Regulating Exposure: Routine Deaths, Work and the Covid Crisis

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Abstract

This paper examines the juxtaposition of two phenomena - deaths at work and coronavirus deaths - in the context of regulatory strategies which are ostensibly to prevent such deaths. More specifically, my particular focus is on the ways in which work, working and workplaces were managed - and indeed somewhat obscured - during the pandemic, so that the normalisation of work-related deaths by and large continued, even perhaps exacerbated, certainly killing tens of thousands of workers. To this end, in the following sections, I begin, first, by examining in historical context how workplace death because normalised through law and regulation, then turn to focus upon the various ways in deaths were further normalised and obscured during the pandemic in the UK. A key conceptual and empirical reference point here is regulation – a phenomenon and process which, as illustrated across different aspects of the pandemic, is revealed as permitting and routinising deaths related to work and working.

Introduction

By January 2021, one year into the global crisis of Coronavirus, it was estimated by the World Health Organisation (WHO) that some 2 million people had died as a result of the virus. At the same time, according to the International Labour Organisation (ILO), we know that some 2.3 million people are routinely killed by work each year, a year-in year-out figure which, more or less, is accepted as a part of 'normal life'.

By the end of the same month, 31 January 2021, the UK Government's had recorded[1] 108,764 coronavirus deaths, the highest *absolute* total in Europe. Moreover, only Belgium and Slovenia had higher death rates per 100,000 of the population, whilst the UK's rate of almost 160 deaths per 100,000 was more than ten times the rate in Finland and almost twenty times that of Iceland. (Statista, 2021) This was despite the fact that the UK was in the *favourable* position of not being one of the first countries to be affected in the world or even in Europe. In the following year, 1st February, 2021 – 31st January, 2022, 'only' some 50,000 lives were lost in the UK – of course, still an exceptional figure albeit attracting decreasing moral and political opprobrium in formal political, media or even medical circles. (Sim and Tombs, 2022)

Such a tragic and dismal relative outcome in terms of death alone can hardly be said to have been unforeseeable. It is best understood as a spectacular if inevitable failure of a regulatory state which had been hollowed out by successive Governments – including New Labour, in

power from 1997. (Jones and Hameiri, 2021) Regulatory capacity had been materially and ideologically undermined over decades (Tombs, 2015), alongside public (including health) services having been systematically diminished through marketisation, privatisation and de-funding through a decade of austerity. (Arrieta, 2022) Indeed, the UK Government's response to Covid was "indicative of more long-term and systematic shifts in state power that have generated victims of government policies through a 'common-sense' narrative that both promotes and veils mass harms to populations of neoliberal capitalist societies". (Coleman and Mullin-McCandlish, 2021: 170)

The figure of 'about' 50,000 Covid deaths in the 12 months from February 2021 also equates with the numbers of deaths caused by work in the UK *each* year. Each year, the Health and Safety Executive (HSE), the body which records work-related deaths (and indeed oversees safety and health regulation in workplaces), press releases the numbers of 'fatal injuries' to workers - in 2020-21, that figure was 142. But this 'headline' figure omits vast swathes of occupational deaths. Indeed also in 2020-21, HSE recorded 13,000 deaths 'estimated to be linked to past exposure at work, primarily to chemicals or dust'. (Health and Safety Executive, 2021: 3) This data still remains a gross underestimate. For example, researchers from the European Agency for Safety and Health at Work calculated, in 2009, 21,000 deaths per year in the UK from work-related fatal diseases, though such data 'might still be an under-estimation'. (Hämäläinen *et al*. 2009: 127) And long-term research by the Hazards campaign, drawing on a range of studies of occupational and environmental cancers, the number of heart-disease deaths with a work-related cause, as well as estimates of other diseases to which work can be a contributory cause, has produced a lower-end estimate of 50,000 deaths from work-related illness in the UK each year. (Palmer, 2008)

This paper examines the juxtaposition of these two phenomena – deaths at work and coronavirus deaths – in the context of regulatory strategies which have been put in place ostensibly to prevent such deaths. More specifically, focus is on the ways in which work, working and workplaces were managed – and indeed somewhat obscured – during the pandemic, so that the normalisation of work-related deaths by and large continued, even perhaps exacerbated, certainly killing tens of thousands of workers. It is worth noting that amongst the deluge of academic – including social scientific – work produced around the epidemic, 'work' and 'workplaces' have hardly featured. In this context, the paper begins, first, by examining in historical context how workplace death because normalised, then turns to focus upon the various ways in which it was both normalised and obscured during the pandemic in the UK. A key conceptual and empirical reference point here is regulation – a phenomenon and process which, as illustrated across different aspects of the pandemic, is revealed as permitting and routinising deaths related to work and working.

Normalising Workplace Death: the emergence of Factories Acts[2]

The first legislation to intervene in the organisation of factory production came in Britain, in 1802, in the form of the Health and Morals of Apprentices Act, designed specifically to regulate the working conditions of 'Poor Law' apprentices in the textile industry. Then, from 1831 onwards, a series of Factories Acts were passed. Although largely concerned with limiting the working day, the debates that framed the emergence of this legislation were dominated by concerns about the horrific rate of injuries and deaths by 'overwork' suffered by factory workers, and particularly children.

In *Capital Volume 1* (henceforth, *Capital*), Marx provides a detailed account of the emergence of these laws. His analysis argued that the scale of industrial carnage had created an urgent need for the state to use the law to control factory owners: first, there was an intensification of class conflict between the emergent ruling class and those who worked in the factories which threatened the efficient organisation of production; second, the industrial system of production could not regulate its own rampant physical abuse of labour, and thus threatened the long-term viability of the factory system. Thus, Marx saw the emergence of regulation as necessary both to dissipate conflict and to check the greed of the factory owners from exhausting its most valuable commodity.

