managed' by the HSE, senior trade union officials, scientists, doctors, employers and the asbestos manufacturers who all attempted to reassure workers that their fears were unfounded. However, whilst government scientists refused to credit the arguments of workers' representatives and campaigners in the 1980s, trade unions were beginning to take workers' fears for their health seriously and started to produce advice for members who might be exposed to asbestos. For instance, in 1982 UCATT launched a campaign against the use of asbestos based materials in the building industry and issued leaflets to members giving them information on how to recognise asbestos products, dust concentrations associated with certain construction processes and official guidelines and legislation. This leaflet states that:

> [Asbestos cement] has been extensively used in the construction industry for many years. In spite of its potentially high risk to the health of the construction worker, asbestos cement is still widely used in new construction work. *It is also a hazard in maintenance, refurbishment and demolition work.* (Emphasis added).[20]

Another leaflet issued about the same time advises UCATT members not to use asbestos in any of its forms, to negotiate the use of safe substitutes and to contact a union representative immediately if they suspect that a product they are working with contains asbestos.

Thus, whilst the risks posed by asbestos to construction workers appear to have taken government epidemiologists and the HSE by surprise, workers and trade unionists have recognised and been attempting to protect themselves from the risks of asbestos for the past thirty years. The HSE sought to explain their neglect in terms of the 'difficulties' of assessing the nature of the risks to these workers. However, there is ample evidence that the HSE had some cognisance of these risks in the early 1980s

[20] UCATT 'Information Package on Asbestos in the Construction Industry', No 1., 1984.

but failed either to act on this knowledge or warn workers. In 1984 the HSE produced a number of hard-hitting posters, with the caption "*Goodbye Dusty*" over a picture of a skull wearing a construction worker's hard hat. Under this picture was a warning that: "Asbestos dust can kill" followed by advice to stop work if workers think they are disturbing the material. The HSE intended to circulate these posters to every building site in the country. However, the poster was withdrawn following pressure from industry. An HSE spokesperson informed the *Hazards* magazine that: "We believe the poster could be misleading".[21] Instead the HSE produced a much less dramatic 'asbestos alert pocket card' in 1985 as part of their 'Site Safe Campaign'.[22] Once again, then, the threat of a known health risk is minimised, and industry's interests prioritised over those of workers.

It is beyond the scope of this thesis to attempt to explain these events. However, there are a number of points that can be highlighted in this history. First, the HSE, government officials and scientists have consistently failed to recognise the real nature of the risks posed by asbestos materials. In doing so, not only have the HSE and government officials ignored research, and *their own data*, pointing to a risk of disease even in the case of low or intermittent exposure, they have also actively intervened to reassure workers by understating the risks of asbestos, by making spurious distinctions between 'types' of asbestos product and by reference to their own flawed research. In doing this, they clearly, and sometimes consciously, served the interests of industry. In fact, where scientific uncertainty existed industry was, without fail, given the 'benefit of the doubt'. As will be seen, a similar pattern can be discerned in the response of the regulatory bodies involved in the case-study discussed below. Attempts by residents on the estate to define the hazards they faced as unacceptable, and to censure those companies that were responsible for the construction work were countered by the efforts of the HSE, the local Environmental Health Department, the local council and the companies on the site. Central to the residents' struggles was an attempt to mobilise these authorities to clearly define the hazards that they faced as law violations and to force the regulators to accept their account of events on the estate.

THE REDEVELOPMENT OF FIRELANDS WOOD ESTATE

[21] *Hazards*, 2, January, 1985

Firelands Wood was a council estate in the south of England, consisting mainly of pre-fabricated concrete houses built in the 1950s and 60s as a 'quick-fix' solution to the post-war housing crisis. As with other pre-fabricated houses, the majority of homes on the estate had developed major structural faults. To repair the houses would have cost the local Borough Council £12 million, so a decision was made, that was also in line with current Government policy,[23] to sell the land to housing associations for redevelopment. The redevelopment was declared by the Council to be one of the biggest social housing projects in the South and received considerable attention from the local press. It became something of a showpiece for the local council and was presented as evidence of the council's commitment to providing 'good quality affordable homes for local people to rent'[24] during East Lyn's by-election campaign.

Between 1992 and 1998 around 320 homes were to be demolished, and 530 new ones built in their place along with a new church and community centre. Because of the number of families involved, the work was done in phases over a period of 6 years, with tenants gradually being re-housed as each phase of construction was completed. The land had been divided up and sold off to four separate housing associations, which were independently developing their 'package' of land. Construction work, however, had been co-ordinated so that once each phase of work was completed residents could be moved into the new houses, and the next phase of demolition would start on the houses vacated.[25] This meant that for six years the tenants of Firelands Wood were effectively living in, or next to, a building site. I first visited the estate on 15 March 1996, four years into the redevelopment, and then again on three subsequent occasions. During these visits, I conducted interviews with a total of twenty-two residents living on the estate, and observed for myself conditions there (*see Appendix 1*). When I began my fieldwork the first two phases of the construction project had been completed, with about 200 new houses built. Whilst some residents had fears concerning the unsafe handling and disposal of asbestos

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[22] HSE 'Asbestos Alert for the construction worker', 1AC/L10 100M 1/85.
[23] Successive Conservative Governments of the 1980s and 1990s pursued housing policies which, under the auspices of promoting choice and opportunity, drastically reduced the number of homes provided by the State. As well as encouraging a rapid expansion of owner-occupiers amongst council tenants, government policy concentrated on shifting responsibility for the provision of 'social housing' from local authorities to private housing associations. (Goodwin, 1997).
[24] *Southern Evening Herald*, 02/04/94.
[25] See Appendix 2 for information regarding the organisation of the work.

during these phases,[26] events on the estate reached crisis point in October 1995 when residents involved the local media as part of an attempt to force the local authorities and regulatory agencies to respond to their concerns.

Chronology of Events

By October 1995 some residents had become increasingly alarmed that, during phase-three demolition of the old pre-fabricated houses on the estate, asbestos products in, and on the outside of houses were not being removed and disposed of safely. [27] Nearly all of the garages on the estate had asbestos cement roofs, and asbestos cement guttering and down-pipes were present on the outside of most of the houses. In addition, some residents reported that there was asbestos inside the houses as well - including asbestos insulation board in airing cupboards and asbestos cement water-tanks in the attics. The construction companies responsible for demolition on phases of the redevelopment that had been completed publicly denied that there were asbestos products inside the houses. When interviewed company management and the planning supervisors acknowledged that there were asbestos cement products on the outside of the houses, but denied the presence of asbestos *inside* the houses. However, two residents interviewed stated that this was untrue and that they knew there was asbestos insulation board in their houses. Both residents had had some experience working with asbestos insulation board during the 1970s. One had worked in the construction industry, and the other on board ships. In addition, the local reporter who first visited the estate claimed to have confirmed that airing cupboards in houses awaiting demolition were lined with what appeared to be asbestos insulation board.[28] Although I could not confirm the claims regarding the asbestos insulation, an independent investigation of one of the houses on the estate that was still to be demolished, discovered what appeared to be an asbestos cement water tank

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[26] These fears were confirmed for me when I witnessed what appeared to be substantial amounts of asbestos cement debris littering those areas of the new estate that had constituted the second and third phases of the redevelopment. Subsequent analysis of this debris by two independent NAMAS accredited laboratories confirmed that it contained asbestos.

[27] Fears about asbestos products not being removed properly were first reported by a local paper, *The Daily Herald* (31/10/95). Residents confirmed these fears during the research interviews.

[28] This was reported in his news article on Firelands Wood on 31/10/95. The reporter claimed that he had asked an Environmental Health Officer (EHO) from the neighbouring authority to accompany him to the estate. It was this EHO who recognised the asbestos insulation board in the airing cupboards. The reporter could not disclose this EHO's identity to me. (Personal Communication 22/03/96).

in the attic.[29] This tends to undermine claims by the companies, the housing associations and the local borough council (which had been responsible for contracting out demolition on the first phase of the project), that the houses had been checked for asbestos on the inside, and none found.

Moreover, it is generally known that asbestos products were commonly used as building materials at the time the Firelands Wood estate was built.[30] Building materials containing asbestos were widely used in the construction of homes (particularly system-built council housing) during the 1950s, 1960s and 1970s. The other main type of asbestos used in houses apart from chrysotile in asbestos cement, was amosite (brown asbestos) which was mainly used in insulation boards. Asbestos insulation board was used in stairways, partitions, heating ducts, airing cupboards, as fireproof panels, linings to doors and meter cupboards and in heating units (London Hazards Centre, 1995). The prefabricated houses on the Firelands Wood estate were built during the 1950s and 60s and as such it would have been usual for houses like these to have contained some of the asbestos products listed above. The fact that houses built during the 50s and 60s typically contained asbestos products is not of course proof that there were asbestos materials inside the houses on the Firelands Wood estate. However, it would mean that the houses should have been systematically checked in order to rule out the possibility. It was claimed during interviews conducted with company personnel that such a survey had been done, but, as will be seen, the evidence for this was somewhat confused and contradictory. As the regulations governing the removal of asbestos insulation are considerably stricter than the regulations governing the removal and disposal of asbestos cement, the presence of asbestos insulation board in the houses would have involved the contractors (and ultimately the housing associations and East Lynn Council) in considerably more expense.

[29] This investigation was undertaken by Bob Stokes, Regional Organiser for the GMB, who was invited to the estate by residents as an independent witness. See Appendix 3.

[30] See previous section. This was further confirmed by Alan Dalton (personal communication 25/03/96) who was at that time National Health and Safety Coordinator for the TGWU, and by Terry Jago of the Asbestos Removal Contractors Association (ARCA) who stated that it would be very unusual for houses built in the 1950s and 60s *not* to contain asbestos products. He gave as examples of products typically used: insulation board in the airing cupboards and behind gas-fires, and asbestos cement soffits, and guttering.

In order to comply with HSE guidelines[31] demolition contractors on the estate should have removed the asbestos cement roofs, pipework, and guttering by hand before the rest of the structure was demolished. To minimise the generation of fibre release, roofs should have been removed whole where possible and removed from the site to prevent them from being crushed by moving vehicles or plant. If asbestos cement sheets are old and disintegrating, and contractors are unable to remove them whole, remote demolition by machine is permitted. However, because subsequent clearance of the asbestos rubble is likely to give rise to dust concentrations that would exceed the control limits, workers should be provided with personal protective equipment including respirators. According to the demolition contractor, AG Brown Ltd's method statement[32] the stacked sheets were then placed in covered containers before being taken away to a land fill site. The method statement also specifies that during removal of the asbestos materials 'operatives [are] to spray water over the working area to minimise the dust element'.

However, residents claimed during interviews that they had watched asbestos guttering being removed from the houses, dropped and left crumbling on the ground. There was also a great deal of concern expressed over the amount of dust that the demolition work was creating. Residents stated that no measures had been taken by the contractor to suppress dust despite the fact that this was specified in the firm's method statement. One resident put a petition up in the local shop expressing concerns about the (as the residents perceived them) unsafe conditions on the estate. This was signed by a number of residents. A local parish councillor, Judith Kent, then contacted the Environmental Health Department on behalf of the residents and asked them to inspect the site. In a press release issued on the 31 October 1995, the Principal Environmental Health Officer for the Borough Council stated:

> The Environmental Health Department first became involved in the site on the 24 October following a request from Councillor Judith Kent to visit and assess the situation. An officer had a discussion with the site agent with regard to the asbestos and found that it was generally being handled satisfactorily. *There were one or two small pieces of asbestos scattered over the site and he arranged for these to be picked up immediately.* Further arrangements were made to visit the site the following day to reassess the

[31] See, Guidance Note EH36 'Work with asbestos cement', Environmental Hygiene 36 (December 1989, revised).
[32] A copy of this method statement was obtained by me. See Appendix 4.

situation. He carried out a further site inspection in conjunction with the site agent and the asbestos removal contractor and was satisfied with the situation.[33]

(Emphasis added).

Then, on Saturday 28 October 1995, a single garage was demolished by the demolition contractor AG Brown. The roof, the underside of which was lined with corrugated asbestos cement was left lying outside a resident's garden over the weekend. The demolition area was not fenced off and consequently, children from the estate had access to the area and would have been able to play on the roof and amongst the surrounding rubble. According to a local journalist who witnessed some of the events on the estate, the roof was 'shattered and crumbling'. This, according to HSE guidance, would have increased the health risks to anyone handling or coming into unprotected contact with the rubble which states that: "*the risk of fibre release is greater when the material is damaged or decaying*".[34] The law requires that principal contractors on a construction project take reasonable steps to ensure that only authorised people are allowed into any area where work is taking place.[35] Ensuring that public access is prevented is especially important if children are in the vicinity. This is acknowledged by HSE Guidance Note GS7 "Accidents to children on construction sites" (1989), which sets out some of the steps which contractors can take to exclude people from the work area. In the present case the demolition contractor had specified in his method statement that Heras fencing and caution signs were to be erected around each block of properties or structure prior to demolition. However a number of residents stated during interviews that demolition areas were not being properly fenced off. The fact that this area and a further area where demolition work was taking place had not been fenced off was witnessed by the local journalist who visited the site on 30th October. [36]This, then, was not an isolated breach of the contractors' duties to take reasonable steps to prevent public access to working areas. It was rather representative of a general site-wide failure.

On the following Monday a reporter from a local newspaper was contacted by the father of the woman whose house was adjacent to the abandoned roof. The resident's father, Mr Cole, was also a councillor for the neighbouring parish. The *Herald*

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[33] See Appendix 5.
[34] HSE Guidance Note EH36 "Work with asbestos cement"
[35] Construction (Design and Management) Regulations 1994, regulation 16(1)(c)
[36] Personal Communication with Simon Davies 22/03/96.

reporter visited the site and the next day a front-page article in the paper reported that residents feared asbestos on the site was not being removed and disposed of safely. The article also reported residents' fears concerning the asbestos inside the houses and further reported that, 'asbestos-lined cupboards were found in a row of empty houses awaiting demolition elsewhere on the site'.[37] After viewing the site, the *Herald* reporter contacted the main contractor responsible for that particular phase of work, ACE Construction Ltd., who arranged for the roof to be taken away. A spokesperson for the company told the journalist that he was "staggered" to find the roof in such a state and that, "It is incredible that it happened in the first place".[38] The Principal EHO returned to the site on Tuesday, following the *Herald* article, and relates:

> When we visited the site on Tuesday morning the matter had been resolved and there was no evidence of asbestos exposed on the site... We are satisfied that apart from the incident this last weekend, the situation is under control and no asbestos remains on the site which could be a danger to members of the public in its current situation.[39]

Despite these reassurances, the local Environmental Health Department seemed to think it advisable to contact the regional office of the Health and Safety Executive in Basingstoke, and an HSE Inspector visited the site on 3 November 1995. The HSE Inspector met with the main contractor and also questioned the demolition contractor. The firms assured the Inspector that work was being carried out in accordance with HSE guidance and that the asbestos cement products were being safely disposed of and not going through the on-site crusher as some residents believed (*see below*). Consequently, when questioned by a parish councillor, the HSE Inspector reassured her that 'precautions being taken were in line with HSE Guidance Note EH36'[40], though he admitted in a telephone conversation with her that to have left the roof lying around was 'not good practice'. He also stated that public access was 'not recommended' but that fencing was now in place to prevent access by the public, especially children living on the estate.[41] He further reassured her that when he visited the site he had spoken to a man from from the Borough Council who was carrying out environmental protection monitoring on the site. However, he later admitted to me

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[37] Davies S. 'Killer Dust Scare Row', *The Southern Daily Herald,* Tuesday October 31, 1995.
[38] Davies S. 'Killer Dust Scare Row', *The Southern Daily Herald,* Tuesday October 31, 1995.
[39] See Appendix 5.
[40] Letter to Della Andrews from JR Peters, HSE; dated 21 November 1995
[41] Notes of a telephone conversation between Della Andrews and JR Peters, taken at the time of the conversation by Della Andrews and checked with the Inspector 7/11/95

that, "environmental air monitoring is not very useful in terms of asbestos because, if you think about it, you've got 100 or so fibres around and then they're blown away... *It's actually called 'reassurance monitoring' because you never find anything, you see!*" (Interview 19/04/96. Emphasis added). Nevertheless, this 'empty assurance' was employed by the HSE inspector to contain the anxiety of residents on the estate.

The Actions of the HSE and the Environmental Health Department on Firelands Wood

Although I will be considering the behaviour of, and the role played by, the regulatory agencies on Firelands Wood Estate later in the chapter, it seems important to stop for a moment to consider their initial handling of events. Both the HSE Inspector and the EHO chose to speak only to the contractors responsible for the removal and disposal of the asbestos on the site. Research by Hutter (1993) and Bergman (1994) confirms that, whatever the official policy of the HSE with respect to investigations and inspections, the practice of talking only, or mainly, to company management is typical of HSE practice. If this is the case it seems important to consider the consequences of this practice in the present case. Neither officer spoke to any of the residents or Rodney Cole, nor did they question the reporter who stated that he had seen rows of empty houses with asbestos-lined cupboards awaiting demolition. Consequently their investigations were limited to the consideration of a single incident. Both officers were aware that accusations had been made by the residents, Rodney Cole and the *Herald* reporter which - if true - meant that breaches of the regulations governing the safe removal and handling of asbestos had been committed which were far more serious than a single incident involving the unsafe handling of an asbestos cement roof. These involved fears that there were asbestos products inside the houses; that the asbestos cement roofs and guttering had been demolished with the rest of the structure; that asbestos debris littered the estate, and (the most serious of the residents' claims) that asbestos cement was put through a crusher situated on the estate (*see below*).

Although the regulators were aware of some (or possibly all) of these fears, they chose to ignore these, question only the contractors and accept the contractors' version of events. The contractors involved whom I later interviewed insisted that the work was done in compliance with HSE guidelines. When I questioned the planning

supervisor responsible for putting together the pre-tender health and safety plan for that particular phase of work, he claimed that the roof incident was "a storm in a tea-cup". He represented the incident as a one-off mistake made by an operative who hadn't realised that the roof was lined on the underside with asbestos cement. He also said that it was '*only white asbestos* cement, not the blue kind like the case in Bristol,[42] and that the contractor hadn't been breaking the roof up' (Interview 20/03/96). Another planning supervisor whom I interviewed (who had no actual responsibility for that phase of work) described the event in almost identical terms, stressing that it was 'only' white asbestos cement, that the HSE had inspected the site and were wholly satisfied and that the whole thing had been blown out of all proportion. (Interview 08/05/96).

Putting aside the question of whether the incident was a genuine mistake on the part of an individual worker or not, there were a number of residents who had witnessed garages, with their roofs still on them, being demolished with a excavator. There were also residents who witnessed guttering and down-pipes being taken down by hand and then dropped to the ground and left there until they were stockpiled with the rest of the rubble for removal to a crusher situated on the estate.[43] The local Borough Council were questioned by the *Herald* reporter about asbestos materials in the houses and claimed that an inspection would be carried out. However, none of these witnesses were questioned by either the HSE or by the EHO during their investigations. In terms of 'conventional' crimes this would be like the police asking someone suspected of committing an offence whether s/he had broken the law and then not attempting to verify their denial. Police suspects are rarely accorded such a degree of credibility. Had either of the inspectors chosen to question any of these potential witnesses, they would at least have been able to confirm that significant amounts of asbestos rubble littered the estate – not just on the areas where construction work was under way, but also in areas where work had been completed two years previously.

Following their investigations the HSE Inspector and the EHO acted to reassure residents and the local news media that the incident of the asbestos roof left lying on

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[42] The planning supervisor was referring to the case of the demolition contractor, Roy Hill, the first contractor to receive a prison sentence which was not a suspended sentence for breaching legislation under the Health and Safety at Work Act 1974. He had, in fact, violated the Control of Asbestos at Work Regulations 1987

[43] This information comes from interviews with residents conducted during the fieldwork on 15/03/96 and on 18/03/96.

the ground for a weekend was a one-off mistake on the part of the contractor and that all other work had been carried out in accordance with legal requirements. In a letter to the Clerk to the Parish Council, David Ralph - the Principal EHO who visited the site - wrote:

> I refer to our recent telephone conversation regarding this matter and can confirm that the report which appeared in the *Evening Herald* on 31 October greatly misrepresents the situation... We will, of course, continue to monitor the situation and deal with any problems that may arise, but we do not anticipate that any further action on our part will be required.[44]

It is not clear how the Environmental Health Department could have established that the allegations contained in the news report were 'a misrepresentation' since they had spoken only to the contractors on the site – unless of course we take the position that contractors are incapable of 'misrepresentation'.

The HSE Inspector also spoke to Della Andrews, a parish councillor, following his visit to the site. She was told, and he later confirmed in a letter, that when he visited the site the work was being carried out in accordance with HSE guidelines. He also assured her that asbestos cement products were not going through the crusher and that both the demolition contractor and the main contractor with overall responsibility for the work 'had good reputations and were fairly well known.'[45]

If we ignore the fact that the regulators' investigations were inadequate in the sense that there was evidence from concerned parties which they neither followed up nor took into account, then the HSE and the Environmental Health Department may have been justified in reporting that it appeared to be a one-off incident. However they went further than this, going to some lengths to minimise the significance and seriousness of those breaches that they did acknowledge had occurred. When the garage had been demolished the area was not fenced off. This was described by the HSE Inspector in his conversation with Della Andrews as 'not recommended'. It seems extraordinary to describe as 'not recommended' such a clear and potentially hazardous breach of health and safety regulations. It must be remembered that the construction work was being carried out in the middle of a housing estate with

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[44] See Appendix 6.
[45] Notes of a telephone conversation between Della Andrews and JR Peters, taken at the time of the conversation by Della Andrews and checked with the Inspector 7/11/95.

families living literally next door to the sites being demolished. The lack of fencing therefore created an extremely serious and high risk of injury or death, particularly for children living on the estate. In relation to the roof left lying around, the inspector stated that this was 'not good practice'.

Statements made by the EHO appear equally unjustified, and are difficult to understand unless we explain them in terms of an attempt to minimise the significance and dangers of the uncontrolled asbestos exposure on the estate. In the press release issued by East Lynn Borough Council's EHO it is stated that, "An officer had a discussion with the site agent with regard to asbestos and found that it was generally being handled satisfactorily. *There were one or two small pieces of asbestos scattered over the site* and he arranged for these to be picked up immediately." According to Arthur Mullin of the Thermal Insulation Contractors Association (TICA), if pieces of asbestos cement were lying around the site this state of affairs was unsafe and unacceptable.[46] Similarly, Terry Jago of the Asbestos Removal Contractors Association (ARCA) stated that, by law, contractors should have removed "all traces of the asbestos cement. It is not acceptable to remove just 95% of it, every last bit should have been cleared away." He went on to say "the danger, especially with small pieces, is that they get ground down and that kids can pick them up."[47] Furthermore, the demolition contractor (who held an asbestos licence) should have been aware of this. HSE Guidance Note EH36 "Work with asbestos cement" states that "At the end of the shift, the work area should be cleaned of any asbestos dust or debris. In particular, waste and debris must be cleaned up and taken for disposal as soon as possible. Fine debris or waste liable to generate dust should be placed in suitable closed containers which prevent the escape of asbestos dust."

Given this consensus within industry and amongst contractors' associations, we must ask why East Lynn's Environmental Health Department represented this breach of the regulations in such an understated way – minimising the risks to the residents of Firelands Wood. It must also be asked why the EHO was able to state with such confidence that asbestos on the site was 'generally being handled satisfactorily', when the presence of pieces of asbestos cement debris lying around the estate - and witnessed by the EHO – was proof that asbestos was not being disposed of properly. Furthermore it is not sufficient to say that asbestos is 'generally' being handled

[46] Personal communication 20/3/96

satisfactorily. The expectation should be that *all* work is being carried out properly with the least risk possible to workers and residents. A question arises as to whether the local authority discharged their legal duties here. The statutory nuisance provision (section 79) of the Environmental Protection Act 1990 places a duty on the local authority to inspect for statutory nuisance and take such steps as are reasonably practicable to investigate complaints. It seems doubtful that simply questioning a site agent would constitute 'taking such steps as are reasonably practicable to investigate' the residents' complaints. Furthermore, there would be a prima facie offence under section 33 (which relates to 'keeping' or 'treating' as well as 'disposing' of waste) committed by the demolition contractor on the estate. There would also have been an offence committed under the Control of Asbestos at Work Regulations 1987, regulation 12, which places on contractors a 'duty to prevent or reduce the spread of asbestos'. However, no formal regulatory action was taken by either the HSE or the EHO against any of the companies over the contamination of the estate with asbestos debris. Moreover, this pattern of inadequate investigation, and the minimisation and distortion of regulatory violations was repeated throughout the research of this case study.

The Nature and Extent of the Health Hazards on Firelands Wood Estate

The following data was obtained mainly through interviews with twenty-two residents on the estate, and through interviews with company management. However, I visited the estate on two further days and witnessed some of the hazardous conditions faced by the residents. I also observed for myself the extensive contamination of the estate with what appeared to be asbestos cement. Samples of this debris were sent to a NAMAS accredited laboratory, which confirmed that they were pieces of asbestos cement.[48]

General Hazards

Residents concerns over unsafe conditions on the estate were not limited to their fears that they had been exposed to asbestos. As previously stated, demolition areas had not been fenced off prior to the article appearing in the Echo. A number of residents also complained about the traffic hazards on the estate. Pavement has been dug up, including the main pavement down to the school, so mothers were forced to walk in

[47] Personal communication 25/3/96

the road (twice a day on schooldays) with children and pushchairs. Nor were the roads which residents had to walk along fenced-off to create a temporary path, or in any way separated from site traffic using the roads. Concerns were also expressed over the speed with which lorries were driving through the estate, especially when parents and children were forced to walk in the road. Even when this was not the case, residents stated that lorries frequently had to drive up onto the pavements to pass each other on the roads. There was a general feeling expressed by residents that the fact there had not yet been an traffic accident was down to good luck rather than good management.

Residents also spoke of injuries and ill health directly resulting from the construction work carried out on the estate. One woman fell down a trench dug into the pavement when she was coming home one night. The trench had been partially covered by a metal sheet which was not fixed into place and which she could not see because it was dark. There were no cones surrounding the hole or other warnings to residents. This woman suffered a fairly serious wound to her leg as a result of this fall for which she was prescribed a course of antibiotics. The Council were immediately informed and arranged for cones and some fencing to be put around the trench. However, this again forced residents off the pavement and into the road, and again no provision was made to separate the area they had to walk in from the vehicles driving through the estate. The trench had been dug to accommodate live electrical cables coming from an electrical sub-station situated a few meters from the pavements. Although the area of the trench which had been cut into the pavement was fenced-off, the electrical cables (laying exposed in the trench and covered with water) and the nearby generator had not been fenced-off and were easily accessible to children.[49]

Several residents described how the windows of houses were smashed in before demolition. This is normal practice, but because demolition areas had not been fenced off and the broken glass not cleared away, a young boy playing there had badly cut his foot. As discussed earlier, the amount of dust created by the construction work, and the failure to take any simple precautions whatsoever, caused serious problems for a number of residents. This was particularly so for asthmatic children whose condition, according to their parents, was seriously aggravated.

Asbestos Exposure on Firelands Wood Estate

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[48] See Appendix 7.

In relation to fears over the unsafe management of asbestos on the estate, twelve out of twenty-two of the residents interviewed described various incidents that suggest residents' fears were wholly justified. There are, of course, ways in which the accuracy of the residents' statements could be challenged or undermined. First, it could be argued that residents could not have been watching the contractors on site the whole time. So, for instance, when residents state that the demolition contractor failed to remove and dispose of asbestos cement products separately from the rest of the demolished structures, the contractors might counter that residents simply didn't see the lorry which came to remove the asbestos roofs separately from the other waste materials. Second, it could be argued that residents would not have known (or would not have known precisely) what the contractor ought to have done to comply with health and safety legislation and therefore residents were liable to misinterpret, or misunderstand the significance of what they saw. There is a degree of truth to this claim. For instance, a number of residents asserted that demolition workers were not wearing any special personal protective clothing, and believed that this constituted a breach of the regulations. However, guidance note EH36, which provides guidance for work with asbestos cement, states: "Where exposure is low, but still liable to lead to deposit of significant quantities of asbestos, perhaps through rubbing contact with wet or friable material, industrial work clothing, such as jackets and overalls will be adequate." Thus, if all the work had been carried out as stated by the contractors then, according to HSE guidance, there would have been no need for workers to wear special clothing or respirators. The demolition contractor's method statement stated that all guttering and roofing could be removed whole and that there would be no sawing or drilling of the material. If this was the case then, according to regulatory guidance, the risk of fibre release was small. Furthermore, the Contracts Manager of the demolition company, AG Brown, stated positively that every roof workers had to remove could be removed whole.[50]

However, it seems extremely unlikely that most of the work could have been carried out in this way. The roofs and guttering on the estate would have been between 30 and 40 years old and it was therefore likely that a number of roofs would have crumbled when workers attempted to remove them. On one visit to the estate I inspected a number of garages which had not yet been demolished. The asbestos cement roofs on these garages were broken and crumbling at the edges. Furthermore,

[49] This was witnessed by me on both of my visits to the estate.

this was witnessed and acknowledged by the HSE inspector who had visited the site, and who commented on the fragile condition of the roofs (*see below and footnote 73*). Furthermore, laboratory analysis of the fragments of asbestos cement from roofs and guttering that littered the estate confirms the old age of the samples. It is stated at several points[51] that pieces appeared 'weathered', and that some fragments contained a 'higher concentration [of asbestos fibre] than the 10-15% typical of UK production *over the last 30 years*'. Finally it is stated that analysis revealed some pieces to contain amosite (or 'brown') asbestos which, according to the HSE guidance note, is only found in old asbestos cement products.[52]

A number of consequences flow from the old and deteriorating state of the asbestos cement materials. In the first place, given the fragile condition of the roofs, it is highly likely that a number of them would have broken as workers attempted to remove them. In considering, therefore, what ought to have happened on Firelands Wood, we should refer first to guidance note EH36 which states:

> The risk of fibre release is greater when the material is damaged or decaying. The extent of dust release depends on the nature of the work. Simple tasks with hand tools on new asbestos cement products will usually create exposures well below the control limits. More extensive work on worn, crumbling or damaged products can cause higher exposures which may exceed them.

If control limits are liable to be exceeded, note EH36 states that, 'Respirators should be worn' and that 'Workers should be provided with protective clothing'. Second, note EH36 states that some tasks are likely to create a greater risk of contamination, including: 'work on products containing crocidolite *or amosite*'; 'work on asbestos cement which is *old, brittle, liable to break* or whose surface has become powdery'; and work involving the '*breakage* of large quantities of asbestos cement'. In such situations 'extra precautions should be taken', and contractors must:

> Mark the work area with warning signs and segregate it to prevent non-asbestos workers approaching. Where the control limits are liable to be exceeded, the notices should say that the area is a 'respirator zone' and RPE

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[50] Personal communication 20/03/96.
[51] See a copy of the report contained in Appendix 7.
[52] The further significance of the presence of amosite in the samples will be discussed below.

must be worn in it. If the action level is liable to be exceeded the area should be identified as an 'asbestos area'. In either case employers should not permit people who are not engaged in the work to remain in the area.

Finally, with respect to the removal of asbestos cement roofs that were liable to break, note EH36 states:

> Remote demolition by machine, such as crane and ball, pusher arm or deliberate collapse may be used. Careful remote demolition gives rise to low dust concentrations of about 0.1 f/ml, but subsequent clearance may result in much higher concentrations of more than 1 f/ml.[53]

During subsequent clearance, therefore, material would need to be sprayed with water to reduce dust and workers would have to be provided with personal protective equipment and respirators.

Thus, when residents observed that workers were not provided with respirators or protective clothing, and that there were no labelled or sealed containers into which asbestos waste was being put,[54] they were probably correct in assuming that contractors had broken the law and failed to adequately protect their workforce. However, this was not because they had detailed knowledge of HSE guidelines, and so it does not address either the argument that residents were not watching the whole time, or the argument that residents could not really understand the significance of what they were watching. There are, however, a number of points to be made which may answer these arguments. First, residents had been alerted to the fact that asbestos was not being disposed of safely from the presence of asbestos cement debris on the estate, by the petition which was put up in a local shop and finally, after an asbestos roof was left outside one resident's house and the reporting of this incidence in the local papers. Residents living across the roads from areas in which demolition work was being carried out were therefore observing that work closely. Four of the residents interviewed who stated that guttering and roofs were not being removed

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[53] The 'clearance level' for members of the public and other employees is 0.01 respirable fibres per millilitre of air. The 'control limit' for white asbestos is 0.5 f/ml averaged over any continuous period of four hours and 1.5 f/ml averaged over any continuous period of 10 minutes. Control limits would therefore likely be exceeded during clearance.

[54] Although the HSE inspector who visited the site told me that the asbestos cement waste would not have to be 'marked or labelled' (interview 19/04/96), section 35 of guidance note EH36 states that: "If waste is to be removed from a site it should be sealed in a clearly marked container labelled as required by [the Control of Asbestos as Work Regulations'.

prior to demolition lived across from, and could look out of their front windows onto, the demolition areas. Moreover, demolition work did not start on the houses opposite three of these residents' homes until *after* the *Herald* article of the 31 October. These residents were therefore aware of allegations reported in the paper concerning previous breaches, and could therefore be assumed to have some knowledge of how the contractors ought to have been disposing of the asbestos waste. There are two further facts which may be taken as independent verification of residents concerns that asbestos products were not separated from other waste, nor properly removed. First, as a consequence of growing fears on the estate regarding potential asbestos hazards, one resident filmed parts of the estate with a camcorder during initial phases of the work. The film confirms that roofs were not always being removed and disposed of legally since it shows a broken roof, similar in size and appearance to the other asbestos cement roofs that covered the garages, lying on top of a pile of rubble. Had the roof been dealt with as the demolition contractor claimed, this roof would have been neatly stacked with other garage roofs and then transferred to a covered skip for removal to a licensed site. Second, there was the presence of substantial amounts of asbestos debris on the estate which showed conclusively that demolition work on previous phases of the redevelopment was in violation of regulations governing the safe management of asbestos.

