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# Bureaucratic ‘Criminal’ Law: Too Much of a Bad Thing?

Jeremy Horder \*

**Abstract:** My main aim is to argue for the legitimacy of ‘regulatory’ criminal law. Historically more significant as a feature of statecraft than its critics have been prepared to admit, I defend a number of the controversial characteristics of such law. Such features include its tendency to come in the form of numerous discrete offences (where the common law was satisfied with one or two general offences), its preoccupation with less ‘serious’ forms of wrongdoing, and its reliance on omission-based liability. The plausibility of these claims comes through shifting the focus away from the favoured moral high ground of traditional critics of bureaucratic criminal law: the interests and concerns of the individual, as the object of criminalisation. A very large proportion of bureaucratic criminal law is aimed at companies, as objects of criminalisation. Whilst companies must be dealt with in a fair and proportionate manner by the criminal law, as entities they lack the capacity for emotional suffering, dignity and autonomy that would otherwise place greater constraints on the scope for the criminalisation of their activities. In developing my views, I try to maintain a healthy scepticism about the viability of identifying a set of laws that are uniquely and distinctively ‘criminal’.

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## RE-MORALISING THE IDEA OF CRIMINAL LAW: THE ‘COUNTER-REFORMATION’

Recent years have seen the emergence of what might be called a ‘counter-reformation’ in criminal law scholarship.<sup>1</sup> Counter-reformation thinking advocates a return to the idea that the criminal law ought to be employed to try people and punish them *only* for serious kinds of wrongdoing.<sup>2</sup> In that regard, such thinking is strongly associated with the case for the confinement of criminal wrongdoing to wrongdoing accompanied by fault,<sup>3</sup> and exemplified mainly by wrong actions rather than by culpable omissions (other than in exceptional cases<sup>4</sup>). To these articles of faith should be added the claim that it should always be the state’s burden, in criminal proceedings, to prove beyond reasonable doubt that such wrongdoing was committed by the defendant. I want to raise some questions about the strength of the case for a counter-reformation, in so far as it relates to at least some of these building blocks in the attempt to narrow the legitimate scope of the criminal law.<sup>5</sup> To understand these questions, though, we must first sketch (and a sketch is all that is possible here) the developments that led to the original reformation of the understanding of criminal law, radically departing from the traditional conception of that phenomenon.

### THE REFORMATION IN THE UNDERSTANDING OF CRIMINAL LAW

Year by year the subordinate government of England is becoming more and more important [...] We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.<sup>6</sup>

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<sup>1</sup> Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ [2000] 116 *Law Quarterly Review* 225; Douglas Husak, *Over-Criminalisation* (Oxford: Oxford University Press, 2008); RA Duff, *Answering for Crime* (Oxford: Hart Publishing, 2007); AP Simester and Andreas Von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011).

<sup>2</sup> In developing this thesis, I should not be taken to be denying that there have always been writers who have argued in favour of the ‘counter-reformation’ view; there have. My use of the term ‘counter-reformation’ is merely a convenient way to describe a certain cast of thought, and how it reacts to and compares with a different, ‘reformation’ cast of thought.

<sup>3</sup> I take the point that, for some, there can be no ‘wrongdoing’ without fault, but I will not take up that issue here: see AP Simester, ‘A Disintegrated Theory of Culpability’, in Dennis Baker and Jeremy Horder (eds), *The Sanctity of Life and the Criminal Law: Essays in Honour of Glanville Williams* (Cambridge: Cambridge University Press, forthcoming).

<sup>4</sup> On which see Andrew Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 105 *Law Quarterly Review* 424.

<sup>5</sup> See further, Jeremy Horder, ‘Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation’, in GR Sullivan and Ian Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Oxford: Hart Publishing, 2012), 79-102.

<sup>6</sup> Frederic W Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1906), at 501.

These are not the words of a Confederation of British Industry Chairman launching yet another broadside against the supposedly over-mighty state in the era of European law, but the words of no less a figure than FW Maitland, lecturing in the late 1880s. In that regard, the background to the 'reformation' view of criminal law was the significant expansion of regulatory criminal offences during the mid-19<sup>th</sup> century.<sup>7</sup> Amongst other catalysts for regulatory activity that proved potent in Victorian England, Governments caught what Carolyn Steadman has aptly called 'inspection fever'.<sup>8</sup> Important examples of the fever's symptoms being displayed were the powers given to Factory inspectorates (Factories Acts, from 1833), and Poor Law Commissioners (Poor Law Amendment Act 1834), but also illustrated through the establishment of numerous other bodies such as 'undertakers' empowered to manage and control markets and fairs (Markets and Fairs Act 1847). In many such instances, the executive bodies were themselves granted delegated powers, under what Bentham termed more generally 'a sort of imperfect mandate [left][...] to the subordinate power-holder to fill up',<sup>9</sup> to make rules breach of which could be a criminal offence.<sup>10</sup> Nonetheless, according to Nicola Lacey,<sup>11</sup> up to and including the time of Sir James Stephen,<sup>12</sup> many criminal law writers of the 17<sup>th</sup> and 18<sup>th</sup> centuries, such as Blackstone or Hale, regarded the criminal law as having a narrower but distinctive morally legitimate field of operation.<sup>13</sup> For these writers (so the argument runs), what made the central case of a 'truly criminal' offence central was its connection to certain kinds of serious moral wrongdoing: broadly speaking, offences against religion, against the state, against the person or against property.<sup>14</sup> By the time Stephen was writing his history of the criminal law in the late 19<sup>th</sup> century, the sheer number of regulatory offences on the statute book that did not very obviously fit within this field of operation had become all-too evident. Stephen noted that so large in number and varied in character were these offences that, 'it would be practically impossible in such a work as this to give anything like a full account of them within any moderate compass',<sup>15</sup> even though, in Stephen's words, some of these offences, 'relate to matters of the utmost importance and the deepest historical interest'.<sup>16</sup>

<sup>7</sup> William H Greenleaf, *A Much Governed Nation, Vol II* (London: Routledge, 1987), at 534.

