"Frenzied Law Making": Overcriminalization by Numbers

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Abstract: The New Labour government was accused of frenzied law making, creating a criminal offence for every day spent in office. The current government, responding to these concerns, has introduced a "gateway" mechanism to halt the tide of criminalisation. New research suggests that the accusations levelled against the last government badly underestimated the reality: criminal offences were – and despite the gateway mechanism, are still – created at a far greater rate than one a day. But what does this actually mean? This article reviews the available evidence on the extent of the criminal law, including recent research by the author and others, noting the characteristics of new criminal offences, which are typically directed towards the regulation of particular activities rather than the general public, but frequently potentially carry severe maximum penalties and should not be wrongly dismissed as trivial and/or regulatory. While acknowledging the significant rate at which criminal offences are committed, it casts doubt on the common assumption that this is something which has increased substantially in recent years. It explores how the vast quantity of criminal offences on the statute book can be reconciled with the doctrinal treatment of criminal law as a somewhat narrower topic, and concludes by analysing the extent to which critiques made of criminalisation in modern practice, particularly in relation to the claims made about the New Labour government, are borne out by the available evidence.

Introduction

Lawyers over a certain age will remember *Statutes in Force*, a collection of brown loose-leaf binders containing copies of Acts of Parliament, thematically arranged by topic rather than year. Launched in 1972 and regularly updated thereafter, it was an attempt to provide an accurate and up-to-date version of all primary legislation in force in the United Kingdom.[1] In practical terms, it was a failure, affected badly by delays in updates being provided, so that it could not be relied upon as an authoritative source of the law as it currently stood.[2] Eventually derided as a white elephant,[3] it

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[1] William L Twining and David Miers, *How to Do Things with Rules: A Primer of Interpretation* (CUP 1999) 255.

[2] Peter Clinch, 'Statutes Probably Not in Force' [1994] Stat LR 64.

ceased publication in 1991,[4] to be gradually replaced by the Statute Law Database,[5] now maintained by the National Archives and freely available online.[6]

While this is a substantial improvement in the accessibility of legislation, the sheer volume of statutory material produced in the United Kingdom is remarkable, and appears to have grown very substantially in the second half of the twentieth century.[7] This means that it is difficult for any database to be entirely free from error, something vividly demonstrated in *R v Chambers*,[8] where shortly before the disposal of an appeal, it was discovered that the Regulations which had been relied upon to prosecute the appellant – and others – had in fact been superseded seven years earlier. The necessary updates had not been made either to the Statute Law Database or to a commercial database used by the prosecuting authorities, and so prosecutions had continued on the basis of outdated law.

Complaints about the inaccessibility of legislation, and the difficulty in establishing what the law is on a particular topic, are nothing new.[9] A related point, however, receives rather less attention, which is that we have very little sense of what the statute book as a whole actually consists of. While the term "statute book" is a convenient shorthand for the "totality of the statute law in force at any particular time",[10] it misleads insofar as it suggests we might have some sense of what that totality is. It is easy to assume that such an overview should be simple to obtain. It is not. Even *Statutes in Force*, had it been successful, encompassed only primary and not secondary legislation, the latter of which makes up a far greater volume of legislative material. Electronic databases may lay greater claims to comprehensiveness, but the way in which legislation is recorded makes it difficult to obtain any overview of the database itself. Such databases cannot readily offer any overview of the totality of criminal prohibitions contained in legislation, because most criminal offences are not contained in obviously "criminal" legislation. The position remains little different from 1980, when JUSTICE made the following remarks as part of a study on "the problem of crimes and contraventions":

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[3] B J Davenport, 'Statutory Interpretation' (publication review) (1994) 110 LQR 307, 308.

[4] Richard J Matthews, 'Why Authentication Procedures Matter for UK and US Public Legal Resources on the Web' (2008) 8 LIM 35, 37.

[5] See Michael Zander, *The Law-Making Process* (6th edn, CUP 2004) 103-104.

[6] At <www.legislation.gov.uk>. Although this site is often referred to as the "Statute Law Database" in practice, it no longer bears this name, but is simply headed "legislation.gov.uk". The site itself uses the term "Statute Law Database" to refer to the version of the database which was formerly hosted at <www.statutelaw.gov.uk>: see 'Frequently Asked Questions' <www.legislation.gov.uk/help> accessed 17 January 2014. The legislation.gov.uk website was launched on 29 July 2010.

[7] See Richard Cracknell and Rob Clements, *Acts and Statutory Instruments: The Volume of UK Legislation 1950 to 2012* (House of Commons Library SN/SG/2911, 2012). This analysis relies in part on page counts, recent figures for which may be inflated by modern drafting styles and publishing formats rather than a real increase in legislation: see Office of the Parliamentary Counsel, *When Laws Become Too Complex: A Review into the Causes of Complex Legislation* (2013) 6-7.

[8] [2008] EWCA Crim 2467. See George Gretton, 'Of Law Commissioning' (2013) 17 Edin LR 119, 133-135.

[9] See e.g. Hansard Society Commission on the Legislative Process, *Making the Law* (Hansard Society for Parliamentary Government 1992) ch 6; Law Commission, *Report on Post-Legislative Scrutiny* (Law Com No 302, 2006) paras 4.11-4.15.

[10] The definition offered at 'Glossary' <www.legislation.gov.uk/help#glossary> accessed 17 January 2013. While my concern in this paper is primarily with the criminal law, many of the difficulties I identify are of a more general nature.