The legal protections for workers enshrined in Factory Acts therefore originated in the need to resolve a contradiction inherent in capitalism, generated by a relentless demand for greater profit which at the same time threatened to exhaust the capacity for sustaining profits in the long term through endangering the supply of labour – the only commodity which could create value in the production process. Marx therefore argues that the general impulse to regulate is not the result of a consensual or philanthropic decision to make humane progress, but that it is in the very conditions of the factory, the "dens of misery in which capitalistic exploitation obtains free play for the wildest excesses", that the need for regulation is created (ibid.: 460). Carson later summed this process up by arguing that the Factory Acts helped ensure a *viable class society*. (Carson, 1980a)

In *Capital*, Marx cites a succession of Inspectors' reports to indicate a sustained condemnation of factory owners – one which appears to intensify over the years following the Inspectorate's establishment. In their consistent flouting of the new regulations, the new bourgeoisie might have appeared as criminals. But any prospects of effective or widespread criminalisation via the Factories Acts were to fade fast. The courts, from an early point, had used their prerogative to avoid conviction where it could be shown that the offence was not wilfully or grossly negligent. They also tended to impose the minimum penalties. Just over two thirds of convictions between 1836 and 1842 resulted in a minimum £1 fine. (Carson, 1979: 50) The discretion being exercised in the courts indicated a major problem of political will to enforce the law.

Proposals for imprisonment as punishment for the most serious offences had been rejected in the framing of the 1833 Act. The newly formed Inspectorate actually lobbied on occasion for a repeal of the most onerous parts of the law having been advised to co-operate closely with employers so as to make the new law acceptable to them. (ibid.: 11-13) The problem the Inspectorate faced was that factory inspectors were being formally

> "required to criminalise what was normal within the factory system … to criminalize a body of men not on the periphery of moral life, such as displaced or poverty-stricken workers, but men who were at the centre of the emerging political and social order". (Norrie, 2001: 85)

Given the routine nature of breaches of the Acts, a response that prosecuted each and every offence would have resulted in a "collective criminalization which extended far beyond some opprobrious minority". (Carson, 1979: 48) With the courts in the main unwilling to embark upon a collective criminalization of the 'respectable' class of factory owners, the Factories Inspectorate very quickly learned to apply the law selectively. They did this by quickly adapting to a system of bargaining and the imposition of low-level sanctions. Criminal prosecution only came after initial attempts to persuade had failed. Further, any decision to prosecute came after inspectors had decided that there was some clear intention on the part of the Factory owner to commit an offence. This Carson describes as the incorporation of the criminal law concept of *mens rea* ('knowing mind', or intentionality) into the decision-making process of the Inspectorate. (Carson, 1979: 52-53)

At the same time as the notion of intentionality (and therefore moral blameworthiness) was *informally* introduced into Inspectors' decisions, the legislative reforms of the 1844 Factory Act deemed an employer "guilty in the first instance" and required the employer to "prove his due diligence" in defence of any case (Carson, 1980b: 164), thus reversing the traditional *modus operandi* of criminal law through removing the need to identify *mens rea* to establish guilt. This effectively created a second-class type of offence within which breaches of the Factory Act would inevitably fall; and this class of offence - since it did not require a state of mind to be demonstrated and carried low-level administrative penalties in the first instance - was more easily constructed in terms of 'administrative breaches' and 'technical offences', rather than as unambiguously criminal offences. Thus strict liability offences came to be regarded as not 'real crimes'. The 1844 Act had therefore taken a major step towards removing the label of 'crime' from Factory Act prosecutions and thus enabled such prosecutions to be more acceptable to the magistrates who were asked to impose sanctions against members of their own class. In turn, this effectively decriminalised breaches of health and safety law and legitimated the normalisation – what Carson (1979) calls 'conventionalization' - of those crimes in the workplace. This creation of a distinct category of regulatory law in 19th century Britain set an enduring pattern which was subsequently to be reproduced in numerous jurisdictions, and which underpins the contemporary normalisation

of work-related deaths (Storey, 2021) – certain deaths become routinised through regulation in order to allow business to proceed in as normal a fashion as possible. (Whyte, 2004, 2015)

To be clear, this is not to claim that the level and effects of workplace regulation (and indeed deregulation) are to be understood through this original (if enduring) settlement around decriminalisation and normalisation. But a focus on this process does underscore that regulation of business, not least in health and safety which can affect the minutiae of production (Szasz, 1984), is *always* a compromise, an outcome of inter- (and intra-) class struggle – albeit this compromise under capitalism must be resolved *for* capitalism, so that the state guarantees and maintains maximum levels of accumulation and profitability within an historically specific balance of class forces which comprise social relations and make social order possible. This is hardly a unique observation – see, for example, Bernat and Whyte, 2017, Bittle, 2015, Tombs and Whyte, 2013. But it *is* one which underpins an understanding of the differential forms of economic regulation which were implemented during the coronavirus crisis: through *regulation*, differential levels of exposure to the virus was ensured, as an effect of economic and political priorities.

Regulating Exposure: Work-Related Deaths and Covid-19

From these observations, the paper now turns to consider several ways in which work was regulated during the height of the Covid pandemic, with specific reference to the UK[3] – a differential regulation which was obscured, but which inevitably generated uneven levels of exposure and thus illness and death.

'Lockdown'?

Early in May 2020, UK Prime Minister Johnson used a national TV broadcast to urge people to return to "Covid-19 secure workplaces". This called an end to the first Covid-lockdown.[4] At the same time, it was based upon a very skewed *idea* of 'lockdown'.