<sup>8</sup> Carolyn Steadman, *Policing the Victorian Community: The Formation of English Provincial Police Forces 1856-1880* (London: Routledge, 1984), at 54. See also Oliver Macdonagh, 'The Nineteenth-Century Revolution in Government: A Re-appraisal' (1958) 2 *The Historical Journal* 52, at 58.

<sup>9</sup> CW Everett (ed), *Jeremy Bentham, The Limits of Jurisprudence Defined* (New York, 1945), at 109, cited by Greenleaf, n. 7 above, at 532.

<sup>10</sup> See e.g. Markets and Fairs Act 1847, section XLII (granting powers to make rules), and section XLIII (making breach of these rules a criminal offence). In 1819-20, ten statutes passed in that year conferred rule-making authority on ministers, commissioners or other executive bodies, but in 1860 33 statutes passed had the same effect: Greenleaf, n. 7 above.

<sup>11</sup> Nicola Lacey, 'Legal Constructions of Crime', in Mike Maguire, Rodney Morgan and Robert Reiner (eds), *Oxford Handbook of Criminology*, 4<sup>th</sup> ed (Oxford: Oxford University Press, 2007), at 185.

<sup>12</sup> Sir James Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883, 3 vols).

<sup>13</sup> For more on Bentham's views, see n. 41 below.

<sup>14</sup> Although these writers were, of course, perfectly well aware of the existence of regulatory criminal offences that fell outside this field of operation.

<sup>15</sup> Stephen, n. 12 above, at 263.

<sup>16</sup> Stephen, n. 12 above, vol iii, at 264.

Like his predecessors, though, Stephen felt able to shrug off the need for even a cursory analysis of such offences because, in his view (repeatedly emphasised), they, ‘have so very faint and slight a connection with the criminal law [“properly so-called”, he might have added] that it would be out of place to enter upon that history at length in a work like the present’.<sup>17</sup>

That self-confidence in the proper scope of the criminal law remained reflected in the content of criminal law courses and of the textbooks that came to serve them during the 20<sup>th</sup> century: including Kenny’s *Outlines of Criminal Law*,<sup>18</sup> and, most famously, Glanville Williams’s *Textbook of the Criminal Law*.<sup>19</sup> However, the further expansion of the regulatory state in the first half of the 20<sup>th</sup> century undermined the confidence of many – including Williams himself – that, putting aside pedagogic considerations, criminal law could still be given a central-case analysis in terms of serious wrongdoing. In fact, it was Williams himself who came to influence a generation of post-war lawyers and theorists with his process-driven definition of crime in terms of the kinds of legal proceedings (civil or criminal) that may follow breaches of legal rules and standards.<sup>20</sup> Williams was unsparing in his criticism of distinguished commentators who, in the early part of the 20<sup>th</sup> century, had sought to defend the view that there was such a thing as criminal law properly so-called: ‘wrongdoing which directly and in serious degree threatens the security or well-being of society [...] [when] it is not safe to leave it redressable only by compensation of the party injured’.<sup>21</sup> For Williams, there could be no ‘essence’ of crime in a world, as he saw it, dominated by *mala prohibita*, ‘with the close social and economic regimentation that seems to be an inseparable part of modern society’.<sup>22</sup> By contrast, for Williams:

A crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings.<sup>23</sup>

Williams’s much-cited argument on this issue drew, in intellectual terms, on earlier process-driven definitions such as that of Kenny, who focused on the state’s power to halt prosecutions or pardon offenders in criminal (but not in civil) cases, or that of Winfield, for whom what was important was the fact that an offender could not bargain his or her way out of punishment in a way that is possible in

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<sup>17</sup> Stephen, n. 12 above, at 264.

<sup>18</sup> Courtney S Kenny, *Outlines of Criminal Law* (London: Macmillan, 1902).

<sup>19</sup> Glanville Williams, *Textbook of the Criminal Law* (London: Sweet & Maxwell, 1978). We should note, though, that the offences against religion and against the state gradually reduced in importance, as criminal law courses settled into a secular, individualist model still predominant today.

<sup>20</sup> Glanville Williams, ‘The Definition of a Crime’ [1955] *Current Legal Problems* 107.

<sup>21</sup> Sir Carleton Allen, ‘The Nature of Crime’, in his *Legal Duties* (Oxford: Oxford University Press, 1931), 233-34. See also Jerome Hall, *General Principles of Criminal Law* (Indianapolis, 1947), at 213.

<sup>22</sup> Williams, n. 20 above, at 115.

<sup>23</sup> Williams, n. 20 above, at 123.

civil proceedings.<sup>24</sup> Such process-driven definitions of crime, with their Weberian emphasis on the roles and standards adopted and applied in virtue of office by officials,<sup>25</sup> said nothing about what kinds of conduct should, or should not, be followed by 'criminal' proceedings. This – reformation – view nonetheless became very much an orthodoxy during the second half of the 20<sup>th</sup> century (and rightly so),<sup>26</sup> when so much important work was being done on the way in which criminal cases falling outside the traditional fields, such as health and safety legislation, came to court or were dealt with in other ways.<sup>27</sup> As Nicola Lacey has put it:

Criminal law [...] concerns itself with the formally established norms according to which individuals or groups are adjudged guilty or innocent [...]. In a system in which criminal law is regarded as a regulatory tool of government and in which (as in the UK) there are very weak constitutional constraints on what kinds of conduct can be criminally proscribed – a world in which everything from terrorism through dumping litter to licensing infractions and “raves” can be criminalised – there is little that can be said by way of substantive rationalisation of the nature of criminal law.<sup>28</sup>

The reformation view focused on the criminal law as – in the spirit of Kelsen<sup>29</sup> – a normative field of meaning: a field in which we can say that the norms<sup>30</sup> are empty vessels into which any content could be poured by Government or, increasingly, by its bureaucratic agencies. The field was thought to be made meaningful as such (in a way that has now become problematic) by the presence of certain key procedural elements: the need for proof of the facts beyond reasonable doubt, the fact that proceedings were undertaken – or could be taken over – by agents of the state, by the availability of punishment following a finding of guilt, and so on.<sup>31</sup> It could, of course, be argued that these key elements themselves represent a distinctive morality of the criminal law; but even if that

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<sup>24</sup> See n. 18 above, and Sir Percy Winfield, *The Province of the Law of Tort* (Cambridge: Cambridge University Press, 1931), ch VIII, both discussed in David Ormerod, *Smith and Hogan's Criminal Law* (13<sup>th</sup> edition, 2011), at 13.