> At an early stage of our discussion, we began to wonder how many different criminal offences it was possible for people to commit in England and Wales. Some of us were naive enough to think that it should be easy to discover such a simple thing. In the event, it proved to be the most difficult task we set ourselves. Several years and many hundreds of man and woman hours later, we still do not know, though we can now make a rather better guess than before.[11]

"Frenzied Law Making"

The lack of any systematic knowledge of the statute book was highlighted more recently when the *Independent* newspaper, in 2006, published an article which has since been regularly cited by scholars working on criminal law.[12] Entitled "Blair's 'frenzied law making': a new offence for every day spent in office",[13] it claimed an "astonishing tally" of 3023 offences created since May 1997, 1169 by primary legislation and 1854 by secondary legislation.

Were these figures correct? The Attorney-General's office could neither confirm or deny them, being quoted as saying that it had no idea how many offences existed. "There are thousands and thousands."[14] Where exactly the figures came from remains unclear. They were described as having been "uncovered" by Nick Clegg, then home affairs spokesman for the Liberal Democrats. Successive holders of this role – Simon Hughes, Clegg, and Chris Huhne – spent some time pressing government departments to confirm how many criminal offences they had created by legislation, but departments frequently declined to give full answers to Parliamentary questions, claiming that the information requested could only be provided at disproportionate cost.[15]

Despite its unclear provenance, the figure of 3023 seems not to have been disputed, and discussion focused instead on its significance. It was taken, for example, as evidence that New Labour had been "seduced by the politics of penal populism";[16] that the criminal law was seen as "a multi-purpose solution to contemporary social ills";[17] and a "cost driver" affecting the legal aid budget, the cost to

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[11] JUSTICE, *Breaking the Rules: The Problem of Crimes and Contraventions* (JUSTICE 1980) para 2.1.

[12] See e.g. Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 Criminal Law and Philosophy 21, 22, 32; Robert Reiner, 'Citizenship, Crime, Criminalisation: Marshalling a Social Democratic Perspective' (2010) 13 New Criminal Law Review 241, 259; James Chalmers and Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71 MLR 217, 217.

[13] Nigel Morris, 'Blair's "Frenzied Law Making": A New Offence for Every Day Spent in Office' *The Independent* (London, 16 August 2006).

[14] Ibid.

[15] See e.g. HC Deb 26 June 2006, vol 448, col 14W (Department for Environment, Food and Rural Affairs). Chris Huhne continued to pursue such questioning at a later date, but with a similar lack of success: see e.g. HC Deb 11 Jan 2010, vol 503, col 679W (Department for Environment, Food and Rural Affairs); HC Deb 14 Jan 2010, vol 503, col 1106W (Department for Business, Innovation and Skills). Cf HC Deb 11 Jan 2010, vol 503, col 662W (Department for Transport), where figures were provided subject to reservations about their completeness. Simon Hughes' efforts are noted by Helena Kennedy, *Just Law: The Changing Face of Justice and Why it Matters to Us All* (Chatto and Windus 2006) 23.

[16] David Wilson, 'Seduced by the Politics of Penal Populism: Would 10,000 New Offences Make Us All Feel Safer and Keen to Re-Elect New Labour?' *The Independent* (London, 16 August 2006).

[17] Adam Crawford, 'Governing Through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice' (2009) 49 British Journal of Criminology 810, 826.

which had been given "scant consideration" when such offences were created.[18] (Commentary, it might be noted, was more common from criminologists than criminal lawyers, who tended to note the figure with a sense of amazement but to be less clear about just what it might mean.) To these complaints, Chris Huhne was later to add the following comments in Parliament:

> The extraordinary creation of offences by the Government is massively complicating the job of law enforcement and of the whole criminal justice system. Some of these offences are completely bizarre – for example, the offence of causing a nuclear explosion. The idea that anyone might cause a nuclear explosion without killing anybody, and therefore being subject to a possible charge of murder, is extremely far-fetched. It is perhaps reassuring for some on the Government Benches that were there to be a nuclear explosion that did not kill anyone, the perpetrator could, indeed, be charged.[19]

Claims that the criminal law contains absurdities are, of course, nothing new. "Strange-but-true" (but frequently not true) laws are a staple of inaccurate media reports.[20] In 2013, the Law Commission published an "informal document" entitled *Legal Curiosities: Fact or Fable?*, aiming to answer queries regularly received by the Commission about "alleged old laws".[21] The document explained that, for example, it is in fact illegal to wear armour in the Houses of Parliament[22] or handle salmon in suspicious circumstances,[23] but not – as is often claimed, but without explanation of how the offence might be prosecuted – to die in Parliament.[24]

Perhaps more interesting was the Law Commission's decision to head up the document with a disclaimer that "readers should not rely on it without conducting their own research", and its conclusion that there was "no evidence" regarding four purported offences, including allowing a boy under 10 to see a naked mannequin and a woman in Liverpool being "topless in public, except as a clerk in a tropical fish store".[25] If the conclusions of a statutory body established to keep the law under review,[26] with well-qualified staff and a full range of legal research resources, are not to be relied upon by readers, and if that body has to plead "no evidence" when trying to establish whether certain criminal offences do exist or have existed, how is any member of the public expected to be able to establish what the law is and to adhere to its strictures?