For this term 'lockdown', and Johnson's calls for workers to return to work, obscured the fact that many workers had never *stopped* going to work - and at this point in May there were even fewer workers in 'lockdown' than had been the case when workers were first ordered to work at home, if they could work at home, on 23rd March. Indeed, it is worth noting that the term lockdown was very much a classed (and, indeed, a racialised) one. It applied to those who could work from home: that is, the desk-based roles of mostly direct employees, as opposed to those who had to leave home for work and/or those who were self-employed or on precarious contacts.

The idea of lockdown had by this point become powerful through media, popular and political discourse – in the UK, associated with ways to fill newly found time, the luxury of the furloughed or working-at-home middle classes, so that this early period of the pandemic was defined by online exercise classes, first-time ventures into sourdough-loaf baking, Netflix binges, online, home-schooling, and zoom quizzes and drinks. But while some of the privileged middle classes found ways to while away their days, their incomes supported by considerable state subsidies, many workers never stayed at home but carried on working as usual – albeit with increased levels of exposure to a potentially deadly virus. These included, of course, 'essential workers', a group that was initially recognised as covering health, social care and emergency service staff, as well as some teachers and associated staff in schools. But this understanding was soon augmented by transport and shop workers, those in the food supply chain, cleaners, postal workers and delivery drivers, and refuse collectors. Even less celebrated than some of these latter groups, perhaps, were workers in construction, call centre workers, security workers and those in other diffuse areas of the gig economy. These were joined, during the second, less stringent, lockdown by manufacturing workers and all those working in previously defined 'non-essential' retail, as well as increasing numbers of teachers and other workers at schools and colleges.

Predictably, many of those who carried on working – who never enjoyed any form of 'lockdown' – were those who were more likely to lose their lives as a result (on which more, below). But for now I want to suggest that the regulatory bodies which might have protected these groups of workers from the most egregious exposure to coronavirus – notably the HSE and Public Health England – were in fact those which were most complicit in *re*-defining safety and health and work in the midst of a pandemic in order to define the unsafe as safe. Thus we see here - as Marx, too, documented in quite a different context - how regulation is revealed as a means of keeping work going in as profitable a fashion as possible, rather than merely or even mainly a regime for protecting workers, a form of regulation *for* capital. In early representations of the pandemic, the fate of those not in lockdown was obscured, as a key popular, media and political preoccupation became the idea of lockdown, ensured through law – enforced by the police who prevented private citizens meeting in, or using many, public spaces or in groups within private households; meanwhile, the millions who continued to work, not enjoying 'lockdown', were exposed with little or no protection to a deadly virus. It is in this latter context that the paper now turns to examine, briefly, two 'work' contexts, namely construction and health and social care.

Regulating Exposure: Construction

Preventing transmission of the virus was the rationale for ordering all non-essential work to cease on 23rd March. But following this, later the same day, then Housing minister Jenrick gave the green light to the construction industry in England and Wales to continue to work when he tweeted the instruction, "If you are working on site, you can continue to do so. But

follow Public Health England guidance on social distancing." (Jenrick, 2020) No distinction was made between 'essential' and 'non-essential' forms of construction. Essential activity might have involved maintenance in hospitals or removing flammable cladding from high-rise tower blocks – where there may have been an argument to say these are essential and work should proceed if adequate safeguards for workers, and notably access to Personal Protective Equipment (PPE) and good washing, changing and eating facilities, was made available to workers. But there was no justification for workers continuing to build retail parks nor luxury apartments, for example.

After 23 March, the Construction Leadership Council (CLC), located within Government, and which works "between industry and government to identify and deliver actions supporting UK construction in building greater efficiency, skills and growth"[5], published a series of different versions of 'Site Operating Procedures', designed to guarantee 'safe' working on site during the pandemic. These procedures for safe working became ever more watered down to the point of being useless in order to allow construction to proceed as normal during the pandemic. In this way, lives were lost: they were lost through transmission on site; they were lost through transmission as workers travelled to, from and between sites; they were lost as workers used any remaining accessible facilities – for food, drinks – during the course of their work; they were lost as workers took the virus back into their homes and ensured further transmission throughout communities. (For an analogous analysis, of universities, see Independent Sage, 2021)

Yet for all of these basic facts of transmission (WHO and ILO, 2021), Public Health England and the HSE fully supported the Construction Leadership Council's series of different 'Site Operating Procedures'. *Six* different versions of safe working on site – published between March and October 2020 - would have been laughable had they not been so deadly.

The first advice to workers across the sector, issued on 23 March, and in line with Jenrick's tweet that day, was that "Workers in the construction industry should work from home – if unable to do so, they should follow 2m distancing traveling to and from and at work". (Construction Leadership Council, 2020a) Of course, most building workers didn't have the choice of working from home – so their choice, put starkly, was to work or not to eat at the end of the week. Within days, images began circulating across social media of workers on sites and canteens where social distancing was clearly not in force or possible. These were followed swiftly, in the first week of April, with the changed advice from the CLC that "where 2m distancing is not possible, maintain 1m plus". (Construction Leadership Council, 2020b)

By 14th April, with it becoming ever more evidenced that social distancing was not happening because not possible on site, the CLC ruled that where "the social distancing measures (2 metres) cannot be applied", then workers "should work side by side, or facing away from

each other, rather than face to face" and "Keep this to 15 minutes or less where possible". (Construction Leadership Council, 2020c) This latter requirement, again proving unenforceable, was rescinded on 4 July and workers were advised to "reduce face-to-face interactions as far as possible". (Construction Leadership Council, 2020e) By October 27 October, workers were told to "Avoid close working where possible". (Construction Leadership Council , 2020f) This guidance did not change until January 2021 (Construction Leadership Council, 2021), weeks after a new wave of severe restrictions on peoples' movements had been introduced across the UK towards the end of 2020.