<sup>25</sup> Famously reflected in the central place given in the mid-20<sup>th</sup> century analysis of a legal system to a rule of recognition accepted by officials, by HLA Hart, *The Concept of Law*, 2<sup>nd</sup> ed (Oxford: Clarendon Press, 1961). There is, though, perhaps a hint of old-fashioned Austinian positivism in Williams's unwitting shift from normative analysis ('an act *capable* of being followed [...]), to empirical, predictive analysis ('the types of outcome [punishment etc.] *known* to follow these proceedings').

<sup>26</sup> See, for example, the section on the definition of crime in David Ormerod, n. 24 above, at 3-15.

<sup>27</sup> See e.g. Wesley Carson, 'Symbolic and Instrumental Dimensions of Early Factory Legislation', in Roger G Hood (ed), *Crime, Criminology and Public Policy* (London: Heinemann, 1974).

<sup>28</sup> Nicola Lacey, n. 11 above, at 181 & 184-85.

<sup>29</sup> Hans Kelsen, *General Theory of Law and State* (A. Wedberg, trans. New York: Russell & Russell, 1961), at 61.

<sup>30</sup> Many of which have typically been power-conferring or declaratory in nature, imposing primary duties by implication rather than expressly.

<sup>31</sup> See, for example, *Benham v UK* (1996) 22 EHRR 293. The meaningfulness of the field has become problematic, because it has become a matter of contention whether any particular one, or all, of the key elements must be present if proceedings are to be regarded as criminal.

were true, it would be – in the spirit of Fuller<sup>32</sup> – a morality of legal procedure, and not one of substantive law.

## THE FOUNDATIONS OF THE COUNTER-REFORMATION

### (1) INTRODUCTION

Regulatory criminal law-making has long been an important dimension to state and legislative power. How else, one might ask, can one explain the presence in Magna Carta not only of the guarantee of key liberties, but also of regulatory criminal law-related rules dictating precise standard measurements for the sale of wine, ale and cloth?<sup>33</sup> One of the features of the (process-driven) reformation view of criminal law is that it has little difficulty accounting for the presence of bureaucratic or regulatory offences within the criminal law.<sup>34</sup> So long as such offences are dealt with through a process involving the key elements of criminal procedure (just mentioned), then they would be criminal offences. What is more, reformation thinking is no mere *ex post facto* rationalisation of early 20<sup>th</sup> century regulatory expansionism. With rare exceptions, courts throughout the 19<sup>th</sup> century, for example, consistently took the view that regulatory offences, even strict liability offences or those involving only a fine as punishment, were criminal offences.<sup>35</sup>

By contrast, modern writers have begun re-asserting and elaborating on the views of Sir Carleton Allen<sup>36</sup> that there is such a phenomenon as criminal law properly so-called, a phenomenon the existence of which calls into question the place of many regulatory offences in a criminal code.<sup>37</sup> The emergence of the counter-reformation is attributable, in part, to modern angst, shared by some politicians and sections of the media as well as by many scholars, about the number of criminal offences – especially regulatory offences – that have come on the statute book.<sup>38</sup> This modern angst that bears a striking similarity to the

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<sup>32</sup> Lon Fuller, *The Morality of Law* (Yale University Press: New Haven, 1965).

<sup>33</sup> Clause 35 reads: ‘There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russet, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly.’ In itself, of course, this clause does not create a ‘criminal offence’ in the modern sense. However, it would have been taken as the standard to be applied under local weights and measures laws in, for example, the medieval market courts of piepowder, where sales in breach of such measures could be treated as an offence.

<sup>34</sup> A definition of such offences can be found in the Law Commission Consultation Paper No. 195 (2010), *Criminal Law in Regulatory Contexts*. See also Ashworth, n. 1 above, at 228.

<sup>35</sup> See, for example, the cases discussed in Williams, n. 20 above, at 111-12.

<sup>36</sup> See n. 21 above.

<sup>37</sup> See n. 1 above.

<sup>38</sup> For some political angst, see e.g. Daniel Hannan and Douglas Carswell, *The Plan: Twelve Months to Renew Britain* (London: Daniel Hannan and Douglas Carswell, 2008), ch 8. In that regard, the authors rail against the mushrooming of so-called ‘Quangos’. The increasing importance of these bodies as regulators in the

outpouring of criticism in the inter-war period of the growth of regulatory law in general (and of delegated power to make such law, in particular), criticism predictably accompanied by a 'back-to-basics' campaign.<sup>39</sup> Ashworth himself starts his article seeking to shock us out of our complacency, by suggesting that, 'there are probably around 8,000 criminal offences now, mostly created over the last 150 years, under the varying influences of [...] the expansion of regulatory mechanisms, and so forth'.<sup>40</sup> With this background in mind, the counter-reformation view of criminal law tries to reignite the back-to-basics campaign as follows:

Legions of strict liability offences, for example, penalise relatively minor omissions or wrongful acts. But a *core element* of criminal law, from a normative point of view, is that the criminal sanction should be reserved for substantial wrongdoing [involving harm and culpability].<sup>41</sup>