The material I have mentioned so far suggests three distinct criticisms which might be made of the criminal law and the practice of criminalisation. The first is that excessive criminalisation has overloaded the criminal justice system. The second is that the criminal law is inaccessible to those

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[18] Law Society, *Access to Justice: Final Report* (Law Society 2010) 17.
[19] HC Debs 4 Dec 2008, vol 485, col 171.
[20] Such as 'Where mince pies break the law...' (*BBC News Online,* 23 December 2006) <http://news.bbc.co.uk/1/hi/wales/6204511.stm> accessed 17 January 2014, a number of the claims in which are debunked in Law Commission, *Legal Curiosities* (n 21).
[21] Law Commission, *Legal Curiosities: Fact or Fiction* (Law Commission 2013), available at <http://lawcommission.justice.gov.uk/docs/Legal_Oddities.pdf> accessed 17 January 2014.
[22] Under the 1313 Statute Forbidding the Bearing of Armour.
[23] Salmon Act 1986, s 32.
[24] A "law" which was voted the most absurd in Britain in a 2007 poll. See 'UK Chooses "Most Ludicrous Laws"' (*BBC News Online,* 7 November 2007) <http://news.bbc.co.uk/1/hi/uk/7081038.stm> accessed 17 January 2014.
[25] Law Commission, *Legal Curiosities* (n 21) 6.
[26] Law Commissions Act 1965, s 3.

who are expected to adhere to its strictures, and the third is that the government has chosen to create absurd criminal laws.

Against this background, the 2010 Liberal Democrat manifesto contained a commitment to "[h]alt the increase in unnecessary new offences with the creation of a 'stop unit' in the Cabinet Office",[27] something which in due course formed part of the Coalition's *Programme for Government*.[28] Later that year, the Ministry of Justice committed itself to publishing annual statistics on the creation of new offences, and also to creating a "gateway" mechanism to scrutinise the creation of all new criminal offences[29] – essentially, an email address to which all proposals to create new offences must be sent for scrutiny and approval (or rejection) by the Secretary of State for Justice. Significantly, the gateway procedure makes no direct attempt to set out any test for determining whether or not criminalisation is justified, saying only that it must be "necessary" in order for the Secretary of State to approve the proposal. The guidance does, however, set out a list of factors which are considered relevant to this decision.[30]

What Do We Know About the Extent of the Criminal Law?

Before considering whether the 3023 figure justified the claims which have been made about it, it is worth noting the existing evidence on the extent of the criminal law. The most influential examination of this to date is an exercise carried out by JUSTICE and published in 1980, which reviewed the contents of *Stone's Justices Manual*, and identified 7,208 discrete criminal offences detailed within that publication.[31] Subsequent estimates of the scope of the criminal law have tentatively built on this. In 1999, Andrew Ashworth conservatively revised JUSTICE's figure upwards to estimate that there might then be around 8,000 criminal offences.[32] In 2008, Fiona Leverick and I combined JUSTICE's figures with the 2006 report of 3,000 new ones to suggest that there were "probably over 10,000 different criminal offences in English law".[33]

Beyond JUSTICE's work, there is little academic work that attempts to quantify the scope of the criminal law in any way.[34] Such work as does exist has been deliberately limited in scope, such as

[27] Liberal Democrats, *Liberal Democrat Manifesto 2010* (Liberal Democrats 2010) 93-94.
[28] HM Government, *The Coalition: Our Programme for Government* (HM Government 2010) 11.
[29] Ministry of Justice, *Business Plan 2011-2015* (Ministry of Justice 2010) 18, 30.
[30] Ministry of Justice, *Criminal Offences Gateway Guidance* (Ministry of Justice 2011), available at <www.justice.gov.uk/legislation/criminal-offences-gateway> accessed 17 January 2014.
[31] Justice (n 11), examining C T Latham and John Richman (eds), *Stone's Justices' Manual* (107th edn, Butterworth 1975).
[32] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?', in *Positive Obligations in Criminal Law* (Hart 2013) 1, 2.
[33] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 217. David Ormerod, *Smith and Hogan's Criminal Law* (13th edn, OUP 2011) asserts (at 3) that "there are well in excess of 10,000 crimes in England and Wales".
[34] See also Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2007) 9, noting a similar dearth of information in the United States.

examining the number of offences created by primary legislation in particular years,[35] or those listed in *Archbold* as triable in the Crown Court.[36]

These exercises have not, of course, been designed for the purpose of quantifying the criminal law as such, but instead to allow other analysis to take place. The difficulty with drawing conclusions about the overall scope of the criminal law from this work is that it relies on very limited or filtered sources. Analysis of primary legislation tells us little about the overall scope of the criminal law, because the vast majority of offences (as I shall explain later) are created by secondary legislation. Analysing sources such as *Archbold* or *Stone's Justice's Manual* will provide only an incomplete picture, because such sources do not aim at comprehensiveness.[37] As JUSTICE noted, *Stone's Justice's Manual "*only describes in detail those offences which are sufficiently common for Magistrates' Courts to need a ready guide for them",[38] and does not include common law offences or those created by local legislation.[39]

A fuller attempt to quantify the scope of the criminal law would necessarily involve a review of primary sources – that is, both primary and secondary legislation – rather than any filtered or edited source. Even that will produce an incomplete picture, because the power to make criminal offences may be delegated to local authorities and regulatory bodies. It is not even clear how many bodies actually have the power to make criminal law.[40] Nevertheless, a review of primary and secondary legislation will produce a significantly more comprehensive account than has been achieved before now. The aim of such an exercise should not be simply – or perhaps even at all – to establish just how many criminal offences there are. As no-one knows how many there *should* be, that bare figure would be of interest but rather unenlightening.[41] However, systematic analysis of this sort should allow us to understand better what might be referred to as "patterns of criminalisation": for example, how and why is the criminal law used by governments? For what purpose are criminal offences created, how severely may they be punished, and how has this changed over time? Can we say anything meaningful about the content of the criminal law as a whole?