Residents' fears that they had been exposed to dangerous levels of asbestos dust centred around their belief that: asbestos cement products had been broken up and crushed during demolition by excavators rather than being removed by hand; that asbestos products (such as asbestos insulation board) inside the houses had not been separately removed and had also, therefore, been demolished with excavators; that all this work had taken place within a few feet of many of the residents' homes; that no water was used to suppress dust and that dust from the demolition of houses (including the demolition of asbestos products) was being blown into the residents homes during the duration of the demolition work; that the site was extensively contaminated by asbestos debris, including those areas where residents had been moved into their new homes; and finally that during demolition, asbestos products mixed with other rubble had been put through an on-site crusher which was situated within a matter of a hundred yards from some residents homes. These residents testified that dust from the crusher would be blown, daily, back up towards the houses - covering their cars and the insides of their houses with a white dust. For example, three residents were interviewed whose front rooms looked out onto the demolition area across the road. This work was started after the publication of the *Herald* article

on 31 October, and was carried out approximately 6 to 7 metres from their homes. The houses being demolished were those in which the *Herald* reporter claimed to have seen: "asbestos-lined cupboards awaiting demolition" and "garages with their asbestos roofs intact". At that time, the area had not been properly fenced off. It was only after the publicity in the *Herald* that the fences were put up all around the site. Residents opposite had therefore been alerted to the fact that the garage roofs, the guttering and down-pipes were made of asbestos cement.

Two of the residents stated positively that asbestos cement products were being demolished along with the houses instead of being removed and disposed of separately. One man watched workmen remove some of the guttering by hand but this was then dropped to the ground where it was left broken and crumbling:

Resident: They took the gutters off and chucked them in the front garden. Because what they did, they came and took the gutters down then they were stripping the roofs [from the houses] and just leaving the gutters in the front garden.

Interviewer: And how long would they be lying around for?

Resident: Probably two to three weeks.

This man also stated that most of the time the roofs on the sheds and garages were being demolished by a crane along with the rest of the structure. Another resident who lived a few doors down the road could not remember whether they had removed the garage and shed roofs before demolition. She did notice however that they took the guttering off first, but some of this broke up as they were removing it and then "they just chucked it all on the floor and then the bulldozers moved in and knocked the whole lot down". The third resident interviewed who lived on that road stated that:

> When they started to bash the garages down some of the roofs were still on them. They were just going in with one of those diggers. They were just bashing them down with that... All they did [before] was smash the windows. Somebody came along before, smashed the windows and boarded them up.

This resident did state that she had seen workmen try to remove some of the roofs prior to demolition, but that as soon as they touched them the roofs would crumble

and break. The asbestos rubble was then just left lying there. As stated, remote demolition is permitted under HSE guidelines. However, as subsequent clearance is likely to give rise to dust concentrations that exceed the control limits, workmen clearing the rubble by hand should have been provided with personal protective equipment and respirators and the area should have been marked with warning signs indicating that the area was a 'respirator zone'. No residents observed any warning signs or workers wearing personal protective equipment or respirators. Nor, as stated, was there any provision made for this in the demolition contractor's method statement. If broken cement sheet is gathered by mechanical means HSE guidelines state that it should be well wetted to minimise fibre release. Again, residents state that no water was used to suppress dust during demolition. HSE guidance note EH36 also advises that "broken asbestos cement sheet should not be bulldozed into a pile" and that "fine debris or waste should be place in suitable closed containers... larger pieces... are best disposed of by careful transfer to covered lorries or skips." However, the three residents interviewed who lived on this street all claimed that rubble was being bulldozed into piles – "they were just shifting it all around with a bulldozer" - and then loaded into uncovered lorries. It is unlikely that the demolition contractor had made safety provisions for the remote demolition of the asbestos cement roofs and subsequent clearance as this was not specified anywhere in his method statement. Moreover, as already noted, in a telephone conversation with me the firm's contracts manager insisted that they had been able to, and had, removed all of the roofs whole.

A further three residents interviewed stated that they had seen asbestos debris scattered over the estate. One of these residents, a former school-teacher who had been re-housed at the time of the interview and lived in an area that was built under a former phase of the redevelopment, had gone out and filled two plastic bags with what she believed to be pieces of asbestos cement. These pieces had been collected from a green bank beside a road running directly past her house; from an area where new garages had been built and from an area that had recently been demolished. She stated:

> The friend I told you about who looked in his airing cupboard [and believed it contained asbestos insulation board] – his house had been razed to the ground opposite where mine was and so I went down that morning across the road to where his house had been to see if I could find any asbestos. I got my feet covered in mud but I found more of this bonded asbestos and that was

> after all their 'experts' came down and said 'there is no asbestos on the estate'. And so they're stuffing us up. 'Everything's above board, everything's honest, we know what we're doing, we're experts...' I've got a file here with their explanations – and yet you can go down and find it [asbestos debris], you know!

The rubble from the bags she had collected was sent off to a NAMAS accredited laboratory for analysis, and it was confirmed that all the pieces were asbestos cement.[55]

Finally I was shown an area of the estate where construction work had been completed about two years before. It was a small square area surrounded by new garages. What looked like asbestos cement debris was strewn over the area - some pieces were just lying on top of the ground and some pieces were half embedded in the earth. As noted, later analysis by a NAMAS accredited laboratory confirmed that this rubble was asbestos cement. Moreover, it was noted in the report that several of the pieces contained chrysotile in higher concentrations than the typical manufacture of 10-15%. The report suggests that the enhanced concentration may have been the result of matrix leaching during weathering. The analysis results also show that some of the samples contained amosite (brown asbestos) as well as chrysotile. The significance of this is that the presence of either amosite or crocidolite is thought to increase the risks of mesothelioma following asbestos exposure and so stricter regulatory controls apply.[56] HSE Guidance Note EH36 states that some work on asbestos cement products are likely to put workers at greater risk of contamination and includes in this list "work on products containing crocidolite or amosite". Had the demolition contractor and the main contractor made an adequate assessment of the risks to workers and residents arising from the removal and disposal of the asbestos cement products, Guidance Note EH36 should have alerted them to the fact that "where old asbestos cement is involved, the type of asbestos should be confirmed by sampling and analysis as some of it may be amosite or crocidolite asbestos. An alternative is just to assume that the asbestos is crocidolite or amosite and act accordingly."

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[55] This rubble was sent with rubble that had been collected by me on the day of the interview.
[56] The import of amosite and crocidolite has been banned in this country since 1986. The control limit for chrysotile is 0.5 fibres per millilitre of air averaged over any continuous period of 4 hours or 1.5 fibres per millilitre of air averaged over any continuous period of 10 minutes. However, for any other form of asbestos, either alone or in mixtures including

One woman interviewed also believed that there was asbestos insulation board inside some of the houses on Firelands Wood:

> I found a red helmeted gentleman and said 'What about the asbestos inside the houses?' Because I have friends who lived in [one of the houses] for 40 years and they told me that the airing cupboards are lined with asbestos. So he said 'No, we had a team of experts going around inspecting and we didn't find any asbestos inside the houses.' Now that must be a deliberate lie because I can tell you of a friend who was a DIY man and he was doing something in his airing cupboard and found it was lined with asbestos.

I was able to speak with this man at a later date and he confirmed that he believed his airing cupboard contained asbestos insulation board. As stated, this man had worked on ships in the merchant navy and had some experience and knowledge of asbestos materials. Furthermore, on 29 March 1996, a parish councillor arranged for Bob Stokes, the regional organiser for the Southern Region GMB, to inspect some of the older houses due for demolition in the next phase of development. He was able to "confirm the existence of materials that apparently contain asbestos, both on the outside and *within the properties*" (emphasis added). He goes on to state that "chemical analysis would be necessary to prove this conclusively, but material of this kind should be treated as containing asbestos unless it is proved otherwise."[57] Bob Stokes was only able to visit three houses. Residents from this area were due to be re-housed and for the reasons discussed above were reluctant to become involved. What appeared to be an asbestos cement water tank was identified in the attic of one house. Bob Stokes was not able to confirm whether some of the houses contained asbestos insulation board, or any other types of asbestos product, because the houses he visited had been extensively refurbished. However, his inspection confirmed that it was likely that at least one house contained asbestos cement products which had not been identified nor planned for by the contractors.

What is particularly worrying for the residents and the workers on Firelands Wood estate is the fear that rubble containing the demolished asbestos cement roofs and

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mixture with chrysotile, the control limit is 0.2 f/ml over a continuous 4 hour period or 0.6 f/ml over a continuous 10 minute period (CAWR 1987, Regulation 2).

[57] Personal communication 11/4/96

guttering was taken from the demolition areas and put through a crusher[58] situated on the estate. Five residents stated postively that asbestos cement roofs on the sheds and garages were demolished with the rest of the structure and taken to a crusher. One of these residents stated:

> [They were] loading the rubble into a lorry and taking it to the crusher. And the dust was blowing back up the road. Some days it was terrible out here. The car was white.

Residents watched excavators fitted with grapple attachments demolishing garages with the roofs still on them. The demolished structures were then stockpiled, loaded onto lorries and transported to the crushing area. Although residents could not be certain that a particular garage roof was demolished and then put through the crusher, they did see garage roofs being demolished with the rest of the structure, the resulting rubble being stockpiled and then, at a later point, they would see lorries transporting rubble from that site to the crusher. The dust arising from the crushing operation and the demolition work caused the residents on the estate particular distress. Dust from the crusher would blow back up towards the homes, covering their cars and coming in through their windows and doors:

> Dust went everywhere. I reckon that's why my kids have suffered so much. Ever since they've lived here all three of my kids have got asthma. I've got a ten-month-old baby boy. I was carrying him when all this was being done. He's had nothing but chest problems since he's been born.

Another woman interviewed said:

> I suffer from asthma and my youngest child does as well. And at the time they were knocking it down we were all very bad. Since they've stopped doing that, we've been OK.

Another resident, interviewed for a local news report on BBC South Today, also stated that asbestos cement sheets were being put through the crusher. She was eight months pregnant when they were demolishing the old houses on the estate. Whilst the demolition was being carried out she was hospitalised twice and diagnosed with

[58] Crushers are used to recycle demolition waste which is then used in building materials -

bronchitis, as were her three-year-old child and her husband. A pensioner living on the estate is quoted in a newspaper article as saying:

> I've been suffering terrible allergies since the demolition began. My eyes have been itching and my throat has been stinging. You see huge plumes of dust billowing up when the wind blows... They are supposed to damp down all the rubble to stop the dust rising – they are even supposed to soak the wheel of the lorries carrying the stuff away. But I have never seen them do it. A lady from East Lynn Borough Council told me there was little the council could do. If they tried to take legal action it would be months before it came to court and there would only be a small fine.

I later established during an interview that the woman from the council she had spoken to was an Environmental Health Officer. The HSE Inspector was quick to point out[59] that asbestos would not have been responsible for any of these conditions, and that asbestos diseases have a long latency period.[60] However, the serious deterioration in some residents' health reveals the extent and intensity of the dust on the estate, and indicates that dust which almost certainly contained asbestos fibres was inhaled by residents on a daily basis and contaminated their homes.

The HSE Inspector, who questioned the contractors on this point, reassured one of the Parish Councillors that asbestos cement was not being put through the on-site crusher.[61] However, the inspector did not bother to question any of the residents who claimed to have seen this happening. In considering how likely it was that residents had accurately perceived this event, it is instructive that inspectors taking part in an HSE co-ordinated national 'blitz' of demolition sites between 1 August and 30 November 1996, discovered:

> Evidence of special wastes (*eg asbestos cement*) *being fed into crushers*, either inadvertently or to disguise its presence; asbestos should always be separate from "inert" waste and properly disposed of.

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usually as hardcore for foundations.

[59] Notes of a telephone conversation between Della Andrews and JR Peters, taken at the time of the conversation by Della Andrews and checked with the Inspector 7/11/95.

[60] Generally between ten and forty years after exposure.

[61] Notes of a telephone conversation between Della Andrews and JR Peters, taken at the time of the conversation by Della Andrews and checked with the Inspector 7/11/95.

(Internal HSE document).[62]

Details from the internal report on this initiative were issued in a press release. An *Observer* reporter who conducted a further investigation wrote:

> One industry expert, who refused to be named for fear of a backlash within the building industry... said disguising asbesots is 'widely known about but little talked of'... *The Observer* has details of another case where hundreds on tonnes of material contaminated with asbestos was dumped on a farm in south-east England. This was then crushed and sold as hardcore. It is thought to have been used to help build driveways and conservatories in the region.
>
> (Barnett, 1998).

The fact that this was a practice uncovered by HSE investigations and 'widely known about' within the building industry strongly suggests that residents were correct in their belief that asbestos waste was being put through the on-site crusher.

Assessing the Implications for Residents' and Workers' Health

The risks of contracting any of the asbestos-related diseases following exposure to asbestos appear to be dose-related. However, the most recent and comprehensive independent research on the health risks associated with chrysotile asbestos has confirmed that no threshold has been identified below which chrysotile does not pose a carcinogenic risk (International Program on Chemical Safety, 1998).[63] In other words there is no such thing as a 'risk-free' exposure to asbestos. Moreover, exposure to crocidolite and amosite appears to increase the risk of contracting mesothelioma following exposure. Amosite was detected in samples of the asbestos cement debris littering the estate, and was the main type of asbestos used in insulation board during the 1950s, 60s and 70s. Residents' exposure to asbestos would have occurred first, during demolition, which had been carried out almost continuously for the four years

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[62] Field Operations Division (Construction Sector), 'Report on Demolition Initiative: 1 August - 30 November 1996. Sector Minute 02/1998/07.

[63] This research was commissioned in 1996 by the World Health Organisation, the United Nations Environment Program and the International Labour Organisation within the framework of the IPCS. According to the WHO "More than 140 IPCS contact points - collaborating centres, institutions and individuals both in developed and developing countries - were involved in the preparation of the evaluation of chrysotile, which was reviewed by 17 experts from 10 countries: Austria, Canada, China, Croatia, Finland, Germany, Italy, Japan,

since work had started in 1992. Second, from the subsequent clearance and disposal of rubble containing asbestos which was put through an on-site crusher. And finally, through the continued contamination of redeveloped areas of the estate with asbestos cement debris.

Remote demolition of asbestos-cement structures is said to give rise to airbourne fibre concentrations of below 0.1 fibre/ml, with subsequent clearance of the rubble giving rise to concentrations greater than 1 fibre/ml.[64] This level is 100 times greater than the legal clearance limit and 2,000 times greater than the government's estimated background level. Workers exposed to fibre concentrations at this level are required to wear full protective clothing, including headwear and footwear, and respirators.[65] According to residents, demolition workers on Firelands Wood Estate were not provided with this protective equipment. This was acknowledged by the company and the HSE inspector who stated that workers had not needed this protective equipment since asbestos materials were all removed by hand. Residents were walking past the demolition areas daily and, during different phases of the redevelopment, could be living within 20 feet of the demolition work. It is reasonable to suppose, then, that for sustained periods of time over four years residents may have been exposed to concentrations of asbestos fibre which, if they were workers, would have meant they should have been wearing full protective clothing and respirators.

In relation to risks arising from asbestos cement that was put through the crusher, the crusher had been brought on-site only for the third phase of demolition. However, although residents would have been exposed for a shorter period of time the levels of fibre concentration in the dust that was blown back up towards the houses from the crusher may have been much greater than levels reached during demolition and clearance. The crusher was in use for about a month.[66] No estimates are given for the crushing of large quantities of asbestos cement, however abrasive disc cutting (which would produce less fibre release than total crushing) can give rise to fibre concentrations of between 15-25 fibres/ ml of respirable air.[67] This is between 1,500 and 2,500 times the legal clearance limit for the public. Residents stated that a

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the United Kingdom, and the United States of America". (Cited in *British Asbestos Newsletter*, Issue 30: Spring 1998).

[64] HSE Guidance Note EH35 'Probable asbestos dust concentrations at construction processes', December 1989, revised.

[65] This is according to Regulation 11 of the CAWR 1987 and its Associated Code of Practice.

[66] Interview with resident 18/03/96.

[67] HSE Guidance Note EH35 'Probable asbestos dust concentrations at construction processes', December 1989, revised.

significant amount of dust was blown back from the crusher. Cars and the insides of people's homes were coated with a fine white dust for about a month whilst the crusher was being used. There is no doubt, then, that if asbestos was being demolished with an excavator, bull-dozed into a pile and put through an on-site crusher residents and workers were potentially exposed to extremely high levels of asbestos fibre. In addition a substantial amount of asbestos debris contaminated the estate. Pieces of asbestos cement were found in a grassy bank adjacent to a road and were likely to be crushed by passing cars. The debris posed a particular risk for children who could have picked up pieces to play with, increasing the risk of fibre release. To conclude, in view of the continuing contamination of the estate - witnessed by me - and assuming residents' observations were correct, the health implications of the regulatory violations on Firelands Wood Estate for both workers and residents are quite horrific.

Chronology of Events Resumed

As stated, an inspector from the HSE visited the Estate on the 3 November 1995. In doing so, he was responding to a request from the Borough Council to inspect the site. Rodney Cole had, on a number of occasions prior to this, attempted to get an inspector from the local HSE office to inspect the estate. However, the HSE never responded to his requests. The inspector that finally visited the site was aware of residents' claims that asbestos cement had not been removed and disposed of safely, and their belief that it was put through an on-site crusher. Nevertheless, he only interviewed the main contractor responsible for all the construction work on phase 3, ACE Construction Ltd, and the demolition contractor AG Brown. They, as would be expected, claimed that all the work had been done according to HSE guidance and that the incident of the asbestos roof being left over the weekend was an isolated mistake by a worker. On the basis of these assurances, the HSE inspector spoke to a local parish councillor[68] and told her that contractors were carrying out the work according to HSE guidelines, that asbestos was not going through the crusher and that a local EHO had been carrying out environmental protection monitoring on the estate.[69] He conceded that allowing the public access to the site (through lack of

[68] Letter to Della Andrews (21/11/95) and telephone conversation (07/11/95).
[69] This was the monitoring that the HSE inspector later referred to as " 'reassurance monitoring' because you never find anything, you see?" (Interview 19/04/96).

fencing) was 'not recommended', and that leaving the asbestos cement roof lying on the estate over the weekend was 'not good practice'. He also stated that the dust from the demolition was cement, not asbestos and that 'all evidence shows that people who become ill are those who have worked with it over a number of years'.[70] Aside from the fact that this last statement is factually wrong,[71] we should also note that the HSE inspector minimised corporate violations of the legislation, such as the failure to fence demolition areas. In fact, these violations were not even acknowledged as regulatory breaches. They were simply referred to as 'not good practice'. Following his visit, as far as the HSE inspector was concerned, this marked the end of the matter. However, as related, this was not the end of the matter for the residents. Violations continued and redeveloped areas of the estate were still contaminated with asbestos debris when I visited the estate in March the following year.

In the face of the apparent indifference displayed by the regulatory authorities, the local council, the housing associations and the principal contractors, and in an attempt to force them to acknowledge and confront the health hazards on the estate, two parish councillors – Rodney Cole and Jack Hale – contacted researchers from the local news programme *BBC South Today* in April 1996. Reporters from the programme visited the site, interviewing residents and filming on the estate. Some of the debris on the estate was sent off for analysis by the programme makers and confirmed as asbestos cement. A short news item appeared on 26 April 1996 confirming that asbestos debris contaminated the estate and reporting residents' fears about the unsafe handling of asbestos materials, and the health risks this posed for them and their children. The company who had contracted out the demolition work on the most recent phases was quoted as saying that they would "check the site again". With respect to the regulators, it was simply reported that "At the time of the demolition the Health and Safety Executive had been happy all guidelines were being followed".

Remarkably, no action was taken by the contractors, the housing associations, or the regulatory agencies following this news report to ensure that the estate was cleared of the asbestos debris. On 20 May 1996 - nearly a month after *BBC South Today's* report about Firelands - Jack Hale visited the local Environmental Health

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[70] From the notes of a telephone conversation between Della Andrews and JR Peters, taken at the time of the conversation by Della Andrews and checked with the Inspector 7/11/95.

[71] There is a growing body of evidence in the medical literature relating to the risks associated with environmental exposures. See, for instance, a 1990 study by doctors in Leeds (Arblaster *et al.*, 1990).

Department. He had made an appointment to speak to one of their officers, but when he got there he was told that the officer was busy. Jack refused to leave and eventually Mr Ralph, the principal EHO, came out to speak to him. He told Jack that the EHD could only ensure that the asbestos on the estate was cleared up and that they couldn't do anything about the companies involved – that was the HSE's job. However, he failed to tell Mr Hale that a prima facie offence had been committed under section 33 of the Environment Protection Act 1990 (which relates to 'keeping' and 'treating', as well as 'disposing' of waste). He also failed to refer Mr Hale to the new Environment Agency, which had just acquired responsibility for enforcing this provision.

Shortly after this Jack Hale spoke to the HSE Inspector who had originally inspected the site. Jack requested that he visit the site again, but that this time he should look at the information Jack had rather than speak only with company management. Jack also said that if the HSE did not respond on this occasion, he would go to the press or make a complaint to his MP whereupon the Inspector retorted that Jack had had something in the press already. Jack claimed that this was nothing compared to the information he now had. The Inspector then agreed to visit the site. On 4 June the inspector visited Firelands again, and after he had inspected the site he spoke to Jack Hale. Jack showed him all the evidence he had relating to the unsafe handling of asbestos and other safety hazards on the estate. This included: a typed summary of residents' statements; photographs of asbestos rubble littering 'completed' areas of the estate; the results of the analysis of this material, including proof that some of the asbestos cement contained amosite; and the letter from the GMB's regional organiser confirming that there appeared to be asbestos products inside the houses. According to Jack, the inspector told him at their meeting that he hadn't been happy with the state of the site when he visited that day. Jack expressed amazement and said it was the best that it had been for two years. The inspector also admitted that the HSE had had 'problems' with the demolition contractor AG Brown before. He told Jack that he would be working with Dennis King & Partners (the company fulfilling the role of planning supervisor under the CDM Regulations) to ensure that *all* the asbestos, including the asbestos inside the houses, was dealt with properly. Jack asked why hadn't it been dealt with properly on previous phases when any contractor – anyone in the business – would expect houses of that age to contain asbestos. Jack reported that the inspector conceded this but when Jack asked why the HSE wouldn't be prosecuting anyone for what had gone on before, the inspector said that there would be no evidence – "it's all gone". In the week following this meeting the HSE

inspector had contacted Jack twice to let him know that he had arranged for the asbestos to be cleared from the estate. He had also raised with the contractors the other health hazards reported by the residents and expected these to be addressed.

It now seemed to Jack that, although no formal enforcement action was to be taken, at least residents' concerns were being taken seriously. Given this, my subsequent conversation with this inspector seems all the more extraordinary. Three days after he had revisited the site and spoken to Jack, I contacted the HSE to question them about the news report on Firelands Wood. The HSE was aware that I was researching the management of health and safety on Firelands Wood as I had previously met with and interviewed the HSE inspector. The inspector stated that he had been down to visit the site again and met with someone from the Resident's Association[72]. He said that the residents were concerned with a whole range of things not just the asbestos and that he and Graham Down – the planning supervisor from Dennis King & Partners – would be getting together to look at the pre-tender plan for the next letting of contract. In this way he aimed to ensure that the contractor was 'tied down to specifics'. I then asked the inspector whether the content of the news report was evidence that work with asbestos on previous phases had not been done in compliance with the legislation. He said the programme did not necessarily imply this and made the following points: first, there was insufficient evidence for the HSE to take action against the contractors. Second, he asserted the programme was 'misleading', made up of a "concoction of photos, some of which were not even of the site". Third, he explained that there were old garages with their asbestos roofs still standing on the estate and that because the asbestos cement sheeting and guttering on these garages was old and crumbling,[73] it would have been quite easy for someone to have picked pieces off of these garages and scattered them around the estate.

The HSE inspector's reasoning does not bear up under investigation. The inspector's second claim, that the programme was made up of a 'concoction of photos, some not even of the site', was itself misleading. The programme may not have shown the site for which ACE Construction was responsible, but the area shown was part of the

[72] This must have been a misunderstanding – Jack Hale is a parish councillor, but he does not live on the Firelands Wood Estate and he is not a member of their Resident's Association. The Resident's Association did not consult with residents on the estate and as such, at least amongst the residents I interviewed, it was not generally felt that they represented the resident's interests.

[73] Despite this assessment of the condition of the asbestos materials on the estate, the Inspector apparently had no difficulty in believing that demolition workers were able to remove these sheets whole and stack them neatly for removal to a licenced tip.

overall redevelopment and as such was the concern of the HSE. The inspector's third suggestion - that someone had 'planted' the asbestos cement rubble around the estate to make it appear as though the contractors had broken the law - is equally bizarre as Jack Hale had just presented him with ample evidence that asbestos on the estate had not been removed or disposed of safely. Furthermore the inspector did not evince this sceptical attitude with Jack, but seemed rather to have accepted the validity of the evidence and the residents' complaints. Objective evidence that the HSE inspector accepted the information supplied to him by Jack Hale comes from internal HSE documents relating to the estate. Internal records are kept by the HSE relating to inspections, investigations and any enforcement action taken. These records were obtained for the redevelopment on Firelands Wood. The record relating to the HSE inspector's visit to Firelands Wood and his discussion with Jack Hale show that the inspector considered Jack Hale's complaint to be "fully justified".[74]

Finally, when I reiterated my concern that the asbestos contamination on the estate was evidence that asbestos had not been disposed of safely, the inspector responded "You can't blame ACE Construction for that. That was another contractor. I don't even know who that was." Now this is an extraordinary statement for two reasons. First, the HSE was responsible for ensuring that *all* the contractors working on the redevelopment complied with the law, not just ACE Construction. Second, the inspector responded - not with a defence of the HSE (and their failure to ensure compliance) - but with a defence of the contractor. Such a response makes little sense unless we understand this either as evidence that the inspector identified in some way with the contractor, *or* as a perception that an identity of interest existed between the contractor and the HSE.

There was one further noteworthy incident, which concerns the media's approach to events on the estate. On 21 May 1996 I spoke to the reporter and researcher from *BBC South Today* who had fronted the news item on Firelands Wood. Jack Hale had tried to contact her several times and left a number of messages but she had failed to return his calls. The reporter confirmed that they had contacted the HSE before the programme. She said that the HSE "were adamant that everything was fine when they inspected the site last year". I asked whether she had made it clear to the HSE and the Environmental Health Department that the researchers had evidence that asbestos debris still contaminated the estate. She said she had, but that neither agency planned

[74] FOCUS report: Contact No. 7634, Investigation No. 000547. Area: 02 South. Date

to revisit the site. Apparently the programme researchers did not find this noteworthy, or in any way remarkable, as they failed to report it in the programme. Moreover, when I expressed surprise that they had not reported further on the failures of the HSE, the EHD and the contractors to take action to clean up the estate, the researcher stated that the HSE had been adamant that construction work was carried out in accordance with HSE guidance. Thus, the news researchers were willing to accept the HSE's assessment as definitive even though this assessment contradicted their own research. This, then, was an example of the HSE successfully acting as 'primary definers' in relation to the health hazards on the estate.

Tracing Company Responsibility - "Collaring the White-Collar Criminal"

In the following section an attempt is made to identify, not only which regulations governing work with asbestos were breached, but also which firms were responsible for those breaches. Establishing which firms were responsible for breaches of health and safety legislation is central to addressing a further issue within the research. That is whether the regulatory violations identified were the responsibility of one firm and, as such, anomalous within the case study, or whether, and to what extent, non-compliance with the legislation was a typical feature of the construction project on Firelands Wood. This is in spite of the HSE inspector's apparent belief that potential breaches of health and safety legislation committed by other contractors and subcontractors on the estate were irrelevant.

In organisational terms the redevelopment of Firelands Wood was particularly complex. Typically on construction projects, different firms on a site will come under the control of one developer and one main contractor, who then subcontracts out different aspects of the work. In the present case study, there were four developers, employing four planning supervisors and three main contractors who (on at least seven occasions) separately subcontracted out the different packages of work. Moreover, on at least two occasions the same contractors were separately employed by different housing associations on different phases of the project. As previously discussed in chapter 3, the fact of organisational complexity is often seen as an

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04/06/96.

obstacle to the clear ascription of legal responsibility under health and safety legislation. However, it was argued this is, in part, dependent on the way that the law frames particular legal duties. For instance, in the present case a number of companies, the housing associations and the Borough Council all had responsibilities under health and safety legislation for locating and identifying any asbestos materials on the site, and for ensuring that this information was passed on to the relevant parties.

Responsibilities For Locating and Identifying Asbestos

First, the Construction (Design and Management) Regulations 1994 place a responsibility on clients for locating and identifying any asbestos on the site being developed. In the present case study the housing associations and the Borough Council had duties as 'clients' under the regulations. HSE guidance on the role of the client states quite clearly:

> You have to provide the planning supervisor with any information you possess that is relevant to the health and safety of the project... You may have the information to hand (eg, existing drawings) or you may have to arrange for surveys of the site or premises to obtain the relevant information (*eg, determining the location and presence of asbestos*).
>
> (Emphasis added).[75]

This information should then have been included in the pre-tender health and safety plan developed by the planning supervisor and passed on to the principal contractor so that an outline on how the asbestos was to be dealt with could be prepared by the principal contractor during tendering.[76]

Second, the main contractors also had responsibilities under the Construction (Design and Management) Regulations. Under Regulation 17(1) Principal Contractors[77] must, so far as is reasonably practicable, ensure information is provided to contractors. This would include information about the location of asbestos on the site. Finally, the demolitions contractors on Firelands Wood would have held duties under the

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[75] HSE information sheet *'Construction (Design and Management) Regulations 1994: The role of the client'* Construction Sheet No. 39

[76] HSE information sheet *'Construction (Design and Management) Regulations 1994: the role of the planning supervisor'* Construction Sheet No.40

Management of Health and Safety at Work Regulations 1992 (MHSWR) and the Control of Asbestos at Work Regulations 1987 (CAWR). Under these two sets of regulations, contractors would have been required to carry out risk assessments in relation to work with any asbestos on the site. Regulation 5(A) of CAWR requires that a 'written plan of work' is produced, detailing how any work with asbestos is to be carried out. Under MHSWR, where an employer employs five or more employees, he or she should have a written record of the significant findings of the assessment (Regulation 3(4)). In the case of the construction project on Firelands Wood estate then, health and safety legislation required that assessments and findings relating to work with asbestos be recorded in writing. An important aid to establishing the extent, nature and causation of regulatory violations is to establish first whether these administrative requirements have been fully complied with. For example, in relation to the housing associations' duty to locate and identify any asbestos on the site (including asbestos products inside the houses) the pre-tender health and safety plan would have provided proof that this duty had been carried out in accordance with the relevant legislation.

On several occasions an attempt was made to obtain the pre-tender health and safety plan from Dennis King & Partners. However, requests to see this document were always met with equivocation and delay. The planning supervisor from this company stated that he could not send me the plan without breaching 'client confidentiality'. Consequently, an attempt was made to obtain permission from their client Sweet Housing Association. The person approached (the redevelopment officer responsible for Sweet's 'half' of the site) claimed not to know what Sweet's policy on this would be. She promised to find out and get back to me but never did, despite subsequent attempts to contact her. On another occasion a refusal to allow access to one of the principal contractor's construction phase health and safety plan was justified on the grounds that it was 'confidential'. On yet another occasion a promise to send me a copy of one of the firms' questionnaires (used to assess the competency of the main contractor) was not fulfilled. These refusals and delays were strongly suggestive of a general reluctance on the part of all the firms and the housing associations to allow access to any documentary material relevant to the redevelopment.

[77] In the case of the redevelopment of Pilands Wood the main contractors (ACE Construction Ltd, Hays Construction, and HH Dove & Son) took on the duties of the principal contractors under the CDM Regulations.

As a result of this reluctance, interviews with management became the sole source of information relating to how and when the asbestos on the site had been identified and who had been responsible for this. However, relying on information provided by company management quickly proved problematic. First, a reliance on management's statements to reconstruct events soon became impossible as I received contradictory accounts as to how the asbestos cement roofs and guttering had first been identified. Whilst the planning supervisor from Dennis King & Partners claimed that asbestos had been identified by site survey and that this information had been included in the pre-tender health and safety plan, the demolition contractor, AG Brown, contradicted this by claiming that the asbestos cement guttering and roofs had first been identified by them. As a method for discovering the nature, extent and causes of corporate violations, interviews with managers proved inadequate in another respect. Direct questions to the main contractors about the specific arrangements for locating and identifying asbestos on the Firelands Wood site were frequently met with a claim either that the person interviewed did not know, or that they could not remember. My first interview was with the senior contracts manager for ACE Construction Limited. He claimed that he did not know the answers to specific questions regarding the identification of asbestos on Firelands Wood because he had only been contracts manager for the Firelands redevelopment since the previous October and had not been involved in the initial stages of the project. Occasionally an answer was given about what would generally happen but not about what *had* happened on Firelands. Because I was dependent on their goodwill, I often felt unable to press the question for fear of antagonising the interviewee and cutting short the interview.

However, the difficulties I faced in establishing whether companies had discharged their legal obligations was unrelated to the organisational complexity of the project. Rather, this was a methodological issue and one effect of a lack of legal power and rights to access certain documentary evidence. The fact of organisational complexity does not, in itself, preclude the possibility of determining fault and responsibility under the law, *providing the law is sufficiently clear in its ascription of responsibility*. Certainly the combined effect of CAWR, the MHSWR and CDM in the present case was to place clear duties on the housing associations, their planning supervisors and the main contractors to locate the presence of any asbestos on the site or in the houses, to identify what type of asbestos workers would be exposed to, and to ensure that this information was passed on to the relevant parties. An adequate investigation by the HSE would have established whether this had been done. The HSE inspector, however, had not asked to see their pre-tender plan and so was not able to confirm

whether a site survey had in fact been undertaken by the housing associations and the Borough Council, nor whether the results of this were recorded in their pre-tender plan.[78] It was, nevertheless possible to establish to some extent which legal duties fell on which parties and whether they had adequately discharged those duties.

Clearly, all demolition contractors on the estate during different phases of the redevelopment had responsibilities under the Control of Asbestos at Work Regulations 1987 (CAWR) for the safe removal and disposal of asbestos products from the houses and garages. Further duties would fall on these contractors in relation to the location and identification of asbestos under CAWR 1987. Regulations 4(a) and (b) require that before commencing work which is liable to expose any of his or her employees to asbestos, every employer must either identify the type of asbestos involved, or assume that the asbestos is crocidolite or amosite and treat it accordingly. When I asked the demolition contractor responsible for phase 3 demolition, AG Brown, how they had determined the type of asbestos present on the estate, the firm's contracts manager claimed that this had been done by sampling and analysis. He then agreed to send me a copy of the test results they had received. As promised the test results were faxed through to me. However the report is dated 31 October 1995, and stamped 'Received' 2 November 1995.[79] *This means that samples from the roofs were only analysed* ***after*** *they had begun to demolish the roofs and garages, and* ***after*** *the local reporter visited the site on 30 October.* In other words, at least one demolition contractor on the estate had not sent samples of the asbestos cement to be analysed as they were required to do by law.