Ashworth's account of criminal law, like that of its far less sophisticated early 20<sup>th</sup> century counterparts,<sup>42</sup> departs from the traditional pre-reformation writers' accounts in employing a more generalised notion of 'substantial wrongdoing' as the central case ['core element'] of a criminal offence. Unlike the traditional accounts, it does not pick out categories of such cases – offences against religion, offences against the person, offences against property, and so on (although some of these are naturally included within the notion of substantial wrongdoing).<sup>43</sup> In taking that course, Ashworth's account is obviously better fitted for – indeed, perhaps inspired by – the ideals of the non-perfectionist, secular liberal state, in which criminal justice is broadly seen in night watchman terms as founded on the equal protection of important liberties, a value regarded as lexically prior to

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1980s and 1990s owed a good deal to the burgeoning of sectoral regulation following the privatisation of a number of sectors of the economy formerly subject to state control: see e.g. Maher M Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' [2011] 70 *Cambridge Law Journal* 113. The authors' complaints are much the same as those which met the expansion of various boards, 'undertakers', inspectors and other officials – including the police – involved in regulation, from the middle of the 19<sup>th</sup> century.

<sup>39</sup> See e.g. Lord Hewart, *The New Despotism* (London: Ernest Benn, 1929); Sir Carleton Allen, *Bureaucracy Triumphant* (Oxford: Oxford University Press, 1931). See also the view expressed by Glanville Williams, at n. 20 above. The back-to-basics campaign, so far as the 'evil' of delegated powers is concerned, is reviewed briefly in Greenleaf, n. 7 above, ch 6.

<sup>40</sup> Ashworth, n. 1 above, at 226.

<sup>41</sup> Ashworth, n. 1 above, at 240 (my emphasis). It would be possible to date the origins of some elements of this view to enlightenment thinking, and in particular to Bentham's view that a criminal law must address only 'mischiefs' so grave that the punishment of them produces overall less evil than would the continued toleration of the mischief. Part of this assessment for Bentham, as for Ashworth, involved consideration of whether leaving the matter to the civil would be as efficacious in deterring the mischief: Jeremy Bentham, *Principles of Penal Law* (ii), 1.4, cited by Kenny, n. 18 above, at 24.

<sup>42</sup> See Sir Carleton Allen, n. 20 above.

<sup>43</sup> I have sought to criticise the focus on 'substantial wrongdoing' as an effective constraint on criminalisation in Horder, n. 5 above.



concerns about security more generally and (even more clearly) prior to concerns about moral or spiritual disintegration.<sup>44</sup>

## (2) PLAYING THE NUMBERS GAME: SOME HISTORICAL NOTES

At this point, it is worth subjecting to scrutiny one driver behind counter-reformation thinking. This is the more or less clearly articulated idea that there are now ‘too many’ criminal offences. It seems reasonable to infer that Ashworth believes that 8,000 criminal offences on the statute book (and at common law) is a great deal too many, and he is not alone amongst distinguished criminal law scholars in holding such a view.<sup>45</sup> The belief that citizens are hemmed in on all sides by extensive and intrusive criminal legislation (and by regulatory requirements more generally), and hence dependent on the favourable discretion of prosecutors to maintain their freedom, is, of course, not a new belief. In 1762, Oliver Goldsmith spoke of the gap he perceived to exist between the number of enforceable criminal laws, and the number of instances in which they were actually enforced:

There is scarcely an Englishman who does not almost every day of his life offend with impunity against some express law, and for which in a certain conjuncture of circumstances he would not receive punishment. Gaming-houses, preaching at prohibited places, assembled crowds, nocturnal amusements, public shows, and an hundred other instances are forbid and frequented. These prohibitions are useful; though it be prudent in their magistrates, and happy for their people, that they are not enforced, and none but the venal or mercenary attempt to enforce them.<sup>46</sup>

Goldsmith’s views were noted by AV Dicey over 120 years on, and similar observations about the perceived scale of criminalisation were being made at that

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<sup>44</sup> Ashworth is famous as a critic of the notion that concerns for liberty and justice must merely be ‘balanced’ against a concern for security and public order: see Andrew Ashworth, ‘Criminal Procedure, Human Rights and Balance’ in Thomas Elholm et al (ed), *Ikke kun Straf: Festskrift til Vagn Greve* (Jurist- og Økonomforbundets Forlag 2008). On the so-called ‘lexical’ priority of liberty, see John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1999), at 266.

<sup>45</sup> See, for example, Douglas Husak’s magisterial treatment of the subject as it applies to Federal law in the USA in his *Over-criminalisation* (n. 1 above); John Spencer, ‘The Drafting of Criminal Justice Legislation – Need it be so Impenetrable?’ [2008] *Cambridge Law Journal* 585.

<sup>46</sup> Oliver Goldsmith, *Works*, vol 111 (John Murray, 1854), 194-95. For similar contemporary criticisms, see Archdeacon Paley’s *Principles of Moral and Political Philosophy* (1785 ed.) at p. 504, and Sir William Blackstone, *Commentaries on the Laws of England* (1765-69), vol 4, at 2-4. In highlighting the lack of enforcement of existing laws, Goldsmith is alluding to the ‘common informer’ system under which a private individual bringing an offender to justice would share in any fine imposed (‘the venal or mercenary’). The system was ineffective in a number of ways. For various reasons I cannot go into here, from Tudor times onwards (and probably long before), only some 2-3% of the courts’ time was occupied by such offences.

later date by FW Maitland, in his analysis of what he called active and negative duties, imposed by the state:

[T]urn from active duties to negative duties, duties which consist in forbearance only and see how we are surrounded by prohibitions: the list of offences for which one may be punished summarily by justices of the peace is enormous.<sup>47</sup>

As Maitland was well aware, many of these offences were by the late Victorian period when he was writing already commonly created through the use of secondary legislation, whose use became increasingly controversial in the early 20<sup>th</sup> century. This is what Cecil Carr said about the phenomenon (and he was not alone), in his famous lectures on delegated legislation published in 1921:

In mere bulk the child now dwarfs the parent. Last year, while 82 Acts of Parliament were placed on the statute book, more than ten times as many “Statutory Rules and Orders” of a public character were officially registered under the Rules Publication Act. The annual volume of public general statutes for 1920 occupied less than 600 pages; the two volumes of statutory rules and orders for the same period occupy about five times as many. The excess in mere point of bulk of delegated legislation over direct legislation has been visible for nearly thirty years.<sup>48</sup>

It is interesting to speculate on what Carr’s view would have been, had he focused specifically on the criminal laws passed in 1920. Adopting the interpretation of separate criminal offences set out in *R v Courtie*,<sup>49</sup> between 150 and 190 offences – the vast bulk of which are regulatory in character – were created by primary legislation alone in 1920, with at least a further 80 created in secondary legislation passed in that year.<sup>50</sup> Naturally, civil servants in the mid-20<sup>th</sup> century were well aware of the potential for controversy in the use of the criminal law to help

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<sup>47</sup> Maitland, n. 6 above, at 505.

<sup>48</sup> See Cecil T Carr, *Delegated Legislation; Three Lectures* (Cambridge: Cambridge University Press, 1921), 2.

<sup>49</sup> [1984] AC 463 (CA). Ashworth (n. 1 above, n.8) does not take that approach to counting offences. He takes a less expansive approach that involves counting as one offence individual provisions within statutes that create offences, rather than looking to the number of separate offences within the provision. As he rightly concedes, that entails an underestimation – in my view, a very large and significant one – of the numbers of offences created in any given year. The difference of approach illustrates some of the methodological difficulties facing scholars seeking to play the numbers game. Indeed, I will later criticise the adoption of a *Courtie* approach as liable to create distortions in analysis: see text at n. 74 below.

<sup>50</sup> Not the least of the difficulties facing any scholar seeking to decide how many criminal offences were created in a single year is that, as the state has sought to extend its governance through law, statutes have become more systematised, becoming inter-dependent and closely related. So, for example, a statute in year X may make it henceforth a criminal offence for anyone to attempt to breach – or to become complicit in the breach of – regulations made criminal as substantive offences in year X minus 1; or, conversely and much more commonly, a year X statute may make it a criminal offence to breach regulations that may be passed in the future under powers granted by the year X statute; and so forth.

achieve regulatory ends. Writing in 1954, Sir Frank Newsam, Permanent Under-Secretary of State for the Home Department, claimed that:

It is part of the Home Secretary's general duty to watch that the penalty provisions included in legislation promoted by other Departments are not out of keeping with those in existing statutes, and that they are reasonable in themselves. The creation of new criminal offences and penalties may sometimes have unexpected consequences, and *the Home Office is constantly on its guard to foresee and prevent them*.<sup>51</sup>

The same claim continues to be made over 50 years later by the Ministry of Justice, which issues guidance on principles of restraint in the creation of criminal offences by other Departments of state.<sup>52</sup> Even so, Newsam conceded that the power to create criminal offences had been considerably widened by the removal from the Home Office's regulatory jurisdiction of a wide range of social and economic activity, which was now the responsibility of officials in mushrooming Departments such as Health, Transport, Housing, Labour, Agriculture and Fisheries, and Education. Such divisions of labour between increasing numbers of separate Departments were motivated in part by a perceived need for specialisation, and each Department that saw itself in those terms accordingly exercised rule-making powers, including powers to create criminal offences, on the basis of an 'expert' theory of authority. This was a development that had long been analysed or predicted by amongst others Karl Marx, who saw such divisions of labour – at least when justified by expert or technical considerations – as a necessary evil in modern society.<sup>53</sup> However, in spite of this, in Newsam's view, these developments had not diminished in any way more generally the volume of work with which Home Office officials were expected to cope, leaving the Home Office hard-pressed to control and direct the criminal law-making activities of more or less newly-minted Departments of state.<sup>54</sup> No doubt, few Home Office ministers since then would beg to differ on that point.

### (3) PLAYING THE NUMBERS GAME: THE NORMATIVE (IN)SIGNIFICANCE OF NUMBERS.

What does this tell us about the over-proliferation thesis? An initial difficulty for anyone seeking to defend the over-proliferation thesis is (as the Law Commission

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<sup>51</sup> Sir Frank Newsam, *The Home Office* (London: George Allen & Unwin, 1954), at 125 (my emphasis).

<sup>52</sup> <http://lawcommission.justice.gov.uk/docs/criminal-offences-gateway-guidance.pdf>:

'A gateway established to prevent the proliferation of unnecessary new criminal offences'.

<sup>53</sup> Karl Marx, *Capital: A Critique of Political Economy* (Vol 1) (New York: Vintage Books, 1977), at 781-94. See also Max Weber, *The Theory of Social and Economic Organization* (New York: Oxford University Press, 1947), at 339: 'Bureaucratic administration means fundamentally the exercise of control *on the basis of knowledge*. This is the feature of it which makes it specifically rational' (my emphasis).

<sup>54</sup> Newsam, n. 51 above, at 125-26.

has observed<sup>55</sup>) to know how many offences would be about right, or how many would be for that matter too few, knowledge of which is surely important if the thesis is, as such, to gain significant traction. Perhaps 3500 offences, would be about right? Would, by contrast, 1500 offences be too few? These questions only have to be asked for their unhelpfulness to be plain for all to see. Secondly, over-proliferation theses typically beg important questions. For example, putting it crudely, are fewer numbers of broadly defined offences better (and in what respect?) than large numbers of highly specific ones? Fewer specific offences generally entails a smaller number of more broadly defined ones; but that reduction in quantity may lead to a corresponding deterioration in the quality of the criminal law. It would, for example, perhaps be possible to abolish a swath of specific animal welfare offences, and to seek to rely instead on a single broad crime of causing, or risking,<sup>56</sup> unnecessary suffering to protected animals.<sup>57</sup> To take that (ideologically speaking) 'common law' course, though, would be to sacrifice a large measure of legal certainty respecting what conduct amounts to a criminal offence on the altar of crime number reduction, a certainty highly prized by many of the adherents of the over-proliferation thesis themselves.<sup>58</sup> Such a policy would place a heavy burden on the courts adequately to develop the meaning of the broader offence in its new role. Yet, we can have little confidence that this burden will be effectively discharged, not least because the courts have been conspicuously poor at settling on a coherent policy to determine the meaning of such offences, as has been the case with public nuisance.<sup>59</sup> Quite simply, as amateurs dabbling in the complex, highly varied and expert-dominated world of regulatory control, Appeal Court judges will never be up to the task, even if the *lis inter partes* were suitable – and it is manifestly wholly unsuitable – as a means of developing a regulatory strategy for criminal offences (or, for that matter, civil penalties).