Fiona Leverick and I have been able to carry out such work recently. We have reported this in detail elsewhere,[42] and so I want simply to refer to some of the key findings of that work for present purposes. We canvassed two one-year periods: the first year of the New Labour government elected

[35] Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74 MLR 1, 7; Pamela R Ferguson, 'Criminal Law and Criminal Justice: An Exercise in Ad Hocery', in Elaine E Sutherland and others (eds), *Law Making and the Scottish Parliament: The Early Years* (Edinburgh University Press 2011) 208, 216.
[36] Andrew Ashworth and Meredith Blake, 'The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306, 307, citing P J Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (1995 ed, Sweet and Maxwell, 1995).
[37] Ashworth and Blake quite properly relied on *Archbold* on the basis that "it may be taken to include the offences prosecuted most frequently" (307).
[38] Justice (n 11) para 2.17.
[39] Ibid.
[40] Law Commission, Consultation Paper on *Criminal Law in Regulatory Contexts* (Law Com CP No 195, 2010) para 1.21.
[41] See James Chalmers and Fiona Leverick, 'Tracking the Creation of Criminal Offences' [2013] Crim LR 543, 546-547.
[42] Chalmers and Leverick, 'Tracking the Creation of Criminal Offences' (n 41). There are particular methodological difficulties in such an exercise, particularly relating to the question of what should be counted as "one" criminal offence, which are discussed in more detail in this paper.

in 1997, and the first year of the Coalition government which took office in 2010.[43] The headline figure is remarkable: in its first year alone, the New Labour government created 1235 offences applicable to England.[44] The Coalition government created 634 such offences in its first year, suggesting that the "gateway" mechanism may have had a salutary effect, particularly as the devolved government in Scotland (where there is no "gateway" mechanism) created offences at a far faster rate over 2010-11.[45]

Criminal offences are repealed as well as created, of course. In practical terms, it is more difficult to track repeals than enactments: while it is possible to examine the statute book for a particular year and assess from the face of that material how many criminal offences it creates, it cannot be established how many offences it repealed without significant further research. It will be clear what provisions of earlier statutory material have been repealed, but not whether these were offence-creating ones. However, we did review whether the offences created in 1997-98 remained in force in 2011, and our data suggests that by then, around 60% of the offences created in New Labour's first year were no longer in force. This seems simply to reflect the fact that much legislation is relatively short-lived: regulatory schemes are constantly being updated and replaced.[46]

This data reveals something else, which is more surprising at first glance. Three of the 1235 offences applicable to England have never been brought into force, including the offence of causing a nuclear explosion[47] – which, as I explained earlier, was given some prominence as evidence of overcriminalisation. The reason for this oddity is that the offence was created in order to implement the Comprehensive Nuclear Test-Ban Treaty,[48] which is not yet itself in force. Because of this, the UK Government has not brought the implementing legislation into force.[49]

This example highlights that criminalisation may be driven by external obligations.[50] The majority of criminal offences created in 2010-11 arose from European Union (59%) or international (11%) obligations, with only 30% of offences *not* implementing some type of supra-national obligation.[51]

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[43] In the second time period, we examined offences created by the Scottish Parliament in addition to those created by Westminster.

[44] The comparison is made by reference to offences applicable to England to account for the fact that in the second sample, separate offences were frequently created criminalising the same conduct in different parts of the United Kingdom, generally in order to implement European obligations at a devolved level. Because of this, substantially *more* individual criminal offences were created across the UK as a whole in 2010-11 than in 1997-98.

[45] James Chalmers and Fiona Leverick, 'Scotland: Twice as Much Criminal Law as England?' (2013) 17 Edin LR 376. The Ministry of Justice suggests that the creation of new criminal offences dropped substantially between the year before the election of the Coalition Government and the year after: see Ministry of Justice, *New Criminal Offences: England and Wales 1st June 2009-31st May 2011* (2011). However, Fiona Leverick and I ("Tracking the Creation of Criminal Offences" (n 41)) have argued that the Ministry of Justice's data (the figures in which are very different to our own) does not provide an adequate factual basis for that claim.

[46] Further systematic analysis would be required to establish this point conclusively.

[47] Nuclear Explosions (Prohibition and Inspections) Act 1998, s 1. Nor have the two offences in connection with on-site inspections created by s 7 of the same Act been brought into force.

[48] Adopted 10 September 1996. See (1997) 35 ILM 1439.

[49] We are not alone in this. See e.g. Swedish Criminal Code 22 kap 6c §, which creates a similar offence to be brought into force on a day determined by the government.

[50] I am grateful to an anonymous referee for observing that the creation of criminal *defences* may also be externally driven: see Immigration and Asylum Act 1999, s 31 ("Defences based on Article 31(1) of the Refugee Convention").

[51] See Chalmers and Leverick, 'Tracking the Creation of Criminal Offences' (n 41) 554-55.

The fact of such obligations does not in itself render the use of the criminal sanction justified, but may help to explain more clearly why it has been invoked in particular terms. Left to its own devices, it is unlikely that the United Kingdom would have chosen to create a specific offence of causing a nuclear explosion. However, it is easy to understand why the UK would support an international treaty requiring a state to "prohibit and prevent" nuclear explosions "at any place under its jurisdiction or control".[52] Even if it could be claimed that existing criminal offences satisfy this obligation in full (which is doubtful), the creation of a specific criminal offence is a more effective means of demonstrating compliance with this obligation and provides a clearer moral basis for persuading other countries to sign up to the treaty. The suggestion that this offence is "completely bizarre"[53] is, it might be said, completely bizarre.