When it was reported in the local press that asbestos on the estate was not being removed and disposed of safely, a spokesperson for the Borough Council claimed that 'land... was given to the housing associations by the Borough Council which brought to its attention that some of the old buildings contained asbestos cement, used in gutters and roofing.'[80] However when I spoke to the contracts manager for the demolition firm involved in phase 3 of the development, he told me that the original enquiry they received from the main contractor did not mention the asbestos on the estate, but simply referred to the demolition of a block of garages. Thus, either the Council did not pass this information on to the housing associations, (thereby breaching their legal duties under the CDM Regulations) or Sweet Housing

[78] Interview 19/04/96.
[79] See Appendix 4.
[80] *The News*, Wednesday November 1, 1995

Association, their planning supervisor, or their main contractor, ACE Construction Ltd, had failed to pass this information down the contractual chain.

Unfortunately, the issue of which parties had legal responsibility for locating and identifying the asbestos on the estate is complicated by the fact that the CDM Regulations came into effect in the transitional phase in March 1995 – half way through the construction project. Of the three main contractors involved in the redevelopment at that time only two had responsibilities in relation to the asbestos on the site. These were Hays Construction and ACE Construction. The sites being redeveloped under the contractor HH Dove & Son had already been demolished and that company therefore had no part in tendering the demolition work and no supervisory role. Hays Construction was the main contractor on phases of the redevelopment which had been completed *before* CDM came into effect. Discovering how asbestos was identified during these initial phases of the redevelopment is pertinent to the question of how responsibilities for locating and identifying asbestos during major construction work would have been organised between contractors before the CDM Regulations came into effect.

During an interview with the director responsible for health and safety from Hays, he claimed that asbestos on the estate had been identified by Hays and by the demolition contractor.[81] However this may not have been the case, as he went on to imply that the asbestos had already been identified by the Borough Council, who had arranged for the first group of houses to be demolished before land was sold to the housing associations. The local Borough Council had originally contracted out the demolition work and Hays then took on the same demolition contractor that East Lynn had used:

> Basically there was a history there already because East Lynn already demolished some houses. Basically we took on under our auspices when we started demolition the same contractor as they had because it was set-up that way...

It seems unlikely, therefore, that Hays would have gone to the trouble of re-inspecting the site for asbestos when they believed that this had already been done. He then explained what would generally have happened before the CDM Regulations came into effect. This is significant in that it demonstrates that the protection of

[81] Interview 10/05/96.

construction workers from exposure to asbestos is often down to chance. He stated that prior to CDM, if the main contractor were given 'a well-documented set of tender documents' the client would have identified any asbestos materials to which workers might have been exposed during construction. If this did not happen, it would be left to Hays' supervisor and the demolition contractor to identify any asbestos on the site:

> It's up to our supervisors as well because they are watching all the time. We have demolitions going on in there and if you've got a good demolition contractor he can say "Oh, I'm a bit suspicious about this". Then you'd get it analysed to make sure, because as you know there are certain grades of asbestos and if it's the most dangerous, blue or brown, in that case you don't disturb or touch anything. You bring an asbestos remover in.

This statement provides a clear example of the inadequate protection afforded to construction workers under health and safety legislation. Most evidence from the construction industry suggests that this is normal practice.[82] This is clearly an unsatisfactory state of affairs and may be the result of a failure of health and safety legislation to articulate clearly the duties of the relevant parties either on large construction projects prior to the CDM Regulations, or in the case of small, routine maintenance jobs.[83] However, the MHSWR 1992 requires that all employers carry out an assessment of 'any risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking'.[84] This regulation placed a duty on main contractors to carry out a risk assessment of any risks to the employees of any sub-contractors. There was, therefore, a legal duty on main contractors, before the CDM Regulations came into effect, to carry out a risk assessment and ensure that information from that risk assessment was passed on to the relevant sub-contractors. This would have included information relating to the presence of asbestos on site.

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[82] Dalton A 'Evil Asbestos' *Hazards 50*, 1995; Brumwell G 'Asbestos is the Worst Industrial Killer' in *Trade Union Review* Issue 2 1996, p14.

[83] A recent TUC Health and Safety Report argues (TUC, 1995) that current legislation fails to address "the reality of the extent of asbestos materials in places where the people running the premises and the people repairing them are not in a traditional employment relationship". This will be the case in nearly all maintenance work. Even if a worker is the direct employee of a company, he or she will not be in any employment relationship with the owner of the premises. The only exceptions to this would be where companies have 'in-house' maintenance (which is very rare) or where work is done by direct labour for a local authority.

[84] Regulation 3(1)(b).

As stated earlier, the CDM Regulations 1994 have now clarified responsibilities for health and safety on large construction projects. A clear duty now falls on the client to identify and locate any asbestos on the site. The regulations also place a responsibility on other duty holders to ensure that this information is passed down the line to the relevant parties and to ensure that they have made adequate provision for dealing with the asbestos identified. The CDM Regulations also require that asbestos be labelled where a major conversion is taking place. Unfortunately the regulations fail to address the risk of asbestos exposure faced by workers on small repair and maintenance jobs (TUC 1995).

Although the CDM Regulations should have clarified responsibility for the location and identification of asbestos, this did not appear to be the case on Firelands Wood. ACE Construction was appointed principal contractor on phases of the redevelopment occurring after the regulations came into effect. Although the senior contracts manager interviewed claimed that he had only taken over responsibility for the site after construction work had started and had not been involved in the production of the health and safety plan for Firelands Wood, he was jointly responsible with a managing director for producing health and safety plans on other projects. It is reasonable to suppose therefore that he would be able to state with some confidence what should have happened on the Firelands Wood development with respect to the identification of asbestos, even if he could not state positively that this had actually happened. This, however, did not appear to be the case. When asked whether the tendering documents for the demolition work had specified that the properties contained asbestos cement products he replied "I imagine it would be, um, if it were garages with sheets on the top, yes it would be either measured or mentioned or talked about".[85] As stated earlier however, the demolition contractor working for ACE Construction insisted that AG Brown had identified the asbestos on the site and that no mention had been made of the asbestos cement sheeting or guttering in the original enquiry. The senior contracts manager for ACE Construction also stated that he did not know whether an inspection had been undertaken to determine whether there was asbestos inside the houses.

Statements made by one of the firms appointed as planning supervisor on the redevelopment present a similarly confused picture. Only one of the three firms appointed as planning supervisor needed to consider the risks of exposure to asbestos

[85] Interview 18/03/96.

for demolition workers and residents on Firelands Wood estate. Areas of the site for which Callum Seaford and Wellard & Parnter had responsibilities as planning supervisors had been previously demolished. However, demolition took place after Dennis King & Partners were appointed as planning supervisor, and risks arising from this demolitionwork should have been specified in their pre-tender health and safety plan. Dennis King & Partners claimed that the asbestos on the estate had been identified by site survey and that this information had been included in the pre-tender health and safety plan.[86] If this is true, there must have been a subsequent failure to communicate this information on the part of the principal contractor, ACE Construction, as the demolition contractor claimed that this information was not included in the tendering documents. However a peculiar exchange took place during an interview conducted with two planning supervisors from Dennis King. They were describing how one of them had been walking around the site. This was beyond the responsibilities imposed on them by their roles, as the planning supervisor has no supervisory responsibilities in relation to the construction work. They gave this account of the incident:

Interviewee 1: I was able to get into a property that had been secured by another contractor who said 'would you like to come in?' I went in there and saw artex on the ceiling. Years ago artex contained asbestos filler, so I highlighted that.

Interviewee 2: And they had it tested before anyone moved in on that site.

Interviewee 1: Unless you'd been around on that site, somebody might never have known about it. It was OK [it didn't contain asbestos].

Whether or not this work came under phases of the redevelopment for which Dennis King was responsible, if a proper site survey had been carried out, as they claimed, they would have known already whether or not the artex ceilings contained asbestos since houses on other phases of the redevelopment were identical to the houses for which Dennis King had responsibility. It is of course possible that this incident occurred at the beginning of Dennis King's involvement as planning supervisor and before they had begun work on the pre-tender health and safety plan. This then would mean that an adequate inspection of the houses had not taken place on previous phases of the development or the contractors would not have had the artex analysed only *after* Dennis King & Partners pointed out the potential risk to them. The

[86] Interview 30/04/96.

identification of asbestos (necessary as a precursor to the implementation of protective measures) is again seen to be a very hit-or-miss affair. What is interesting is that the planning supervisors from Dennis King & Partners who recounted this episode, did so without suggesting that they viewed it as a serious breach of the regulations, which suggests that such an event was unexceptional in their experience. Thus, it appears that either Sweet Housing Association had not conducted an adequate survey of the site for asbestos, or the Borough Council, who were responsible for the initial phases of demolition at the start of the redevelopment, had not surveyed the site.

To summarise then, it was never clear that the developers, the principal contractors or the demolition contractors had carried out an adequate and systematic inspection of the houses. Of the four housing associations with overall responsibility for the redevelopment, only one – Hive Housing – had no responsibility for any of the demolition work. The local Borough Council and Sweet Housing Association were responsible for phases of the redevelopment in which demolition was carried out. During these phases, Sweet had clear duties as a client under the CDM Regulations, including a responsibility to locate and identify any asbestos on their sites. It was not possible to establish whether the two remaining housing associations had any responsibility for demolition on their sites. The significance of clarifying who was responsible for locating and identifying the asbestos on the estate becomes clear in view of the fact that the planning supervisors and the main contractors denied that there were any asbestos products *inside* the houses. However, evidence from residents and other sources suggests there may well have been asbestos inside the houses, and interviews with company management failed to produce convincing evidence that this possibility had been ruled out. On the contrary, confused and contradictory statements tend to suggest that adequate inspections of the houses were not undertaken. If there was asbestos inside the houses, then there was no controlled removal of these products prior to demolition.[87]

Both Hays & Son and ACE Construction Limited, as main contractors on their respective sites, had responsibilities under MHSWR and CDM for ensuring that work was carried out in accordance with the relevant legislation. ACE Construction also had a responsibility under CDM to ensure that information about the asbestos products on the estate was passed on to the demolition contractor. This does not

appear to have happened. East Lynn Borough Council claimed that 'land... was given to the housing associations by East Lynn Borough Council which brought to its attention that some of the old buildings contained asbestos cement, used in gutters and roofing.'[88] This is a rather ambiguous statement. It does not indicate whether the Council was simply alerting the housing associations to the presence of asbestos on the estate, or whether they had informed the housing associations that the garage roofs and guttering were the only products which contained asbestos cement. In the latter case, the housing associations and their planning supervisors could claim that it was reasonable for them to rely solely on this information from the Council, and that this released them from the need to undertake an inspection of the houses on the estate. Whether it was reasonable for them to do this would depend in part upon the adequacy of the evidence upon which the Council made their claim, particularly as people with experience in the construction industry would be aware that of houses of that age were likely to contain a number of different asbestos materials. However, this is not what the planning supervisor from Dennis King & Partners claimed. They claimed that asbestos on the estate had been located and identified during a site survey. Hays also claimed that they would have carried out their own inspections. If these surveys *were* carried out, there is strong evidence to suggest that they were all inadequate as they failed to detect asbestos products inside the houses. It seems more likely however, that in spite of these claims, the housing associations, their planning supervisors and the main contractors relied upon information from the Council. This seems particularly likely in view of the fact that the local Borough Council was responsible for the initial demolition work.

Duties to Ensure the Safe Removal and Disposal of Asbestos

With respect to the actual removal and disposal of asbestos cement products, the serious breaches of the regulations observed by residents could be inferred from the existence of a substantial amount of asbestos debris contaminating the estate. It is important to note that asbestos cement rubble littered the estate in areas that had been developed under previous phases of the project. Demolition on these phases had not been carried out by AG Brown. It would appear therefore that legislation governing the safe disposal of asbestos was breached by the demolition contractor on phases 1

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[87] Removal of products like asbestos insulation board from inside the houses would have incurred significantly greater expenditure than the removal of the asbestos cement products.
[88] *The News*, Wednesday November 1, 1995

and 2 of the redevelopment, and that non-compliance with the law was not limited to AG Brown. It further suggests that the failure to adequately supervise the work extended beyond a single main contractor and included *all* main contractors who had sub-contracted out demolition work.

With respect to the demolition contractors, CAWR 1987 specifies that all employers must make an adequate assessment of the nature and degree of exposure that might occur and take steps 'to prevent or reduce to the lowest level reasonably practicable that exposure'. Moreover, the employer's duties extend beyond his or her immediate employees to 'any other person who may be affected by the work activity, whether at work or not' (Regulation 3(1)). The Approved Code of Practice (ACOP) accompanying the regulations specifies that this includes a duty to 'people in the neighbourhood who might be incidentally exposed to asbestos dust arising from the work'. Breaches of regulations governing the removal and disposal of the garage roofs and guttering were witnessed by residents and could be inferred from the existence of asbestos cement debris contaminating the estate. These breaches could not have occurred if the demolition work had been properly supervised. It must be the case therefore that either the work was not supervised by the demolition company, or that these regulatory violations were sanctioned by line management (namely the demolition foreman and banksman).

To conclude, a number of companies, the housing associations and the local Borough Council had responsibilities for the safe location and management of asbestos on the site. The fact that the redevelopment was organisationally complex did not dilute these responsibilities in any way, as in often suggested. Residents' observations and other evidence suggest that the following breaches of the asbestos regulations took place on Firelands Wood estate:

- The demolition contractor, AG Brown did not identify the type of asbestos contained within the cement products by analysis until *after* the removal and disposal of those products had begun.
- Although some of the cement sheeting on the garage and shed roofs was removed and disposed of separately, residents stated that in some instances asbestos roofs were being demolished with the rest of the structure. A video recording of a garage roof lying on top of a bulldozed pile of rubble tends to support this claim. Although this is permissible, extra precautions would need to have been taken and residents did not observe such precautions – which would have been visually obvious.

- Residents also believed that asbestos-containing rubble from the demolished houses was being put through the on-site crusher.
- The presence of a substantial amount of asbestos debris around areas of the estate that had been completed two to three years previously meant that demolition contractors had not disposed of this asbestos safely. This continuing contamination of the estate constituted a serious risk to people's health, especially that of children.

It was not at all clear that an adequate survey of the site had been undertaken to locate and identify asbestos products. Although those parties responsible for the redevelopment claimed that there were not asbestos products inside the houses, a number of residents believed that there were and most commentators agreed that houses of this type and age would generally have contained a number of asbestos products. One resident who had experience of working with asbestos believed that his airing cupboard contained asbestos insulation board.[89] Rodney Cole believed that he had found asbestos insulation board in his daughter's flat. The regional organiser for the southern region GMB identified what appeared to be asbestos cement products inside one of the houses, and finally, Simon Davies reported that he had seen a row of asbestos-lined cupboards in houses awaiting demolition.

In Chapter 3 it was argued that the absence of intention does not necessarily mean that company management was morally blameless. Instead it was argued that employers 'overlook' their responsibilities under HSWA and remain ignorant of the legislation and regulatory guidance because of the low priority accorded to the health and safety of workers and members of the public. Whilst some instances of non-compliance on Firelands Wood Estate may have been the product of oversight (for example, the failure to adequately inspect the inside of homes for asbestos), ignorance or blundering, this does not mean that management was blameless. The housing associations and the contractors were not involved in a new or unfamiliar undertaking, they were doing what they usually did - demolishing sites and building houses. The risks of exposure to asbestos - particularly in the demolition of structures of a certain age - is well known within the industry. However, these risks appear to have been addressed in a haphazard and inadequate way - if not intentionally disregarded. Furthermore, accounts given by management about their usual procedures for identifying and dealing with asbestos suggest that their haphazard and

casual approach was typical of other construction projects. In the case of the exposure of residents and workers to asbestos dust on the Firelands Wood estate, why should employer ignorance constitute an excuse if it was born out of a disregard for the safety of those adults and children that their 'blundering' put at risk?

THE WIDER IMPLICATIONS OF REGULATORY FAILURE AND NON-COMPLIANCE ON FIRELANDS WOOD ESTATE

The foregoing discussion suggests that the regulators on Firelands Wood Estate - intentionally or not - performed what was effectively a vital public relations function for the companies and housing associations. The precise way in which regulators' response to residents' fears allowed companies on the site to dismiss residents' claims and avoid taking remedial action will be explored in greater detail in the next chapter. For the moment it is necessary to consider what conclusions, if any, might be drawn from their behaviour. There are, of course, difficulties in attempting to make any kind of generalisation from a single case-study. Slapper and Tombs (1999) refer to this problem of 'generalising' in the context of corporate crime research, and discuss Bryman's (1988) argument that concerns over the 'generalisability' of case study data tend to misunderstand the aims of such research. Thus, Slapper and Tombs write that:

> Rather than seeking to generalise from case studies to populations or universes - for example, from the crimes of some drug companies to all pharmaceutical companies, or indeed to all manufacturing companies or even all private corporations - 'the issue should be couched in terms of the generalisability of cases to theoretical propositions' (Bryman, 1988: 90). Thus, case study data are significant when the researcher, or some other researchers, seek 'to integrate them with a theoretical context' (*ibid.*: 91). Indeed, while case study work has been invaluable in the corporate crime research tradition, there remains a tendency for these studies to be treated in relative descriptive isolation, rather than as forming the basis for theoretical interrogation and development.
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> (1999: 50-51).

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[89] This resident's home had been demolished during a previous phase of the redevelopment and so it was not possible for me to confirm this by laboratory analysis.

Similarly, I would argue that the issue in relation to the present case study is whether, and how, this data can illuminate previous arguments relating to the production of a moral 'un-panic' in relation to corporate crime and corporate violence. In previous chapters I argued that we cannot explain the non-criminalisation of corporate crime either in terms of inherent differences between corporate and conventional crimes and criminals, nor in terms of the existence of a public consensus or shared public morality. Instead I attempted to demonstrate some of the ways in which the nature and threat of corporate illegality is obscured through the minimisation or invisibility of the consequences of this illegality, through an obfuscation of corporate fault, and through the generation of an ideology of corporate social responsibility. I also argued that legal and regulatory forms and practices were central to the perpetuation of a sense that corporate violence is not *criminal* violence. Data from the present case-study is consistent with these general propositions. Individual inspectors from both the Health and Safety Executive and the local Environmental Health Department actively sought to minimise the seriousness of regulatory breaches on the estate, and to deflect public censure and residents' fears. Thus, the criminal nature, and the harmful consequences, of corporate illegality may also be obscured by regulatory agents in an enforcement context.

Moreover, the charge that this case might have been anomalous and not representative of the HSE in general (or even of this particular inspector) is diminished when we consider that *two* regulatory agencies were involved in events on Firelands Wood, and that inspectors from both agencies behaved in a remarkably similar way. Furthermore, the HSE inspector's approach to the hazards represented by the asbestos cement roof was judged by Terry Jago, of the Asbestos Removal Contractors Association, to be 'typical' of the HSE's general approach to asbestos cement as a 'low risk' material. However, the fact that the HSE judges asbestos cement to be a low risk material could lead to the argument that the approach taken by the HSE inspector and the EHO was justified if both genuinely believed that the roof incident was an isolated breach. It should be noted that this interpretation is rather difficult to sustain since both regulators had definite knowledge that the estate was contaminated with asbestos debris and that demolition areas were initially unfenced. Moreover, these inspectors' own knowledge of the old and fragile condition of the asbestos cement products, and the high probability that there would be asbestos products *inside* houses of that age and type, ought to have alerted them to the fact that the demolition contractor would be unable to carry out work in the way they claimed,

and that there was in all likelihood asbestos inside the houses that had not been properly planned for or removed prior to demolition. Nevertheless, if we set aside these doubts and suppose for a moment that both the HSE inspector and the EHO had simply made a mistake, and misjudged both the contractors, and the scale of the hazards, on Firelands Wood does this then mean that we can dismiss the case study as an anomaly? The answer to that, I would argue, depends on the reasons underlying their 'misjudgement'.

What is at issue here is not whether the state's differential response to corporate crime can be justified by reference to inherent differences between corporate and conventional offending. These arguments were addressed in earlier chapters. The question here is whether this differential response can be justified by reference to more 'pragmatic' criteria - namely, the success (for whatever reason) of the compliance approach. It is frequently asserted by academics across a number of disciplines,[90] that however 'unfair' the differential response to corporate and conventional crime may appear to be - the conciliatory approach to corporate regulation almost invariably adopted by regulatory agencies 'works better' than a punitive response. This is what is implied by the HSE when they state that their main purpose is to prevent accidents from occurring, rather than to punish companies after the harm has been done - the implication being, of course, that the approach adopted by them is indeed successful in raising standards and so preventing injuries, deaths and disease.[91] This is also what is implied by Braithwaite when he discusses 'the dilemmas in choosing between retribution against alleged white-collar criminals and the wider public interest' (1982: 752) and again, more recently, when he laments:

> I have observed the tragic little drama of virtue being destroyed many times during my empirical research on business regulation. The government inspector marches into the workplace and starts making threats; citations are written; most critically, both the demeanour of the inspector and the policy that stands behind that demeanour communicate the expectation that the manager on the receiving end of the encounter is untrustworthy... But this assumption is often wrong. The safety manager may deeply care about the

[90] By, for instance, the criminologist John Braithewaite, the socio-legal theorist Keith Hawkins, and the political scientist Robert Kagan.

[91] For instance, John Rimington, ex-Director General of the HSE stated in 1991: "There is justice to firms and individuals to be done, not just revenges to be executed, and if pain is to be reduced there is a deeper aim which is to prevent the incidents that lead to accidents". (Cited in Bergman, 1994: 6).

> safety of her workers, and she resents, bitterly resents, being treated as if she does not care. This resentment can destroy her good faith, her willingness to go an extra mile beyond what the inspector asks her to do...
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> (Braithwaite, 1993: 85).

How then would these theorists explain the failure of both the HSE and the EHD - who both adopted a 'trusting' approach to company management on Firelands Wood - to ensure that workers and residents on the estate were adequately protected? Whilst Kagan and Scholz argue that most regulators are able to differentiate between the 'good' and the 'bad' apple firms most of the time, they do concede that inspectors adopting the compliance approach to regulation may occasionally be deceived by a particular company, or 'guess wrong' and 'treat an "amoral calculator" as if he were a "good citizen".' (1984: 79). Kagan and Scholz might argue, than, that the failure to protect residents and workers on Firelands Wood Estate can be understood as an unfortunate mistake on the part of the regulators which, whilst not exactly anomalous, is nevertheless rare enough to ensure that, overall, the compliance approach works better than a sanctioning strategy.

This interpretation becomes untenable when we begin to identify those factors that led these regulators to their mistaken judgements - if that is what they were. For instance, the immediate cause of the HSE inspector's failure to discover the extent of regulatory violation and secure compliance, was the inadequacy of his investigation. Yet other research suggests that in important respects this failure to properly investigate is not an anomalous event. For example, the HSE inspector did not question workers or residents about violations on the estate - he simply asked company management for their account of events. As stated, both Bergman (1994) and Hutter (1993) have found that this may be typical of HSE inspections and investigations. A study by Hutter, exploring the extent to which HSE inspectors involve the workforce and their representatives in their enforcement practice, found that only a third of safety representatives interviewed knew in advance of an inspector's visit or received information after a visit (1993: 462). Hutter also refers to a study by La Trobe/ Melbourne Occupational Health and Safety Project, which investigated the operation of the HSWA-style Occupational Health and Safety Act 1985 in the State of Victoria. The findings of their study accord with those of Hutter's, with the researchers observing that: "... some inspectors are clearly experiencing difficulty in adjusting to the idea that occupational health and safety is no longer a matter exclusively for management." (Cited in Hutter, 1993: 463). Hutter

concludes that HSE inspectors were failing "to implement fully the 1974 provisions relating to employee-inspector relations" (465). Significantly, Hutter traces this failure back to the very approach that was meant to facilitate a gradual improvement in occupational health and safety standards in British workplaces. She writes:

> Securing compliance, rather than punishment, is the main objective of this approach and the preferred methods to achieve these ends are conciliatory. The main actors in this approach are employers, managers, and inspectors, not employees. Not only have these enforcement relationships tended to be bipartite, but their consensual nature had not easily allowed for the introduction of the employee/ employer relationship.
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> (Hutter, 1993: 465).

These findings have important implications for inspectors' ability to detect unsafe managers and workplaces and, consequently, for ensuring workers' and public safety. In the present case study, the HSE inspector's almost exclusive reliance on information from management may have resulted in the continuing exposure of residents to extremely dangerous levels of asbestos dust during demolition and crushing activities, and in the continuing contamination of the estate with asbestos waste. Bergman's (1994) study of 28 workplace deaths in the West Midlands also reveals a pattern of inadequate investigation of occupational fatalities and injuries, in which HSE inspectors failed to discover the extent of hazardous practices within workplaces and the way in which these practices were either condoned, or instigated by management. The crux of this failure to investigate properly appeared to be the willingness on the part of HSE and EHD inspectors to rely on statements of company directors and managers in relation to the circumstances surrounding workplace fatalities. Workers were interviewed, but only with a view to establishing the immediate *technical* causes which led to the deaths and not with a view to discovering whether unsafe work practices were condoned by management. Likewise, inspectors failed to investigate the safety histories of the companies involved, either through an inspection of accident books and minutes of safety committee meetings or by interviewing present and past workers about their company's safety history (Bergman, 1994: 97-99).

Information concerning past accidents, or issues discussed during safety committee meetings would be relevant, not just to the question of how safe or unsafe a company was, but also to establishing the extent of management knowledge. It is interesting

that the 'system' for evaluating company knowledge preferred by regulatory agencies is one whereby company knowledge is inferred from a history of regulatory contact and warnings (Carson, 1970a; Weait, 1989). This method for assessing company knowledge rests upon an essentially private relationship between the regulator and company management. Regulatory bodies - unlike the police - do not encourage the participation of the public in their investigations, or draw on knowledge and information that could be offered by workers or the local community to build up evidence against companies. In this way, regulators appear to be more concerned with the *forms*, as opposed to the substance, of compliance - focusing almost exclusively on company responses to inspectors' requests rather than on the wider issue of a company's safety history. Yet this narrow focus also informs regulators' judgements as to the character of the company they are dealing with - that is, whether or not they believe a particular company to be a 'good apple' firm (Bardach and Kagan, 1982). Thus, ironically, the very approach that theorists like Bardach advocate for the regulation of business activity, may actually prevent inspectors from accurately distinguishing between 'good and bad apples' (if, indeed, such a distinction exists) - and, therefore, decrease the likelihood of inspectors responding appropriately to specific instances of corporate offending. As we have seen, the repercussions of this for workers and the public may be extremely serious.

This analysis also has implications for the normative work of academics like Scholz (1984) and, more recently, Ayres and Braithwaite (1992), who advocate a model of regulatory enforcement based on evolutionary game theory. Proponents of a 'regulatory pyramid', which has as its base the use of persuasion and education, have attempted to prove by mathematical modelling that the best regulatory outcome for both regulators and for regulated firms occurs within a framework of co-operation and compliance. However, if one party departs from this approach then the other party responds on a 'tit for tat' basis. So, for instance, if an offending company fails to comply with a regulator's request, the regulator can then progress gradually up the enforcement pyramid - increasing the punitiveness of his or her response accordingly. This 'defence' of a compliance approach to regulation is rather more sophisticated than the simple concept of 'corporate virtue' since it does not suggest that corporations may posses an inherent capacity for good (the fiction of the 'soulful corporation'), but argues that within a framework of co-operation between regulator and regulated companies, compliance will be the rational choice for corporate actors. However, such a model obviously depends on regulators having accurate knowledge of the nature and extent of a firm's offending. The foregoing analysis of events on

Firelands Wood, and the research of Bergman (1994) and Hutter (1993) suggest that it may be commonplace for regulators *not* to have this necessary knowledge. This appears to be the consequence of an organisational culture within regulatory bureaucracies that first, prioritises the knowledge and 'expertise' of company management over that of workers, and second adopts a 'trusting' approach to business within an enforcement context.

The are two further points of interest to be made here. First, the 'trusting' approach to business manifested by the HSE inspector on Firelands Wood contrasts with evidence from interview data with company management[92] that inspectors may adopt a *sceptical* approach to public fears and concerns. For instance, a director from Hays Construction related how an HSE inspector had responded to complaints from the public in relation to demolition work that the company was involved with in the town centre:

> We had a lot of dealings with the HSE through our involvement with a project in the middle of town, and I found them very, very good to deal with. I got to know their inspector very well. The reason for this is that we did a job in the High Street. We had to pull down the old Odeon and build the *Virgin* megastore. But the problem with that is you get thousands and thousands of "safety officers" from the general public walking past [laughs]. And they ring the HSE over the slightest thing. And [the inspector] says to me: "You've got to remember you've got thousands of 'safety officers' walking past that place!" He came down several times and I spoke to him in the evenings and because we were trying to go about it the right way, they were very good because they were trying to be practical at the same time. They knew we had a very difficult site in a difficult area. But once the demolitions had finished, and the hoarding was up, there was nothing back from the public at all you see.
>
> (Interview 10.05.96).

Statements like these from the managers interviewed provide some evidence that HSE inspectors may identify with company management - since they feel that managers and inspectors are all a part of the same industry, and share a common language and technical expertise. 'The public', on the other hand, are 'outsiders' who

[92] See Methodology section in Appendix 1.

do not understand the difficulties, or technical aspects, of construction work. This is consistent with evidence presented in chapter 2 suggesting that the 'audience' whose support the HSE are most concerned to win, is their audience within the business community. Whilst it is true that, in most contexts, the public will have incomplete knowledge of occupational hazards, legal standards and what is regarded as 'good practice' within industry, this does not mean that evidence they may have about the way in which work was undertaken is irrelevant. Moreover, lack of knowledge is not a factor in relation to *workers*, and cannot therefore explain why inspectors do not draw from workers' knowledge and expertise to a greater extent. Indeed, research commissioned by the HSE discovered that trade union safety representatives were more knowledgeable than their employers with respect to important legal requirements relating to the safe use of chemicals (HSE, 1997).

The second point of more general note is that the organisational habit of trusting management within an enforcement context is part of a wider organisation of trusting regulatory relations between the state and industry, in which an enormous amount of faith is placed in the belief that corporations will behave responsibly. Drug companies, for instance, are trusted to organise their own clinical trials for testing the safety and efficacy of new drugs, and are then trusted to provide regulators with the results of these (Abraham, 1995). Industry representatives sit on HSE advisory committees and are trusted to contribute to the setting of standards that will adequately protect workers' and public health. Thus, it is not simply the case that individual inspectors 'trust' individual companies within an enforcement context, but that the current organisation of regulatory relations is based upon a more general trust of industry as a whole. These 'acts of faith' are underpinned by ideologies of corporate responsibility and legitimacy, and will be explored in more detail in a later chapter.

CONCLUSION

Adequate investigations by the regulatory agencies responsible for enforcing environmental and occupational health and safety legislation on the estate could have discovered the nature and extent of corporate illegalities committed during the redevelopment. Yet, despite the fact that both regulatory agencies were aware of the many serious claims made by residents, they chose to restrict their investigations to a questioning of company management and focus only on the incident of the asbestos

cement roof that was left lying outside a resident's garden over a weekend. The choice to limit their focus in this way cannot be explained in terms of the fact that this one incident was the only 'proven' breach. On the contrary, both inspectors were aware, and an EHO involved had himself observed,[93] that asbestos cement debris was contaminating the estate. Yet the regulators' response to this knowledge was, in the case of the Principal EHO, to state that, "There were one or two small pieces of asbestos scattered over the site",[94] and in the case of the HSE inspector to suggest, first, that this debris had been 'planted' on the estate by residents and, second, that it was not an issue because it did not concern the main contractor for the third phase of the redevelopment. Since the HSE would have been responsible for *all* construction work that took place on the estate this last assertion was a complete *non sequitur*. Nor could there have been any justification for the Principal EHO minimising the seriousness of this contamination and the health consequences for residents. Moreover, when - nearly six months later - it was confirmed on a local news broadcast that asbestos cement debris continued to contaminate the estate in areas that had been built over and redeveloped,[95] the regulatory bodies responded by doing precisely nothing until forced by Jack Hale to take some action.

A pattern can also be discerned in the way both these regulatory agents dealt with the public. Not only did the regulators take no formal enforcement action against the companies involved with respect to the illegal exposure of residents and workers to asbestos dust, but they consistently avoided publicly defining these violations as illegalities - in this way creating ambiguity and confusion around the precise legal status of the companies' hazardous acts and omissions. For instance, AG Brown's failure to safely dispose of the asbestos cement roof was described by the EHD as 'a problem',[96] and by the HSE as 'not good practice',[97] and the general lack of fencing around demolition areas was described as 'not recommended'.[98] Moreover, the regulators seemed concerned to reassure residents, and the public more generally, that health hazards on the estate were not serious. For instance, in a letter to the Clerk of the local parish council, the Principal EHO wrote that "the report which appeared in

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[93] See EHD Press Release 31/10/95, Appendix 5.
[94] EHD Press Release 31/10/95. Appendix 5.
[95] The implications of the presence of asbestos debris in these locations are extremely grave. These were areas where the old pre-fabs had been demolished, the land cleared and prepared, and finally houses and roads built and grass planted. The fact that asbestos debris could still be found in these areas must have meant that huge quantities of asbestos cement were broken up by excavators and then not cleared from the site.
[96] EHD Press Release 31/10/95. Appendix 5.
[97] Telephone conversation with Della Andrews 07/11/95.

the Evening Echo on 31 October greatly misrepresents the situation." Yet this assurance was given without any proper investigation of the residents' claims. Similarly, the HSE inspector positively stated to another parish councillor that no asbestos products were being put through the crusher, that the health risks to workers were low and the risks to residents were 'non-existent'.[99] Here again, the inspector was simply repeating assurances given to him by company management. He did not seek to verify managers' claims by, for instance, speaking to residents or workers.

The foregoing case-study analysis has sought to examine the role of regulatory agents in deflecting public censure of, and minimising the seriousness of corporate crime. At the same time, it is argued that the enforcement practices adopted by these regulatory agents are typical of an organisational culture and practice of 'trusting' industry, and that this policy and practice has implications for how we assess the efficacy of compliance approaches to corporate offending. In the following chapter, I turn from an exclusive focus on the behaviour of regulatory agents, to look at the activities of the companies involved in redeveloping the estate. It will be argued that the regulators' behaviour opened up a space for company management to suppress residents' criticisms and ensure that their definitions and account of events on Firelands Wood were publicly accepted.

[98] Telephone conversation with Della Andrews 07/11/95.
[99] Telephone conversation with Della Andrews 07/11/95.

