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Work-Related Deaths as Symbolic Events

This chapter provides a theoretical overview of how and why issues of regulatory law are enforced, and what considerations shape this process. It will position this book in relation to existing approaches to this issue, aiming to build on both the critical literature influenced by Marxist theory and the work of scholars writing within a broadly pragmatic ‘regulatory studies’ tradition. These often conflicting approaches are reconciled via the notion of regulation as a communicative endeavour which incorporates normative and instrumental components. While regulatory systems tend towards instrumentalism, in terms of a focus on technical issues and compliance with the law, work-related deaths have a communicative power which instrumental systems of regulation struggle to respond to. A Habermasian theoretical framework will be used to explain how the moral and instrumental components of this issue interact, and why the latter predominates within the context of health and safety regulation. It will be argued that corporate manslaughter reforms can thus be understood as a reaction to this instrumentalism and a primarily communicative response to the normative demands of wider society.

Theorising the role of regulatory enforcement

Enforcement is just one element of the role fulfilled by regulatory agencies, along with the issuing of guidance and advice to regulated companies, the creation of legal standards, the proactive monitoring of compliance, and the coordination of self-regulation. Regulation is defined in terms of the ‘sustained and focused control exercised by a public agency over activities that are valued by a community’ (Selznick 1985: 363); this definition identifies the ‘directive’ nature of regulation.
in compelling certain behaviours in pursuit of desired outcomes (Ogus 1994: 7), as well as the constraint of this compulsion by virtue of the nature of the acts regulated. Baldwin et al. (1998: 3) suggest that the defining feature of ‘regulation’ is that it encourages activities that are defined as desirable, such as wealth generation, employment, and the provision of valued services, rather than prohibiting purely antisocial activities. The latter, it might be argued, involves a different moral agenda and should be left to the criminal law (Gill 2002: 532; Richardson 1987: 299). Regulation is, therefore, primarily concerned with the ‘management’ rather than the ‘prohibition’ of conduct, with the result that enforcement action is utilised relatively rarely in practice (Hawkins 1984; 2002; Hutter 1997; Kagan 1984; Scholz 1984; Tombs and Whyte 2007). Despite this, enforcement is the most high-profile form of regulatory activity, capable of communicating with a wide audience, and is often invoked in response to incidents that may have had very serious consequences.

There are numerous ways of thinking about regulation: as a matter of correcting markets (Breyer 1982; Ogus 1994; Veljanovski 1983), pursuing procedural public interest goals (Baldwin 1995; Feintuck 2004; Sunstein 1990), and enacting certain values, such as the pursuit of social solidarity and freedom from domination (Braithwaite 2008; Prosser 2006; 2011). These differences of purpose make regulation a politically contested activity, and enforcement represents the most controversial part of the process – why enforce, and when, and in pursuit of what outcome? Much of the literature has identified two main ‘schools’ of thought on these issues: the ‘compliance school’ and the ‘deterrence’ or ‘punishment school’ (Ayres and Braithwaite 1992; Baldwin et al. 1998; Gray 2006; Hawkins 1984; Hopkins 1994; Pearce and Tombs 1990; Reiss 1984; Tombs and Whyte 2007), and while these terms have been used pejoratively in the past (Hawkins 1990; 1991; Pearce and Tombs 1990; 1991), the discussion here merely aims to explain the continuum along which regulators position themselves as ‘proactive or reactive, as an educator or a policeman, or as providing persuasion or punishment’ (May and Burby 1998: 161). It should be noted that ‘enforcement’ is a broad term, covering a wide range of different measures, from verbal warnings (Eckert 2004) and conversations about compliance (Black 1998), to bargaining and the threat of sanctions (Hawkins 1983; 1984; Hutter 1989), to administrative penalties such as enforcement and prohibition notices (Hawkins and Thomas 1991), to prosecution for regulatory and criminal offences. There are many debates about enforcement; for now, the question is ‘why enforce?’