It might be tempting to assume that much of the criminal law created by legislation each year is somehow trivial and regulatory in nature; the kind of material found in subordinate legislation. That assumption is both right and wrong: most criminal offences are in fact created by statutory instrument (99% in 1997-98 and 86% in 2010-11). However, the majority of criminal offences created in both of the sample years were imprisonable: 65% in 1997-98 and 56% in 2010-11. Statutory instruments are regularly used to create criminal offences punishable by significant periods of imprisonment: there were 22 offences created in 1997-98 and 133 in 2010-11 which carried maximum sentences of five years or more. It might be assumed that the creation of criminal offences carrying lengthy terms of imprisonment should be a matter for Parliamentary consideration rather than ministerial order, but that is not the reality.[54]

How Rapidly has the Criminal Law Really Grown?

All this is evidence of an important phenomenon, worthy of detailed consideration. But is it a relatively new and growing problem? The belief that criminalisation has increased in recent history seems to be a widely accepted one: it is something that "can scarcely be doubted".[55] A fair representation of the prevailing view may be found in the comments of Victor Tadros, who writes that the goal that "the criminal law as a whole is one that we can have confidence in... *is increasingly being set back* by the range of trivial offences, obscurely defined and chaotically distinguished, which ensure that the criminal law as a whole is properly treated with suspicion".[56] In its work on *Criminal Law in Regulatory Contexts,* the Law Commission offered striking evidence of increased criminalisation:

[52] Art I(1) of the Comprehensive Nuclear Test-Ban Treaty.
[53] See text to n 19.
[54] See further Law Commission, Consultation Paper on *Criminal Law in Regulatory Contexts* (Law Com CP No 195, 2010) para 3.157, and see also Lord Hewart of Bury, *The New Despotism* (Ernest Benn 1929) ch 6. It should be noted that (with the exception of a significant number of offences created by the Water Environment (Controlled Activities) (Scotland) Regulations 2011, SSI 2011/209) the offences created in both years with a maximum sentence of five years or more were created by Orders in Council giving effect to decisions of the Security Council under s 1 of the United Nations Act 1946.
[55] The phrase comes from Husak (n 34) 17, although Husak's analysis relates to the United States.
[56] Victor Tadros, 'Fair Labelling and Social Solidarity", in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 67, 80, emphasis added.

> Since 1997, more than 3000 criminal offences have come on to the statute book. That figure should be put in context, taking a longer perspective. Halsbury's Statutes of England and Wales has four volumes devoted to criminal laws that (however old they may be) are still currently in force. Volume 1 covers the offences created in the 637 years between 1351 and 1988. Volume 1 is 1382 pages long. Volumes 2 to 4 cover the offences created in the 19 years between 1989 and 2008. Volumes 2 to 4 are no less than 3746 pages long. So, more than 2 and a half times as many pages were needed in Halsbury's Statutes to cover offences created in the 19 years between 1989 and 2008 than were needed to cover the offences created in the 637 years prior to that. Moreover, it is unlikely that the Halsbury volumes devoted to 'criminal law' capture all offences created in recent times.[57]

This is a vivid illustration, but a misleading and unhelpful one. First, one would expect any compendium of legislation to be more heavily weighted towards recent years, as new legislation replaces old. But secondly, and far more importantly, the "criminal law" volumes of Halsbury's Statutes are concerned primarily not with criminal offences, but criminal procedure. The enormous growth in these volumes in recent years represents a substantially increased volume of criminal justice legislation, but such legislation will often reform procedures or sentencing while creating few or no new offences. Most criminal offences will not actually be included in these volumes of Halsbury's Statutes. They are offences created not in "criminal" statutes, but in statutes which create criminal offences as part of a broader regulatory scheme. The following table lists all criminal offences created in 2011-12, categorised according to a slightly modified version of the categories used in Halsbury's Statutes:[58]

	2010-2011
Agriculture (including farming and horticulture)	521
Terrorism / international sanctions	188
Water (supply of, excluding nature conservation issues)	171
Parliament / elections	170
Food production (excluding agriculture)	138
Health and care regulation	131
Environment (including energy conservation and pollution control)	54
Health and safety at work (including on ships)	45
Fishing	41
Sale of goods	34
Armed forces (including weapons)	33
Animals (general animal welfare, veterinary medicine)	32
Other	26
Criminal law (general)	23
Land, tenants and housing	22

[57] Law Commission, *Criminal Law in Regulatory Contexts* (n 54) para 1.17. The measure used by the Commission was, perhaps coincidentally, suggested earlier by James Townsend, 'Blair's Law-Making Frenzy Unmatched in Six Centuries' (letter) *The Independent* (London, 18 August 2006).

[58] See further James Chalmers and Fiona Leverick, 'Quantifying Criminalisation', in R A Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014 (forthcoming).

Roads, railways and transport	21
Nature conservation (including forestry but excluding animals)	20
Courts and legal services	9
Children	8
Shipping and navigation (including port management)	8
Police (including prisons, private security)	7

The Law Commission's claim that "it is unlikely that the Halsbury volumes devoted to "criminal law" capture all offences created in recent times" is something of an understatement. On the account presented in this table, "criminal law" comprised only just over one percent of all the criminal offences created in a single year.[59] That is a paradoxical claim which I will return to shortly. But at this stage, we should note that it fatally undermines the Law Commission's attempt to use the "criminal law" volumes of Halsbury's Statutes to demonstrate rapid growth in the criminal law. In fact, we have surprisingly little evidence to support the inference that the creation of criminal offences has rapidly increased in recent years, contrary to the assumption that is commonly made. We know that the quantity of legislation produced annually – both secondary and primary, and crudely measured in terms of pages – increased dramatically over the course of the twentieth century,[60] but that does not in itself evidence an increase in the number of criminal offences created.

In fact, some work in progress at the University of Glasgow,[61] reviewing the creation of offences over 1951-1952, suggests that the number of criminal offences created during that year is likely to have been higher than the 634 created for England over 2011-12. The creation of regulatory offences in significant numbers is not a modern phenomenon.[62] The claim that the rate at which criminal offences are created has increased in recent decades in the United Kingdom has surprisingly little evidence to support it, and it may simply be untrue.