6

STRATEGIES OF DENIAL: 'ISSUE SUPPRESSION' ON FIRELANDS WOOD ESTATE

The following chapter explores the way in which company managers on Firelands Wood Estate sought to manage public impressions. In this way, it is proposed that corporations may themselves be active and key participants in the production of a 'moral un-panic' in relation to regulatory illegality. Individuals who are prosecuted for conventional crimes would rarely be in a position to influence perceptions in this way. Nelken has observed that 'the negotiation of meaning is biased in favour of structurally powerful groups' (1983: 211). In the context of business regulation for instance, corporations may 'negotiate' the precise legal status of their activities during the setting of legislative standards.[1] Alternatively, companies may negotiate standards in the enforcement context, where larger, economically powerful companies in particular are able to challenge regulatory rubrics such as 'so far as is reasonably practicable' (James and Walters, 1999) or the technical feasibility of a particular standard (Lynxweiler *et al.*, 1984). However, the negotiation of meaning may also occur - not just between regulator and regulated companies - but between companies and their workers, or companies and a local community. Within these contexts the approach adopted by regulators and other public officials may be crucial in determining the outcome of events. This was the case on Firelands Wood, where the position taken by the regulators *vis a vis* regulatory violations on the estate created the space in which companies were able to deny residents' allegations and dismiss their fears.

In the present case study I have identified four separate 'audiences' which company managers had to confront. These were the residents, the regulators, the wider public (through the reporting of events in the local news media), and finally the 'audience' provided by this research. Clearly, the priorities for company management were: their

immediate need to contain and resolve residents' criticisms; persuade the regulators that contractors were effectively managing safety on the site; and deal with - and deflect - media attention. However, I have sought to understand management responses to questions about the estate during the research interviews, in terms of a wider 'public relations' strategy. This is because the fieldwork for this research was conducted whilst events were unfolding on the estate and, as such, I became part of the wider 'public' whose perceptions companies sought to influence. Although company management approached each audience in a slightly different way, two techniques in particular have been identified as forming the basis of companies' attempts to deflect criticism and evade any legal consequences that might have arisen from their regulatory breaches. The first technique can be characterised as the technique of 'minimisation', and included attempts to minimise or obscure health risks on the estate. The second technique employed by company management was to 'reverse' censure. This involved the demonisation and 'othering' of the very people placed at risk by unsafe conditions on the site, namely the workers and the residents.

These techniques were essentially part of a wider strategy that Otake (1982) has called a corporate strategy of 'issue suppression'. Otake has examined the corporate strategies, and the social and institutional processes, that prevented a particular social conflict - a conflict surrounding the manufacture of defective cars in Japan - from coming to the surface of the political arena. Within his analysis, car manufacturers' responses to events were understood primarily in terms of the corporate imperative of containing any social issues or conflicts that threatened to adversely affect the interests or goals of the organisation. Otake identifies a number of factors that were pivotal to the car manufacturers' success in suppressing and defusing the conflict and anger surrounding their manufacture of a car that was known by company management to have serious design faults. These were: the support of state officials; the companies' monopoly over information and technical expertise; the role played by the media; and the relative powerlessness of the victims. As we shall see, these factors were equally significant in relation to the development of events on Firelands Wood.

MANAGING IMPRESSIONS, NOT SAFETY

[1] See discussion on the negotiation of legal standards in chapter 4.

Techniques of Minimisation and Neutralisation

Although the public and official interpretation of an issue, including its legal or illegal status, was not the primary focus of Otake's analysis, it was of central importance for the companies in this case. Companies needed to avoid the identification of their regulatory breaches as constituting serious violations of the law. As we have seen in the previous chapter, the interpretation of events offered by the regulators and their low-key response was crucial in defusing media interest, and in reassuring a small number of parish councillors who became involved in events on residents' behalf. This, in turn, released regulators from the need to take enforcement action against companies on the estate.[2] These developments then created the space within which company management could embark on a more vigorous dismissal of residents' claims and criticisms. This can be inferred from the noticeable change in the way that companies responded to concerns that residents' health was threatened by certain events on the estate. For instance, the first news report to suggest regulations governing the control of asbestos had been breached followed the incident where an asbestos cement roof was left crumbling outside a resident's garden over the weekend of the 28 to 30 October 1995. The main contractor for the third phase of the redevelopment was ACE Construction, whose first response to these revelations by the news media was an acknowledgement of the seriousness of the incident and an assurance that the breach would be immediately rectified. An *Herald* article reported that a representative from ACE Construction admitted that he was "staggered" to see the asbestos sheeting left in that way and that "It [was] incredible that it happened in the first place".[3] However, during interviews conducted with company management between March and May 1996, a very different sentiment was expressed. Representatives of the firms interviewed were virtually unanimous in their dismissal of the event. The planning supervisor from Dennis King described the incident as a 'storm in a teacup' and as an

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[2] This is because vocal and insistent public criticims of a company's action may be one of the factors forcing regulatory agents to take formal action. For instance, Perrone (1995) found that public outrage, adverse attention from the media or pressure from the relatives of a deceased worker were all external factors that might influence an agency's decision to prosecute. Similarly Weait (1989) found in his study of the Pollution Inspectorate that, "evidence of public concern is an important motivating factor in issuing a letter... the event had become a matter of public interest and the inspectorate must be seen to be 'doing something'." (Weait, 1989: 65).

isolated mistake made by a demolition worker.[4] During a second interview, following a report on the news program *BBC South Today*, he stated that events on the estate had been 'blown out of all proportion'.[5] The planning supervisor from Callum Seaford expressed a similar view, arguing that it was 'only' asbestos cement and that this material was not as dangerous as other kinds of asbestos products. Similarly, the senior contracts manager from ACE Construction asserted that:

> It was unfortunate that the paper made a big deal of it. It wasn't, in my opinion anyway, like it was reported... It may not have been on ACE's site, so from the point of view of commenting on the article, then I've got to be careful... And I would suggest you should be careful on how you interpret the article.[6]

How then is this apparent discrepancy between the initial reaction of the contractors and their subsequent dismissal of the incident during interviews to be explained? In light of the minimal importance company management appeared to attach to resident's fears, it seems reasonable to assume that their initial response was dictated, not by a genuine concern for workers or residents, but by a calculation of what the most appropriate and publicly acceptable response to the incident would be. Once information about regulatory breaches entered the public domain through the involvement of the news media, the behaviour of the organisations involved and conditions on the estate became the object of public scrutiny and criticism. This forced a 'ritual cleansing' in the form of an apology and admission of their mistake. What the organisations sought to anticipate and avoid was the accusation that they were not taking health and safety seriously. Moreover, given that companies' breaches went beyond the incident of the roof,[7] the contractors could not be sure, in the first instance, how the regulatory bodies would react to hazards on the estate. There was, therefore, an initial need to counter the impression that contractors were generally failing to manage the construction project in accordance with legal requirements, or that they

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[3] Davies S 'Dust nightmare on prefab site', *The Southern Daily Herald* October 31 1995: 3
[4] Interview 20/03/96.
[5] Interview 03/04/96.
[6] Interview 18/03/96.
[7] For instance, it was almost certainly known by company management that asbestos debris littered the estate since the EHD had inspected the site and found asbestos debris just a few days before the asbestos roof episode was reported in the paper. Similarly, management must have been aware that demolition areas were not properly fenced.

were not taking health and safety seriously. Thus, whilst there was an initial expression of concern, management also sought to represent the roof incident as an isolated and completely exceptional event. The spokesperson for ACE Construction, for example, described it as "incredible" that this could have happened - implying that controls over the safe removal and disposal of asbestos were generally effective. This portrayal of the incident as unrepresentative of general conditions on the estate therefore marked an early attempt to contain and minimise the significance of residents' fears.

This was followed by a series of interventions on the part of a number of official bodies, who appeared to mobilise their resources in support of contractors on the estate. Publication of the initial *Herald* article was followed almost immediately by attempts on the part of the local Environmental Health Department and the Borough Council to allay public concerns and block any further adverse publicity. The EHD issued a press release stating that:

> Apart from the incident this last weekend, the situation is under control and no asbestos remains on the site which could be a danger to members of the public in its current condition.[8]

A spokesperson from the Council also attempted to contain anxieties by emphasising the 'less hazardous' nature of the asbestos materials involved. In a local news article he stated that:

> Staff would be carrying out regular routine checks on the site to ensure any further asbestos cement – *not the more hazardous blue asbestos* – was swiftly removed.[9] (Emphasis added).

As will be seen, this representation of asbestos cement as 'not the dangerous kind' was central to contractors' efforts to reassure residents on the estate. Their attempts to persuade residents' that there was no danger to their health were again supported by a number of officials and official bodies. For instance, a meeting of the Firelands Residents Association was organised to discuss residents' claims shortly after the first article appeared in the *Herald* on the 31 October 1995. At this meeting, the Housing

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[8] See Appendix 5.
[9] 'Asbestos alert at housing site' *The News* November 1, 1995

Officer from the local council assured members of the association and the residents present that there was nothing to fear. In the next meeting of the local Parish Council a number of officials were present, including the Mayor and the Chief Executive of the Borough Council. One of the residents present at this meeting describes it in the following terms:

> We had the mayor... and the Chief Executive, and all the big bugs there, and they started saying, "We've got the experts, we know what we're doing. There's been a lot of sensationalism, but it's all wrong - it's all been puffed up!" and so on...[10]

The HSE had visited the site on the 3 November, and made it clear that they were satisfied with managements' representation of the roof incident as an isolated mistake. The contractors could therefore by fairly confident that, so far as the HSE was concerned, the matter was resolved. However, the activity of the regulators was not limited to this validation of managements' account of events on the estate. The regulatory agencies also played an important, and active, part in defusing residents' criticisms more directly. This was through their discussions with local parish councillors representing the estate. As discussed in the previous chapter, both the HSE inspector and the Environmental Health Officer sent letters to local Parish Councillors effectively refuting the charge that there was a past or future risk to residents arising from the removal and disposal of asbestos on the estate. Thus, the mobilisation of these officials, acting in support of the contractors and developers, gave an important credibility to the contractors' denial that there had been any significant breaches of health and safety legislation on the estate. The public status of these officials, and the authority of the regulatory bodies, were fundamentally important to the ultimate success of the companies in containing the conflict on Firelands Wood, and evading any legal consequences.

However, it is possible to be even more specific about the role played by these public officials. Research by Swigert and Farrell (1980) in relation to the attempted manslaughter prosecution of Ford Motor Company, and Crainer's (1993) study of the attempted prosecution of P&O following the capsize of the *Herald* off the coast of Zeebrugge, suggest that a failure on the part of both companies to respond 'correctly'

once events became public increased the criticism coming from the media, which in turn may have contributed to a general pressure to prosecute these companies. Crainer relates how there were charges from the news media, in the days immediately following the tragedy, that P&O was 'seeking to evade responsibility' and 'lacked moral courage' (1993: 83). Similarly, Swigert and Farrell argue that: 'definitions of deviance are shaped not only by public reaction but by the repentant or nonrepentant responses attributed to those who are so defined' (1980: 174). Swigert and Farrell found that a majority of news reports relating to the Pinto deaths 'depicted Ford as resisting a definition of harm and liability' (175), and conclude that:

> In its decision to contest civil suits, the corporations refused to recognize that moral boundaries had been trangressed. This opened the way to a definition of the manufacturer as a force against whom the power of the law must be directed.
>
> (Swigert and Farrell, 1980: 180)

This suggests that contractors on the estate were wise in not attempting to dismiss the significance of the asbestos roof in their early response to events. Crucially, however, Council officials, the Environmental Health Department and the Health and Safety Executive all provided the initial refutations that the contractors themselves were unable to make. These early interventions on the part of the regulators then opened the way for the contractors to dismiss the significance and seriousness of those regulatory offences that had been made public. In this way we can understand managers' dismissal of residents' fears, not as contradicting their initial expression of consternation, but as a continuation of their attempts to manage public impressions and deflect criticism. These dismissals, then, represent - not a change of heart - but a change of tactic, facilitated by regulators' failure to respond to or investigate residents' concerns, and the active intervention of a number of public officials.

Public Silence and Private Denial

The minimisation of regulatory breaches on Firelands Wood was based, in the first instance, on what appears to be a selective emphasis - by both regulators and contractors - of those events that could most easily be explained as an unfortunate but

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[10] Interview 15/03/96.

harmless occurrence, along with a notable 'silence' with respect to events that could not be explained in this way. To this end, the companies focused on a single 'incident' to the exclusion of other hazards on the estate. The particular breach that they focused on was their failure to properly dispose of a single roof, which was left outside Sonia Cole's house over the weekend. This could be, and was, explained by the contractors as an isolated mistake made by an individual operative who did not realise that the roof was made of asbestos cement. This was the explanation offered to the press, the regulators, the Council and the residents. A member of the Firelands Wood Residents' Association confirmed in an interview that this was how contractors had accounted for the breach.[11]

Whether or not the episode of the asbestos roof *was* a genuine mistake on the part of an individual worker, what is significant is the failure of the construction companies and their representatives to *publicly* address or attempt to explain those regulatory offences which could *not* be represented as isolated and 'faultless' mistakes - specifically, the claim that there were asbestos materials inside the houses, the contamination of the estate by asbestos cement debris and residents' belief that asbestos cement sheeting was being put through a crusher on site. When publicly confronted on these issues by the news media, company spokespersons and public officials were non-committal - neither denying nor confirming the allegations. For instance the local Council, responding to the claim by a local journalist that asbestos insulation board lined the inside of cupboards, simply stated that: 'inspections of the interior of houses awaiting demolition would continue'.[12] Similarly, in a news item on *BBC South Today*, when rubble and debris filmed on the estate was confirmed by the program makers as asbestos, the main contractor, ACE Construction Ltd, stated that they would 'check the site again'.[13] In this respect their non-committal and low-key response was tactically astute. Otake observes:

> We have seen that the corporations' critics lack the resources and backing to control the corporations' activities, and that they usually exhaust their resources after a short burst of mobilization. A corporation's counter attack against an opponent, thus, is not only unnecessary, but quite risky. Such a

[11] Interview 18/03/96.
[12] Davies, S. (1995) "Docker preparing cash claims', *Daily Herald*, 01/11/95.
[13] *BBC South Today* 26/4/96

> counter attack might prolong public interest in the issue... A corporation's best strategy is to wait for opposition forces to exhaust their resources and for public interest to dwindle, by carefully avoiding provocative action... The press will soon stop criticising the corporation over the same issue, unless the latter provides new material to write about.
>
> (Otake, 1982).

Otake's analysis suggests that investigative journalists reporting on corporate illegality or deviance may have to be particularly dogged and determined if they are to keep an issue alive in the public mind. In the present case, the researchers for *BBC South Today* accepted the HSE inspector's assurance that 'all the guidelines were being followed'.[14] The failure of the regulatory agencies to reinvestigate the site following this news report and the failure of the program makers to press the issue or research the legal implications of their evidence meant that the contractors successfully avoided having to account for these findings publicly.

However, in the context of a number of *private* discussions held between the companies and the residents, the companies and the researcher, and the regulators and the parish council, specific claims regarding the other allegations were denied and the episode of the asbestos roof dismissed as 'a storm in a teacup'.[15] For instance, when questioned by a resident accompanied by a parish councillor for the estate, management explicitly denied that there was asbestos inside the houses, and assured the resident that the houses had been inspected and no asbestos was found inside.[16] As already discussed in the previous chapter, the inspector from the HSE assured a parish councillor during a telephone conversation that asbestos cement was not being put through the crusher, and that the health risks to residents, arising out the removal of asbestos on the estate, were 'negligible'.[17] In relation to the breach that *was* publicly acknowledged, contractors and officials sought to minimise the significance of this in their discussion with residents and the parish council. As mentioned above, officials from the Borough Council told parish councillors that the news reporting of conditions

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[14] Telephone conversation with Heather Macarthy, researcher *BBC South Today*, 21/05/96.
[15] Interview with Graham Down, planning supervisor from Dennis King & Partners. 20/03/96.
[16] Interview 15/03/96.
[17] Notes of a telephone conversation between Della Andrews and the HSE inspector, taken at the time of the conversation by Della Andrews and checked with the Inspector 07/11/95.

on the estate was 'sensationalised'.[18] In a letter to the Clerk of the parish council the Principal EHO claimed that, 'the report which appeared in the Evening Echo on 31 October greatly misrepresents the situation.'[19] And finally, during the fieldwork, two planning supervisors and one of the main contractors stated variously to me that the whole affair 'had been blown out of all proportion', and 'wasn't anything like it was reported'.[20] In support of these claims they were able to impress upon me that the HSE had visited the site and given them a clean bill of health.

Whilst residents rejected, and members of the parish councillors were ambivalent about, these reassurances,[21] in the absence of an official investigation by the regulatory authorities the extent of the contractors' failure to locate asbestos inside the houses was never revealed, nor the extent of the uncontrolled exposure of residents to asbestos dust arising from the demolition work. Only the regulatory agencies possessed the authority to obtain the documentary evidence that would have proved one way or another whether an adequate inspection of the houses had been carried out. But these allegations were never investigated, in spite of the fact that regulators were aware of these fears from the point when they first became involved.[22] Thus, the regulators - by only addressing the failure to safely dispose of the roof left outside Sonia Cole's garden, and by neither fully acknowledging nor investigating the other allegations - ensured that suspicions concerning the full extent of the regulatory offences committed on Firelands Wood estate were never publicly confirmed.

To conclude, whilst residents' allegations were privately denied, and the seriousness of those regulatory failures that could not be denied were dismissed, certain serious violations were never publicly proved. It is important to stress that even though the regulators were aware of most of the claims made by residents (including the claim that there was asbestos insulation board inside the houses[23], the presence of asbestos debris on the estate and the claim that asbestos cement sheeting was being put through

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[18] Interview with resident present at the meeting, 15/03/96.
[19] Personal letter to the Clerk to the Parish Council 3/11/95
[20] Interviews with company management.
[21] Evidence for this comes from interviews conducted with residents, and from personal communication with a local parish councillor 19/03/96.
[22] See previous chapter.
[23] This was brought to the attention of the local Council by the local investigative journalist. East Lynn claimed that inspections of the interior of the houses awaiting demolition 'were continuing' (Davies S 'Dockers preparing cash claims', *The Southern Daily Herald* November 1 1995

the crusher on the estate) they failed to adequately investigate any of these claims. It was this failure on the part of the regulators that allowed the contractors to avoid offering any public explanation for these regulatory breaches, although managers privately denied that there was asbestos inside the houses to one resident and during interviews. Furthermore, the fact that contractors were able to evade these issues publicly meant that they could more easily label opposing accounts as sensationalised and misleading, by offering a creditable explanation for, and account of, the incident of the asbestos roof.

"It's Only Asbestos Cement"

The second way in which they sought to contain the conflict was through the minimisation of the health risks posed by those breaches that were publicly acknowledged. To this end, contractors emphasised the type (asbestos cement) and the condition of the asbestos roof. For instances, two planning supervisors stressed during interviews that the asbestos in question was "only white asbestos - not the dangerous kind", and that "white asbestos cement is not that dangerous". In relation to the actual condition of the roof, the planning supervisors and the demolition contractor insisted that the roof had not been broken up, but was removed in one piece. This account was supported by the EHD's press release, in which it was stated that, although the roof was lined with asbestos "this was still adhering to the concrete material". However, as we have seen, this account of the condition of the roof was contradicted by a resident and a local journalist who stated that the roof was 'crumbling' and broken up. This seems the more plausible account when we consider the age of the asbestos cement products on the estate.

The companies had a rather more difficult time persuading the residents, than they had had persuading the regulators, that no health risks arose from the construction activity on Firelands Wood. Whilst public officials, the regulators and company management claimed that work was being carried out safely, residents had actually witnessed for themselves conditions and practices on the estate and were not convinced. For instance, one resident, who had attended both the meetings mentioned above, was told by a representative from one of the construction firms that 'everything was under control'. But this resident had actually walked along a green bank that ran parallel to the road

outside her house, and picked up pieces of asbestos debris from around the estate. She said angrily:

> I got my feet covered in mud, but I found more of this bonded asbestos and that was *after* all their 'experts' came down and said "there is no asbestos on the estate." And so they're stuffing us up. 'Everything's above board, everything's honest, we know what we're doing, we're experts...' I've got a file here with their explanations – and yet you can go down and find it [asbestos debris], you know![24]

However, the contractors did have some success in persuading some of the residents that the risks associated with asbestos cement were not as bad as those associated with other forms of asbestos. For instance, two residents mentioned during their interviews that it was 'only' white asbestos cement. A committee member from the Firelands Residents Association stressed that it was only white asbestos and that he had been told 'that this was not as dangerous'.[25] Another resident interviewed stated:

> One thing to be said for them is that it's not the dangerous brown asbestos or blue. And also there's only sixteen percent asbestos in the bonded asbestos. And also the kind I picked up, bonded asbestos, is perfectly harmless as it is. It's when it's crushed..."[26]

Here again, the contractors' representations of the nature and seriousness of the risk were given official support and credence. As stated, a Council official stressed in a news report that the material being removed was not 'the more hazardous blue asbestos' (see above). And the resident quoted above was basing her assessment on reassurances provided by the HSE inspector in a letter to one of the parish councillors. In it he states:

> Asbestos cement is a hard composite material containing a relatively low percentage of asbestos, typically 10-15%, which is less than most other products containing asbestos. Provided the material is not cut with power

[24] Interview 15/03/96.
[25] Interview 18/3/96
[26] Interview 18/3/96

tools... or crushed and broken in large quantities, the risk of releasing asbestos fibres into the atmosphere is low."[27]

Residents' acceptance of this technical assessment can be understood in terms of the official status of the regulator and their own lack if knowledge of the scientific literature. It may also be the case that residents were more willing to accept this appraisal of the health risks of asbestos cement both because it did not contradict their own direct experience and observations, and also because it provided them with a degree of reassurance.

The preceding discussion aimed to identify some of the ways in which the construction companies and developers sought to contain and suppress the issue of asbestos exposure on Firelands Woods. It was argued that this was achieved by contractors publicly focusing only on those events that could be explained in terms of a worker's mistake. In relation to this incident, the type of asbestos, and other 'facts', were emphasised in order to convey a sense of the minimal risks posed to the residents by this event. Other concerns relating to the presence of asbestos products inside the houses, residents' fears of exposure during demolition and crushing and the continued presence of significant amounts of asbestos debris were privately denied or dismissed. The lack of investigation by the regulators, their attempts to reassure residents and members of the local parish council, and their refusal to label regulatory failures as law violations were crucial in facilitating contractors' attempt to minimise and obscure events on the estate. In the following section the second technique used by contractors to suppress and contain the issue of asbestos exposure on Firelands Wood is explored. This technique was essentially one in which the process of censuring was reversed, and involved attempts to demonise, disparage and 'other' any critics of the companies on the estate.

Inverting Censure, Blame and Responsibility

I have argued that the minimal and non-committal response of the contractors to publicity and questions about asbestos debris on the estate was an astute response in

[27] Letter to Della Andrews, 21/11/95

the context of addressing their 'public' audience. The regulatory authorities had given every indication that they would not be pursuing this matter, and if adverse publicity could be contained and public criticism kept to a minimum it seemed unlikely that the regulatory authorities would be forced to change tack. It was therefore essential that the companies and developers issued no public statements which might provoke people living on the estate, thereby prolonging the conflict and increasing the chances of the regulatory authorities having to investigate residents' complaints. Following from this, the technique of inverting censure and blame against the residents, employed by managers in the research interviews, would have been highly inappropriate as a comment in a news article. Any criticism of the residents in this context would in all probability have fuelled people's anger and prolonged the conflict. As it turned out, media publicity was not sustained enough to put pressure on the regulatory agencies to reinvestigate the project or take enforcement action. As stated, one of the reasons for this was that the researcher for *BBC South Today* accepted the HSE inspector's assurance that the HSE had visited the estate and 'been happy that all guidelines were being followed'. Thus, in spite of the fact that this statement was clearly incongruent with the researcher's own evidence that the estate was contaminated, she accepted the implication that the issue was therefore settled.

Whilst it was tactically necessary for companies to give only limited and unprovocative responses to the news media, the circumstances of the interview provided an opportunity for - indeed demanded - a more lengthy explanation of events on Firelands Wood. In marked contrast to their reticence with the press, during interviews and in the context of small meetings, where information could be more easily controlled, company personnel were vigorous in their criticism of those groups and individuals whose account of events on Firelands Wood estate contradicted their own preferred account. These criticisms were aimed mainly at the following people: Rodney Cole, who had first contacted the press, the *Herald* journalist Simon Davies, and the residents. Once again, public officials supported contractors' attempts to invalidate these accounts. It will be argued that these responses need to be understood as further measures intended to suppress the issue of asbestos exposure on the estate by undermining the perceived sources of the criticism and conflict.

The Firelands Wood Saboteur

As previously stated, the construction companies and the HSE gave mutually reinforcing accounts of events on Firelands Wood. This is not surprising since the HSE inspector's conclusions were based wholly on information received from the main contractor, ACE Construction, and the demolition contractor AG Brown. What is more surprising is that following the television report confirming the contamination of the estate with asbestos debris, and when pressed in the research interviews to explain and comment on the significance of this, identical and rather improbable explanations were offered by both regulator and management. It was suggested to me on two occasions that it was possible that someone had 'planted' the asbestos debris around the estate. On the first occasion a manager from Callum Seaford[28] said that from the television footage it looked as though "somebody had got a handful of the stuff from somewhere else and dumped it there."[29] The second occasion occurred nearly a month later during a conversation with the HSE inspector who had originally inspected the site. When asked whether evidence in the news report confirmed residents' claims that asbestos on the estate had not been disposed of properly the inspector disagreed. Instead he represented that it was possible someone had broken pieces off some of the garages and guttering still standing on the estate, and scattered them in the area shown in the television broadcast.[30]

There are a number of factors that suggest first that this claim was completely unfounded and second that it was not genuinely held, or at least that it was not genuinely held by the HSE inspector. First, the asbestos rubble filmed by *BBC South Today* had previously been observed by me during a visit to the estate. Although some of the rubble was lying on the surface of the ground, some of the rubble was half buried in the earth and, by the compacted appearance of the earth surrounding the rubble, it had clearly been there for some time. Photographs documenting this fact had been shown to the HSE inspector by Jack Hale (a local parish councillor) *before* the inspector made the suggestion to me that the contamination had been caused by someone other than the demolition contractor. Furthermore, in his discussions with Jack Hale the HSE inspector in no way indicated that he disputed any of the evidence in Mr Hale's possession. In fact the inspector actually told Jack Hale that the HSE had 'had problems' with the demolition contractor AG Brown before. However, the most

[28] Callum Seaford were employed as agents for one of the developers of the estate, and, after the introduction of the CDM Regulations, they were appointed planning supervisor
[29] Interview 08/05/96.

powerful evidence that the HSE inspector accepted Mr Hale's claims comes from internal HSE records relating to his visit to the estate on this occasion. As stated in the previous chapter this record describes the substance of Mr Hale's complaint relating to the asbestos and his complaint is described as "fully justified".[31] Despite this, the HSE inspector suggested to me that the rubble had been deliberately placed there.

As stated, this highly implausible suggestion was also made by management. As it is unlikely that this explanation would have occurred to the HSE inspector himself it seems probable that this explanation was suggested to him by the companies. It is highly unlikely that the construction companies genuinely believed their own explanation. Asbestos debris had been discovered around the estate on a previous occasion and witnessed by the local environmental health officer. No suggestion was made at that time that this had been caused by anyone other than the demolition contractor. Moreover, if the construction companies involved believed that one of the residents, or some other person, was deliberately contaminating the site with asbestos debris it would have been open to them to have called in the police to investigate. This was not done. As to the HSE inspector, whilst he may have accepted this explanation initially, it appears from his own records of the visit that he did not continue to hold to this view in light of the more persuasive and feasible evidence presented by Mr Hale. It could be argued then that in proffering this explanation to me the inspector was attempting to conceal regulatory breaches committed by the contractors and/or conceal the failure of the HSE to adequately investigate, or take action in relation to these offences.

Following the news report on *BBC South Today*, in which it was confirmed that a substantial amount of amount debris still contaminated the estate - despite previous assurances that the matter has been dealt with - it would have been difficult to have minimised the seriousness of this fact. Instead an explanation was given where responsibility for the contamination of the estate was shifted on to some person unconnected to those organisations and individuals managing the construction project. It is significant that this particular account was not publicly aired as it is likely that it would have provoked a response either from the residents or the media and possibly prolonged the conflict. However, within the context of a confidential interview that

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[30] Personal communication 07/06/96.
[31] See footnote 74, chapter 5.

would have no immediate or personal repercussions, it might have seemed 'safe' for company management to articulate this view. Whether or not this rather far-fetched view was genuinely held, the effect of such statements was to shift responsibility and attention away from the construction companies.

Muggers, Vandals, Thieves and Irresponsible Mothers

It was also in the context of management interviews that a similar inversion of responsibility and censure took place in managements' representations of residents on the estate. For instance, during an interview, one of the planning supervisors from Dennis King described how he had walked around the estate one evening. He described the experience as a pleasant one, except for the fact that 'he was worried about being mugged'. A similar signalling of Firelands residents as the disreputable, and possibly criminal, working class occurred more explicitly in the context of an interview with another planning supervisor. In the course of providing examples of the kinds of risks that would have been recognised in the pre-tender health and safety plan it was stated that:

> There were quite a lot of concerns about security and vandalism on the site, and that site does suffer quite a lot [from vandalism]. But we had to make it clear that they [the main contractor] couldn't use any anti-climb barbwire or anything else that would actually be dangerous.[32]

As well as painting a picture of residents on the estate as *the source of danger*, a simultaneous impression was given of responsible contractors concerned to safeguard residents' health and safety. This was followed by statements expressing the view that it was ultimately the responsibility of mothers to ensure the safety of their own children and that the contractors had done everything that was reasonably within their power to protect the residents from themselves:

> I think ACE [Construction Ltd] were pretty proactive on safety and they actually [showed] a couple of videos for the local community at the community hall (I think Hays did as well) saying that sites are dangerous. They went quite a long way to try and educate people that sites are dangerous.

> Mothers have got to look after their children. We can put fences up but at the end of the day if people want to try and get in, they'll get in...[33]

Such an attitude is remarkably similar to a more general attitude, evinced by management in the interviews, towards safeguarding the health and safety of their employees. As well as censuring residents through the use of the criminal stereotype, these representations echo a pattern of ascribing the causes of accidents and ill health to the unsafe actions of the victims of industrial injuries and ill-health. The existence of this particular kind of victim-blaming has been noted, for instance, by Tombs (1991). Within such a perspective, the main responsibility of employers will be to protect workers from their own ignorance, stupidity or bad luck. Management therefore appear as benign nannies in relation to dangers that said to have been created by the carelessness of workers or, in the present case, the deviancy of the residents. It is interesting to note that this particular technique for reversing blame on to the victims of corporate violence was already within management's *repertoire* since they used it in relation to their employees. This will be illustrated in the following chapter.

Moreover, this representation of events on Firelands Wood is rather disingenuous. Whilst the planning supervisor positively stated that the main contractors did everything within their power to deny members of the public access to the sites under construction, the reality of the situation was that demolition areas were almost entirely accessible. The contractors and developers would have been aware of this either through their supervision of the site or (if they had failed in their duty to adequately supervise the work) because the lack of fencing was publicised through the newspaper article and because the HSE inspector privately criticised the contractors for this breach of the regulations.[34] The portrayal of management as complying with health and safety requirements is, at least in respect of the fencing, clearly false. This lends support then to an understanding of these representations not as simple statements of facts, or even as statements of belief. Rather these patterned and thematic responses must be understood in terms of the achievement and management of certain impressions. What is important here is not simply the representation of management as

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[32] Interview with the planning supervisor from Callum Seaford, 08/05/96.
[33] Interview with the planning supervisor from Callum Seaford, 08/05/96.
[34] Interview with HSE inspector 19/04/96.

'responsible' but the contrast of management responsibility with the implied irresponsibility and deviancy of the residents.

In this present case, managers' statements and responses occurred in the context of an interview whose organising purpose and theme was the management of health and safety on the estate. The backdrop to this - acknowledged by both the interviewer and the interviewee - was the conflict surrounding the residents' exposure to asbestos and other unsafe conditions on the estate. These characterisations of residents as at best irresponsible and at worst criminal contrived, therefore, to produce a number of effects. First, in representing residents as deviant and disreputable, doubt is cast on their claims without managers having to directly deny the validity of those claims. As was seen in relation to management's attempt to account for the contamination of the estate with asbestos rubble, statements directly denying or otherwise attempting to explain unsafe conditions on the estate were hard to maintain. As such, this general discrediting of residents may have been a more effective way of undermining their claims. Second, attention was directed away from management's responsibility for safety on the estate, towards the individual responsibility of residents. Third, these censures of the residents neutralised specific instances of regulatory non-compliance by constructing the victims of these offences as 'unworthy' (Herman and Chomsky, 1994).

Personal Vendettas and Spotty Young Journalists

This interpretation of management's statements becomes more plausible when we consider that this was not the only instance of reverse censure that took place but was, rather, part of a more general pattern in which an explicit attempt was made to discredit those individuals criticising the companies or drawing attention to conditions on the estate. These efforts were directed mainly but not exclusively at discrediting Rodney Cole. Mr Cole was an elected councillor for the neighbouring parish and as such he had no officially recognised role as a representative of Firelands Wood residents. However, his daughter and grandson both lived on the estate, and as such he had good reason to be concerned about conditions on the site. This was particularly so since the garage roof had been left directly outside of his daughter's garden. Mr Cole had been the one to bring the presence of asbestos rubble on the estate to the attention of a parish councillor. This led to the first involvement in the redevelopment of the

local Environmental Health Department. Mr Cole was also responsible for putting the petition up in the local shop expressing concern over the unsafe removal and disposal of asbestos cement products. Finally, after the roof was left over the weekend outside his daughter's home, he contacted a journalist from the local paper, who visited the site and reported residents' claims and recounted his own observations about the unsafe conditions on the estate.

During interviews with company management the possibility that Mr Cole was motivated by a genuine concern for the welfare of his daughter, grandchild and other residents was never acknowledged. On a number of occasions, my references to the adverse publicity concerning the redevelopment prompted an attempt by the manager interviewed to portray Mr Cole's involvement as illegitimate. For instance, I was informed that the whole conflict was the result of "one person's personal vendetta against the local Borough Council".[35] The HSE inspector also attempted in an interview to imply that Mr Cole's concern and involvement in the estate was unofficial and therefore suspect. The inspector referred to:

> A complaint we received from a local councillor (*in inverted commas*) who complained about asbestos cement sheeting... and the disposal of it.[36] (Emphasis added).