The basic point, of course, was that social distancing simply cannot be achieved in one of the most labour intensive industries. Indeed, the HSE, the body which should have helped to oversee compliance with basic health and safety standards, in fact signed up to social distancing guidance for building sites (Construction Leadership Council, 2020a-f) – even though they appeared little more than sham. Regulation thus legalised - permitted - the routine exposure of construction workers, which for some resulted in death whilst also representing a mechanism for community transmission of the virus.

Regulating Exposure: PPE in health care settings

A key controversy at the start of the pandemic revolved around the volume of available PPE. Having been caught vastly unprepared at the start of the pandemic (Calvert and Arbuthnott, 2021: 81-106), not least as a result of ignoring its own pandemic-preparedness exercise in 2016 alongside marketing and privatising logics which had led to the breaking up an NHS Supply Chain into eleven outsourced contracts (Hall et al., 2020), the NHS lacked, and was immediately unable to procure, adequate PPE to meet rising demand.

It was certainly the case that the lack of availability of adequate PPE during the early months of the endemic did help to spread transmission in hospitals and other care settings, and did lead to the deaths of workers, patients and residents. On 29th March, the BBC reported that Amged El-Hawrani, an ENT consultant at the University Hospitals of Derby and Burton, died of the virus. In her diary of the first four months of the pandemic, palliative care doctor Rachel Clarke observed,

> "Just a few days prior to Mr El-Hawrani's death, the British Medical Association issued a blunt public warning to the government. Without enough PPE, the BMA predicted, doctors were going to die. Frontline staff were buying their own protective equipment from high-street DIY chains or to cobble together homemade kit amid widespread shortages of PPE". (Clarke, 2021: 130-1)

When PPE finally did arrive in the hospice within which Clarke was working, notwithstanding that it fell short of WHO guidelines – below – it was in grossly inadequate supply, expected to

last just two days, and indeed much had "a best before date of 2016". (Clarke, 2021: 150) As Clarke observes, "You might as well push a passenger outside of a plane with a handkerchief in lieu of a parachute." (Clarke, 2021: 151)

So while there was considerable controversy about the *quantity* of available PPE, this tended to obscure political or popular discussion of its *quality*. Further, what failed virtually at all to enter into that discussion was the role of regulation in legitimating the use of inadequate yet available levels and quality of PPE. Effectively what happened was that, as with regulations around 'safe' working on construction sites, regulatory advice on how PPE should be used in clinical settings was consistently watered down to allow work to continue under conditions which could be met, but which were not adequate to protect those doing or otherwise involved in the work.

Specifically, in January 2020, the WHO classified coronavirus as a High Consequence Infectious Disease (Ashton, 2020: 151) – which entailed "requiring full personal protection for those in clinically exposed roles" (Ashton, 2020: 189), the kind of PPE popularly associated with a head-to-toe Hazmat suit. But then, in the UK, on March 19th, with "the shortage of PPE becoming ever more apparent, it was re-designated to a lower category of risks known as 'Hazgroup3', or HG3" (Ashton, 2020: 151-2) - a downgrading of risk classification which was "unique to the UK". (Ashton, 2020: 189) Government advice issued that day stated, "As of 19 March 2020, COVID-19 is no longer considered to be a high consequence infectious disease (HCID) in the UK", thus superseding what it stated had been " an interim recommendation in January 2020 to classify COVID-19 as an HCID". (Public Health England, 2020) Thus the lack of availability of higher-grade PPE "meant that the safety specification for PPE for staff caring for COVID-19 patients could be revised downwards". (Ashton, 2020: 152) With a few clicks of a keyboard, the unsafe had become safe in ways that facilitated continued working.

But this was not to be the last deadly concession to pragmatism over workplace safety in health care settings. As the debate about the lack of available PPE raged in the UK in the earliest weeks of the pandemic, regulatory guidance was further weakened when PHE/HSE published an update to that guidance on 2nd April, recommending sessional use of PPE:

> "in some circumstances PPE, particularly masks and eye protection which is there to protect the health and care worker can be worn for an entire session and doesn't need to be changed between patients, as long as it is safe to do so". (Public Health England, Department of Health and Social Care and NHS England, 2020)

Finally, by mid-April - 17th April to be precise - PHE, again with the support of HSE, issued new guidance on the use of PPE 'when in short supply', recommending cleaning and re-use of

items including gowns and facemasks in a ‘health and social care setting’. (Public Health England via Gov.uk, 2020; see also Donnelly and Gardner, 2020)

Let’s be clear what is happening here - as in construction settings - with respect to regulation. First, regulations are issued to ensure that work can proceed safely; then, as it quickly emerges that work cannot proceed under these regulations, whether due to the nature of the activity, or available equipment, or both, the regulations are changed - relaxed - so that work which was not deemed safe becomes safe, and thus lawful. And this regulatory relaxation can occur and re-occur consistently and rapidly until regulation falls into line with the prevalent or achievable working practices. Moreover, as lead regulatory bodies, both HSE and PHE, oversee the legalisation of expedient, if plainly bogus and ultimately fatal, claims that many forms of work could be done safely during the pandemic. While health care workers were being lauded as heroes, the avoidable death of so many of them became normalised – an inevitable fact of working on what had quickly begun to be referred to, using one of many military metaphors, ‘the front-line’. (Farris et al., 2021)

Regulating Exposure: in search of ‘Covid-secure workplaces’