Understanding the Subject Matter of Criminal Law

I noted the oddity of suggesting that "criminal law" accounted for just over one percent of all criminal offences created in a given year. How can we make sense of this claim? In trying to answer this question, we might begin with some curious comments by Mountifort Longfield – an intriguing character who was simultaneously Dublin's Regius Professor of English and Feudal Law and that same institution's Professor of Political Economy.[63] In giving evidence to a Select Committee on Legal Education in the mid-nineteenth century, he explained his approach to criminal law as follows:

> I try to take a two years' course; in the course of two years to go through the body of law, except that I have never lectured on criminal law, not considering it worth calling the

[59] 23 of 1702.
[60] See n 7 above.
[61] By Fiona Leverick, Alasdair Shaw and myself.
[62] See Jeremy Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?', in Duff and others (n 58) (forthcoming).
[63] Alan A Tait, 'Mountifort Longfield 1802-1884: Economist and Lawyer' (1982) 133 Hermathena 15.

> attention of students to. There are no fixed principles in it, except that men must not commit certain crimes, and if they do, there are certain punishments.[64]

Criminal law, on this account, consists simply of everything prohibited by the state under threat of punishment. On this basis, a textbook of criminal law might simply consist of an alphabetical list of crimes and their definitions, and such texts have been written.[65]

There is, of course, no doubt that we do now have principles of criminal law which can sensibly be covered in an introductory course for students,[66] even if we might have grave reservations about the state of these principles.[67] Principles are expressed primarily in the general part of the criminal law: that is, rules applying to more than one crime rather than those setting out the definitions of individual offences.[68]

The special part may then be understood as consisting primarily of the definitions of individual offences, but no account of this special part can realistically hope to be comprehensive. Older textbooks adopt straightforward if imperfect limiting devices, such as restricting their coverage only to imprisonable[69] or indictable[70] offences. More recently, Glanville Williams said in his 1978 *Textbook of Criminal Law* that "detailed and systematic information about the mass of regulatory offences" was "outside my purview",[71] adopting a more malleable and elusive distinction: how should we decide when something is or is not "regulatory"?[72] Most, if not all, contemporary textbooks dispense with such disclaimers, beginning with a discussion of criminal law's general part before proceeding to a discussion of *some* specific offences. Few of these books explain why they have examined those offences in particular or even acknowledge the selective nature of their coverage.[73] The honourable exception, unsurprisingly, is Andrew Ashworth's *Principles of Criminal*

[64] *Report from the Select Committee on Legal Education, Together with the Minutes of Evidence* (PP 686, 1846) Q 2835.
[65] John W Angus, *A Dictionary of Crimes and Offences According to the Law of Scotland* (3rd edn by Charles Angus Macpherson and James Mill, Green 1936). See also Peter Hamilton and J Ross Harper, *A Fingertip Guide to Criminal Law* (6th edn, ed by Kristopher Donnelly, Bloomsbury 2013).
[66] On the concept of principle in criminal law, see e.g. Nicola Lacey, 'Principles, Policies and Politics of Criminal Law', in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 19; Lindsay Farmer, 'The Idea of Principle in Scots Criminal Law', in James Chalmers, Fiona Leverick and Lindsay Farmer, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) 86.
[67] See e.g. Ian Dennis, 'The Critical Condition of Criminal Law' (1997) 50 CLP 213.
[68] Glanville Williams, *Criminal Law: The General Part* (2nd edn, Stevens 1961) v.
[69] John H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (W Paterson 1867) 1.
[70] J W Cecil Turner, *Russell on Crime* (12th edn, Sweet and Maxwell 1964) 3.
[71] Glanville Williams, *Textbook of Criminal Law* (Stevens 1978) 9.
[72] We should not, of course, assume that "regulatory" is synonymous with "not serious": see Stuart Green, 'Why it's a Crime to Tear a Tag off a Mattress: Over-Criminalisation and the Moral Content of Regulatory Offences' (1997) 46 Emory LJ 1533, 1565.
[73] I can see no explanation or direct acknowledgment in Ormerod (n 33); A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (5th edn, Hart 2013) or Jonathan Herring, *Criminal Law: Text, Cases and Materials* (5th edn, OUP 2012). I mean no criticism of any of the texts I discuss here; I have mentioned them here only because they are rightly regarded as the leading modern textbooks.

Law.[74] Offences which are not included in the special part may, of course, raise questions about, or be illustrative of, general part doctrines such as strict liability or causation, and are frequently referred to in this context. They are not airbrushed out of the picture entirely. The point is only that it is tacitly accepted as sufficient to say little or nothing about the prohibitions which such offences create and the subject-matter which they address.

Selective coverage is inevitable, but on what basis does this selection rest? It is not that the omitted material is in some way "not criminal". In his 1955 *Current Legal Problems* lecture, Glanville Williams concluded convincingly[75] that "a crime is an act capable of being followed by criminal proceedings having a criminal outcome".[76] This approach has been termed "wonderfully circular"[77] – which it is – but the circularity is a meaningful one, cautioning us against fruitless attempts to define crimes by reference to some elusive "essentialism".[78] Nor is it that the omitted material is criminal but trivial: as noted earlier, the majority of criminal offences created by secondary legislation each year are imprisonable.