Occasionally this turned into a more vociferous attack. One parish councillor, who also lived on the estate, attended a special meeting of the Residents Association held to discuss events on the estate. She reported that a Housing Officer from the local Council referred to, "that monkey, Rodney Cole, cavorting about on a garage roof".[37]

The allusion to Mr Cole on a garage roof was a reference to a photograph of him taken by a photographer from *The Southern Daily Herald* during Simon Davies's visit to Firelands Wood following the incident of the garage roof. The photograph appeared along with the article detailing conditions on the estate. It showed Mr Cole walking across the roof of a garage that had not yet been demolished. Much was made of the opportunity this afforded company management and the regulators to present Mr Cole

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[35] Interview with Graham Down, Dennis King Partnership 30/4/96.
[36] Interview with Jonanthon Peters, HSE Inspector 19/4/96.
[37] Interview 15/3/95.

as irresponsible and foolish. Asbestos cement sheeting is a fragile material and there was therefore a risk that Mr Cole might have fallen through the roof of the garage. The HSE inspector told another parish councillor (in rather more measured terms then those the housing officer had used) that Mr Cole was "lucky not to fall through the roof" because of the fragility of the material.[38] The planning supervisor from Dennis King was interviewed on two separate occasions. On the first occasion, when I mentioned the initial article in the *Daily Herald* he responded by explaining why it was all 'a storm in a teacup', going on to criticise Mr Cole for climbing on the roof. He also stated that the journalist from the *Herald* was simply 'looking for a story'.[39] On the second occasion, when I alluded to the television news report publicising the contamination of the estate with asbestos he again asserted that the whole thing had been blown out of proportion again and described Simon Davies as "a spotty young journalist who had tried to tell the blokes on site how to do their jobs."[40]

The planning supervisor from Callum Seaford also criticised Mr Cole in the context of assuring me that events on Firelands Wood had been distorted and exaggerated by the press. These responses are noteworthy because they form a consistent and patterned response to questions about the unsafe handling of asbestos on the estate. In these responses, attention and censure is shifted from the actions of the contractors and developers to those of their principal critics. Moreover, through their depictions of Mr Cole and the *Herald* journalist as irresponsible and risk-taking on the one hand, and inexperienced and interfering on the other, they were able to contrast this with their own position as responsible professionals who knew what they were doing. In this way it was implied that management's account of events was infinitely more credible than their opponents. Their criticisms of Mr Cole were also thematically consistent with their portrayal of the residents and their portrayal of workers in discussion of the causes of injuries and deaths. Within these various representations the victim of workplace mismanagement is presented as the cause of his or her own misfortune and the creator of workplace risks. Company managers, on the other hand, are represented as a benign, law-abiding group intent on protecting these individuals from their own ignorance or foolishness particularly through education.

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[38] Notes from a telephone conversation between Della Andrews and JR Peters, HSE. Taken by Della Andrews at the time of the conversation and confirmed with the Inspector. 07/11/95.
[39] Interview with Graham Down, Dennis King Partnership 20/3/96.
[40] Interview with Graham Down from Dennis King Partnership 30/4/96.

Professionalism and the Hierarchy of Credibility

The professional status of the contractors, and other organisations with some role in the redevelopment, was explicitly used to deny the validity of opposing criticisms and accounts. When one of the planning supervisors on the project was asked whether the asbestos on the site had been identified in the pre-tender plan, he explained that because demolition had already been completed on their areas of the redevelopment they were not responsible for identifying the asbestos on the estate. However he also stated that he thought the Council had had some of the houses checked before all the work started. He went on to say that the Fire Brigade had used a couple of the houses prior to demolition to film a training video. This, he said, proved that the houses could not have contained asbestos as the Fire Department would not have used the houses if there had been any doubt about it. He went on to argue:

> There's a whole range of responsible professionals saying the same thing. You have the Council, the Fire Brigade, the HSE, two professional contractors. They should know what they are talking about. You've got to believe them.[41]

In raising issues of 'professionalism' in the context of this particular social conflict, contractors were depending upon the existence of what Becker has termed a 'hierarchy of credibility'. Becker (1967) argues that in any hierarchical relationship, those in a superordinate position tend to represent and articulate the approved and dominant morality. It is also generally assumed that individuals belonging to superordinate groups have the right to define reality because their position gives them priviledged access to information. Individuals can occupy a superordinate position by virtue of their class, or because of their official or professional status within hierarchical social relationships. Thus a hierarchy of credibility is constructed in various social situations and contexts, and we:

> Are morally bound to accept the definition imposed on reality by a superordinate group in preference to definitions espoused by subordinates...

[41] Interview with Gerald Taylor, Planning Supervisor, Callum Seaford 08/05/96.

> Thus, credibility and the right to be heard are differentially distributed through the ranks of the system.
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> (Becker, 1967: 241).

I would argue however that the relationship of the corporation to the hierarchy of credibility is not automatic simply by virtue of the corporation's economic and political power, although individuals from within the corporate elite may have a stable, superordinate position within the hierarchy. This is because, as was argued in chapter 3, the success of the corporate ideology is neither complete nor unproblematic. Glasbeek (1988) and Tombs (1997a) have argued that the large corporation has had some success in representing itself as the centre and motor of a nation's economic prosperity – the provider of jobs, services, goods and wealth. Market competition is also represented as the engine for technological innovation and advance. In this way corporations "have made us understand that what is good for them is good for us." (Glasbeek, 1988: 384). This ideology has not however been an unqualified success. There also exists a good dose of cynicism and distrust of the large corporation. The degree to which this exists will vary according to cultural, national and other social factors, but the consequences of this are important for the ease with which corporations are able to suppress and contain conflict, information or social forces which threaten their immediate or long term interests.

For instance, the success of Japanese car manufacturers in concealing certain manufacturing defects from the public was dependent in the first instance, not on a generally held faith in their absolute integrity, but on their monopoly of information and technical expertise. However, the economic, political and social power of the corporations did not immediately ensure that their initial denials were publicly accepted once rumours about the defects had started circulating. This was a consequence of what Otake (1982) identifies as a general anti-big business feeling that pervaded public opinion in Japan. Instead, initial public and media acceptance was secured through governmental protection and validation. When the Ministry of Transport was first questioned about the suspected defects, a spokesperson from the MOT stated "Honda says there are no defects in the N 360, therefore there is no reason to expect any" (Cited in Otake, 1982: 93). The credibility of the car manufacturers in this case was dependent on the unqualified support and trust of government officials.

In this sense a company's position within the hierarchy of credibility may be uncertain, and something that needs to be negotiated and won. The success with which companies in the present case study were able to ensure that their particular version of events was the publicly accepted one, and thus suppress the conflict on Firelands Wood and avoid any legal consequences for failing to comply with health and safety legislation, was dependent on two main factors. First, it is logical to suppose that the degree of credibility they carried would arise in inverse relation to the lack of credibility attached to the groups with which they were in conflict. The status of the residents as neither experts nor professionals seemed to put them at a disadvantage, at least as far as the HSE inspector was concerned. A parish councillor described the inspector as 'rather dismissive' when she spoke to him following his first visit to the estate.[42] As discussed in the previous chapter, there is evidence from interviews with management and the interview with the HSE inspector, that the contractors and the inspector shared a particular attitude to 'the general public' as a rather bothersome constituency they were nevertheless forced to deal with. The social status of residents on the estate may also have been a factor in determining the extent to which they could influence official bodies such as the regulatory agencies and the local council. The majority of residents on the estate were working class, but there was also a perception that a large number of people on the estate belonged to the 'disreputable working class'. One resident, discussing the fact that people from Firelands estate were not guaranteed a place in one of the new houses, stated:

> Firelands has a bad reputation for villians. Velmour estate is even worse. There are fourteen people living around me who come from the Velmour estate... That's their attitude - 'shove all our ruffians into Firelands'.[43]

There was certainly a perception amongst a number of the residents interviewed that they were seen as relatively powerless and therefore treated with a lack of courtesy and consideration by the contractors, the developers and the local council. This was expressed on one occasion by the assertion that "they treat Firelands people like dirt".[44] Another resident interviewed understood it in the following way: "they just don't care. They think we're so ignorant on Firelands that we don't know what's going on and so

[42] Personal communication 19/03/96.
[43] Interview 15/3/98
[44] Interview 15/3/96

they can do what they like."[45] This perception of residents on the estate as separate from the 'respectable working class' facilitated the demonisation and 'othering' of the residents by company management discussed above. The labelling of residents as 'criminal', 'deviant' and 'irresponsible parents' would have pushed the residents to the bottom of the hierarchy of credibility.

The second factor that proved critical in the construction of management credibility was, as in the case of Otake's car manufacturers, the mobilisation of official bodies and individuals acting in support of the developers and contractors. The representation of events on the estate provided by the regulators faithfully reflected the account that companies and the developers sought to promote. The construction companies, accused by residents of endangering their health and safety, were described as 'reputable' by the HSE inspector. The HSE inspector criticised Rodney and questioned the legitimacy of his role, as did the housing officer from East Lynn Borough Council. If, as Otake asserts, the mass media plays a critical role in the politicisation of social issues[46] then the HSE inspector's assurances to the researcher from *BBC South Today* that "everything was fine when they inspected the site"[47] may have been have been critical in the suppression of this particular conflict. The HSE inspector belonged to an institution which lent him credibility in the eyes of the researcher – so much so that she was willing to accept his judgement of the affair over her own observations and experience of conditions on the estate.

The involvement of official bodies and individuals in the conflict did not stop at their validation and confirmation of contractors' account of events. At particular points in the affair they took a more proactive role in aiding the suppression of criticism and conflict. Shortly before *BBC South Today*'s reporting of the asbestos contamination of Firelands Wood, East Lynn Borough Council wrote to Hound parish council to 'enquire' what 'Mr Cole's position was'. The effect of this was to put pressure on the other parish councillors to ostracise Mr Cole.[48] At the same time the issue of Mr Cole's involvement in the estate was entered in the minutes of the local Parish Council 'for discussion' at their next meeting.[49] About a fortnight later, Sweet Housing

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[45] Interview 15/3/96
[46] Otake, op cit.; p88
[47] Telephone conversation with Heather MacCarthey, *BBC South Today* 21/5/96
[48] Interview with Jack Hale, parish councillor 24/3/96
[49] Interview with Jack Hale 24/3/96

Association's solicitor and Firelands Wood Residents Association[50] wrote separately to Hound Parish Council, asking that the council keep Mr Cole away from the estate.[51] The involvement of East Lynn Borough Council in the suppression of publicity on behalf of the contractors can be understood quite simply in terms of their actual involvement as developers in the construction project. It should be remembered that they were responsible for contracting out the demolition work during the initial stages of the redevelopment. The general marshalling of the 'forces of respectability' may have been an issue in the eventual bowing of the parish council to the censuring of Mr Cole. However, this may also represent a general conservative tendency on the part of official bodies to avoid potential conflict with commercial interests.

Thus, the activities of these official bodies and individuals combined to secure the contractors' superordinate position in the hierarchy of credibility - to reconstruct this hierarchy at a local level. This and the refusal of regulators to make events 'newsworthy' by labelling companies' breaches as law violations, in turn determined the extent to which the local news media were willing to pursue the issue as a news item.

CONCLUSION

In the preceding sections the behaviour and responses of the companies and developers were analysed in terms of their efforts to suppress the issue of residents' exposure to asbestos and other unsafe conditions on Firelands Wood estate. Company management sought to suppress and contain the conflict by representing events and conditions in a way that minimised the nature and extent of health risks to residents and workers. Company management then needed to ensure that this representation became the publicly accepted account of events. One of the ways in which they sought to do this

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[50] As previously noted, the Residents Association did not appear, from the interviews conducted with residents on the estate, to actually represent the views or wishes of the majority of the residents. Their preferred tactic in responding to health and safety hazards on the estate had been to liase with company management – mirroring in a sense the preferred approach of the regulators. They were therefore angered by the adverse publicity and the criticisms of the contractors made by residents, and blamed Rodney for the conflict on the estate. It is difficult to see how the conflict could in reality have been the responsibility of Mr Cole. Residents had not been coerced by him into making their statements to the press. On the contrary, many residents ended up approaching Mr Cole with their complaints rather than the Residents Association, implying that they did not see the Association as their mouthpiece.

[51] Telephone conversation with Jack Hale 10/4/96.

was through the discrediting of their chief critics. To this end company management censured the residents of Firelands Wood, Mr Cole and the *Herald* journalist, whilst simultaneously attempting to portray themselves as reputable and conscientious employers. This strategy of reversing censure acted as a smokescreen by shifting attention and criticism away from the construction companies and towards the victims of their regulatory offences. This tactic had a number of effects, serving to discredit sources of opposing information, shift responsibility onto residents for their own health and safety and neutralise the regulatory breaches that were publicly acknowledged through the construction of the residents as 'unworthy victims'. The acceptance of the contractors' and developers' account of events by the media, the regulators and other official bodies was a precondition of their success.

The phenomenon of issue suppression, as Otake formulates the concept, involves the suppression of social conflicts that could adversely affect the corporation. Because the criminal label both expresses and mobilises public censure, the corporation's successful suppression of social conflict and criticism will necessarily entail an avoidance of the labelling of their harmful acts or omissions as 'crimes'. The present case study has allowed an analysis of the immediate and local forces that combined to ensure that potential violations of health and safety regulations were not labelled as 'criminal'. In this sense events on Firelands Wood provide an insight into the 'peculiarly systematic form of non-labelling at the operational level' which Carson (1970) has identified as characteristic of white-collar crime.

The relative powerlessness of the victims of the companies' safety crimes, including the demolition workers (some of whom may have been exposed to extremely high concentrations of asbestos fibres) may have facilitated this process. These workers were obviously dependent on the companies for their jobs. And, as Tony O'Brien of the Construction Safety Campaign has argued: "Workers who complain about asbestos do not get controls or masks - they get the sack" (cited in Dalton, 1995b). The residents, on the other hand, were not dependent on the construction companies in the same way, although many residents did not want to 'rock the boat' because they had been told that the Council was deciding which families were re-housed on the estate.[52] Nevertheless, the social status of the residents, and the identification of a proportion of them as the disreputable working class, ensured that they were not seen by those official bodies and

individuals, whose responsibility it was in some way to protect their interests, as deserving of, or able to demand, their support. Thus residents lack of political, social and economic power may have determined their 'subordinate' position within the hierarchy of credibility in relation to the companies on the estate.[53]

Some white-collar criminologists have noted the similarity between the responses of corporations to accusations of deviance and those of individuals who are labelled. For instance, Ermann and Lundman (1996) categorise deviant corporations' responses according to the techniques of neutralisation' identified by Sykes and Matza (1957) amongst working-class boys labelled as 'delinquents'. Sykes and Matza identified five techniques of neutralisation: denial of responsibility, denial of injury, denial of the victim, condemnation of the condemners, and the appeal to higher loyalty. Similarly, Ermann and Lundman identify three characteristics typical of the 'alternative accounts' offered by corporations. They write that:

> Organisations attribute troublesome actions to particular individuals ("scapegoating"), assert that no one was injured ("denial of injury"), and accuse attackers of being dishonest and self-serving ("condemnation of the condemners").
>
> (1996: 30).

All of these techniques characterised management responses to events on Firelands Wood estate. However, what fundamentally distinguishes the vocabularies of neutralisation employed by the companies on the estate, from those articulated by accused individuals is their social affect. In the present case study management accounts were not simply mechanisms of justification or neutralisation but, more significantly, were functional to the suppression and containment of a particular social

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[52] Interview with parish councillor 15/03/96.

[53] However, I would not want to argue that their powerlessness to publicly define events was an inevitable consequence of their social status. Instead, it may also have been a consequence of the fact that residents on Firelands Wood did not organise politically. For instance, around that time Southampton City Council was prosecuted by the Health and Safety Executive for its failure to warn maintenance workers employed by the council about asbestos insulation materials in a number of tower blocks in Southampton. The residents of these tower blocks set up a residents committee to campaign around the issue. This committee managed to mobilise the continued support of two local papers and the City Council was forced to concede to a number their demands - including demands that air monitoring was carried out in their flats, and that the asbestos products were 'made safe'.

conflict and, as a result, to the avoidance of the criminal label. Ultimately it was not management's accounts *per se* that were instrumental to achieving this end, but rather the processes by which management's accounts were validated by those bodies and individuals with an official status and role in relation to events on the estate. This case-study analysis has, therefore, shown how companies can shape public definitions and negotiate the formal labelling of their illegal acts in a way that conventional defendants cannot.

7

PASSING THE BUCK: THE 'DEMORALISATION' OF CORPORATE RESPONSIBILITY

MANAGEMENT ATTITUDES TOWARDS THE CONTROL OF HAZARDS AND THEIR ACCOUNTS OF INDUSTRIAL INJURY, DISEASE AND DEATH

The following chapter is based around an analysis of data gathered during interviews with managers from the companies responsible for the Firelands Wood redevelopment. These interviews were designed to explore managers' attitudes towards their responsibilities for the health and safety of workers and members of the public affected by their undertakings, and to elicit data concerning the relationship between company management and the regulatory authorities. In their answers to questions concerning the importance of health and safety management, the managers expressed attitudes and values that were associated in Haines's (1997) research with firms that possessed 'a greater capacity for virtue'. This appears to be consistent with Haines's thesis that larger companies occupying a controlling position in the contractual hierarchy are more able to respond 'virtuously'. The managers interviewed came from companies that dominated the contractual relationships on the site. They were also medium-sized companies, and two of the main contractors were subsidiaries of a larger group.

However, despite the initial impression of 'good appleness', when more probing questions were asked to elicit managers' attitudes and beliefs concerning the causes of injury and ill-health, managers tended to offer accounts which 'demoralised' managerial responsibility in various ways. It will be shown that these attitudes were consistent with, and drew upon wider discourses and myths within the construction industry more generally. Interviews were also conducted with workers and trade unionists within the industry (see below and Appendix 1). Qualitative data from these

interviews provide a valuable means of reflecting critically on some of the attitudes expressed by managers in this study.

Interviews were conducted with eight managers from the six companies identified as having overall responsibility for previous and current phases of the redevelopment, namely, the three companies functioning as planning supervisors for the developers, and the three main contractors, who fulfilled the role of principal contractor on their phases of the redevelopment. In addition the Contracts Manager from AG Brown, the demolition contractor on the third phase of the redevelopment, was interviewed.[1] Interviews conducted with company management occurred at a particularly interesting time. As stated, a new and pivotal set of regulations specific to the construction industry had recently come into effect. These were the Construction (Design and Management) Regulations 1994 (CDM). The CDM Regulations were specifically designed to clarify responsibilities between developers, contractors and sub-contractors on large construction projects and to improve the management and planning of health and safety. They marked an attempt to raise awareness of health and safety at every stage in the construction project and strengthen managerial self-regulation. In this way the regulations provided an ideal and easy entry into discussions about the management of health and safety.

Good Apple Firms?

The overwhelming impression conveyed from interviews with company management was an impression that these firms were responsible employers, genuinely concerned with the health and safety of their workforce and members of the public. This impression was maintained throughout discussions around diverse subjects such as their perception of the CDM Regulations; their relationship with the HSE; and the appropriateness of the criminal sanction for violations of health and safety legislation. The impression of reputable and reasonable employers, making every effort to comply with their duties under health and safety legislation, was conveyed in a number of ways. First, it was signalled through their acceptance of regulatory controls and an active approval of measures that were perceived as improving the safety record of the industry. In this sense there was no sign of the deregulatory 'fever' that gripped Conservative Government Ministers throughout the 1980s and early

[1] See Methodology section in Appendix 1.

1990s. For instance, when asked whether he felt that the content of the legislation in any way 'burdened' industry, a manager from one of the firms acting as principal contractor replied

> The only thing I can honestly say is, that because of the industry's record, it's an understandable burden. It's a way of helping [the industry] improve.[2]

Second, a general sense of 'good appleness' was conveyed through accounts that suggested that managers were attempting to comply with, and saw value in, the bureaucratic and administrative requirements of the CDM Regulations. For instance, one of the planning supervisors interviewed explained how his firm, in assessing the competency of the principal contractor, tried to guard against the possibility of approving the appointment of a particular firm simply because it looked safety conscious 'on paper':

> The original questionnaire we put together after reading... the HSE [guidance] went along the lines of 'do you understand the CDM regulations?' Well, everyone's going to say 'yes'. And the original set of questions we had were a little bit naïve. The revised set... are more along the lines of requiring specific information about training, about their knowledge and about the people that will be running the job.[3]

Another example was given where compliance with the regulations had delayed the start of production on site, implying that safety had been prioritised over production.[4] Contractors also suggested that, in general, compliance with health and safety legislation was the norm, with one contractor explicitly denying that production pressure would ever be allowed to compromise safety in his firm.[5] In fact, safe ways of working and compliance with health and safety legislation were frequently represented as being in the best interests of the company. In the present case study, one planning supervisor gave support to the HSE dictum that "good health is good business" when he asserted: "But injuries cost money! God forbid, if we had a fatality on this site everything would be shut down until the HSE says 'go'. And that can cost cash."[6] Another manager stated that if an inspector asked for a specific improvement

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[2] Interview with Frank Smith, Director for Health and Safety, Hays & Sons10/5/96.
[3] Interview with Chris Davies, planning supervisor, Wellard & Partners 17/4/96.
[4] Interview with Gerald Taylor, planning supervisor, Callum Seaford 8/5/96.
[5] Interview with Jim French, senior contracts manager, ACE Construction 18/3/96.
[6] Interview with Graham Down, Planning Supervisor, Dennis King & Partners 30/ 4/ 96

to be put in place then: "Our boys will do it, because it's not in our interests to do anything else".[7] In this way he suggested that there was little conflict between the purpose of health and safety legislation and the goals and interests of the company. Similarly, one of the planning supervisors on the project suggested that CDM benefited the industry because it imposed a degree of planning and forethought that actually benefited developers and contractors economically.[8]

Finally, the impression that these companies were the kind of 'good apple' firms described by Bardach and Kagan (1982) was also conveyed through more general discussions concerning their perceptions of the nature and necessity of the present regulatory system. Relationships with the HSE were presented as harmonious and constructive. The HSE were described by one planning supervisor as 'brilliant' and 'generally very helpful',[9] and contractors represented the HSE inspectors as reasonable and courteous in their dealings with business. Although managers may have overemphasised their acceptance and appreciation of the HSE, it did seem that relations were genuinely and generally easy. A number of managers had consulted the HSE over the CDM regulations, one manager was on first name terms with the local inspector and, as mentioned in chapter 5, another related how a local inspector had joked with him about the perils of undertaking construction work in city centres 'under the eyes of a thousand safety inspectors'. Furthmore, company management appeared to approve of the fact that health and safety legislation belongs to the criminal law. All the contractors stated that the threat of criminal prosecution and punishment was necessary as a deterrent to regulatory offending, and felt that the system could not be wholly voluntary. One of the planning supervisors on the project argued that it was necessary that breaches of health and safety legislation were seen as 'criminal':

> Because I don't think they would carry any sort of weight otherwise, and we're talking about life and death here really, so therefore you should have something more than just a slap on the wrist... I quite firmly believe that putting someone's life at risk, or potentially putting someone's life at risk is a criminal offence and that type of statute should be there.[10]

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[7] Interview with Jim French, ACE Construction 18/3/96.
[8] Gerald Taylor, Callum Seaford, 8/5/96.
[9] Interview with Graham Down, planning supervisor, Dennis King Partnership 20/3/96
[10] Interview with Chris Davies, Wellard & Partners 17/4/96

There was a strong sense, then, that management attached great importance to their legal duty to protect the health of their workers and members of the public. This was conveyed in the interviews through their support for and apparent compliance with health and safety law and the associated enforcement apparatus. However, this impression sits uneasily with their unjustified minimisation of regulatory breaches on Firelands Wood estate. However, in her study of company responses to workplace deaths, Haines (1997) suggests that some attempt at neutralising criticism is to be expected, and that a better indicator of a firm's 'capacity for virtue' or regulatory trustworthiness will be found in the general attitudes of its managers towards health and safety as well as in evidence that corrective organisational measures were put in place following any failure of a firm's safety systems. In other words, the test of an organisation's 'good appleness' is in what the organisation *does*, rather than what it says. Although managers were not specifically asked whether changes were made to improve safety on the estate,[11] the evidence presented in chapter 5 strongly suggests that supervisory and organisational changes were not made on the estate after management became aware of certain hazards. How then can we begin to explain the discrepancy between the high priority that these managers appeared to accord to health and safety management generally and their non-compliance with the legislation without suggesting that they were consistently insincere in answering interview questions. .

MANAGERS EXPLAIN (AWAY) INJURIES AND DEATHS IN THE CONSTRUCTION INDUSTRY

It will be argued in the following sections that managers' apparent acceptance of responsibility for health and safety was circumscribed in important respects. These related to the way in which managers explained the high incidence of injury, disease and death in the construction industry. Managers tended to offer two 'orders' of explanation for this high incident rate. Almost without exception, it was explained either in terms of factors over which, managers claimed, companies had only tenuous control, or (when the possibility of company culpability was acknowledged)

[11] This was because serious and persistent breaches of the asbestos regulations were denied, and any breaches that were acknowledged were presented as 'one off mistakes' beyond the control of the main contractors. Questions about practical measures to tighten supervision and improve safety on the estate would therefore have implied a disbelief of their explanations, or been dismissed as unnecessary by managers.

responsibility was laid at the door of the disreputable 'cowboy operator'. These accounts will be critically examined in the following sections.

Technocratic Perspectives, Accidents and Hazardous Industries

All managers interviewed were asked to identify the main causes of injury and death in the construction industry. It is interesting that the initial response of two out of three of the main contractors and one of the three planning supervisors interviewed, was framed in terms of the technical circumstances surrounding injuries and deaths, rather than in terms of underlying causes that might imply responsibility. For instance, the question 'in your opinion what is the main cause of injury in the construction industry?' prompted the following responses:

If you actually take the statistics, it's falls, foot injuries (people treading on things). I think you'll find falls and foot penetrations are the biggest two. And falls are classed over three feet.[12]

Traffic accidents, falls from heights.[13]

I think people falling, or falling objects are the greatest. And machinery and open trenches. They're the main ones. I say that because statistically I know that's correct.[14]

By framing questions of causality in terms of the technical circumstances of injuries and deaths, managers in this study were formulating the issue of ill-health and injury amongst construction workers in a morally neutral way. This way of framing the issue is not, however, peculiar to the managers involved in the redevelopment of Firelands Wood. Rather, their responses directly reflected the way in which information is presented within HSE statistics, and were therefore consistent with a particular approach to workplace injury and ill health in which issues of morality and responsibility are submerged beneath a mode of analysis and understanding in which the technical aspects of risk control are emphasised (see chapter 4). This would explain why the HSE inspector gave exactly the same response during his interview.

[12] Interview with Jim French, senior contracts manager, ACE Construction 17/ 4/ 96
[13] Interview with Graham Down, Dennis King Partnership 30/ 4/ 96
[14] Interview with Frank Smith, Health and Safety Director, Hays and Son 10/ 5/ 96

When asked what, in his experience, were the main causes of injury and ill health in the construction industry, he replied "It's 95 per cent falls from a height of over two metres. Which would be any working height from the top of a ladder. That accounts for the vast number of injuries."[15]

When pressed to offer explanations of workplace deaths and injuries beyond the immediate mechanical circumstances, managers tended to fall back on an argument that construction work is inherently dangerous. Here again then, an account of workplace hazards is offered in which management is not responsible for the high rates of injury and disease:

> Construction is just a dangerous industry. It's very labour intensive. It's very machine intensive. Hard to control, not like in a factory. Things are changing all the time.[16]

Related to this order of explanation were managers' accounts of how things sometimes 'just go wrong'. Within this account, management were represented as well-intentioned, but either powerless to control events or not responsible in any moral sense:

> Most people in this industry running building sites have got some fundamental clock in their head that says "Oh yeah, I've got to check such and such. And that's why it's so frustrating when somebody gets hurt or something goes wrong. It's frustrating for all those concerned because they have got so much in their heads that they've either missed it, it was pure negligence, or it was just sod's law that something went wrong. You just can't tell.[17]

> The objective is to eliminate [hazards]. And if you can actually do that, and make people aware, then most of the time you're going to be alright. But there's going to be the odd one.[18]

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[15] Interview with Jonathon Peters, HSE Field Inspector, 19/ 4/ 96
[16] Interview with Graham Down, planning supervisor, Dennis King Partnership, 30/ 4/ 96
[17] Interview with Jim French, senior contracts manager, ACE Construction, main contractor 17/ 4/ 96
[18] Interview with Jim French, senior contracts manager, ACE Construction, main contractor 17/ 4/ 96

Whilst it is clear that some workplaces are inherently more dangerous than others the explanation of injuries and fatalities in terms either of the inherent dangers of construction, or in terms of isolated, unexpected and unpredictable events is not supported by sociological research or by HSE research (1988). The report of the Health and Safety Executive's five year study of fatalities in the construction industry concludes that these fatalities occurred in the process of simple, routine work. Although the majority of deaths involved falls, these were not the result of workers having to work at a height during the construction process. Rather, the falls occurred because of the use of defective equipment, the failure to maintain and check equipment, lack of training and supervision, and the failure to implement safe systems of work. Carson (1982) and Wright (1986), in their respective studies of accidents in the UK offshore oil industry, have also challenged the idea that workers' deaths were a product of the particularly hazardous conditions of the North Sea. Rather than these accidents being anomalous events, arising out of 'organisational abnormality', Wright argues that an analysis of these accidents and fatalities demonstrates that aspects of *normal* work organisation - particularly the 'speed-up' - were contributory causes in all cases. Although these studies concerned fatalities in the offshore oil industry, Wright argues that because the accidents in the study were not produced by 'the unique conditions' of the industry, it is likely that the causal factors located within his study will be found in other industries.

Whilst technical explanations of workplace injury and death and explanations in terms of the inherent dangers of the industry were common, by far the most frequent response amongst the managers interviewed was to locate responsibility, in one way or another, within the individual worker. *All* the managers interviewed, except for one, articulated some version of the view that workers are responsible for their own injuries, deaths and disease.

Blaming the Worker

Within this account of workplace injury and death workers were portrayed as taking 'unnecessary' risks, or of adopting unsafe work practices which then became the normal way of working. When asked why they thought workers might take these risks, managers often explained this terms of the characteristics of individual worker - most often their ignorance, stupidity or machismo. Explanations in this vein included the following statements:

> Carelessness and lack of information I would say are probably the two main reasons for injury and death.[19]

> We're not dealing with the most intelligent people in the world... If they had the IQ of a brain surgeon, they'd be brain surgeons, not labourers.[20]

> An operative had suffered burns to his legs because he was laying concrete in shorts on a hot day, and therefore he'd got concrete burns on his ankles. The macho image of the builder going around in a T-shirt [and] shorts – you know, "Oh, I can do anything" and then he's off work for three or four days. Whereas a pair of protective wellies - I mean, he should have been wearing protective shoes or boots anyway - but a pair of welllington boots in that case would have saved him that problem and saved the contractor from entering it in the book.[21]

Occasionally it was suggested that unsafe work practices had become the normal way of working:

> People aren't scallywags – it's just that they've taken these risks in the past, and now they're beginning to see that those risks are unacceptable.[22]

> I don't see the steadily increasing injury and death rate suddenly dropping. It should level off a bit and then start dropping. It's just that established work practices will have to be re-educated. The regulations are there – fine. They can do all the paperwork on it, but it's actually getting the operatives on site educated in the right way.[23]

This perspective – in which it is the behaviour of workers that is seen as the source of workplace hazards, injuries and deaths – is widespread both within and without industry (Tombs, 1991; Nichols, 1997; MacEachen, 1999). First, the attitudes evinced by managers within the present case study appear to be representative of the kinds of attitudes generally held by senior and middle management across industry. Dawson *et*

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[19] Interview with Chris Davies, planning supervisor, Wellard & Partners 17/ 4/ 96
[20] Interview with Graham Down, planning supervisor, Dennis King Partnership 30/4/ 96
[21] Interview with Chris Davies, planning supervisor, Wellard & Partners 17/ 4/ 96
[22] Interview with Peter Tagart, planning supervisor, Dennis King Partnership 30/ 4/ 96
[23] Interview with Chris Davies, planning supervisor, Wellard & Partners 17/ 4/ 96

al. found that, whereas first line supervisors and workers' safety representatives tended to see the mechanical material environment or materials used as major health and safety problems, senior and middle management within the chemical industry were more likely to see work hazards in terms of workforce 'attitudes, knowledge and behaviour' (1988: 71).

These worker-blaming ideologies are not confined to company management. For instance, in 1996, the then Conservative government minister for health and safety, stated that the aim was to "educate workers because, after all, a lot of these accidents occur because people are stupid".[24] Rather more circumspectly, the Robens Report states, 'safety is mainly a matter of the day-to-day attitudes and reactions of the individual' (1972a: 1). Moreover, despite the fact that the HSE increasingly stresses management's responsibility for providing a safe system of work, there are signs that the worker-blaming perspective of the Robens Report has not been displaced, and is easily mobilised. For instance out of the HSE's 2,252 prosecutions in 1991, 26 prosecutions were taken against individual workers as compared to only 16 prosecutions of directors or managers (Bergman, 1992a). Further evidence of the operation of worker-blaming ideologies within the HSE can be found following the publication of Peto *et al.*'s (1995) latest estimates for mesothelioma deaths.[25] Dr Peter Graham, a senior health policy official within the HSE, stated in a press release that:

> It is our view that these workers, *especially plumbers, carpenters and electricians,* may be at particular risk. This is because they are often unaware of the presence of asbestos materials in the buildings where they are working, or unaware of the risks associated with exposure to asbestos dust and of the precautions they should take to protect themselves. They may also include young and inexperienced workers who feel that they do not need to worry about a hazard that is intermittent and slight, and which will probably not affect their health for many years.[26]

Thus, the responsibility of employers and property owners is completely overlooked, not to mention the HSE's failure to recognise and address the risks of exposure amongst this group of workers (Dalton, 1995a, 1995b). Instead, asbestos exposure is presented as the consequence of risk-taking or ignorant young men. Finally, the HSE

[24] Cited in Wintour (1996).
[25] See chapter 5.

commissioned and published a report in 1998 which investigated: 'individual differences in accident liability'. The report characterises two main 'personality types' that are more likely to have accidents, and calls for: 'a systematic and integrated approach to human failures and accidents liability' (HSE, 1998c).