The inevitable, obvious but crucial, observation is that those who were forced to continue to work through ‘lockdown’ were the members of our communities who were more exposed, less protected, more likely to die. It should be emphasised, however, that these vulnerabilities to Covid of the least protected workers often simply reflected the hazards they faced at work “in normal life”, in that patterns of death “broadly reflect the pre-Covid major differences in age-standardised death rates”. (Spiegelhalter and Masters, 2021: 127) These were, in effect, routine deaths in far from routine times, an increase in the same kinds of “disposable bodies” of the “ultimately killable” for the sake of a flourishing economy. (Darian-Smith, 2021: 63)

Thus, reporting on an ONS survey of deaths by occupation from March-December 2020, Knutt (2021) observed that:

- the highest number of deaths were in 'elementary process plant workers', performing manual work in processing or manufacturing businesses, followed by 'elementary construction occupations';
- security guards and related occupations had the next highest rate of death - roughly three times the all-worker average for men;
- caring, leisure and other service occupations was the next category, with mortality highest among care home workers and those who provide personal care in people’s homes, with deaths amongst women three times the average for all women in the workforce;

- other categories with statistically high COVID-19 mortality were process, plant and machine operatives and skilled trades.

(Knutt, 2021)

Such data, and the preceding sections, therefore turns attention to work and workplaces as site of transmission and infection – an observation all-too-frequently obscured by Government messaging about precautions to be taken in 'public places' such as social distancing and subsequently mask-wearing. What was lost in such messaging was that the public places being referred to – shops, public transport, education setting, various sites of leisure – were, for significant numbers of people, places of work.

To this point, various references have been made to (the failures of) the key health and safety regulator in Great Britain, the Health and Safety Executive. This section turns to focus explicitly on the role of the HSE during the pandemic. One starting point is May 2020 when, as stated above, Prime Minister Johnson announced that HSE spot-checks would make ensure that workplaces were "Covid-19 secure", so "keeping employees safe". (Parsley, 2020). Yet this contradicted the reality that, even from the very beginning of the pandemic, HSE had virtually abrogated its regulatory responsibility for Covid-19 safety. On the 27th March, it announced it was suspending all inspections of building sites because it could not guarantee the safety of its inspectors. (Wadham, 2020) Meanwhile *Hazards Magazine* noted that between March and mid-June, HSE had not conducted one single visit of a care home, despite its responsibility for regulating safety in those sites (O'Neill, 2020); by the end of September, it had conducted eight such visits. (Health and Safety Executive, 2020a)

While government insisted the regulator was still capable of doing its job, year-upon-year of ceaseless political attacks, incremental budget cuts, and government limits imposed on inspectors, had rendered it - and its local authority counterparts[6] – ever more toothless. Thus, in the years prior to the outbreak of the health pandemic, HSE funding had been reduced significantly: it fell from £239m in 2009-10 to £141m in 2019-20. When inflation-adjusted[7], this amounts to a real terms reduction of 58% in central government funding. These funding cuts inevitably affected staffing numbers. If we examine the numbers of HSE full time equivalent (FTE)[8] posts, including "Frontline staff" (which includes all inspectors), we find that between 2010 and 2020, total HSE staff fell by 36% (from 3702 to 2371), with frontline staff, including all inspectors, declining by 28% (1,464 to 1,059).[9]

Given this decline in funding and personnel, then it is hardly surprising that, during this period, every form of enforcement activity declined, so that:

- Between 2010 and 2019, total HSE Field Operations Directorate Inspections fell by 38% (18,052 in 2018/19)

- Between 2010 and 2020, total Enforcement notices issued by HSE fell by 36%, with the most serious, Prohibition notices, falling by 50% (7075 notices in 2019/20)
- Between 2010 and 2020, convictions of offences fell by 39% (467 in 2019/20).

This is the context for understanding Prime Minister Johnson's cynical assertion that HSE is well-placed to ensure that workplaces were "Covid-19 secure. Indeed, when Johnson pledged £14m of additional funding to support the HSE for this task, he must have recognised this as a symbolic gesture – it amounted to a fraction of the almost £100m loss to its budget in the past decade.

The 'extra' funding provided to HSE was allocated for activity over and above its normal regulatory duties. It was allocated ostensibly to cover the much vaunted "spot inspections" promised by government to detect breaches of law relating to Covid exposure and transmission. Effective checks were certainly needed. Evidence from a TUC (2020) survey undertaken between 31st July and 5th August 2020 indicated that very clear breaches of the law were present in over a third of workplaces. This survey found that 62% of workers were not aware if their employers had carried out Covid-Secure risk assessments. Only 42% reported being given adequate PPE, 34% said they were concerned about not being able to socially distance from colleagues and 30% said they were worried their workplace would not be cleaned properly.

Given that HSE is responsible for regulating approximately 5.5 million duty-holders (Temple, 2020), this was a huge task. And as the data below shows, the £14million enabled a volume of spot checks that would reach less than 0.5% of these duty-holders. But this feeble response to the pandemic by the UK's leading safety regulator is revealed as even more problematic when one examines what *constitutes* a 'spot check'.

As HSE notes, what it refers to as 'Spot Check Calls' follow a 3-stage process, based initially on a telephone conversation "whereby Stage 1 is a scripted question set that follows the COVID guidance, Stage 2 is a more detailed conversation delving into any areas of potential concern from Stage 1". (Health and Safety Executive, 2020a) These calls are largely carried out by "approved partners to deliver the spot check calls and visits". (Health and Safety Executive, 2020b) In other words, Covid 'spot checks' were conducted by telephone calls, largely made by outsourced, private providers.