A possible, if imperfect, explanation for the selectivity of criminal law texts can be found by reference to the concept of "special capacity".[79] Most criminal offences are addressed not to the general public, but to particular sets of persons acting in particular capacities, such as license-holders, or those undertaking a particular trade or activity. The following table sets out the extent to which criminal offences created in 1997-98 and 2010-11 required such special capacity:

	1997-1998	**2010-2011**
None	33 (2%)	200 (11%)
Role (by virtue of engaging in an activity)	728 (52%)	652 (37%)
Role (by virtue of being awarded a licence or by registration)	87 (6%)	158 (9%)
Role (status, e.g. "a debtor")	None	18 (1%)
Implied special capacity (ordinary people never undertake activity)	256 (18%)	345 (20%)
Implied special capacity (ordinary people highly unlikely to undertake activity)	47 (3%)	117 (7%)
Prior circumstances (e.g. receiving information or a donation)	20 (1%)	39 (2%)
Imposed (prior requirement or direction has been imposed on the accused)	203 (15%)	187 (11%)
Corporate offence	9 (0.6%)	35 (2%)
Specific body (e.g. "the harbour trust")	12 (0.9%)	6 (0.3%)
Familial	None	3 (0.2%)
Total	1395	1760

[74] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, OUP, 2013) vi. Outside of the UK, a particularly interesting and thoughtful examination of the scope of a criminal law textbook can be found in Jeremy Gans, *Modern Criminal Law of Australia* (CUP 2012) 1-10.

[75] Horder (n 62) remarks that Williams' views on this point "became very much an orthodoxy during the second half of the 20th century (and rightly so)".

[76] Glanville Willliams, 'The Definition of Crime' (1955) 8 CLP 107, 131. As Williams discusses in some depth, this definition is not as simple as it might seem, because of difficulties in identifying "criminal proceedings", but I leave that point aside here.

[77] Lindsay Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5 Social and Legal Studies 57, 58.

[78] A point which is equally true in other jurisdictions: see e.g. Suzanne Wennberg, *Introduktion till straffrätten* (9th edn, Norstedts Juridik 2011) ch 1.

[79] This term is borrowed from a rule of Scottish criminal procedure: see Gerald H Gordon with Christopher H W Gane, *Criminal Procedure According to the Law of Scotland* (6th edn, W Green 2006) paras 24-104-24-107.1.

A fuller account of what is meant by these various categories can be found elsewhere,[80] but for present purposes the key point is that the vast majority of criminal offences are *not* directed to the public at large. Special capacities can vary in their scope, and might range from being a driver of a motor vehicle or holding a driving license (covering almost three-quarters of the adult population of the United Kingdom)[81] to the other extreme of being Gwynned Council, the only body capable of committing an offence created by a 1998 regulation.[82] As motoring is such a common activity that road traffic offences come close to being directed to the public at large, relatively cursory accounts of road traffic offences do sometimes make it into the more comprehensive criminal law textbooks,[83] but otherwise textbook authors quite legitimately concentrate on those offences where special capacity is not required.

There are many other explanations which might be offered for the normal compass of a criminal law textbook, such as the focus of criminal law study on those issues which feature prominently in appellate decisions, professional requirements (although such requirements may be themselves influenced by traditional approaches to the teaching of criminal law and the scope of textbooks) and a view that certain elements of the special part are better illustrative of the general part than others. None of this is to claim that the narrow focus of a standard criminal law text is wrong. The point is merely that it is surprising that this focus is rarely if ever acknowledged let alone explained – the potential explanations noted here are not offered in practice – and it is unclear to what extent it is a matter of conscious choice as opposed to unconscious evolution in the compass of such texts.

ISCJIS and "Charge Codes": Some Neglected Evidence

Even if special capacity provides a rational basis for criminal law texts focusing on some offences and not others, it does not fully explain why this focus is a justified one. A criminal offence may be incapable of commission other than by a set group of people, but it nevertheless remains a criminal offence, and a basis for the state inflicting hard treatment on an individual.

Some further light may be shed on this issue by an examination of a neglected source: "charge codes" produced for the purpose of ISCJIS, the Integrated Scottish Criminal Justice Information System. ISCJIS is an initiative designed to allow for the electronic exchange of information between different criminal justice agencies.[84] Charge codes provide a mechanism for criminal justice agencies to record specific offences in their systems. This code set is regularly updated, and there is a protocol permitting agencies to request new codes where necessary.

[80] Chalmers and Leverick, 'Tracking the Creation of Criminal Offences' (n 41) 557-58.
[81] See Anna Donabie, *Transport (Social Trends 41)* (Office for National Statistics 2011) 10.
[82] The Porthmadog Harbour Revision Order 1998, SI 1998/683, r 17(2), which made it an offence for the Council to fail to notify destruction or decay of tidal works to the Corporation of Trinity House of Deptford Strond.
[83] See e.g. Ormerod (n 33) ch 33.
[84] See 'What is ISCJIS?' (Scottish Government) <http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/iscjis/publications/las-sras/introduction/what-is> accessed 17 January 2014.

In the June 2013 set of codes, there were 5533 codes available.[85] This is not a comprehensive list of all criminal offences which might be committed. It was originally compiled by Crown Office (the Scottish prosecution service) reviewing all charges prosecuted "within the last few years" and allocating a code to each of them.[86] The code set is updated as necessary,[87] which may include adding codes for offences which have been on the statute book for some time. The June 2013 update, for example, included the insertion of codes relating to offences created in 1994[88] and 2005.[89]

A cursory examination of the ISCJIS code set reveals a picture which is rather closer to the textbook accounts of criminal law than to the statute book as a whole. While it still contains a significant number of offences involving special capacity (primarily road traffic and health and safety offences), it is not dominated by them in the same way that the overall criminal statute book would seem to be. As a list of offences, it would be more readily recognised as the "criminal law" by a lay person than any complete list of offences which might be compiled. It is remarkable because it represents the subset of the criminal law which has actually resulted in prosecution in recent years in Scotland, and evidences the extent to which a significant raft of offences never actually trouble the courts.