It is possible to imagine a world in which guidelines on meaning and on law enforcement policy are issued by departmental and industry experts that relate to every context in which the general offence of causing or risking unnecessary animal suffering may take place: to name but a few such contexts, the commercial transport of animals,<sup>60</sup> the disturbance of basking sharks,<sup>61</sup> the possession of a live badger,<sup>62</sup> the maintenance and running of dog kennels,<sup>63</sup> pet shops,<sup>64</sup> and

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<sup>55</sup> Law Commission, n. 34 above, at para 3.18.

<sup>56</sup> Risking harm would have to be added to the existing general offence of causing unnecessary suffering to a protected animal contrary the Animal Welfare Act 2006, s.4, in order to provide adequate coverage, not least when the concern is with the handling and upkeep of very sensitive animals or of large numbers of animals.

<sup>57</sup> A similar point could be made about the vast numbers of specific environmental offences, which could be in theory be dealt with solely through the common law offence of public nuisance.

<sup>58</sup> Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it' (2011) 74 *Modern Law Review* 1.

<sup>59</sup> See John Spencer, 'Public Nuisance – A Critical Examination' (1989) *Cambridge Law Journal* 55.

<sup>60</sup> See, e.g. the Welfare of Animals During Transport Order 1992.

<sup>61</sup> Wildlife and Countryside Act 1981, s.5.

<sup>62</sup> Protection of Badgers Act 1992, s.4.

<sup>63</sup> Animal Boarding Establishments Act 1963.

circuses,<sup>65</sup> the possession of dangerous wild animals,<sup>66</sup> the failure to provide a proper living environment for a pet cat,<sup>67</sup> or the sale of goldfish at fairs.<sup>68</sup> However, when underpinned with an offence as vague as causing or risking the unnecessary suffering of a protected animal, such an approach can only serve to set up a whole series of unhelpful tensions between the principle of legality and the rule of law,<sup>69</sup> leaving citizens - and those tasked with regulating their conduct - in acres of legal no-man's land. What Glanville Williams once claimed to be a defect of *mala prohibita* would in all probability turn out to be the defect of turning back to a common law approach: 'it is utterly inevitable that the citizen can only find out the limits of the permissible by bringing down the law on his own head'.<sup>70</sup> It is one of the unsung virtues of clear and specific secondary legislation (including criminalising legislation) made under primary legislation directed at regulating particular industries or practices, backed by an enforcement strategy informed by experts following consultation with industry specialists, that it is capable of coordinating behaviour in the interests of the common good in a way that general common law-style offences cannot hope to do.

Accordingly, the legislature has for decades (indeed, longer) sought to specify in some detail what failures in point of animal welfare will attract criminal sanctions in regulatory contexts. Consider section 5 of the Welfare of Animals During Transport Order 1992, made under the Animal Health Act 1981, that makes it a criminal offence to fail to abide by the following conditions:

Persons having control of animal transport undertakings

5. Subject to article 6 below, every person having control of any animal transport undertaking which transports animals in the course of business or trade shall—

- (a) ensure that the animals are entrusted only to persons possessing the knowledge necessary to administer appropriate care to the animals in transport;
- (b) ensure, in the case of animals travelling unaccompanied, that the consignee is prepared to receive them;

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<sup>64</sup> The Pet Animals Act 1951.

<sup>65</sup> The Performing Animals (Regulation) Act 1925.

<sup>66</sup> The Dangerous Wild Animals Act 1976.

<sup>67</sup> Animal Welfare Act 1986, s.9, and see, in relation to this, the Code of Practice for the Welfare of Cats: <http://www.defra.gov.uk/publications/files/pb13332-cop-cats-091204.pdf>.

<sup>68</sup> Animal Welfare Act 2006, s. 11.

<sup>69</sup> See, in a different context, John M Finnis, 'Invoking the Principle of Legality against the Rule of Law' (2011) *New Zealand Law Review* [2010] 601.

<sup>70</sup> Williams, n. 20 above, at 115. Williams probably took this view of *mala prohibita* because, at the time he was writing, there were no systems of the kind currently widespread in the world of regulation devoted to giving publicity to and guidance on a person's obligations and on how to comply with the law: see Horder, n. 5 above.

- (c) ensure that the animals are transported without delay to their place of destination;
- (d) ensure that during the journey the consignment is accompanied by a certificate signed by him or on his behalf stating:
  - (i) the origin and ownership of the animals,
  - (ii) their place of departure and place of destination, and
  - (iii) the date and time of departure;
- (e) draw up for journeys exceeding 24 hours a journey plan showing—
  - (i) the arrangements for the animals to be rested, fed and watered, and (if necessary) unloaded and given accommodation appropriate to their species;
  - (ii) the arrangements for feeding and watering in the event that the planned journey is changed or disrupted,and ensure that during the journey the consignment is accompanied by the journey plan; and
- (f) ensure that copies of the journey plan and the certificate required by this article are kept for a period of six months from the end of the journey and produce them at the request of an inspector.