Within industry more generally, there is some evidence to suggest that 'behaviour-based safety programs' are becoming increasingly popular with employers. These initiatives, which promise to improve the health and safety records of companies, are predicated upon worker-blaming ideologies which assume that workers choose to work in unsafe ways but that they can be 're-educated', persuaded or trained to work safely. In 1997 and 1998 a series of 'Behavioural Safety Conferences', organised by IIR Ltd., were attended in this country by a number of major employees, including McVities, British Nuclear Fuels Engineering, Bechtel Ltd., Bayer plc., British Airways, Texaco and Virgin Atlantic. Potential delegates were told that they could "gain valuable insight into the practicalities of implementing behavioural safety techniques" from companies like Rail Link Engineering who, "are implementing a safety behavioural programme on their Channel Tunnel project".[27] Moreover, Ian Waldram, President of IOSH - the Institute of Occupational Safety and Health Professionals, which has a membership of around 25000 - has recently endorsed this approach. At a conference organised by the Institute of Employment Rights, Waldram asserted that the final stage in improving the health and safety record of a company was tackling 'behavioural aspects' of safety (Waldram, 1999).

Since behaviour-based safety models appear to be enjoying a renaissance,[28] it seems important to explain their increasing popularity. The value of this approach to management is threefold. In the first place, it redefines the notion of 'workplace risks' to signify something created or caused by the behaviour of workers. Consequently, attention is displaced from health hazards created by work *processes* – such as production processes that expose workers to carcinogenic substances, inadequate staffing levels, or work conditions that create the risk of muscoskeletal disorders. In this way managers are able to look for individualised solutions to workplace hazards.

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[26] Health and Safety Executive 'HSE Campaign Warns Plumbers, Carpenters and Electricians of Fatal Asbestos Dangers', press release 6 February 1995.
[27] IIR Limited. Conference bulletin: "Developing and Employee-Led Safety Culture by Implementing Safety Behavioural Measurement and Management Techniques".
[28] Behaviour modification safety programs were popular in the 1970s - see, for instance, Petersen (1975) - but were criticised by Sass and Butler (1977), who argued that they were not based on any scientifically reputable theory and should therefore be regarded as ideological, not scientific approaches to workplace hazards.

For instance, following the recent success of social worker John Walker in winning damages from his former employer Northumberland County Council for exposing him to unreasonable stress in his work, employers have been under pressure to tackle this health issue in some way. However, rather than addressing issues within the work environment that are causing employees stress (staff shortages, the threat of violence and harassment, shift work, job insecurity, and unattainable production targets), employers are providing access to 'counselling services'. According to the EAP (Employee Assistance Programmes) Association, more that 1.2 million employees have access to EAPs, and the 'market' has been doubling every four years (Hall, 1995; MacErlean, 1998). Thus, responsibility for stress is passed on to the employee. He or she is offered advice on developing 'coping strategies' and any subsequent failure to cope can then be located within an employee's failure to master these strategies.

Second, evidence from Canada (Walker, 1998; MacEachen, 1999) suggests that the value of these programmes for management may have less to do with creating safer workplaces and more to do with providing companies with a relatively inexpensive 'due diligence' defence in court. Third, the strategies of control called for by such a focus are wholly in line with the business community's insistence on 'management's right to manage'. As Tombs has argued, the worker-blaming perspective can be "used to justify an ever-increasing regulation of the details of [workers'] behaviour" (1991: 64). For instance, under the pretext of managing health and safety in the workplace, employers have introduced drugs and alcohol testing for employees (Wood, 1995), and placed CCTVs in changing rooms and toilets.[29] Research by MacEachen (1999) has discovered that employers within the Ontario newspaper industry are responding to the risk of repetitive strain injuries (RSI) amongst their workforce through a combination of ergonomic *and* surveillance strategies. Employers interviewed by MacEachen principally understood RSI in terms of workers' posture, and used this understanding to justify increased surveillance of workers bodies in the workplace and the questioning of workers about their diets, the amount of exercise taken and any hobbies they had.

Another example of safety being used as a pretext for the intensification of controls over workers' behaviour can be found in the British rail industry. The assumption that the action and behaviour of workers is the chief cause of 'accidents' in the workplace underlies the 'points system' which has recently been introduced to monitor train

drivers in the UK and measure - not their safety performance - but some notional risk they pose to future rail safety. The scheme creates a number of 'offences' which carry a variable number of penalty points. So, for instance, "leaving a train unattended is a four point penalty whereas wearing a moustache is a five point offence because it is considered to be 'offensive and aggressive'".[30] It hardly needs to be pointed out that this scheme does not begin to address the safety failures that led to the Southall rail crash.[31] Although the driver in that case may have passed through a red light, his action was only the last link in a chain of managerial failures to maintain a safe public transport system. Driver error, although rare, was predictable and predicted, which is why various other safeguards – the presence on high speed trains of two drivers; the rule that trains should not run if the AWS was not working; the introduction of the ATP system – had been implemented and recommended. It was the removal and dilution of these safety systems by Great Western Trains that which caused the Southall rail crash. New control systems that penalise drivers and threaten them with job loss for having 'bulky pockets, marriage difficulties, a death in the family or being over 55',[32] are not going to rectify these fundamental safety failures which can only be the responsibility of management. Moreover, the limited scope of 'safety systems' based on this 'individualised' understanding of health and safety is obvious when we consider the failure of such approaches to account for, or address, industrially-caused disease, ill health, injury and death that is clearly attributable to excessive exposure to toxic chemicals, harmful dust, unhealthy and debilitating work practices and conditions, badly designed or faulty machinery or any other facets of work life clearly beyond the (even notional) control of the worker.

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[29] 'Colgate-Palmolive gets its hands dirty and visits the men's room to spy', *Workers Health International Newsletter*, July-December 1998: 5.

[30] *Workers Health International Newsletter*, January – June 1998: 3.

[31] These were that 1) under a 'restructuring deal' agreed between Great Western Trains and the union Aslef, one driver was allowed to drive trains up to 125mph, whereas previously all trains travelling more than 110mph would have been operated by two drivers as a safety precaution. Aslef agreed to the deal on condition that trains would be equipped with the sophisticated Automatic Train Protection (ATP) system that overrides the driver and stops the train in the event of danger. However, although ATP was fitted to the Southall train, it was not operational. 2) Following the Clapham rail crash it was recommended that all trains be fitted with ATP, but when it was revealed that this would cost £1 billion the Conservative government allowed Railtrack to forgo the introduction of ATP on all lines. 3) The driver of the train had reported that the train's Automatic Warning System (AWS) was faulty. This system sounds an alarm to alert the driver to warning signals. The driver must then respond to the alarm. If s/he fails to respond the train will break automatically. However, despite the AWS not working, the train was allowed to leave Swansea to travel back to London because Great Western Trains had been allowing trains to run, in contravention of the rules, even when the AWS equipment was found to be defective (Harper, 1997; Harding and Gentleman, 1997; Harding, 1997).

[32] *Workers Health International Newsletter*, January – June 1998; p3

The attitudes of managers interviewed in the present case study were clearly informed by these 'victim-blaming' discourses within industry. Thus, when managers were asked to provide examples of safety problems and how they had tackled these, they frequently used examples which centred around a concern with the safe or unsafe practices of workers and, in particular, the issue of personal protective equipment (PPE). The following example was typical of this tendency:

> It's like the case of the guy up the scaffold the other day. No hard hat on. No goggles. No ear-protectors working that close to a hammer, chopping out brickwork... There was another case, what was it someone was saying? A welder who'd got welder's flash. He'd looked at the weld without safety glasses in place – he just wanted to check where something was. He's suffering from defects of the eye. You know, you've got to use the right equipment and abide by the rules, otherwise there will be problems.[33]

Although managers were able to refer to a number of other safety issues beyond the issue of PPE – for example, fencing; adhesives; contractors adequately shoring their foundations; noise and so on – all the managers interviewed referred to personal protective clothing at least once, and some managers made a number of references to PPE. Moreover in spite of the fact that managers, through the use of specific examples, demonstrated an awareness of industrial hazards and unsafe work conditions that were solely within management's control, they persisted in asserting that it was workers themselves who created the risk of injury and death in the construction industry. This had clear implications for the way in which management envisaged its own role in the control of health and safety on construction projects. Although none of the managers explicitly referred to 'behaviour-based safety programs' they articulated ideas that were very much consistent with this approach. Thus, when managers were asked to describe management's role in the prevention of injuries, fatalities and disease this was envisaged, almost exclusively, as being a matter of protecting workers from themselves. Managerial responsibility was therefore articulated by these managers mainly in terms of the provision of supervision and training:

[33] Interview with Chris Davies, planning supervisor, Wellard & Partners 17/ 4/ 96.

> The site supervisor, the contracts manager, do have to keep a tight rein on all of the sub-contractors that are on site, make sure that PPE is available to all the people that need it and that they obey the basic rules and regulations.[34]

> I think it's a constant requirement on all of us to continue to educate people that they are taking risks.[35]

> It's certainly management coming down the line. The operatives need to be told how to do the job properly, they need to be trained. That's all part of the education, part of the 'toolbox talks'. We tell them how they've got to do a particular job and why they've got to do it... So operatives need to be properly trained in the job they do. It's no good just bringing someone in off the street with a shovel to do things. He needs to be told that there is a risk of burns from concrete, there's a risk of losing your hands on a saw... So the training has to come from the top, from the right people, the organisation has to be in place. Until that's done, until it's fully in place by everyone, the injury and fatality rate won't drop.[36]

Whilst effective training and the provision of information about the health and safety implications of particular substances or equipment are critical,[37] the broader issue under consideration was how managers envisaged their own role in, and responsibility for, safeguarding the health and safety of workers and members of the public. An analysis of management attitudes in the present case study suggests that a significant transformation of meanings and goals has taken place. Although managers talked about 'safe systems of work', of 'the organisation being in place' and about 'good management of the construction process', these imperatives tended to be interpreted in a particularly narrow way. So whilst the 'good management' of health and safety at work requires attention to a number of issues – of which the training and supervision of workers is but one – this was persistently interpreted to mean the control and observation of workers. This meant there was a risk that managers would overlook hazards within the work environment or work process which management should, according to HSE guidance, be aiming to eliminate or at least control. In this

[34] Interview with Chris Davies, planning supervisor, Wellard & Partners 17/ 4/ 96.
[35] Interview with Gerald Taylor, planning supervisor, Callum Seaford 8/ 5/ 96
[36] Interview with Chris Davies, planning supervisor, Wellard & Partners 17/ 4/ 96
[37] For instance, Bergman's research (1994) indicates that, across industrial sectors, workers are not being given crucial information or training about equipment, substances or work

way, the goal of controlling occupational hazards through the systematic implementation and planning of safe processes, equipment and conditions is translated into the goal of the organisation's control over workers' behaviour.

Furthermore, the managers interviewed appeared to feel that if these controls failed, management was not to blame because 'the systems were in place'. The following quote summarises the logic implicit in this way of thinking, whilst it also illustrates the pitfalls of such a mind-set:

> An accident really, at the end of the day, is probably... down to the operative not obeying the rules. Because I think management is so au fait and conscious about health and safety that things are put in place for the operative. But if an operative moves a scaffold board and falls through the hole, how can you cater for that? The new regulations might, because I'm led to believe that when the new regulations come in all scaffold boards must be strapped down regardless. So that's the sort of thing. Or, somebody (for ease) moves a bit of handrail and walks off the edge. I mean how can you cater for that sort of thing?[38]

The 'Demoralisation' of Responsibility

Whilst this manager sought to demonstrate the limits of managerial responsibility, he inadvertently indicated the opposite – that by introducing a simple safeguard (strapping the scaffold boards down) this particular risk could be avoided. However, the problem with these managers approach to health and safety lies not only in the fact that an overemphasis on workers' actions might lead management to miss crucial hazards within the work environment, but also that management may feel that there is no moral imperative on them to act. For instance, management may be resistant to investing time and money to ensure that workers cannot move scaffold boards when they perceive this necessity as arising out of the 'stupidity', 'carelessness' or 'laziness' of workers.[39] This is because the consequence of positing workers and

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processes. This lack of training and information, or management's provision of faulty training and misinformation, is causing workers' deaths.

[38] Interview with Frank Smith, Director of Health and Safety, Hays, main contractor 10/ 5/ 96.

[39] This attitude on the part of senior managers appears have contributed in an important way to the Zeebrugge disaster. Cutler and James (1996) point out that Townsend Thoreson managers refused to install indicator lights on their ferries because someone was already employed to check the bow doors and they therefore "viewed the situation as not calling for 'fail safe'

members of the public[40] as the source of danger and the creators of risk is that managers seemed to feel that although they were under a formal *legal* duty to 'protect workers from themselves', that duty was without a *moral* dimension.

The sense that managerial responsibilities were formal, rather than moral, was accompanied by a perception that if anything went wrong, management could not really be blamed. To illustrate this, a number of managers recounted stories where 'all the safety systems were in place' yet accidents had still occurred because of the unsafe actions of workers. One contracts manager stated that the difficulty was trying to get the workers to do what they were supposed to be doing, because: "management can't be there all the time to police them".[41] On another occasion a planning supervisor recounted two different stories. In the first incident a worker, according to this manager, "decided he was going to be lazy" and not follow procedures. This resulted in the serious injury of another worker. The second incident was a 'near miss' also caused, the planning supervisor insisted, because a worker decided to work in an unsafe way. He asserted that in both cases all the proper equipment had been provided, and then concluded: "you cannot stop the idiots" for the simple reason that management cannot always be watching ("the agent had turned his back for a few minutes").[42] The predominant impression that was conveyed during these interviews was of a well-intentioned management, helpless in the face of the persistent stupidity and laziness of individual workers.

This sense that the responsibility of management to safeguard workers' health is morally ambiguous or neutral, returns us to Kagan's argument that regulatory law forces companies to be responsible for 'the negligent or irresponsible worker, consumer or tenant' (1984: 53)[43] and that companies breaking regulatory laws are therefore not morally culpable in the same way that 'conventional criminals' are. It is important therefore to consider whether these responsibilities are truly 'formal' or whether management are, in a more direct way, responsible for the actions of workers.

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investment. This issue was simply one of staff not carrying out their contractual duties and that was a supervisory and disciplinary matter." (Cutler and James, 1996: 160).

[40] See previous chapter.

[41] Interview with Neil Adam, contracts manager HH Drew & Son, main contractor 29/ 4/ 96.

[42] Interview with Graham Down, Planning Supervisor, Dennis King Partnership 30/ 4/ 96.

[43] See chapter 3.

The Production of Workplace Injury, Disease and Death in the Construction Industry

In the context of the current case study, the question of why workers sometimes work in unsafe ways is particularly pertinent. This is because at first sight it appears to have been the demolition workers who committed the most serious health and safety breaches on the site. As noted earlier, residents observed demolition workers bulldozing asbestos cement materials into a pile and putting this debris through the crusher. Even if this practice was condoned or instigated by management, we still need to understand why workers would be prepared to endanger their own and other people's health in this way. Whilst it was not possible to secure interviews with these workers, in-depth interviews were conducted with other workers, tutors and trade unionists within the industry (see Appendix 1). The qualitative data obtained from these interviews provides a way of understanding workers' actions in terms of the particular social, economic and organisational pressures they are exposed to within the construction industry.

What was interesting about some of the examples managers gave in which workers appeared to be responsible for their own injuries is that these examples lacked any 'explanatory power'. For instance, one planning supervisor exclaimed:

> Guards on saws – you know, everyone rips the guard off. There's all sorts of stupid things that they just don't see. Carelessness really.[44]

The crucial question here is why workers appear to be willing to act against their own interests and, we are told, management's desire for them to work safely. This manager's explanation – that it is 'carelessness' – is clearly implausible in the context of his own account. The 'carelessness' thesis cannot explain why workers take the guards *off* saws (or any other equipment). If workers were simply being careless they would not go to the trouble of removing a guard, although they might not bother to put one on. Sociological research into the causes of industrial injuries and deaths does not support the 'carelessness' thesis. For example, Armstrong and Nichols object to Robens's theory of worker apathy in the context of their study of accidents in a manufacturing factory. They write:

[44] Interview with Chris Davies, planning supervisor, Wellard and Partners 17/4/96.

> Risks were taken, not because men didn't care whether they took them or not, but for a very definite reason – to keep up production. 'Apathetic' men simply would not have bothered.
>
> (Nichols and Armstrong, 1974: 21).

Thus - far from the behaviour of workers residing in apathy, ignorance or stupidity - Nichols and Armstrong's research revealed that workers were driven by the company imperative of maintaining or restoring production. Moreover, this imperative was communicated to workers, in various ways, by management:

> The men acted as they did in order to cope with the pressure from foremen and management to keep up production. This pressure was continual, process failures were fairly frequent and so the short-cutting methods used to deal with them were repeatedly employed.
>
> (Nichols and Armstrong, 1974: 20).

Management's desire to achieve higher productivity through the intensification of workers' labour can be communicated to workers implicitly or explicitly. It can also be forced on workers through the formal re-organisation of work routines. Many of the so-called 'new' methods of industrial organisation and production (the 'just-in-time' system, flexibility, job rotation and teamworking) have been associated with management attempts to increase the productivity of labour - in essence, to intensify work and cut down on workers' 'unproductive' time (Turnbull, 1987; Tomaney, 1990). The consequences of these new organisational forms for workers' health and safety are becoming apparent. For instance, 'the speed-up' is one of the factors identified by Wright (1986) as causative of the high rates of injury, death and dangerous occurrences in the offshore oil industry. Grunberg (1983) and Sutherland (1998) have demonstrated empirically the link between this intensification of labour and an increase in accident rates. Similarly, American research studying the effects of teamworking on workers in a car manufacturing plant found that under "a continuous improvement" system, these workers suffered an epidemic of repetitive strain injuries (Landisberg *et al.*, 1996).

It is particularly interesting in this respect that analysts of the much trumpeted 'new and future organisational forms' of production, such as Piore and Sabel (1984), cite the construction industry as a model for such forms. For it is precisely the nature of most employment relationships within the construction industry that causes workers

to be exposed to economic and productive pressure in a particularly acute way. One of the most striking continuing trends within the construction industry since the 1970s has been the increase in the proportion of self-employment.[45] In the mid-1970s the self-employed accounted for about 25 per cent of the construction labour market. In 1994 this had risen to 44 per cent of total employment in construction, as compared to 13 per cent self-employment in the general economy.[46] However, whilst 'labour-only subcontractors', or 'the lump' as they are referred to in the industry, may be classified as self-employed for tax purposes this does not mean that they are their own bosses as the term tends to suggest. As Austrin notes:

> The lump worker was not directly employed in the legal form of a direct contract between himself and the employer, but the different legal form... in no way altered the economic relationship between them. He produced for his employer; he neither owned nor controlled his own capital but remained as a seller of labour only.
>
> (Austrin, 1980).

One of the main effects of this switch away from direct employment has been to expose construction workers to intense job insecurity, particularly during slumps in the market and particularly whilst unemployment in the industry remains high. Between 1981 and 1983 unemployment in construction reached 30 per cent, and has generally remained between 11 and 18 per cent since (Sutherland, 1998). These conditions, along with the fact that construction workers have few employment rights and the low levels of unionisation, mean that they are particularly vulnerable to management demands to intensify work. Workers will put pressure on themselves to increase their productive labour, sometimes without the explicit exhortations of management, because they know that it is the fast workers who will be rehired for the next job. As one worker put it:

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[45] The impetus for this has come from an increasingly uncertain market and the sharp recessions that have plagued the sector. The use of labour-only subcontractors enables management to shed labour quickly in order to respond to fluctuations in demand. Although the use of casual labour has always characterised the industry, this has increased over the last two decades and was encouraged by the Thatcher government during the 1980s as part of its drive to 'free up' labour markets and reinstate management's 'right' to manage. This was achieved through the introduction of certain tax changes and when the DoE withdrew support for direct employment as the preferred form of employment by its contractors (Evans, 1990).

[46] Report by the Consultative Committee on Construction Industry Statistics, *The State of the Construction Industry* July 1995, Issue 4: 18-19.

> They like quick workers, definitely. Firms I've worked for will take me back all the time. They keep the good people on. If you're too slow they're going to get rid of you. So you've got to work to earn your money.[47]

Furthermore, the typical method of remuneration for this work – that is, being paid a fixed price for a job – means that the economic pressure on firms to 'get the job done' in the quickest possible time, in order to maximise the value of the contract and minimise production costs, is passed on to the individual worker. Interviews with workers, trade union officials, tutors, and management were carried on at a time when all those interviewed agreed that wages had been squeezed. The low number of 'new orders' for work meant that there was intense competition between firms, and contractors bidding for tenders had to keep their quotes low.[48] One director of a small painting firm thought that contractors were generally being paid at the same prices they had been getting four years before.[49] He went on to state that because everyone had to pay the same amount for construction materials, the only way that firms could compete was to keep their labour costs low. In this way wages were depressed. Consequently, in order to earn a reasonable wage when workers are offered a fixed price for a particular job, they have to produce work quickly. The practice of offering a 'fixed price' therefore creates an illusory identity of economic interests between worker and management:

> A price for a job means that we're given a price and you have to judge for yourself how long the work is going to take you and whether it's going to be worth it. So if you're given a price and it's going to take you two weeks, you've got to make sure you're going to get at least two weeks wages out of it plus a bit more... You're under pressure all the time for that kind of work. Because if it's a price you just want to get there, get it done. You don't want to be hanging about waiting for them to buy this, buy that [personal

[47] Interview with worker 29/11/95.

[48] This suggestion from the interview data that workers can be pressured to intensify their labour under particular economic conditions is supported by an analysis of output for the industry over the last two decades. Evans (1990) describes how inflationary pressures in the mid-1980s led clients to seek faster completion times in order to achieve a more rapid return on their investment. This along with increased competition in the international and domestic contracting markets led to the kind of production pressures described by the interviewees. In 1986, output levels per employee had risen to match rates in the USA. However, as Evans points out, investment in research and development and the purchase of new capital equipment remained limited throughout the period, suggesting that these productivity gains were achieved through the intensification of workers' labour.

[49] Personal communication with John Rooker, Managing Director, UJS Painting Contractors 30/5/95.

> protective equipment that hasn't been supplied]. It's your time and your money.[50]

Another worker expressed the same view in explaining why he sometimes worked in ways that appeared to compromise his safety: "You've got to do that to earn your money. If you don't, you've got to do it the long way around. So it's more time so you're losing money."[51]

Another interviewee who had worked in the industry for over twenty years made it clear how pressure to get the job done quickly can lead to injuries. His subtle analysis of the nature of power relations in the work place and the organisation of work also illustrates how management's ability to pass economic and production pressures on to workers allows managers to distance themselves from unsafe and hazardous work practices whilst still benefiting from them:

> It's the old thing of the most important thing is just getting the job done. We used to have a term for it in the joiner's shop – 'rush jobs'. Suddenly, every job became a rush job because the hours were cut to a bare minimum to rake in the profits off of each individual job. So you had a ten-hour job one week. The next week you'd have eight hours for the same job. So there's a rush. Which means that if you're the poor chap who's got the four hours of that job to do the machining, you've cut an hour off his machining time. So what's he going to do? Where's he going to save time? He's going to spend less time checking the machine, setting up guards and things. But then of course [management] can look back and say, 'well, the guards were there but you didn't use them'. How can you prove the company was negligent just because they've cut the time on a job for instance?[52]

Moreover, the example of workers failing to wear the personal protective equipment provided for them - repeatedly used by management to demonstrate their carelessness or machismo - was also explained by workers interviewed in terms of a pressure to get the job done quickly and a failure of the part of management (and designers) to provide workers with PPE that is suitable for the environment in which they are working. For example, it is a commonplace amongst workers that the kind of hard

[50] Interview with worker 28/9/95.
[51] Interview with worker 29/11/95.
[52] Interview with worker 16/10/95.

physical exertion required during most work within the construction industry will cause equipment like goggles to steam-up. When this happens, workers cannot see what they are doing and it becomes impossible for them to work without constantly stopping to clean their goggles. It is a measure of workers' lack of control over the design, manufacture and purchase of work equipment, and of the lack of priority accorded to their needs, that most items of personal protective equipment should be such a discomfort and liability in terms of the ease with which they can work. In such situations, managers should either ensure that the equipment supplied to workers is suitable for the environment they are working in, or that workers are given more time to do their jobs. Unfortunately, interview data with workers suggests that this is not the case. Once PPE is provided, management seem to feel that their responsibility to workers is discharged. Workers are expected to wear their equipment, however much this hinders their work, and complete their jobs in the given amount of time.

Thus, what Robens described as 'apathy' and the managers in this study as 'ignorance, carelessness, stupidity and machismo', can be understood in terms of workers responding to the particular economic, productive and contractual relations that dominate their industry. Moreover, it was clear from the interviews that workers who sought to secure improvements in their work conditions in order to protect themselves from specific hazards were in a very vulnerable position. For instance, one of the workers interviewed had been involved in a refit of the ship the *Queen Elizabeth II*. Half way through their work it was found that carpenters working for one of the contractors had been drilling into asbestos insulation board. The workers were told by managers from their company to carry on working, although they were not offered any protective equipment. They did continue to work but insisted that some record be kept by the contractor to note the fact that they'd been drilling into asbestolux without protective equipment:

> From then on we were told to carry on. We weren't supplied with the proper protective clothing, nothing... Since that day they had it in for us. [They tried] to get us off the boat, so we wouldn't cause any trouble, because we were quite loud about it, telling people and everything. And they were listening, and it started to affect their work. That's probably one of the reasons they got us off... They said we were fighting on there with the other

> workers, so they sacked us for that. That's why we took it to court. We settled out of court. We weren't fighting on there.[53]

This worker did continue to work on the asbestos insulation board, without any protection except for a jumper, which he wrapped around his nose and mouth. His belief that other workers on the ship had become worried about the asbestos was confirmed in another interview with a worker who had also been employed on the refit, but who was working for a different contractor:

> Apparently two workers from [name of company], before we'd got there, had kicked up a fuss about the asbestos levels on the ship. And really caused a stink about it. They were sent home, sacked. And there was a lot of talk about it amongst the blokes. But because they'd been made an example of and been sent back, everybody was too scared to put their ass on the line, as it were.[54]

However, an important point to emerge from these interviews was that workers *will* try to protect themselves from workplace hazards, even if this is simply by wrapping a jumper around their mouths to minimise the amount of asbestos dust going into their lungs. Moreover, workers suggested that they would work in safe ways if they felt able to resist the economic and production pressures they were subject to. As one worker said:

> If they put the prices up so you could slow down a bit – using proper stuff and everything. They won't do it. You just can't win at the moment. I don't think you'll ever win."[55]

There is a solid body of empirical evidence that suggests workers will take the opportunity to prioritise their safety when the workforce is in a relatively strong position in its relationship to management. Nichols (1986) suggested that the injury rates for different industrial sectors indicated that workers in sectors characterised by low pay, low levels of union organisation and a high number of small establishments may be more at risk of injury than workers in industrial sectors characterised by high wages, employment concentration in large establishments and strong union organisation. Dawson *et al.* (1988) attempted an analysis to test for these effects.

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[53] Interview with worker 29/11/95.
[54] Interview with worker 28/9/95.
[55] Interview with worker 29/11/95.

They found that increases in the major and fatal accidents rates between 1981 and 1984 were greater in those sectors where increases in productivity were higher than average (suggesting an intensification of labour) and where low pay is prevalent (low pay being a characteristic of weak union organisation). And Reilly *et al.* (1995) have demonstrated statistically that strong workplace organisation has a determining effect on worker safety at the level of the individual establishment. For instance, workplaces that have union-appointed employee representatives on their health and safety committees have, on average, 5.7 fewer injuries per 1000 employees than workplaces where management alone decide on health and safety arrangements. This figure means that where management consult with union safety representatives, major accident rates are less than half the rate in workplaces without employee representation and consultation.

This statistical data, as well as the qualitative data from workers interviews in this study tends to contradict the image that managers in this case study project of themselves as the people who 'protect the workers from themselves'. However, the widespread and persistent existence of modes of explanation that blame workers for industrial injuries obscures management's role in the production of pressures that impel workers to work in unsafe ways. Moreover, these explanations ensure that when companies fail to supervise, or provide information and training these failures are seen as adminstrative failures and as such, as morally neutral. The second way in which managers distanced themselves from the high rates of injury and death within the construction industry was through their discussions of the 'construction cowboy'.

The 'Moral Majority' and the 'Fringe Contractor'

It was previously noted that responses managers gave to questions designed to elicit managerial attitudes to health and safety generally conveyed an impression of 'good appleness'. On the whole, managers appeared to see the benefit of, and comply with, health and safety legislation and to value the regulatory agencies enforcing it. Similarly, managers seemed to approve of the fact that this legislation came under the auspices of the criminal law and that violations were subject to criminal sanctions. The potential to criminalize health and safety violations was seen as justified on both a deterrent and on a moral basis. However, closer questioning revealed that whilst contractors seemed to accept – indeed approve – of the criminal prosecution of

certain regulatory offences, the mobilisation of the criminal law, and the application of the criminal label, was seen as appropriate only in the case of regulatory offences committed by 'cowboy' companies. For example, the senior contracts manager of one of the firms employed on the development said:

> Our industry has been working for a long time trying to get [the industry's injury and fatality record] better and better. If you took the regs away, then it could go the other way. Because it doesn't take many cowboys to make the figures twice as bad.[55]

In assuming the existence of two very different kinds of contractor within the industry – the mainstream and reputable companies versus the 'fringe contractors' – managers were able to shift responsibility for the high rates of injury, disease and death in the construction industry onto some 'other' disreputable group. Whilst managers represented the majority of contractors as 'responsible' and 'law-abiding', the coercive part of the regulatory system was accepted as a necessary tool for keeping the 'lawless minority' in line. Conversely, what was appropriate for the 'good apples' was self-regulation. In this sense, these managers were advocating, and positing the existence of, a twin-track approach to health and safety regulation. One manager, referring to what he saw as the aims underlying the CDM Regulations, said:

> The intention is to be self-regulating, isn't it? I don't see anything wrong with that, providing the bite is still there for the people who aren't doing it correctly... I think any reputable company will treat [health and safety law] seriously. I really do. I can't see any reason why they shouldn't. When you talk about cowboys, you're talking about non-registered companies basically. I mean, that's the cowboy situation. That's why our general works... don't do many porches or extensions these days, because there's a black economy out there doing that sort of thing.[56]

Not only was it argued that the 'moral majority' and the 'cowboy operator' should be subject to different regulatory regimes, managers also asserted that when regulations were breached different regulatory responses were appropriate for each case. This was justified on the basis that there was a qualitative difference between the culpability of 'cowboys' who breach health and safety regulations and that of the

[55] Interview with Jim French, senior contracts manager, ACE Construction 17/4/96.

majority of contractors, and that this difference resided in the presence or absence of intention. Managers argued that whilst the 'fringe element' within the industry might intend to break the law, the respectable majority of firms breach regulations through 'ignorance', 'oversight' or as a consequence of organisational and supervisory failures. As one manager, discussing the Law Commission's proposals for a new offence of corporate manslaughter,[57] stated:

> If anybody causes a death in the industry by pure neglect or for monetary reasons, I think they deserve what they get to be quite honest with you. But what I worry about is getting the right equilibrium. You will get people looking after health and safety that are genuinely trying to do their job correctly, and accidents still happen. But I'm hoping the law will see that.[58]

What is important for the present discussion is the extent to which there exists a consensus within regulatory and industry discourses concerning the distribution, nature and extent of corporate criminality within the construction industry, and the function such representations serve. In asserting that deliberate non-compliance is the preserve of the 'cowboy', managers involved in the redevelopment of Firelands Wood were simply echoing what is the dominant mode of articulating the relationship and nature of 'criminality' to and within the business sector. The category of the cowboy firm enables regulators, the State and industry to represent 'criminality' within the industry as something that is confined to a small, marginal group of contractors, whilst the majority of employers are represented as well-intentioned, respectable and law-abiding. This, it is argued, has implications for the way health and safety should be regulated. So, for instance, Lord Whitty[59] has stated in relation to the HSE's enforcement practice that:

> We must ensure that employers with good intentions are empowered to do the right thing - while at the same time sending a clear message to the cowboys: you will not get away with it, and the penalty will fit the crime.
>
> (Whitty, 1999).

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[56] Interview with Frank Smith, health and safety director, Hays & Sons 10/5/96.
[57] The Law Commission (1996) *Legislating the Criminal Code: Involuntary Manslaughter*, LAW COM No. 237, London:HMSO
[58] Interview with Frank Smith, health and safety director, Hays & Sons 10/5/96
[59] Under Secretary of State for the DETR.

These sentiments correspond to Kagan and Scholz's (1984) argument for a 'regulatory mix', which can respond to the different circumstances and degrees of culpability evinced by the 'good apples' on the one hand, and the 'bad apples' on the other. Moreover, like Bardach and Kagan (1982), the present Director General of the HSE has expressed the opinion that, "there are only a small number of cowboy firms".[60] An important question, then, is how the cowboy firm is identified within the regulatory context, and whether the discursive category of the 'cowboy operator' relates to any pre-existing, identifiable group of construction firms.

Will the Real Cowboy Operator Please Stand Up?