In broad terms, we may be said to have two types of criminal law, with one being a subset of the other. The first is the entire criminal statute book;[90] the second is the subset of that book which is actually enforced by the criminal justice system. As Nicola Lacey has suggested, we can usefully distinguish between "formal" criminalisation (the law on the books) and "substantive" criminalisation (the law in action).[91] The line between these two types of criminalisation is not a sharp one, and we should not assume that formal criminalisation does not matter or can be disregarded as far less important than substantive criminalisation. For example, the fact that an offence does not trouble the courts tells us little or nothing about informal interventions by the police, regulatory bodies or other agencies, nor about the steps people take to comply with the criminal law without official intervention. Additionally, criminal offences which are rarely enforced raise significant concerns of potential arbitrariness in the application of the criminal law.

Conclusion: Real and Unreal Problems

[85] See "Standards" (Scottish Government) <http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/iscjis/standards> accessed 17 January 2014. There were 6295 codes in total, with 761 being marked as "deleted". A further code (0ZZZ000000000000) denotes a "non Scottish charge" and exists only for the use of the courts and police, not prosecutors.

[86] "Charge codes" (Scottish Goverment), file available at <http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/iscjis/publications/las-sras/iscjis-website/charge-codes> accessed 17 January 2014.

[87] For the protocol on requests for such changes, see *Revised Protocol for the Issue of New Charge Codes and Styles* (nd), available at <http://www.scotland.gov.uk/Resource/Doc/925/0105925.pdf> accessed 17 January 2014.

[88] Firearms Act 1968, s 16A (possession of firearm with intent to cause fear or violence)

[89] Three offences under the Control of Vibration at Work Regulations 2005.

[90] I use this term as a shorthand to include both statutory and common law offences; the latter are numerically small compared to the total quantity of offences but much more significant than a simple counting exercise would suggest.

[91] Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 MLR 936.

As I explained earlier, the modern critique of overcriminalisation has centred on three apparent problems: overuse of the criminal justice system, inaccessibility of the criminal law, and absurdity. Some of these criticisms, however, are overstated. First of all, the critique rests on shaky foundations. The extent – if any – to which the size of the criminal statute book has increased in recent years is unclear. Regulatory criminal law – indeed, an extensive volume of such law – is a longstanding feature of the criminal law and not a new phenomenon.[92] Even if the volume of criminal law has increased, the link between such criminalisation and the work of the criminal justice system is a weak and attenuated one given the extent to which many criminal offences will never be prosecuted. Two caveats are important, however. First, the threat of the criminal sanction remains: this can have a chilling effect on the behaviour of individuals, and the lack of enforcement of any criminal offence does not mean that there are not real social and economic costs associated with its presence on the books. Secondly, the observations here are not intended to make any claim about whether the criminal justice system is in fact being overused, but simply to suggest that if it is this is likely to be for reasons other than the creation of substantial numbers of new offences.

I have not sought to explore the question of absurdity in detail here, as it is difficult to examine in the abstract rather than individually in relation to specific provisions. I would suggest only that there is a risk of exaggerating this point. Governments are unlikely to resort arbitrarily to the use of the criminal sanction, and individual examples which may seem perplexing on their face – such as the offence of causing a nuclear explosion – are likely to have a rational explanation when examined further, particularly when the significance of international obligations in criminalisation decisions is recognised. That is not to say that such laws are good laws, necessary laws, or fairly-defined ones. Avoiding absurdity is not much of an achievement.

The problem of accessibility, however, is a rather more real one. I have said less about this here, as my aim has been to dispel particular misconceptions about overcriminalisation, but we have a significant volume of criminal law which is relatively inaccessible, difficult to comprehend, or both,[93] something which is problematic in its own right but worsened by the extremely restrictive approach taken to the defence of mistake of law in the United Kingdom.[94] This presents challenges which are difficult enough for lawyers, let alone lay individuals who are expected to adhere to the law's strictures. The problem of accessibility is not one which is addressed by measures such as the Ministry of Justice's Gateway mechanism which target the quantity rather than the quality of criminal law.

While accessibility is to some degree improved by the developments in the publication of statutory information I mentioned earlier, this is of limited value when the material is organised in such a way as to make it obtainable but difficult to interrogate (due to volume) or comprehend (due to complexity). Moreover, problems of accessibility can only be mitigated rather than removed by any process of decriminalisation which retains a regulatory framework but does not rely on the criminal law for its enforcement. All this presents two clear challenges, which may be noted in conclusion.

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[92] Horder (n 62); Darryl Brown, 'History's Challenge to Criminal Law Theory' (2009) 3 Criminal Law and Philosophy 271; Anthony I Ogus, 'Regulatory Law: Some Lessons from the Past' (1992) 12 LS 1.

[93] For particular examples, see Chalmers and Leverick, 'Tracking the Creation of Criminal Offences' (n 41) 559-60.

[94] Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74 MLR 1; James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green / SULI 2006) ch 13.

First, there is an obligation on governments to recognise the importance of good law-making.[95] Secondly, there is a challenge for criminal law scholarship, which must be more alert to the regulatory function of criminal law,[96] and more nuanced in its analysis of superficially attractive claims of overcriminalisation.

[95] There have been welcome developments in this direction recently. See Office of the Parliamentary Counsel (n 7) and the "Good Law" initiative at <http://www.gov.uk/good-law> accessed 17 January 2014.
[96] See e.g. Lacey, 'Principles, Policies and Politics of Criminal Law' (n 66).