Was the passing of this Order an example of the unnecessary proliferation of regulations backed by criminal sanctions, or alternatively, was it good statecraft attentive to the need for clarity and certainty concerning the taking of important steps to avoid animal suffering? I do not believe that, to preserve the purity of the 'true' criminal law, such rules may be justified only if they end only in some kind of civil penalty. The Royal Society for the Prevention of Cruelty to Animals (RSPCA), for example, said in response to the Law Commission's proposal to replace a greater number of criminal sanctions with administrative penalties:

The RSPCA also consider that the power to impose a system of civil sanctions already enacted in the Regulatory Enforcement Sanctions Act 2008 and introduced in the Environmental Sanctions Order 2010 should not be extended beyond environmental offences (which was the intended ambit of these pieces of legislation) onto the [Animal Welfare Act 2006]. Prosecutions concerning sentient beings are in a different category to other types of prosecutions. Offences under the [Animal Welfare Act] should remain criminal offences without the introduction of a system of civil sanctions.<sup>71</sup>

So, is unjustifiably risking animal suffering in itself necessarily a 'serious' wrong that thereby qualifies as a candidate for 'true' criminalisation? Or, is the real truth that such wrongs vary enormously in terms of seriousness, and that there is no clear discernible tipping point at which they become 'truly' criminal?<sup>72</sup>

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<sup>71</sup> [http://lawcommission.justice.gov.uk/docs/cp195\\_Criminal\\_Liability\\_responses.pdf](http://lawcommission.justice.gov.uk/docs/cp195_Criminal_Liability_responses.pdf), at para 1.26.

<sup>72</sup> See the discussion of 'seriousness' as a benchmark in Horder, n. 5 above, and see also the concluding section below.

For Ashworth and Zedner, it is late 20<sup>th</sup> century legislators who must take a large slice of the blame for supposed over-criminalisation. They say, ‘the pace of change appears to have quickened in the final quarter of the last century [the 20<sup>th</sup> century] and this acceleration is continuing’.<sup>73</sup> Yet, methodological difficulties beset any attempt to prove or disprove the numerical element to this thesis, whichever approach one adopts to decide the ‘how many?’ and ‘too many?’ questions.<sup>74</sup> For example, here is one problem with adopting the approach to counting set out in *R v Courtie*, in order to prove the thesis.<sup>75</sup> It is the difficulty of knowing whether the difference between formally separate criminal offences is so significant that their separateness is really an important factor in any critique of (supposed) over-proliferation. Consider the aforementioned Welfare of Animals During Transport Order 1992. A question arises concerning how appropriate it is to see the 1992 Order as having (needlessly?) added so many offences to the list. This is because the mischiefs separately addressed are so closely related. This is an issue that must be addressed in considering quite literally thousands of regulations creating criminal offences in the UK. When offences are closely inter-related and mutually interdependent in the constitution of a coherent scheme of protection, as in clause 5 (set out above), is it right to criticise each separate offence for having on its own contributed in a some significant way to an undesirable ‘proliferation’ of criminal offences? Bear in mind that the separation of the wrongs in section 5 is meant primarily to enhance clarity and specificity for the purposes of fair and effective regulation, so far as both enforcers and transporters are concerned. Accordingly, it can be argued that it is misleading in this instance – as it would equally be in thousands more instances of similar secondary legislation – to point to this section of the 1992 Order as an example of the ‘lost cause’ that our supposedly runaway criminal law-making process is claimed to be.

In this, as in many other respects, much modern legislation simply follows the examples set by legislation creating criminal offences in regulatory contexts going back many years. The legislature has long preferred highly specific individual criminal wrongs, moving away from continued reliance on very broad general offences of a common law type (other than as a back-stop).<sup>76</sup> This does no more than reflect what is now a largely unquestioned feature of good statecraft: the modern duty (the origins of which lie in the Victorian era) to provide for clear,

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<sup>73</sup> 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, at 21. I have conceded that increasing specialisation and multiplication of executive and quango functions has led to an increase in the volume of criminal legislation over the last 25 years: see n. 38 above. The Law Commission has made the same point: see n. 34 above, at para 1.21-1.24.

<sup>74</sup> See text at n.49 above.

<sup>75</sup> [1984] AC 463 (CA). See text at n. 49 above. The *Courtie* approach was not, of course, created by the Court of Appeal for the purpose for which it is now being used.

<sup>76</sup> An excellent analysis, where public nuisance is concerned, can be found in John Spencer, n. 59 above. Perhaps unmatched for the level of detail provided is the Locomotives Act 1861, s.3, which saw the creation of a one-sentence, 158 word offence concerned in great details with the size and composition of permitted Locomotives and their tyres.

fine-tuned regulatory governance in the promotion of safety and public welfare in an ever-widening variety of contexts.<sup>77</sup> The legislation of 1920 is replete with statutes providing a highly context-specific criminal law basis for, or dimension to, such governance, examples being: the Census Act 1920, the Dangerous Drugs Act 1920, the Ready Money Football Betting Act 1920, the Seeds Act 1920, the Roads Act 1920, the Firearms Act 1920, the Official Secrets Act 1920, the Employment of Women, Young Persons and Children Act 1920, and many more (and this is not to mention all the regulations and orders also passed in that year to the same end, such as the American Gooseberry Mildew Order 1920).

Many of these Acts and Orders drew in to the process of regulatory governance already existing professional bodies, officials and employers. The Acts and Orders sometimes included a role for such people in enforcement or in licensing, such as Chief Police Officers (Firearms Act 1920), the Registrar-General (Census Act 1920), medical practitioners (Dangerous Drugs Act 1920), and employers (Employment of Women, Young Persons and Children Act 1920). However, when it comes to the delivery of regulatory goals it is also worth noting that whilst in 1902 there were only 50,000 non-industrial civil servants, by 1939 the number had risen to 163,000, and by 1944 it was 505,000.<sup>78</sup> Against that background, moreover, we should note that some of the 1920 legislation demonstrates that long before accession to the EU, the passing of regulatory criminal legislation has been the product of international agreements or of international standards, rather than of some peculiarly English taste for 'the teasing vigilance of the perpetual superintendence of law'.<sup>79</sup> Examples of such quintessentially white collar, civil service-led criminal law are the Dangerous Drugs Act 1920, that sought to give effect to the Hague International Opium Convention of 1912, and the Employment of Women, Young Persons and Children 1920, that sought to give effect to International Labour Organisation standards. In terms, then, of Governments' ability to deliver regulatory strategies (including widespread use of criminal offences), through increases in the human resources of officialdom needed to carry out that activity, it is highly arguable that the really significant modern period was the first half of the 20<sup>th</sup> century, and not the last third.