Outsourcing of these checks to private companies was largely an effect of the rules governing the additional government funding allocated: it could not be used to train new inspectors (TUC, 2020). Indeed, more than half of the additional £14 million granted to HSE, £7.2milion, was spent on "third party compliance spot checks". (Health and Safety Executive, 2020a) The Stage One scripted calls took outsourced companies 15 minutes to complete (Booth, 2020) In May, a YouGov survey of the public reported findings that indicate widespread suspicion of the effectiveness of spot check phone calls. The survey found that 67% of the public

supported random in-person HSE checks compared with 9% who thought phone checks would be sufficient. (Prospect, 2020)

A very small proportion of phone-based spot checks led to further action. Some "stage 2 calls are referred on to Stage 3 (on-site inspection) if there are any outstanding concerns from the calls process and it is only at this stage that enforcement action would be taken". (Health and Safety Executive, 2020b) In the six months from 1st April-30th September, a total of 15,622 'spot check calls' were made, supplemented with 4,938 'spot check visits'. In total, this Covid enforcement activity generated 78 notices and no prosecutions. (Health and Safety Executive, 2020a)

In addition to Covid checks, in this period, HSE inspectors conducted 406 non-Covid inspections. Taken together, that means that in a six-month period, HSE made 5,344 inspections or visits to British workplaces – a decline of over 40% on the six months in the previous year. (Health and Safety Executive, 2020a)

As Britain's workplaces were the site of unprecedented danger, HSE virtually disappeared as an enforcement presence.

Conclusion

This paper began by setting out how, historically in the UK, workplace deaths were de-criminalised, routinised, normalised and obscured even as they became subject to the first form of regulation of private capital in the world. Important empirically, and indeed contemporaneously, this also provided theoretical indication that regulation needs to be understood dialectically, both as a means of potential control of economic activity but, more broadly, as a regime of permission (Bernat and Whyte, 2017), defining certain forms of deleterious effects of economic activity as acceptable.

The paper then turned to consider various dimensions of regulation in a very different context – namely that of the Coronavirus pandemic, with specific reference to the UK. That said, while a very different empirical focus, what emerged through the consideration across these sections was a similar conceptual point – regulation as a means of generating acceptable deaths. Thus I argued that the idea of 'lockdown' obscured the fact that many workers continued to work in conditions which were immediately more hazardous – and lost their lives as a result. I observed, too, in the very different contexts of construction and health care how regulation allowed these occupational activities to continue whilst remaking legal the conditions which would increase deaths and illness within them. Then the paper turned to examine the body which ostensibly exists to enforce law and make workplaces safer and healthier – the HSE, a legacy of the early Factory Acts in fact (Robens, 1972) – and we found that it, too, operated as a regime of permission, explicitly withdrawing from its role in enforcing law in workplaces at a time when that role was most urgent. Thus, in each of the

areas considered – lockdown, construction, health care and law enforcement - regimes of regulation made some classes of deaths permissible, acceptable and routine.

More specifically, the pandemic has revealed HSE to be far less the enforcer of safety and health at work law as is claimed through its mandate and on the basis of which it claims legitimacy - rather, it is part of the regulatory structure put in place in 1830s Britain which Marx, Carson, Storey and others have observed became integral to the viable capitalist society. It was and is a regulatory structure which allows the deaths of workers to be conventionalised, normalised and acceptable. Regulation does not prevent deaths at work: it routinises them. This preceded and followed, but became perhaps more evident, during Covid than in 'normal' times.

This then brings to the fore the theoretical claims made by succession of neo-Marxists – following Marx's analysis of the Factory Acts - that regulation is revealed as not solely *or perhaps even principally* about 'controlling' corporate harms. Herein, regulation in capitalist societies appears as much about social order maintenance. Regulation maintains the steady rate and function of the machinery of industry and commerce. (Whyte, 2004, 2015) As such, its purpose is to seek a stable and uninterrupted system of production, distribution and consumption. The consequence of looking at regulation from this perspective is to recognise that the regulation of corporate activity by the state may ameliorate the harms of corporations, but that may not be its primary purpose. And in pursuing its *primary* purpose, regulation prevents corporate harms being identified, processed or formally recognised as *crimes*, or, if they are recognised as crimes, to engender responses which effectively decriminalises them whilst generally leaving management autonomy within corporations wholly unscathed. Specifically, regulation has and continues, to normalise routine workplace deaths.

References

Arrieta, T. (2022) 'Austerity in the United Kingdom and its legacy: Lessons from the COVID-19 pandemic', *The Economic and Labour Relations Review*, 33(2) 238–255

Ashton, J., with Morris, M. (2020) *Blinded by Corona. How the pandemic ruined Britain's health and wealth, and what to do about it*, London: Gibson Square.

Bernat, I. and Whyte, D. (2017) 'State-Corporate Crime and the Process of Capital Accumulation: Mapping a Global Regime of Permission from Galicia to Morecambe Bay', *Critical Criminology*, 25, 71–86 .

Bittle, S. (2015) 'Beyond Corporate Fundamentalism: a Marxian class analysis of corporate criminal law reform', *Critical Sociology*, 41, (1), 133-51.

Booth, S. (2020) 'Fears HSE spot checks will be latest outsourcing "disaster"', *Schools Week*, 19 September, Fears HSE spot checks will be latest outsourcing 'disaster'

Brown, J. and Kirk-Wade, E. (2021) *Coronavirus: A history of English lockdown laws. Research Briefing*, London: House of Commons.

Calvert, J. and Arbuthnott, G. (2021) *Failures of State: The Inside Story of Britain's' Battle with Coronavirus,* London: Mudlark.