On one level the implication within regulatory and academic discourse is that any employer who deliberately flouts the law is a 'cowboy'. However, whilst the implication may be that any firm whose managers intend to breach the regulations is liable to be labelled a cowboy, in reality it appears that the label is not applied to every firm that breaks the law as the following observation by Angela Eagle makes clear:

> Only recently, fines totalling £3,800 plus costs were imposed by north Surrey magistrates for asbestos-related offences committed by Surrey county council and W.S. Atkins Ltd. on council premises. The Surrey case is worrying because it involved what was thought to be a blue chip company, from which one might have expected higher standards. If blue chip companies are being hauled before the courts for failing to observe existing statutory requirements, I dread to think what the cowboy companies are doing.[61]

A distinction, then, is being made between the 'blue chip' company and the cowboy firm - even when a blue-chip company breaks the law. The suggestion here is that blue chip companies cannot, by definition, be 'the cowboys'. Similarly, some of the managers interviewed associated the disreputable cowboy operator with the smaller subcontractor. The existence within the construction industry of a significant number of 'one-man bands' undertaking casual and intermittent work along with a certain amount of 'moonlighting', (Dawson *et al.*, 1988) lends this association a degree of

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[60] Taylor R 'Prevention rather than cure' in *Health and Safety at Work – A Financial Times Guide*, November 1996: 6.
[61] *Hansard*, Debates for 18 June 1997, column 282

plausibility. One manager explicitly associated the 'cowboy operator' with non-registered companies:

> When you talk about cowboys you're talking about non-registered companies basically. I mean, that's the cowboy situation. That's why people like our general works – they do an awful lot of short-term contracts, but they don't do many porches or extensions these days because there's a black economy out there doing that sort of thing. But it's still hazardous.[62]

The figure of the cowboy operator that begins to emerge from management interviews and a review of statements made by regulators and politicians is the figure of a contractor that is *marginal* to the industry. Cowboy firms are represented as either numerically marginal (according to Bacon), illegitimate (according to the manager above), or economically marginally (according to Eagle). Other managers, when asked to specify who precisely the cowboys were, tended to be slightly more ambiguous than the manager quoted above. However, there was a tendency to associate 'problems' in the industry with the smaller contractors, even if they were not explicitly identified as cowboys:

> You're still going to get the small builder who will not comply with the regs – either because he doesn't know about them, or because he doesn't want to. Or feels he doesn't have to. So there will always be an incidence of contravention of the regs on that level – and that's a large chunk of the market.[63]

As stated, aside from their tendency to associate problematic behaviour with the smaller firms, managers' very definite and positive use of the notion of the 'cowboy operator' to signify that illegality within the construction industry was associated with a small number of marginal firms can be contrasted with a certain amount of ambiguity and contradiction in their answers when managers were asked to indicate, specifically, who the cowboys were in the context of the violation of health and safety legislation. It is conceivable that this ambiguity can be explained in terms of the artificiality of the category. Managers' comments could lack specificity and yet still be coherent and intelligible because they were drawing upon wider discourses within which the 'cowboy builder' is a recognised and familiar figure. The question is,

[62] Interview with Frank Smith, Health and Safety Director, Hays & Sons 10/ 5/ 96

whether the shifting and imprecise definition belies the artificiality of the category, or whether there is some evidence – apart from the assertions of managers, regulators and government officials – supporting the contention that two 'types' of firm exist within industry, and that criminality within the industry is confined to the marginal firms.

'Who is the White Collar Criminal'?

A number of academic studies have attempted to discover whether there are 'types' of organisation that generate more white-collar crime.[64] Croall (1990) appears to have found empirical evidence that provides some support for the stereotype of the 'cowboy' or 'fringe' contractor as the main source of regulatory offending. Croall studied a range of offences falling under consumer protection legislation. Information about companies prosecuted under this legislation, and individual cases, was gathered from a variety of sources, but information regarding the size of companies prosecuted was mainly gathered through observation of court cases. Data gathered through this methodology indicated a "prevalence of small businesses among the establishments prosecuted."[65] Unfortunately, a number of methodological weaknesses beset Croall's research and render her data unreliable. Her research and her conclusions will be considered at some length since they serve to demonstrate some of the difficulties and pitfalls of attempting to discover what kinds of organisation commit more crime. Croall writes that:

> Court observation enabled further exploration of the size of offending businesses. About half of all establishments prosecuted were described as companies; however, out of 57 defendants seen in court, only 9 were large companies. A further 6 were medium-sized companies, and 33 were small businesses.
>
> (1990: 121).

Now, the classification of companies in terms of 'size' is far from straightforward. However, there are a number of officially recognised 'indicators'. For instance, the DTI classifies companies according to the number of individuals employed (see Appendix 1). However, the complexities involved in classifying firms in terms of

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[63] Interview with Chris Davies, Planning Supervisor, Wellard & Partners 17/ 4/ 95

[64] See Braithwaite (1985b), and Keane (1993) for reviews.

[65] Croall H (1990) 'Who is the White Collar Criminal?', *British Journal of Criminology* **29(2)**; pp158-159 and162-163

their 'size' is neither recognised nor addressed in Croall's work. Instead, we read in a footnote that:

> As information about the size of business was not always available, a 'common sense' definition was employed. Companies identified as 'large' were in fact defined as such on the basis of their being 'household names' – for example, supermarket or catering chains and large food manufacturers. There is thus inevitably some underestimation of larger companies as their scope may not have been sufficiently described or their name not recognised.
>
> (Croall, 1990: footnote 1 at 162).

The first problem with assessing Croall's own interpretation of her data arises because of a lack of information given relating to the nature of her data. For instance, she does not tell us, in cases where 'information about the size of business' was available, either what that information was or how it corresponded to official definitions of 'small', 'medium' and 'large' enterprises. Nor does she tell us in what proportion of cases this information was available. The significance of this relates to the second point, which is her arbitrary and highly subjective identification of 'large' companies. Since we do not know the number of cases in which Croall applied her own subjective definition we do not know to what extent her assessment of firm size is flawed by this problematic identification of 'large' companies. The same objections can be made in relation to her estimates of the proportion of 'medium-sized' and 'small' firms in the offending population of firms as Croall gives no indication at all as to how she has categorised these.

There is a second problem with attaching analytical significance (either in terms of propensity to offend or in terms of inferring enforcement bias) to the apparent prevalence of small businesses amongst the overall population of prosecuted firms. This relates to the question of whether the number of small businesses prosecuted is actually disproportionate to the number of small businesses in the regulated population as a whole. For instance, if the proportion of small businesses prosecuted was roughly the same as the proportion of small businesses in the overall population of regulated firms in Croall's study then, discounting the possibility of any enforcement bias effects, this would indicate that there is an equal propensity

amongst small and large businesses towards offending behaviour.[66] Without further empirical evidence any possible effects of regulatory bias on the prosecution rates would be unknown. It could be the case for instance that small businesses are, in reality, less likely to offend but that specific enforcement practices or stereotypes held by regulators mean that their offences are more likely to be discovered and prosecuted. Or it could be the case that small businesses are more likely to offend, but that the targeting of larger commercial enterprises means that they are actually under-represented in the prosecution figures. The point is that we are given no indication of the proportion of small firms prosecuted *relative* to their proportion within the regulated population of firms as a whole (or relative to their share of work), or whether Croall has even considered how these questions might affect the conclusions that can be drawn from her figures.

The third point to make is that Croall's research is limited by the fact that her study relates only to prosecutions occuring between 1982 and 1983 – a period of only a year. By her own admission, a number of factors can produce significant variations in the figures from one year to the next. For instance, Croall writes that:

> Departments had different policies and priorities: the frequency of inspections varied, and different groups were targeted for attention. One department carried out 'purges' of particular problems at different times – for example, concentrating on the weight of 'punnets' of strawberries on the summer and on toy safety at Christmas. Another department was engaged in a crack-down on food establishments which involved inspecting all establishments over a period of time and prosecuting all offenders, leading to a 'crime wave'.
>
> (1990:165).

Given the gaps in the construction and presentation of her data, it is impossible to draw any firm conclusions at all as to whether or not there actually is a prevalence of small firms among establishments prosecuted under consumer protection legislation, or whether this prevalence might be significant as an indicator of either propensity to offend or regulatory bias. However, Croall nevertheless goes on to consider both these questions. She concludes that, whilst there may be some overrepresentation of small establishments in her data due to various enforcement factors, 'small businesses

[66] This analysis would be further complicated if an adjustment was also made for large

are likely to represent a significant group of offenders and that this is not only the result of selective enforcement'. (1990: 170). Following Nelken (1983), and Sutton and Wild (1985) Croall suggests that a number of structural factors, particularly the greater resources of larger companies to comply with legislation as well buffer against the effects of unfavourable market or economic conditions, mean that it is more likely that small businesses will have to resort to illegal activity in order either to survive or to increase profits. This part of Croall's argument is highly speculative and is not really supported by her own empirical work which could be explained wholly in terms of a number of various enforcement effects which Croall herself enumerates.[67] Indeed, using the enforcement records of regulatory agencies in order to make any generalisations about the nature, extent or profile of corporate offending or offenders is highly problematic (Lynxweiler *et al.*, 1984; Braithwaite, 1985).

As stated, Croall contends that the preponderance of small businesses found in her data accurately reflects the greater likelihood of small businesses breaking the law. She explains this in turn by reference to large businesses' greater financial resources. Whilst small business crime can be cogently explained in terms of the economic and competitive pressures to which smaller businesses may be exposed, a number of *caveats* must be considered. In the first place, Clinard and Yeager's (1980) study of the enforcement records of the 477 largest, publicly owned manufacturing firms in the United States, reminds us that intense financial and competitive pressures and uncertainties may be constant features of the economic and industrial environments within which large corporations operate too. Firm size, in and of itself, may therefore be a fairly weak indicator of propensity to offend. For instance, amongst the giant corporations studied by Clinard and Yeager, the violating firms were on average larger, and more diversified (1980: 132). Moreover, it may increasingly be the case that large corporations behave and organise as though they were smaller economic units. One strategy amongst large corporations has been to fragment into smaller, relatively independent establishments as a way of circumventing the harshest effects

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companies' and small companies' 'market share'.

[67] For instance the fact that enforcement occurs mainly at the point of sale where numerically there are many more smaller enterprises rather than at the point of manufacture, an area dominated by the larger companies (p170); the fact that arrangements were made in advance for the inspection of larger premises (p167); the fact that stereotyped notions of which kinds of traders constituted a problems could effect enforcement action (p166); and finally, and most remarkably, her finding that "testing programmes were limited. These included detecting substitutions or excess water content in processed food, and the safety or quality of consumer goods, both involving manufacturers. Thus the low priority accorded to expensive testing programmes could result in proportionately more offences of larger concerns escaping detection" (p167).

of downturns in the economy. Although this is motivated by the need to achieve flexibility in the face of difficult or uncertain economic environments (and thereby maintain financial performance) for the organisation as a whole, it may also have the effect of exposing smaller units within the organisation to greater financial and competitive pressures (Tombs, 1992, 1995). In addition, as Tombs (1995) observes, such decentralised forms of organisation, with weakened lines of accountability and oversight, can make corporate crime both more likely and more possible.

Second, whilst the weight of evidence suggests that large firms do tend to be 'safer' than smaller establishments (Tombs, 1988; Nichols, 1989; Stevens, 1999), these studies do not explain this association or establish causality. Croall's explanation - that larger establishments are better able to comply with regulations because they possess greater resources - rests on an implicit assumption that businesses will be willing to direct financial and other resources into complying with regulatory law whenever those resources are available. But it is possible to argue that differences between firms with high injury rates and firms with better safety records may be less to do with management willingness to devote greater resources to safeguarding workers' safety and more to do with the ability of an organised workforce to insist that this is done. In other words, the availability of financial resources may be no guarantee that those resources will be utilised to ensure compliance with the law. Employer compliance with health and safety legislation may be as much a product of a workforce's organisational strength and confidence (Grunberg, 1983; Tombs, 1988; Nichols, 1989) - which tend to be highest in industries where employment is concentrated in large establishments - than it is a product of greater resources and capability. For instance, Dawson *et al.* found that increases in the fatal and major accident rates between 1981 and 1984 were greatest in industries where there had been "greater than average increases in productivity and where low pay is prevalent" (1988: 41-42) - both of these being features of industries with low levels of worker organisation and therefore, one would assume, a limited ability to resist dangerous or harmful work practices. Interestingly, they found that the association between firm size and increased incidence rates for fatal and major injuries was much weaker.

What this evidence suggests is that firm size, by itself, may be an inadequate and also misleading indicator of a firm's propensity to offend. How, for instance, are we to explain the vast difference in health and safety standards and practices often found to exist between manufacturing plants within the domestic markets of large multinationals and their overseas subsidiaries. For instance, in the late 1970s the

American asbestos manufacturer Amatex owned two asbestos textile plants in Mexico. In 1977 Amatex's US-based plant in New Hampshire finally achieved compliance with OSHA standards required by the agency in 1976. However, conditions in the firm's Mexico plants failed to meet even the meagre occupational health standards required by that country, let alone the standards prevailing in the US. This may have been due, not only to inadequate state enforcement, but also to the Mexican plants' trade union's close alliance with management (Castleman, 1979).

Examples such as these tend to undermine the assumption that large multinationals with adequate resources will use those resources to comply with, or exceed, health and safety legislation. Instead, large corporations have typically attempted to minimise labour costs through the relocation of hazardous production processes to developing countries with minimal or non-existent health and safety (or other kinds of protective) legislation (Castleman, 1979, 1981; Ives, 1985; Baughen, 1995). Another way in which large corporations have been able to avoid the costs of, and legal responsibilities attached to, production and manufacturing processes is through an increasing utilisation of subcontracting. This may involve the disaggregation of production and manufacturing to factories within Free Trade Zones or export processing zones (EPZs), where large multinationals and transnational corporations are able to exploit minimal regulation and low wages. [68] Or, jobs that are difficult to 'relocate' abroad (such as jobs in the construction and service sectors and some manufacturing jobs within the textile industry) may be subcontracted out to small firms within the domestic market. Mitter (1994), for instance, argues that the kind of 'flexible' working contracts typically held by small manufacturers in the developing world who produce goods for large corporations, are being reproduced between subcontractors and large corporations in the developed world as a result of growing casualisation and the spread of subcontracting. Productivity within small establishments in the developed world may be achieved by subjecting workers to sweatshop conditions,[69] but the arm's length relationship between the corporation and its subcontractors means that the corporation is often able to avoid not only the high 'overheads' associated with labour-intensive production processes, but also the legal liability for the any occupational hazards suffered by workers.

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[68] *Behind the wire: anti-union repression in the export processing zones.* ICFTU, April 1996, ICTFU Publications.

[69] For instance, labour activists in the United States filed a lawsuit against Guess Inc. and sixteen of its subcontractors, alleging unfair business practices, retaliation against whistleblowers and negligent supervision. This was after subcontracting factories (but not

Thus whilst smaller companies may well be less safe than larger companies within the First World, this may be a consequence - not of larger companies greater 'virtue', but of the fact that larger companies are able to pass certain economic and production pressures on to workers or smaller firms. Within the construction industry, large construction firms were better able to respond to difficult economic conditions and changing markets during the 1970s and 80s. Inflationary pressures caused clients, who sought quicker returns on their investment, to press for faster build times. Evans argues these factors: 'stimulated new markets in specialist management services and new contracting arrangements which favoured the largest construction firms'. Large companies were also able to diversify beyond contracting whilst shifting 'its attendant risks and costs (including employment) onto chains of smaller subcontractors' and onto (so-called) self-employed workers (Evans, 1990: 242-243). Large firms tend to dominate the contractual hierarchies and are therefore able to pass production pressures and tight economic margins on to firms lower down the contractual chain (Haines, 1993). Whilst Haines (1993) asserts that it is not size *per se* that determines the extent to which a firms are forced to bear the impact of intense economic and productivity pressures, but rather their place within the hierarchy of firms, it is increasingly likely to be the case that large construction companies will dominate these hierarchies. This is the tendency that is emerging as large firms increase their share of new contracts by moving down-market and 'squeezing out' the medium-sized firms.[70]

In conclusion, economic and production pressures and unstable financial environments impact upon large and medium-sized companies as well as upon the small firm (Box, 1983). Nevertheless, large companies may be in a better position to avoid, minimise or shift legal obligations aimed at protecting workers and consumers, the uncertainties of volatile markets, and the pressures of a competitive environment. Indeed, corporate strategies aimed at shifting legal, economic and productive 'burdens' are producing new configurations of work and employment on local and global levels. This means that whilst both small and large companies may seek to evade legal responsibilities for workers' health and safety, the ability of larger companies to control and dominate contractual relationships within industrial sectors

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Guess) were fined for labour violations. *Workers' Health International Newsletter* Issue No. 49/50 Winter 1996/97, p40

[70] Evans (1990: 243); and Consultative Committee on Construction Industry Statistics *The State of the Construction Industry*, February 1995 Issue 3, Construction Sponsorship Directorate

enables larger companies to simply evade the law rather than break it. Criminogenic pressures can, in some situations, be passed down through the organisational structure of contractual relations – resulting in an *impression* that it is the smaller organisations that present the greater regulatory problem. To what extent, then, does the discourse of the cowboy firm accurately reflect, or articulate, this empirical reality?

The Ideology of the Cowboy Firm

In the context of the regulation of corporate safety crime, the discourse of the cowboy firm is comprised of two central claims that require some consideration. The first is the claim of 'marginality'. As discussed, criminality is represented as residing within the 'cowboy' firm. The cowboy, in turn, is represented as being either numerically marginal, illegitimate or economically marginal. This is in spite of the fact that within the discourse of regulators, industry and the managers interviewed in the present case study, the term itself is shifting and not clearly limited to any pre-existing category of firms in the construction industry. In a sense, it is easier to identify the type of firm to which the label is never applied - that is, the blue-chip company whose respectability appears to be assured (or assumed). The elasticity of the concept can be discerned in the fact that at one moment it appear to encompass only unregistered firms, whilst in another instance encompassing those firms that are described as 'one-man bands', and in yet another instance it is used to signify a firm that is, simply, economically marginal. In any event, the assertion that 'there are only a small number of cowboys',[71] or the association of the cowboy operator with the non-registered or small builder, means that the cowboy is seen as unrepresentative and on the margins of the construction industry. And since, within this discourse, the cowboy is represented as the repository of all *'true'* illegality, criminality too is depicted as marginal to, rather than endemic within, the industry despite the continuing high rates of injury and death which accompany construction activity.

The second claim within the discourse concerns the 'nature' of offences committed by the 'cowboy' on the one hand and the reputable company on the other, and can be understood as an attempt to resolve an apparent dilemma faced by inspectors within the enforcement context. This is the fact that the larger, 'reputable' companies break the law as well. In fact, as we saw in chapter 4, an aggregation of all companies'

[71] Jenny Bacon, Director General of the HSE, cited in Taylor R 'Prevention rather than cure', in *Health and Safety at Work - A Financial Times Guide*, The Financial Times Survey Department November 1996; p6

(including their subsidiaries), prosecutions for health and safety offences over the last ten years indicate that larger companies like Tarmac and John Laing are the greatest 'recidivists'.[73] This contradiction within the discourse of the cowboy operator finds an apparent resolution in the claim that what distinguishes the cowboy from the respectable firm is 'intentionality'. Thus, it is said that whilst the cowboy firm deliberately flouts the law, the respectable firm violates the law through oversight or organisational failure.

But the paradigm cowboy/reputable company, used within the context of the construction industry, is a distortion of some real structural relations. First, in the context of the organisational dynamics discussed above it is distorting in the sense that it obscures the extent to which senior managers, clients and main contractors create the conditions in which regulatory offending is likely to occur. The ideology of the cowboy firm precludes any recognition of this dynamic and instead encourages an understanding of their involvement as something 'negative' and morally neutral - as a supervisory or organisational failure. It is also distorting because it assumes that for firms higher up the organisational hierarchy 'lawfulness' is a product of virtue rather than of an ability to pass criminogenic pressures down on to subcontractors and workers. In other words it represents as marginal and atypical something that is a consequence of processes, practices and structures intrinsic to the industry.

The lack of intentionality imputed to respectable firms is then taken as evidence that these firms are actually well-intentioned. As argued in chapter 4, there is clearly a problem with this translation since a lack of intention does not necessarily mean that a firm is well-intentioned. This 'slippage', as we have seen, also occurs within the arguments of a number of compliance theorists. The significance of this translation for the regulation of workers' health and safety is that it has provided a rationalisation for the adoption of a non-punitive approach to corporate regulation. Through the foregoing discussion we can see how the discourse of the cowboy operator is the 'framework' within which arguments about intentionality take shape within an enforcement context. Moreover, the category of the 'cowboy operator' functioned as a pivot around which individual company managers in the present case study could

[73] 'Bosses in the Dock', *Dispatches*, Channel 4 06/05/99.

coherently insist on the importance of a punitive response to corporate offending, whilst denying that this applied to either themselves or their companies. Similarly, the high death and injury rate could be acknowledged as a problem for the construction industry even as they insisted that the problem was one for which they bore no responsibility. Thus the figure of the cowboy operator allows both an individual company and industry as a whole to preserve its 'legitimate' status and deny moral culpability for the violence that is inflicted on workers' bodies through the routine failures of company management to observe the law.

CONCLUSION

In-depth interviews with company managers provided an opportunity to explore their understanding of the causes of industrial injury, disease and death. A consideration of the wider literature and regulatory and other public discourses, suggests that the dominant 'explanations' offered by these managers reflect wider ideologies and attitudes held within industry, and accepted by regulators and state officials. By locating 'danger' within the mechanics of construction processes, within the behaviour and personal characteristics of building workers, and within the operation of smaller and economically marginal firms industry is able to convey an impression that management responsibility for workplace health and safety is mainly a matter of legal form, without any moral content. However, this impression is only maintained by an obfuscation of the material organisation of economic and productive relations within the industry, whereby larger firms and firms dominating the contractual hierarchy are able to pass tight margins and 'build times' on to the smaller sub-contractors and individual workers.

The fact that contractors' responsibility for creating these criminogenic pressures is largely unrecognised within regulatory law, and the operation of the 'cowboy/ legitimate company' paradigm in regulatory discourse and practice ensure that economically significant companies are able to preserve their status as socially responsible corporations - even in the context of persistent regulatory violation resulting in the death and injury of workers and the public. The ideology that it is only the 'fringe contractor' that can be said to represent a truly criminal element

within the regulated population, and that regulatory violations committed by legitimate businesses are simply organisational failures for which no one can or should be blamed, is an idea which is central to the logic, structuring and justification of regulators, businesses and government officials' discourses around the State's approach to the regulation of industrial health and safety. In other words, the existence of worker-blaming discourses and ideologies and the myth of the cowboy firm both function to justify and perpetuate the organisation of 'trusting' relations between the regulators and the business community.

What is particularly interesting is that the HSE's understanding that the cause of most workplace deaths is management failure is not then translated into public censure. There was, for instance, clear evidence of this understanding in my interview with the HSE inspector who had visited Firelands Wood, who stated:

> The reason why [the Construction (Design and Management) Regulations] came about is an understanding that the ultimate cause of failure is management. I mean, the traditional idea is that people who have accidents are stupid. That's not the case. Particularly in the construction industry - if somebody refuses to do work, they know somebody else will. So they are under the pressure and in that economic climate where it's a tough industry and if they don't get on and do it - do that five minute job - they know somebody else will. SO it's difficult to blame the employee... That's why, whenever we investigate accidents we hardly ever look at the person who was injured. We very quickly move up the management chain and ask what systems are in place.[73]

Similarly, the HSE appear to recognise that it is often larger companies that create the conditions and pressures which force smaller companies to 'take short cuts' on safety. Research conducted by John Rimington for the HSE looked at the relationships between firms within the contractual chain across industrial sectors.[74] This research discovered that larger companies are beginning to audit the health and safety performance of their smaller suppliers. This is motivated by their desire to control risks and losses. At the same time, larger contractors were increasing pressures on

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[73] Interview 19/04/96.
[74] *Managing Risk - Adding Value: How Big Firms Manage Contractual Relations to Reduce Risk*, HSE 1999.

smaller contractors and suppliers to become more 'flexible' and responsive to the larger contractor's demands. Thus, Rimington found that:

> Market leaders in every industry, whether they adopt fully intergrated quality management systems or not, are increasing their grips on chains of supply. *They do so by checking rather than managing* and also by increasing intimacy. This can amount to absorbing suppliers and contractors into the culture of the dominant firm *while avoiding the costs and liabilities of actual management.*
>
> (Cited in Taylor, 1998. Emphasis added).

However, this understanding of the pressures put on smaller firms - pressures which might be expected to lead to regulatory violation, or lead companies to 'improve' their accidents records by discouraging workers from reporting injuries[75] - is put to one side, and the research findings used to argue that:

> The companies in the study demonstrate that 'good health and safety is good business', and that the 'carrot and stick' approach taken by large firms helps to drive up health and safety standards. The co-operation and commitment of large companies in working with small firms - whether contractors, suppliers or neighbouring businesses - is vital in bringing about real improvement.[76]

It appears, moreover, that the HSE are going to use this 'interpretation' of the report to justify an increasingly 'hands off' approach in relation to larger companies who, under the 'Good Neighbour Scheme',[77] will be allowed to determine 'best practice' standards for industry and 'regulate' the health and safety performance of smaller firms. Thus we can see that evidence of the existence of productive pressures that might lead to regulatory offending is somehow transmuted by the HSE into the discourse of the

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[75] The danger of this was recognised by Patrick Ragan - Director of Corporate Health, Safety and Environmental Affairs for Rhone-Poulenc who states that: " By trying to improve safe behaviour by rewarding 'good' performance, firms commit the 'total quality sin' of measuring the wrong thing to reward. If the reward is based on fewer accidents reported, that is usually the result. Fewer accidents are reported - though no fewer accidents occur. This is especially true when the system calls for punishment if too many accidents are reported - the outcome is exactly the behaviour rewarded, which created a system primed for increasingly severe accidents". Cited in Walker (1998).

[76] HSE Press Release 'New Princes of Big Business Hold Sway over Contractual Relations - HSE Report', E95:98 - 29 April 1998.

[77] Under this new HSE initiative large companies are encouraged to form 'partnerships' in which they offer health and safety expertise to smaller contractors, suppliers and neighbouring businesses.

socially responsible corporation - allowing the continuation of a non-punitive approach to corporate illegality and corporate violence.

8

CONCLUSION

This thesis began by observing that a common assumption within the criminological and socio-legal literature on corporate crime is that corporate illegality – despite the scale of harm involved – generally fails to arouse moral outrage, resentment or anxiety, and that this absence of societal 'concern' explains, or allows, the differential treatment accorded to corporate offenders by the State.[1] However, evidence was presented in Chapter 2 demonstrating that – with respect to work-related deaths, injuries and disease caused by management negligence – there have been explicit attempts, occurring intermittently over the course of nearly two centuries, to represent these as forms of criminal violence. What is striking about this history is the fact that whilst pressures for regulation have met with greater and lesser degrees of success, specific attempts to establish an identity between, and equivalent treatment of, conventional crimes of violence and corporate safety crimes have largely failed.

In an attempt to account for corporations' seeming resistance to the criminal label (Wells, 1993; Tombs, 1997) I analysed two sets of distinct but related phenomena. First, I considered recent attempts by trade unionists, campaigners and the families of those killed in work-related settings to mobilise the criminal law against acts of corporate violence. In tracing the responses of specific state institutions and officials to these attempts, I concluded that the pattern of institutional responses revealed within this recent

[1] As discussed in Chapter 2, this assumptions underlies the work of academics from theoretically diverse traditions. However, their different theoretical frameworks lead them to quite different conclusions about the legitimacy of the State's differential treatment of this form of social harm. For Hawkins (1984, 1990) it is futile to criticise legal institutions of officials, regulatory agencies, or governments for failing to deal punitively with corporate illegality, since these state bodies merely reflect the general 'tenor' of public sentiment in much the same way that a barometer records the weather. Box (1983) and Reiman (1995), on the other hand, would argue that if the general public are indifferent to corporate crime, this indifference is rooted in an ideological misapprehension which allows the various institutions of the State to adopt their (preferred) non-punitive response to corporate illegality.

history constitutes strong evidence that a powerful and continuing resistance to treating corporate illegality as 'real crime' exists within certain key political, legal and regulatory institutions of the State. Second, I looked at the ways in which the embedding of corporate violence within the *forms* of regulatory law and enforcement, statistical data, and public representations of corporate illegality obscure the relationship between corporate illegality, corporate responsibility and harm, rendering critical audiences' attempts to represent corporate violence as *crime* problematic. Moreover, the resistance of state institutions to the criminal labeling of corporate harm is demonstrable through their attempts to preserve the second set of factors analysed – namely, those discourses and practices that obscure, neutralise and render morally and legally ambiguous acts of corporate violence.

This thesis therefore represents an attempt to consider systematically and in detail the micro-processes that constitute and support corporate resistance to the criminal label and social censure. However, in attempting to trace the 'how' of corporate resistance, I have largely left unanswered the question of *why* the forms of resistance identified in this thesis exist in the first place. This conclusion, therefore, will address that broader question as a way of contextualising some of the main arguments and observations made throughout the thesis.

Clearly the actions of regulatory agents, government ministers and members of the legal profession do not occur in a vacuum, and need to be explained. Organisational factors – such as the contrasting institutional procedures identified by Sanders (1985) within the police on the one hand, and the HSE on the other – and the existence of powerful organisational cultures help to explain the immediate actions and decisions of regulatory agents. However, both Carson (1979) and Sanders (1985) insist on the need to look beyond the immediate micro-level processes of the organisation. Both authors argue that an institutional propensity on the part of the Factory Inspectorate towards prosecution avoidance developed in response to the particular complex of social, economic and political forces that existed during the formative years of that organisation. However, as noted earlier, this begs an important question: why should institutional procedures and an organisational ethos shaped by the logic of the emerging social order of the early nineteenth century have survived into the present day in the face of explicit and implicit pressures for change?

This question poses particular problems for regulatory theorists like Hawkins (1984) and Bardach and Kagan (1982) who seek to explain regulators' approach to enforcement in terms of societal ambivalence towards 'regulatory offending'. Such an interpretation of regulatory behaviour and policy is rooted in a particular conception of the state, which is also dominant within political and popular discourse. This conception, which encompasses both consensus and pluralist theories of the State, holds that, by and large, States will represent and give effect to the interests and wishes of 'the people'. Whilst consensus theories of the state assume the existence of cohesive societies bound by a shared morality, pluralist theories of the state recognise the diversity of groups that make up complex, modern industrial societies (Pearce, 1976). Yet despite these distinctions, within both perspectives the nature of the conceptual relationship between State and society is identical in certain crucial respects. For instance, within *both* frameworks the State seeks to fulfill its role of 'representing' the interests and morality of society – either directly, by reflecting some posited moral consensus, or by attempting to reconcile and balance the conflicting demands of diverse sections of society as they are articulated through organized 'interest groups'. Within this latter framework the state still manages to function 'democratically', it is argued, since no single group's interests will be allowed to dominate indefinitely.

Neither theoretical position, however, is able to explain the patterns of resistance amongst State officials and institutions to a growing public demand, discussed in Chapter 2, for the criminalisation of corporate killings. Indeed such theories are directly contradicted by this history. The groups demanding punitive state action in response to the transport tragedies of the 1980s and 1990s, for example, were not 'marginal' or minority groups. As stated, powerful sections of the media added their 'voice' to the demands of relatives of those killed and injured in these disasters. Yet, despite the existence following the *Herald* disaster of something approaching a consensus that P&O were responsible for the deaths of 192 people and should, therefore, have been prosecuted for corporate manslaughter, the State – over a decade later – has not yet acted to remove some of the obstacles to prosecution identified at the time of the trial and later by the Law Commission (1996). In stark contrast to this apparent reluctance on the part of the State to institute legal reforms that would begin to address some of the demands for an effective criminalisation of corporate killings, the State responded with alacrity to the

demands of a small group campaigning for a more punitive response to road traffic deaths caused by drunk and reckless drivers (Bergman, 1991: 24).

This pattern of systematic bias, which favours the interests of corporate capital over other conflicting or competing demands, has been demonstrated by other academics working within a range of disciplines and across diverse regulatory contexts (Carson, 1979 and 1982; Levi, 1987; Abraham, 1995; Woolfson *et al.*, 1996; Pearce and Tombs, 1998; Burrows and Woolfson, forthcoming 2000), and is evident even in relation to the interests of organised labour. However, since pluralist theories of the State understand organised labour as a powerful interest group in its own right, then according to such theories we would expect, historically, to see the State resolving the conflicting demands of representatives of organised labour and capital in the interests of labour much more than has in fact been the case (Miliband, 1969). As the gap between public expectation and the operation of the law has become more evident, regulators and government ministers have sought to explain the disjunction between public sentiment and their reluctance to sanction corporate offenders by continuing to argue that the criminal justice system is ill-suited, or largely irrelevant to the control of harmful corporate activity. In this way State officials can assert that even if they are failing to respond to public sentiment in these matters, this failure constitutes a rational choice which is consistent with 'natural justice' and with the *real* interests of workers and the public. These arguments (also voiced by some academics and the 'business community') represent corporate violence as a phenomenon that is inherently different from 'real' criminal violence. In addition, they represent the context of corporate regulation as one in which an adversarial, or 'policing' approach to corporate illegality fails to secure the kind of improvements which the 'compliance approach' can secure. Therefore, they conclude, a non-sanctioning approach to corporate harm is both 'just' *and* produces the greatest benefits for those people the regulatory system purports to protect.

However, it has been a central contention of this thesis that these arguments are based on a number of spurious distinctions and cannot, furthermore, be sustained in light of certain empirical evidence. For instance, in Chapter 3, I offered a sustained and detailed critique of the arguments of those who seek to represent corporate violence as 'non-crime', or mere administrative offending. In addition, case study data presented in Chapter 5 demonstrates that the failure of regulatory agents to act against corporate offences on

Firelands Wood estate - or even to label companies' acts and omissions as 'illegal'- *created*, rather than reflected, a sense of ambiguity. If it is accepted that the roles played by various bodies of the State cannot be understood in terms of justice, rationality or on the grounds that their approach simply reflects public sentiment, how then are we to conceptualise and explain the State's resistance to criminalising corporate offenders?

Marxist theories of the State and society posit the existence of an economic elite within capitalist societies and argue that this economic elite also comes to dominate politically through the State. Questions concerning the precise relationship between the economic power of the 'ruling class' and the State (as the locus of political power) are unresolved within Marxist theories, as are questions concerning the degree of relative autonomy that the State exercises in relation to the ruling class. Nevertheless, common to Marxist theories of the State is the view that:

> the intervention of the state is always and necessarily partisan: as a class state, it always intervenes for the purpose of maintaining the existing system of domination, even where it intervenes to mitigate the harshness of that system of domination.
>
> (Miliband, 1977: 91).

Marxist theorists have argued that this 'partisanship' can be understood as the consequence of a number of factors. This includes the ability of fractions of the capitalist class to place enormous pressure on State institutions around particular issues, and the existence of a certain coincidence of interests, ideologies and assumptions between officials of the State – what Miliband calls 'the State elite' (1969) – and members of the economic elite. However, perhaps the most decisive factor influencing the activity of the State is its '*insertion in the capitalist mode of production*' (Miliband, 1977: 72). Miliband explains that:

> The nature of the state is here determined by the nature and requirements of the mode of production. There are 'structural constraints' which no government, whatever its complexion, wishes and promises, can ignore or evade. A capitalist economy has its own 'rationality' to which any government and state must sooner or later submit, and usually sooner.

(Miliband, 1977:72).