Carson, W.G. (1980a) 'Early Factory Inspectors and the Viable Class Society: a Rejoinder', *International Journal of the Sociology of Law*, 8, (2), 187–91.

Carson, W.G. (1980b) 'The Institutionalisation of Ambiguity: Early British Factory Acts', in Geis, G. and Stotland, E. (eds) *White-Collar Crime. Theory and Research*, London: Sage, pp. 142–73.

Carson, W. (1979) 'The Conventionalisation of Early Factory Crime', *International Journal of the Sociology of Law*, 7 (1), 37–60.

Clarke, R. (2021) *Breathtaking. Inside the NHS in a time of pandemic*, London: Little, Brown. *January*, Site-Operating-Procedures-Version-9.pdf (constructionleadershipcouncil.co.uk)

Coleman, R. and Mullin-McCandlish, B. (2021) The Harms of State, Free-Market Common Sense and COVID-19, *State Crime Journal*, 10, (1), 170-188.

Construction Leadership Council (2021) *Site Operating Procedures – Version 7 Published, 7 January*, Site-Operating-Procedures-Version-7.pdf (constructionleadershipcouncil.co.uk)

Construction Leadership Council (2020f) *Site Operating Procedures – Version 6 Published*, 20 October, Site-Operating-Procedures-Version-6.pdf (constructionleadershipcouncil.co.uk)

Construction Leadership Council (2020e) *Site Operating Procedures – Version 5 Published, 4 July*, Site-Operating-Procedures-Version-5.pdf (constructionleadershipcouncil.co.uk)
Construction Leadership Council (2020d) *Site Operating Procedures – Version 4 Published, 19 May*, Site Operating Procedures – Version 4 Published » Construction Leadership Council

Construction Leadership Council (2020c) *Site Operating Procedures Version 3 Published, 15 April*, Site Operating Procedures Version 3 Published » Construction Leadership Council

Construction Leadership Council (2020b) *Site Operating Procedures – Version 2 Published, 2 April*, Site-Operating-Procedures-02-April-2020-v2.pdf (constructionleadershipcouncil.co.uk)

Construction Leadership Council (2020a) *Site Operating Procedures – Version 1 Published, 23 March*, Site-Operating-Procedures-23-March-2020-v1.pdf (constructionleadershipcouncil.co.uk)

Darian-Smith, E. (2021) 'Dying for the Economy: Disposable People and Economies of Death in the Global North', *State Crime*, 10, No. 1, 61-79

Donnelly, L. and Gardner, B. (2020) 'NHS medics told to reuse PPE and wear aprons if gowns not available as stocks fall', *The Telegraph*, 17 April, NHS medics told to reuse PPE and wear aprons if gowns not available as stocks fall (telegraph.co.uk)

Farris, S., Yuval-Davis, N. and Rottenberg, C. (2021) 'The Frontline as Performative Frame: An Analysis of the UK COVID Crisis', *State Crime*, 10, (2), 284-303.

Hall, D., Lister, J., Hobbs, C., Robinson, P. and Jarvis, C. with Mercer, S. (2020) *Privatised and Unprepared - The NHS Supply Chain Final*, London: University of Greenwich/We Own It, London: University of Greenwich.

Hämäläinen, P., Saarela, K., and Takala, J. (2009), 'Global trend according to estimated number of occupational accidents and fatal work-related diseases at region and country level', *Journal of Safety Research*, 40(2), 125–39.

Health and Safety Executive (2021) *Health and Safety at Work. Summary statistics for Great Britain 2021*, London: Health and Safety Executive.

Health and Safety Executive (2020a) *Freedom of Information Request Reference No: 202010347*, 16 December.

Health and Safety Executive (2020b) *Health and safety spot checks and inspections during coronavirus (COVID-19)*, 5 November, Health and safety spot checks and inspections during the coronavirus (COVID-19) pandemic - HSE news

Independent Sage (2021) *Statement on Universities and Colleges Autumn 2021 in the Context of SARS-CoV-2, 9 September*, 8.-IS-Universities-Autumn-2021-FINAL-v2.pdf (independentsage.org)

Jenrick, R. (2020) *Advice for the housing, construction & building maintenance industries*, 23 March, https://twitter.com/robertjenrick/status/1242210351007096836

Jones, L. and Hameiri, S. (2021) COVID-19 and the failure of the neoliberal regulatory state, Review of International Political Economy, DOI: 10.1080/09692290.2021.1892798

Knutt, E. (2021) 'Report Reveals Covid Deaths by Occupation', *IOSH Magazine*, 2 February, Report reveals COVID deaths by occupation | IOSH Magazine

Marx, K. (1867/1976) *Capital. A Critique of Political Economy. Volume 1*, Harmondsworth: Penguin.

Norrie, A. (2001) *Crime, Reason and History: A Critical Introduction to Criminal Law*, *2nd Edition*, London: Butterworths.

Palmer, H. (2008) 'Work related deaths – What is the true picture?', *Safety and Health Practitioner*, 10 December, Work related deaths – What is the true picture? (shponline.co.uk)

Parsley, D. (2020) 'Coronavirus in the UK: Boris Johnson's promised workplace safety inspections "don't exist"', *I-News*, 17 May, Coronavirus in the UK: Boris Johnson's promised workplace safety inspections 'don't exist'

Proctor, K. (2020) 'Lack of testing and PPE among key England Covid-19 mistakes, MPs told', *The Guardian*, 24 July.

Prospect (2020) *Prospect poll finds 67% of workers want in person spot-checks to ensure that workplaces are safe*, 1 June, Prospect poll finds 67% of workers want in person spot-checks to ensure that workplaces are safe | Prospect

Public Health England (nd) *Coronavirus (COVID-19) in the UK*, Deaths | Coronavirus in the UK (data.gov.uk)

Public Health England (2020) *Status of COVID-19*, 19 March, https://www.gov.uk/guidance/high-consequence-infectious-diseases-hcid#status-of-covid-19

Public Health England, Department of Health and Social Care and NHS England (2020) *Press release. New personal protective equipment (PPE) guidance for NHS teams*, 2 April, New personal protective equipment (PPE) guidance for NHS teams - GOV.UK (www.gov.uk)

Public Health England via Gov.uk. 2020 (advice live from April 2020 and withdrawn 16 September) *Guidance. Considerations for acute personal protective equipment (PPE) shortages*, last accessed 13th January 2021

Robens, Lord (1972) *Safety and Health at Work, Report of the Committee 1970-72. Cmnd. 5034*; HMSO, London, UK.

Sim, J. and Tombs, S. (2021) 'Narrating the Coronavirus Crisis: State Talk and State Silence in the UK', *Justice, Power and Resistance*, 4 (1), sim-and-tombs-narrating-the-coronavirus-crisis-state-talk-and-state-silence-in-the-uk.pdf (bristoluniversitypress.co.uk)

Spiegelhalter, D. and Masters, A. (2021) *Covid by Numbers. Making sense of the pandemic with data*, London: Pelican Books.

Statista (2021) *Incidence of coronavirus (COVID-19) deaths in the European Economic Area and the United Kingdom as of January 31, 2021, by country*, Europe: coronavirus deaths per 100,000 by country | Statista

Storey, R. (2021) '"By the Numbers": Workers' Compensation and the (Further) Conventionalization of Workplace Violence', in Milloy, J. and Sangster, J. (eds), *The Violence of Work. New Essays in Canadian and US Labour History*, Toronto: University of Toronto Press, 160-183.

Szasz, A. (1984) 'Industrial Resistance to Occupational Safety and Health Legislation, 1971-1981', *Social Problems*, 32 (2), 103-116.

Temple, M. (2020) 'Oral Evidence', *Work and Pensions Committee Oral evidence: Health and Safety Executive*, 4 March, https://committees.parliament.uk/oralevidence/179/default/

Tombs, S. (2020) 'Shut the Sites!', *Harm & Evidence Research Collaborative*, 21 April, Shut The Sites! | Harm & Evidence Research Collaborative (HERC) (wordpress.com)

Tombs, S. (2015) *Social Protection After the Crisis: regulation without enforcement*, Bristol: Policy Press.

Tombs, S. and Whyte, D. (2013) 'Transcending the Deregulation Debate? Regulation, risk and the enforcement of health and safety law in the UK', *Regulation & Governance*, 7(1), March, 61-79.

TUC (2020) *Many UK workplaces still not "Covid-Secure" – TUC poll reveals*, Many UK workplaces still not "Covid-Secure" – TUC poll reveals | TUC

WHO and ILO (2021) *Preventing and mitigating COVID-19 at work Policy brief, 19 May*, wcms_793043.pdf (ilo.org)

Whyte, D. (2015) 'Policing for Whom?', *Howard Journal of Criminal Justice*, 54, (1), 73-90.

Whyte, D. (2004) 'Regulation and Corporate Crime', in Muncie, J. and Wilson, D., eds., *Student Handbook of Criminal Justice*, London: Cavendish, 134–48.

[1] A death is attributed to coronavirus if it occurred within 28 days of a positive test. This replaced a previous definition, used by the Government until 12th August 2020, which had defined a coronavirus death as anyone "with Covid-19 on the death certificate". On that latter definition, the total number of deaths, still officially recorded by the Government, stood at 129,369 at 31st January 2021. (Public Health England, nd)

[2] This section draws upon work developed over several years with my friend and colleague David Whyte.

[3] While I refer interchangeably to the Johnson and UK Government as a political entity as well as to the UK as a geographical one, it should be noted that across the UK, health is a devolved matter, while some powers crucial to responding to the health crisis, notably fiscal matters, are determined by the UK Government. Further, while it is slightly misleading to refer to *UK* responses to the health crises - these inevitably varied by jurisdiction – there were broad corollaries in the ways in which the four administrations acted, alongside some points of divergence both in practice and representation.

[4] In England, lockdowns proceeded as follows, while there were variations in the other three jurisdictions in the UK: first national lockdown, March to June 2020; minimal lockdown restrictions, July to September 2020; reimposed restrictions, September to October 2020; second national lockdown, November 2020; introduction of an extensive tiered system,

December 2020; third national lockdown, January to March 2021, release of all restrictions from March 2021- March 2022. (Brown and Kirk-Wade, 2021)

[5] https://www.gov.uk/government/groups/construction-leadership-council

[6] Local authority inspectors have statutory responsibility for large sectors, including retail, wholesale distribution, warehousing, hotel and catering premises, offices, and the consumer/leisure industries.

[7] Inflation adjustment calculated using the Bank of England inflation calculator.

[8] Full Time Equivalent (FTE) is a unit of measurement typically used in workplaces that have a mix of full time and part time employers and is used as a comparator across different workplaces or contexts.

[9] All HSE data here – with the exception of that relating to Covid enforcement (accessed via Health and Safety Executive 2022a, 2022b) - is based upon a combination of publicly available data via the 'Enforcement' section of HSE Statistics and a series of Freedom of Information requests made since 2010, notably Freedom of Information Request Reference No: 2010020046, 12/04/2010; Freedom of Information Request, HSE Response, 2014060117, 2/7/2014, Freedom of Information Request Reference No: 201608042, 4 August 2016, Freedom of Information Request Reference No: 202104190, 20 May, 2021.