As Snider points out, "This general thesis explains both state timidity to pass and state reluctance to enforce laws penalizing corporations since both potentially endanger accumulation" (1991: 215). Concrete historical reality is, of course, more complex than this general statement would suggest. In the first place, regulatory decisions and regulatory trends cannot always, or simply, be 'read off' from broader structural and economic relations. Micro-sociological processes can produce 'unexpected' regulatory results, as Abraham and Sheppard (1998) demonstrate in relation to the Medicines Control Agency's decision to ban the tranquilizer Halcion in the UK. Second, as Snider (1991) points out, this thesis in its broad outline leaves us unable to explain the fact that regulation is introduced in the first place, and that over the past fifty years western industrial democracies have seen real improvements in work conditions, levels of pollution and the safety of consumer products – although this has by no means involved continuous and even 'progress,' and has quite recently involved the lowering of regulatory standards in some areas.[2]

In order to account for these trends we need to understand first that regulation may sometimes be in the interests of corporate capital. Second, that "while the state does act, in Marxist terms, *on behalf* of the 'ruling class', it does not for the most part act *at its behest*" (Miliband, 1977: 74).[3] Third, that the State may and does have interests and purposes of its own, which it will sometimes pursue contrary to the interests of economic elites (Abraham, 1995), and this includes action to protect and secure its own legitimacy. Fourth, that the State does not constitute a homogenous unity, but is rather "... structurally shot through and constituted with and by class contradictions", and that these may express themselves as conflicting pressures and purposes within and between state institutions (Mahon, 1977). And finally, that "agency, struggle and resistance" may force the State to institute significant reforms, and that these can be accommodated "without major shifts in the means of production" (Snider, 1991: 215). Accepting the parameters

[2] See, for instance, Abraham and Lewis (1999) on the health and safety implications of the new centralised European-procedures for drug approval and marketing in EU member states.
[3] The significance of this statement concerns the 'relative autonomy' of the State. One argument is that, given that the ruling class is not a homogenous entity but is made up of different fractions with sometimes conflicting interests, this relative autonomy is crucial if the State is to secure social order and the long-term hegemony of the ruling class (Mahon, 1977; Pearce and Tombs, 1998).

of this more complex understanding of the relationship between State, society and corporate capital, what then are the possibilities for a thoroughgoing criminalisation of corporate violence within regulatory regimes?

The first point to make is that 'regulation' and 'criminalisation' are discrete (albeit related) phenomena, with distinct potential effects and consequences for corporate capital. As such we need to consider the possibilities associated with both separately. Carson's (1979) analysis of the introduction of the early Factory Acts and the subsequent development of regulatory systems for enforcing that legislation provides an opportunity for clearly understanding the differential possibilities and dynamics associated with regulation and criminalisation. Carson's sophisticated analysis points to an apparent contradiction in the history of British factory legislation during the nineteenth century, namely the existence on the one hand of an "internal dynamic... within the emergent social order of industrialization... that generated an impetus *toward* rather than away from effective regulation" (44) and, on the other, a need to avoid the thoroughgoing enforcement of the legislation through the criminal courts (48). Carson argues that full-scale enforcement of the early factory legislation through the courts would, at that time, "have involved a degree of collective criminalization which extended far beyond some morally opprobrious minority" (Carson, 1980: 189). This, in turn, would have presented too great a contradiction to "the structural and moral contours of the emerging social order" (*ibid*). That is to say, full-scale criminalisation of early factory crime would have undermined the emerging hegemony of the bourgeoisie.

This argument, that the criminalisation of corporate violence constitutes a powerful, *ideological* challenge to the legitimacy of corporate enterprise (and capitalist relations of production more generally) is consistent with my own consideration in Chapter 3 of what, precisely, may be at stake in both academic and non-academic struggles over the effective criminalisation of corporate harms. With respect to regulation, it is possible that, from time to time, the economic interests of a particular company may converge with the aims and requirements of a particular piece of legislation, or that it will sometimes be in the interests of a fraction (or fractions) of capital for the law to be enforced consistently throughout a particular industry (Tombs, 1995a). Crucially, periods where regulation is effectively enforced may also be necessary to secure in the long-term the continued legitimacy and acceptance of corporate capital (Pearce and Tombs, 1996). By contrast, so

long as the application of the criminal label continues to be one of our most powerful mechanisms of social censure, the *consistent* and *unambiguous* labelling of acts of corporate violence as 'crimes' would always threaten to undermine the legitimacy – and thus the long-term interests – of corporate capital.[4]

If we accept that a structural and necessary bias towards corporate capital exists within the State, then we can predict that the real possibilities for effective criminalisation of corporate harms are severely limited, since any moves in that direction will always be strongly resisted by corporate capital, and therefore also by relevant state institutions and officials.[5] One of the purposes of this thesis was to demonstrate the observable effects of this resistance in the face of both explicit and implicit pressures for change. However, whilst the effects of this resistance are indeed observable (in, for instance, the continued low rates of prosecution following workplace deaths) such an observation does not help to explain *how* the criminalisation of corporate violence is routinely avoided. Previous research has identified the ability of corporations to avoid the criminal label through, for instance, their ability to influence regulatory standards and define the parameters of their compliance (Nader, 1971; Carson, 1982; Wikeley, 1992; Crainer, 1993, Abraham, 1995; Egilman and Reinert, 1995; Woolfson *et al.*, 1996); or in terms of the relative powerlessness of their critics and victims (Ermann and Lundman, 1996); or through the ability of corporations to relocate hazardous activities and products to the third world,

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[4] This is because research suggests that criminality is, at the very least, routine throughout the corporate sector (Pearce and Tombs, 1990). Full enforcement of the law, therefore, would involve a degree of criminalisation which, following Carson (1979), would undermine the ideology of the benefits of corporate enterprise and thus potentially threaten the legitimacy of, and consent (in Gramscian terms) for capitalist economies.

[5] There are exceptions this broad statement. For example, it is a fact that following the creation of the Serious Fraud Office in the UK there was both an expansion in the *volume* of serious fraud cases prosecuted and, to a lesser extent, an expansion in the *type* of case prosecuted (Fooks, 1997). There was, in other words, a genuine expansion in the scope of criminal justice intervention against corporate frauds. However, the impetus for this came about partly from the financial services industry itself, and can be understood in terms of the financial sector's, and the then Conservative Government's "overarching goal of promoting London as a major financial centre" and, as a consequence, their need to preserve the integrity and reputation of the UK's financial markets (*ibid*). At this time then there was a genuine attempt to deter serious frauds through criminal prosecution, whilst criminalisation also served an important legitimating role for a Government which was being publicly accused of "leniency towards its 'friends in the City'" Fooks, 1997: 82). Similarly, Snider (1991) has argued that since the control of insider trading and stock market fraud is generally in the interests of both the corporate sector and States (who are also investors in the market) then we would expect to find this sphere of corporate illegality one which was subject to more rigorous forms of regulation and enforcement. Arguably, we might also expect this sphere of corporate illegality and deviance to be the one most likely to attract unambiguous forms of criminalisation.

thereby avoiding the more stringent legislative controls operative in the first (Castleman, 1979, 1981; Ives, 1985; Braithwaite, 1993).

Whilst all of these strategies are routinely and effectively utilised by corporate capital, this overt (or discoverable) exercise and exploitation by corporations of their economic and political power carries with it an important risk. Such manoeuvres are fairly naked abuses of power which allow corporations to routinely avoid legal control and as such there is a risk that if, or when, they are uncovered the social and moral legitimacy of corporate capital will be undermined. What particularly interested me here, therefore, was the way in which the embedding of corporate violence within specific forms and practices of regulatory law and its enforcement produce and sustain a perception of that violence as non-crime. For it is not the *absence* of legal controls which obscures, or renders ambiguous, specific instances of corporate violence – but the generation and re-generation of particular forms of control and representation within regulatory law. This thesis shows how the potential to criminalise corporate violence is negotiated and elided in ways that preserve and enhance the legitimacy of corporate capital. First, case study data presented in this thesis suggests that the enforcement practices of regulatory agents tend to render the illegal acts of companies both morally and legally ambiguous. Second, corporate violence is embedded within legal and other public forms of representation that obscure the nature and extent of the harm caused by corporate illegality. Third, criminality is represented as marginal to corporate enterprise through the perpetuation of the mythical paradigm: responsible corporation/ cowboy operator.

It is important to point out, however, that these 'techniques of neutralisation' and minimisation have evolved as a response to ideological and material struggles to exercise some democratic control over corporate capital. 'Pro-regulatory' struggles, as Snider has called them (1991) can and have forced change. Two recent examples of this are first, the beginnings of an identification between corporations and criminals through the soon-to-be-introduced offence of corporate killing and second, High Court criticism of the CPS's decision not to prosecute for manslaughter following the negligent killing of Simon Jones by Euromin. The form that corporate regulation takes is historically contingent, ultimately unresolved and, therefore, a potential site of struggle. What seems equally clear however, is that the fundamental organizing principles of the economic environment in which corporate capital operates will always impose certain key conditions on the form

and effect of regulation. What seems significant, however, is not where those limits ultimately reside, but how fundamental economic relations are produced and reproduced in the formulation of regulatory law and policy and the practice of regulatory enforcement. And, to this effect, we must not only ask how does it happen, but also how is it possible?

APPENDIX 1

METHODOLOGY

THE HSE'S MEDIA STRATEGY

The arguments raised in chapter 2, and developed in chapter 4, concerning the HSE's relationship to the news media in particular, and to publicity more generally, were based on a content analysis of all HSE press releases relating to either HSE prosecutions or to workplace deaths and injuries between December 1997 and September 1999. Press releases relating specifically to prosecutions, deaths and injuries were chosen since - unlike press releases relating to changes in legal standards or other technical information, which would be expected to be directed almost exclusively towards an industry or 'specialist' audience - this information would be of interest to the general public and therefore hold some 'news value'. The analysis, amongst other things, sought to explore the way in which the HSE constructed information relating to corporate illegality as compared to other institutions of criminal justice. To this end, some comparison was attempted with press releases issued by the Metropolitan Police, the Police Federation and the Crown Prosecution Service over the same period. The analysis of the HSE's representation of workplace deaths was based on all press releases relating to work-related deaths *except those issued by the Railways Inspectorate*. These were excluded from the analysis for the following reasons. A large number of press releases related to a single disaster - the Southall rail crash of September 1977. Including these press releases in an analysis of HSE publicity of work-related deaths would have distorted the findings since a number of press releases would have referred to just one event. It is also argued that HSE publicity in relation to this event was exceptional since the HSE were, in the months following the crash, under growing pressure from the public to censure the rail operator in this case. A consideration of these press releases therefore would involve an analysis - not of the HSE's willingness to publicly censure companies - but of the HSE's *response* to overwhelming public censure. This was not the immediate purpose of the

analysis. The discussion in chapter 4 relating to the adoption of 'naming and shaming' strategies by regulatory agencies was based on an analysis of internal documents from both the Health and Safety Executive and the Environment Agency, as well as on personal communications with Peter Johnson from the General Policy Branch of the HSE's Policy Unit and with Alan Dalton, an Environment Agency Commissioner. Peter Johnson currently has responsibilities covering a range of areas including enforcement policy, reactive briefing, prosecutions, penalties and manslaughter charges.

THE FIRELANDS WOOD CASE STUDY

Fieldwork Methodology

The fieldwork and interviews forming the basis of the case-study analysis of asbestos exposure on Firelands Wood Estate were conducted over a five month period in 1996. The purpose of the fieldwork was both to uncover, so far as possible, the circumstances surrounding, and the true extent of, the exposure of residents and workers on the estate to asbestos dust and also to identify and analyze those processes and forces that shaped, and ultimately determined, the conflict between the companies on one side, and their critics on the other over the significance and status of the companies' illegal and harmful actions.

The methodology chosen for this fieldwork marks a rejection of the preferred research methodology of scholars like Keith Hawkins (1984), Bridget Hutter (1988), Matthew Weait (1989), and Eugene Bardach and Robert Kagan (1982) in their studies of business regulation. These scholars have adopted an approach to researching business regulation that relies primarily on data from interviews with inspectors to provide an insight into the nature of both corporate offending and the state's response to that offending. However, a mistaken acceptance of inspectors' accounts of what they do as accurately reflecting regulatory enforcement practice has led these researchers to make inaccurate and misleading assertions relating to aspects of the HSE's prosecutorial activities. For instance, Hutter and Lloyd-Bostock, who researched the effects of injuries and deaths on the enforcement practice of the various inspectorates of the Health and Safety Executive, inform us that: "Following fatal or very serious accidents prosecution will frequently be

considered" (1990: 412). Similarly, Hawkins - through an uncritical acceptance of the perceptions and assertions of HSE inspectors - creates the impression that workplace fatalities generally result in a prosecution. For instance, he writes that:

> Action for regulatory inspectors is much more secure when there is already a body on the floor, and people are sufficiently chastened by the experience that they respond readily to demands for remedial measures. In such circumstances, prosecution often comes as no surprise. It is largely for these reasons that there is a marked tendency in the [Factory Inspectorate] to prosecute after an accident... So far as the FI inspector sees it: "If there's been a fatal accident, it's very difficult not to take action if the evidence is there and there's a breach there..."
>
> (Hawkins, 1989: 380).

However, as data relating to HSE prosecutions (discussed in chapter 2) shows, the impression that we are left with from these statements by Hawkins seriously misrepresents the actual rate of HSE prosecution following workplace deaths.

In order, therefore, to elicit information concerning the nature, extent and consequences of regulatory offending on Firelands Wood estate, company management, regulators, local journalists who had reported on events, a number of public officials, Firelands Wood residents and the HSE inspector who investigated the site were all interviewed or contacted. Where possible, interview data was supplemented with documentary and other evidence. For example, I obtained copies of the HSE's internal FOCUS reports which record and give details of inspectors' visits to the site. I also obtained a copy of the demolition contractor's method statement, copies of letter sent between various parties involved in the events, and a press release issued by the local Council.[1] Residents' claims that the estate was contaminated with asbestos debris were confirmed by laboratory analysis of samples of asbestos rubble collected from the estate.[2] An attempt was made to confirm residents' claims that the houses on the estate contained asbestos products. The regional organiser from the GMB was able to view three houses on the estate that had not

[1] See appendices 4, 5 and 6.
[2] See appendix 7.

yet been demolished and confirmed that what appeared to be an asbestos cement water tank was located within one of those houses.[3]

The Fieldwork

The redevelopment at Firelands Wood provided an opportunity to test the extent to which self-regulation, initially, and the subsequent intervention of the regulatory authorities were effective in securing compliance with the law in this instance. It also provided an opportunity for me to identify and explore those factors that seemed to be of primary importance in determining how this particular instance of regulatory failure was formally labelled and publicly defined. Consequently, on 15 March 1996 I first visited the site for the purpose of speaking to the residents in an attempt to verify the claims contained in a local newspaper report of 31 October 1995. I also hoped to secure interviews with both workers and managers from the firms involved in the redevelopment. In the event I had to abandon my attempts to interview workers. This was because I began to anticipate two major problems with securing and conducting these interviews. First, my access to workers would be controlled by management. I thought there was a possibility that this might inhibit the freedom with which they felt they could answer questions. This in turn could distort the information I received. I also felt that managers might perceive this as a signal that I rejected or mistrusted their account of events. Second, it was clear from some of the statements made by residents I spoke to that some of the workers had been hostile to the residents concerns. This was in spite of the fact that they too were victims of asbestos exposure on Firelands Wood. In understanding this apparent lack of concern for their own health it is not enough to state, as Hawkins does, that "present evidence does not suggest that the workforce is particularly activist in the cause of its own health and safety" (1990: 462). The issue of workforce involvement in perpetuating unsafe work practices is explored in chapter 7.

I visited the estate on four separate occasions. Interviews with residents were conducted during two of these visits. On the other occasions I walked around the estate and took photographs of different areas under construction, inspected the garage roofs that had not yet been demolished to see for myself the condition of the materials, and witnessed the presence of a substantial amount of asbestos waste contaminating the estate. As stated, this was collected and sent off for laboratory analysis. Additional evidence collected in

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[3] See appendix 3.

this way tended to support residents' claims. Field notes were kept in the form of a diary, in which I recorded details of visits to the estate, and any contact made with any of the parties involved in events. This included notes of telephone conversations with local newspaper and television journalists reporting on events on the estate, a number of parish councillors, and representatives from the housing associations and the local Council.

Interviews with residents and their representatives

The residents of Firelands Wood, and a local reporter were the only ones to contradict company management's account of events. Although I was not able to personally verify all of the residents' claims, much of what I witnessed for myself on the estate supported those claims and as such I have tended to accept the truth of their account of events. This is subject of course to the possibility that in some instances they have either not accurately remembered, or not understood the significance of what they have seen. Where I think that this is a possibility I have signaled this in the text of the thesis, and as far as possible I have attempted to corroborate information I received.

Although residents felt able to criticise the management of health and safety on the estate in a way that workers may not have, residents nevertheless were not entirely free to say whatever they thought. Indeed, on one occasion a number of residents who had been approached by a woman I had already interviewed refused to become involved in the research. They explained that they were due to be re-housed and didn't want to 'rock the boat'. This was because there was no guarantee that Firelands residents would be re-housed in the new homes being built on the estate. The decision as to which families would be re-housed on the estate fell to the local Council which, as a condition of passing the land over to the housing associations, had reserved the right to fill the houses from their waiting lists. Clearly, this put the residents in a vulnerable and uncertain position and made some residents wary of criticising the Council or the construction work (in which the Council had been involved as the original developer).

In spite of these constraints, I managed to secure interviews with twenty-two residents from fifteen separate households on the estate. Interviews were semi-structured and conducted over two days. On the first day fourteen people were interviewed from eight separate households. On the second day, follow-up interviews were conducted with some of the original interviewees to confirm a number of points, and an additional eight

residents from seven separate households were interviewed. Out of the twenty-two people interviewed, twelve described various incidents that suggest asbestos on the estate was not removed and disposed of safely. Information from residents relating to other health and safety hazards was also elicited. In addition to interviews with residents, four parish councillors, representing residents on the estate, and a parish councillor from the neighbouring parish were interviewed at least once. These parish councillors all had some knowledge of, and became involved in some way in, the conflict. I continued to communicate with two of these parish councillors, Jack Hale and Esther Vale, who kept me informed of developments on the estate. All interviews were taped.

Company Interviews

Interviews were sought with managers from all the construction companies that were identified as having overall or supervisory responsibilities for health and safety during past and current phases of the redevelopment. Not all of these companies were responsible for the regulatory breaches identified during the research. For instance, two of the companies acting as planning supervisors and one of the main contractors on the estate had no responsibilities for planning, contracting out or supervising the demolition work, and as such were not implicated in events relating to workers' and residents' exposure to asbestos on the estate. Two demolition companies had been responsible for demolition work on the estate up until that point. An interview was secured with the Contracts Manager from one of these companies. An attempt was made to secure an interview with the other demolition contractor but I was not successful in this. In all, nine managers were interviewed from seven separate companies.

All of the managers interviewed were at either senior or mid-management levels within their companies. The companies interviewed would be classed as medium-sized companies according to the DTI 's classification, except for the demolition company AG Brown which employed between 27 and 30 operatives. As such, this company was at the 'upper end' of the 'small business' category, which includes businesses employing anywhere between 1 and 49 employees. As stated, the main contractors would have been classified as 'medium-sized businesses. The annual turnovers of these companies varied considerably and fell between £9 million and £22 million. However, one of these companies - ACE Construction - was a subsidiary of a larger Group that had an annual turnover of around £42 million, and Hays Construction (with an annual turnover of

between £20 and £22 million) was an independent trading company within a larger holding company that had an annual turnover of around £75 million. Information relating to company turnover and number of employees was elicited form managers during interviews.

Interviews with company managers lasted around an hour and contained both semi-structured and open-ended questions. The interview schedule was designed to gather information relating to two distinct issues. First, specific questions concerning contractual relationships and the organisation of work on the Firelands Wood redevelopment aimed to establish the precise responsibilities of each party and gauge the extent of manager's awareness of the legislation. In addition questions concerning the residents' claim were designed to elicit data concerning management responses and attitudes to events on the estate. Second, general questions relating to the regulation of occupational health and safety within the construction industry were designed to gather data relating to management's attitudes towards, and beliefs around, the legal and regulatory frameworks for controlling occupational hazards, the enforcement practices of the HSE, the appropriateness of the criminal sanction, the cause of injury and ill-health within the industry, and the nature and extent of management responsibility.

Managers' responses were 'coded' and re-organised around a number of 'themes' to facilitate analysis.

Additional Interviews

A number of additional interviews were conducted as part of the fieldwork. The HSE Inspector who had visited the site was interviewed concerning events on the estate. These questions were interwoven with more general questions relating to the nature of his work within the HSE.

Finally, because of the difficulties involved in interviewing workers on the site, background data relating to workers' perceptions and experiences of health and safety within the construction industry were gathered through in-depth, semi-structured interviews with a number of local building workers who were unconnected to the redevelopment. Five workers were interviewed in total. The amount of experience that

these workers had of the industry varied from between two years in the case of one worker to over thirty years in another worker's case. In addition in-depth interviews were conducted with Derek Shepherd, the Regional Organiser from the local branch of the building workers' union UCATT; Dennis Harryman, the Regional Organiser from the local branch of the TGWU; Eamon Andrews an NVCQ tutor for construction at the local technical college; and Alan Fraser, the local TUC tutor teaching trade union safety representatives and shop stewards courses. Data gathered during these interviews was used as a counter-point to data gathered during interviews with company management, and is discussed in chapter 7.

APPENDIX 2

The entire estate was divided into over seven different 'packages of land', with each package planned as a separate phase of work. These were then passed over to different housing associations who invited tenders for each phase of work separately. When I became involved in Firelands Wood in February 1996, the site had been divided up between four different housing associations for independent redevelopment. Between them, these housing associations had separately employed four separate firms to take on the duties of planning supervisor under the Construction (Design and Management) Regulations 1994, and three different firms to take on the responsibilities of the principal contractor. The first phase of building had started in November 1991.

To complicate matters further, the same firms could find themselves employed by different housing associations on different phases of work. So Dennis King & Partners (who, in their role as planning supervisor, were responsible for the largest number of houses) were employed by Sweet Housing Association, Norland Housing Association and Eastwind Housing Association. Hive Housing Association employed a different firm, Callum Seaford, and Sweet Housing Association employed two firms – Dennis King & Partners and Wellard & Partners – to look after different phases of the redevelopment. Two of the firms employed as main contractors (Hays and ACE Construction) had worked for two different housing associations on different phases of the work. And whilst Hays had worked with two different planning supervisors – Dennis King & Partners and Callum Seaford – ACE Construction had worked with *three* different planning supervisors – Dennis King & Partners, Callum Seaford and Wellard & Partners. The third main contractor involved in the redevelopment, HH Dove & Son, worked with only one planning supervisor (Dennis King & Partners) and was employed by only one housing association (Norland).

The organisations that were identified as having legal responsibilities under health and safety legislation in relation to the location, identification and safe removal and disposal of asbestos materials on the estate were: the local Borough Council, Sweet Housing Association, their planning supervisor from Dennis King & Partners, Sweet Housing

Association's main contractors on different phases of the redevelopement (Hays Construction and ACE Construction Ltd), and the demolition contractors.

APPENDIX 3

GMB
working together

IN THE SOUTHERN REGION

BS/KDJ

11th April 1996

Ms. Courtney Davis,
II, Robinia Green,
Lordswood,
Southampton.
SO16 8EQ

Dear Ms. Davis,

RE : REDEVELOPMENT - WOOD ESTATE

Following my recent visit to the Wood redevelopment site, I thought it pertinent to drop you a line in order to establish my findings.

As you are aware, I visited several properties that are due for demolition within the second phase of the development, and can confirm the existence of materials that apparently contain Asbestos, both on the outside and within the properties. Of course, chemical analysis would be necessary to prove this conclusive, but material of this kind should be treated as containing Asbestos unless it is proved otherwise.

The materials that I witnessed were of the Asbestos Cement Sheeting type, which are generally regarded as safe, provided they are not disturbed, are not worked on, i.e. cut, drilled etc., and are in no way damaged or deteriorated with age. The danger occurs if the material is broken in any way which can allow Asbestos particles into the atmosphere. Please remember it is the particles you cannot see that are most harmful.

However, when this material is removed it is covered by the Asbestos Regulations and the work must be carried out by a licensed operator who is obliged to produce a Risk Assessment and Method Statement as to how the work will be carried out, and this must be strictly adhered to. Great care must be taken not to damage or break the sheets and where there is a danger that this

GMB, SOUTHERN REGION
Regional Secretary: Eddie Warrillow General Secretary: John Edmonds
6 GLOSTER COURT, WHITTLE AVENUE, SEGENSWORTH, FAREHAM, HANTS. PO15 5SH
TELEPHONE: 01489 578665 FAX: 01489 578889

will occur it is normal to carry out the work under Water-Mist conditions. Operators carrying out the work should be properly trained and wear the correct protective equipment.

Finally, after the material has been removed it must be taken to a licensed Asbestos tip, any loose material must be carefully bagged in bags marked Asbestos Waste. Any Contractor who breaches these regulations risks imprisonment and Contractors have been imprisoned in this regard.

The responsibility for the work itself lies with the H.S.E. who are responsible to ensure the work is carried out correctly as outlined in the Method Statement and to ensure the workers are not put at risk.

The responsibility for the public and the environment however, is the clear responsibility of the Local Environment Health Officer, in this case of [redacted] Council, and it is the responsibility of this person to ensure that all Regulations are complied with and that the public and the environment are protected. The L.E.H.O. would normally oversee the work and ensure that air-monitoring, site clean up and dumping regulations are complied with.

Hope this advice is of some use to you. If I can assist you further, please contact me.

Yours sincerely,

BOB STOKES,
Regional Organiser

APPENDIX 4

[redacted]

MOLITION ONTRACTORS LTD.

[redacted],
PORTSMOUTH,
HANTS.
[redacted]

Tel: [redacted]
Fax: [redacted]

:f:

DATE:

:of:

CSIMILE TRANSMISSION COVER SHEET

STINATION FAX. NO: 01703 593024

:: - COURTNEY DAVIS

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NAMAS

ry Analytical Analytical and Consultant Chemist

. Perry
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Wickham Road
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PO16 7BS

Tel: Fareham (01329) 220237
Fax: Fareham (01329) 285072

RECEIVED - 2 NOV 1995

of [redacted] Our Ref ARP/me/BS16879

Contractors Ltd

[redacted]
mouth
[redacted]

31 October 1995 DATE

RESULTS OF MICROSCOPICAL EXAMINATION OF SAMPLES OF INSULATION

of submission..... 31 October 1995

d of examination

ample of insulation was examined by a documented in-house method using ised light microscopy and dispersion staining microscopy.

ts

attached mple	Description	Result of microscopical examination	Total proportion of asbestos
ldon			
e roof	hard sheet	contains Chrysotile	moderate

1 Proportion of asbestos

High	=	50-100% of asbestos
Moderate	=	5-50% of asbestos
Low	=	1-5% of asbestos
Trace	=	less than 1% of asbestos

Note 2 Types of asbestos

Crocidolite (blue asbestos)
Amosite (brown asbestos)
Chrysotile (white asbestos)
Anthophyllite, Tremolite, Actinolite

3 This Laboratory has been accredited by the National Measurement Accreditation Service for qualitative identification of asbestos.

The opinion about the proportion of asbestos is not within the scope of the NAMAS accreditation scheme.

Signed.....
Analytical and Consultant Chemist

APPENDIX 5

PRESS RELEASE copy to all Cllrs 8/11/95

ALLEGED ASBESTOS PROBLEMS AT [redacted] ESTATE, [redacted]

The work being carried out on this estate is the demolition of houses and associated structures. The land is owned by [redacted] Borough Council but will shortly be transferred to [redacted] Housing Society (only technical difficulties have prevented this transfer taking place already). The work is being carried out for [redacted] by [redacted] Construction, who are utilising the services of Messrs A G [redacted] for the demolition work. The Housing Section therefore have no direct responsibility for works being carried out on the site. This is, as previously stated, the responsibility of [redacted] via their managing agents, [redacted] Partnership.

The Environmental Health Department first became involved in the site on 24 October following a request from Councillor [redacted] to visit and assess the situation. An officer had a discussion with the site agent with regard to asbestos and found that it was generally being handled satisfactorily. There were one or two small pieces of asbestos scattered over the site and he arranged for these to be picked up immediately. Further arrangements were made to visit the site the following day to reassess the situation. He carried out a further site inspection in conjunction with the site agent and the asbestos removal contractor and was satisfied with the situation.

The site was visited again on Tuesday 31 October and it appears that there had been a problem over the weekend. Apparently a brick built garage with a concrete roof had been demolished by A G [redacted] and post demolition it was found that the inside of the roof was lined with asbestos, although this was still adhering to the concrete material. This was then left until the Monday, at which time an [redacted] reporter visited the site and noticed the rubble containing asbestos. I understand that he contacted the site agent who arranged for it to immediately be cleared to secure storage. When we visited the site on Tuesday morning the matter had been resolved and there was no evidence of asbestos exposed on the site.

Responsibility for asbestos removal rests with the contractors, [redacted] Construction (nothing to do with [redacted] Borough Council), and the person to contact is [redacted] of [redacted] Construction, Woodside Road, [redacted].

Enforcement of health and safety issues on the site rests with the Health and Safety Executive, Priestly House, Priestly Road, Basingstoke.

The Environmental Health Section is responsible, under the Environmental Protection Act 1990, for matters relating to "accumulations and deposits which are prejudicial to health or a nuisance". We are satisfied that apart from the incident this last weekend, the situation is under control and no asbestos remains on the site which could be a danger to members of the public in its current situation.

D.J.

PRESSRELASB

PRINCIPAL ENVIRONMENTAL HEALTH OFFICER

BOROUGH COUNCIL

APPENDIX 6

[redacted] BOROUGH COUNCIL

[redacted]
Director of Housing and Health

Housing and Health
Civic Offices [redacted]
Hampshire [redacted]
Telephone: [redacted]
Fax: [redacted]
Britdoc: DX122380 [redacted]

DIRECT DIAL FAX: [redacted]

Mr [redacted]
Clerk to [redacted] Parish Council
[redacted]

My ref: DJR/JHA/8/1069/0/3
Your ref:
Date: 3 November 1995

Please ask for Mr
Extension [redacted]
Direct Dial [redacted]

Dear Mr Spires

Asbestos at Wood Estate, Bursledon

I refer to our recent telephone conversation regarding this matter and can confirm that the report which appeared in the Evening [redacted] on 31 October greatly misrepresents the situation. I issued a press release to them on the afternoon of 31 October and a copy of this is enclosed for your information. I believe it covers all the points we discussed in our telephone conversation but if you have any further queries please do not hesitate to contact me.

We will, of course, continue to monitor the situation and deal with any problems that may arise, but we do not anticipate that any further action on our part will be required.

Yours sincerely

[redacted]
Principal Environmental Health Officer

Enc.

APPENDIX 7

MAS
STING
0436
0436 SI
0436 SII

McCrone Scientific Ltd.

McCrone House, 155A Leighton Road,
London NW5 2RD. UK. *(entrance in Torriano Ave)*
Tel: 0171 267 7199 Fax: 0171 267 3383
+44 171 267 7199 +44 171 267 3383

Test Certificate

ourtney Davis
Robina Green
ordswood
outhampton SO16 8EQ

page 1 of 1
yr letter: 16/3/96
our ref: MA1788/1
18 March 1996

ANALYSIS FOR ASBESTOS.

samples in two separate Jiffy bags were received at the McCrone laboratory by post from Courtney avis on 18 March 1996 with a request to determine the types of asbestos present. They were nalysed on the day of receipt in accordance with the attached appendix.

ESULTS.

.a Largest piece, curved, ca 6" long: Chrysotile detected.
Comment: Asbestos cement, typically manufactured to contain 10 - 15% chrysotile.

1b 2 separate narrower pieces, ca 5" long: Chrysotile detected.
Comment: Asbestos cement which appeared weathered. It contained more chrysotile than typical manufacture of 10 - 15% asbestos but the enhanced concentration may be the result of matrix leaching during weathering.

Bag without label addressed to Courtney Davis from the London Hazards Centre.

2a Flat material including 1 piece ca 4½" x 7" plus several smaller pieces: Amosite and chrysotile detected.
Comment: Asbestos cement, typically manufactured to contain 10 - 15% asbestos which in this sample was less than a quarter amosite, the majority being chrysotile.

2b 8" long narrow piece: Chrysotile detected.
Comment: Asbestos cement, typically manufactured to contain 10 - 15% chrysotile.

2c Smaller pieces: Chrysotile detected.
Comment: Asbestos cement reinforced with chrysotile which appeared to be present in higher concentrations than the 10 - 15% typical of UK production over the last 30 years.

Amosite (brown asbestos) was present in the sample 2a. The current control limit for airborne respirable amosite is 0.2 fibres per ml. This is an upper limit which should not be exceeded during work unless appropriate precautions are taken.

Chrysotile (white asbestos) without amphiboles (amosite, crocidolite etc) was present in all other samples. The current control limit for airborne respirable chrysotile is 0.5 fibres per ml. This is an upper limit which should not be exceeded during work unless appropriate precautions are taken.

For McCrone Scientific Limited

Jean Prentice.

Comments, opinions and interpretations expressed herein are outside the scope of NAMAS accreditation.

APPENDIX A1.1

Summary of Techniques and Equipment Used for the Identification of Asbestos and other Fibres and Particles in Insulation Samples

Issued 24 August 1994

The method accords with the HSE publication MDHS 77, produced by CFM Working Group 2 of which the Laboratory Director is a committee member.

Initial Treatment

Where necessary samples are digested in warm 10% acetic acid or cold 10% hydrochloric acid before analysis.

The samples are examined dry in a dust exhaust cabinet using a stereobinocular microscope at magnifications of 10x or 20x. The entire submitted sample is vigorously tweezered apart and representative fibres are extracted and cleaned for identification using the polarised light microscope equipped with the McCrone dispersion staining objective.

If no fibres are detected, random samples of powdered materials are mounted for further analysis from either the particles adhering to the stereo microscope examination platform or the inside of the container in which the material was submitted.

Examination Using the Polarised Light Microscope

The dispersion staining objective has a magnification of 10x (NA = 0.25). The total magnification used is 80x. For dusts, floor tiles and materials where fine asbestos may be present further examination occurs at magnifications up to 500x with the addition of phase contrast light microscopy.

Fibres are mounted on clean microscope slides in Cargille liquids of known refractive index. Types of asbestos and other fibres and particles are identified by morphology, relief, Becke line, colour, pleochroism, refractive indices, birefringence, extinction, extinction angle and optic orientation. Quantification of asbestos present in the sample is an opinion given by the McCrone operator on a mass basis. It is based on the known analyses of standard products gained through knowledge of the asbestos manufacturing industry plus the product information listed in ARC Technical Note 3 and The Dept of the Environment publication "Asbestos Materials in Buildings".

McCrone Scientific carry NAMAS accreditation for counting of asbestos fibres and for asbestos identification. NAMAS do not offer accreditation for the identification of other particles and fibres although the same test proceedure is used. Any comments in the enclosed report are based on tests for which McCrone have NAMAS accreditation.

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