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<sup>77</sup> Care must be taken in interpreting this claim. It is obviously no part of the claim that the 19<sup>th</sup> and 20<sup>th</sup> centuries saw, from modest beginnings, a carefully stage-managed march towards wide-scale regulatory control. Historians still debate the question of the extent to which the 19<sup>th</sup> century in particular saw any state 'planning' of an overall strategic kind. For AJP Taylor, for example, England simply, 'stumbled into the modern administrative State without design': Alan Taylor, *Laissez-faire and State Intervention in Nineteenth-century Britain*, (London: MacMillan, 1972), at 236

<sup>78</sup> Strikingly, there are now only 435,000 non-industrial civil servants: <http://www.civilservant.org.uk/numbers.pdf>.

<sup>79</sup> An early 19<sup>th</sup> century MP's phrase to describe the evils of codification: *Hansard*, xix, col. 647 (March 29, 1811).



**(4) OVER-PROLIFERATION THESES, THE EU ‘PROBLEM’, AND THE CONCEPT OF ‘CORPORATE’ CRIME.**

According to Julia Black, regulation is, ‘the sustained and focused attempt to alter the behaviour of others according to standards or goals with the intention of producing a broadly defined outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification’.<sup>80</sup> Precisely because they focus on aspects of strategic planning in the role of the employer, of the doctor, of the vet, of the public official, or of whoever else is charged with playing a part in policy implementation, regulatory criminal laws are preventative offences, aimed primarily at risk-reduction rather than with harm already done. The last point is picked up by Ashworth and Zedner who treat regulatory criminal law with some suspicion as a largely unwelcome encrustation on good old-fashioned, ‘truly criminal’ law:

The historic orientation of the criminal justice system towards reactive policing and post-hoc punishment is [now] overlaid by a pro-active, preventative rationale that seeks to avert harms before they occur.<sup>81</sup>

In that regard, though, it is telling that, in his powerful argument decrying the expansionary tendencies of the criminal law, Ashworth does not take as one of his main case studies a piece secondary regulatory legislation. Instead, he concentrates a great deal of his fire on a preventative measure that is, strictly speaking, epiphenomenal in criminal law terms, namely the Anti-Social Behaviour Order, a two-step prohibition not regarded by the courts as in as of itself a criminal offence.<sup>82</sup> Whether or not Anti-Social Behaviour Orders were ever justified, that focus is telling. It is an illustration of what might more broadly be considered to be the intense concern of many criminal lawyers interested in criminalisation with individual or group ‘trouble-making’ (and violence) in towns and cities – especially when engaged in by disadvantaged young people - and with the state’s continuing commitment to what is viewed as a disproportionate and often unnecessary criminal law response to such ‘trouble-making’ or violence.<sup>83</sup> Whatever its merits in its context (and I do not underestimate its moral importance), this liberal-individualist Dickensian focus, as common on the ‘right’ as on the ‘left’ of the spectrum of criminological thought,<sup>84</sup> leaves too little examined what became

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<sup>80</sup> Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1.

<sup>81</sup> Ashworth and Zedner, n. 73 above, at 40. In fairness, their critique of pre-emptive crimes is also concerned with their use in non-regulatory contexts.

<sup>82</sup> See Ashworth, n. 1 above.

<sup>83</sup> See Husak, n.1 above.

<sup>84</sup> See e.g. George L Kelling and James Q Wilson, ‘Broken Windows: The Police and Neighbourhood Safety’, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>; contrast: Robert J Sampson and Stephen W Raudenbush, ‘Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows”’ (2004) *Social Psychology Quarterly* 67 (4): 319–42.

during the 20<sup>th</sup> century – and still remains – the biggest driver of criminalisation in modern Britain. This is the attempt to regulate the activities of businesses, and of small businesses in particular, not least (in more recent times) in order to deal with the challenges of creating a single European market.

For example, historically, a great deal of legislation underpinned by criminal offences has always been aimed at farming and allied trades, even though this sector constitutes only 2-3% of UK enterprises, and the advent of the single European market has sustained that trend. As a recent illustration, let me take 2008 as an example. In that year, 440 offences were brought on to the statute book. Perhaps as few as 30 of these offences were aimed at private individuals. Of the rest, aimed at business activity, 179 offences were created by the Department for the Environment, Food and Rural Affairs (DEFRA), 133 of which were aimed specifically at the agricultural sector. One of the main influences here may be (there is not enough evidence to prove it) the impact of European law in seeking to create a level playing field for trading and the harmonisation of good trade practices throughout the EU. Notoriously, the EU is responsible for far less UK legislation than the general public supposes, even though 92% of European rules and standards are incorporated into law in the UK by secondary legislation. For example, between 1987 and 1997, of the 27,999 statutory instruments issued only 7.9% made reference to European legislation (although this rises to 15% if local SIs are excluded).<sup>85</sup> Having said that, the Government department that was most concerned, in its own activities, with turning European rules and standards into secondary legislation ('Euro SIs') was what is now the DEFRA, but was formerly the Ministry of Agriculture, Fisheries and Food (MAFF). Of all the secondary legislation passed under MAFF's aegis between 1987 and 1997,<sup>86</sup> no less than 51.3% of these laws can be classed as Euro SIs. By contrast, 28% (still a substantial figure) of the secondary legislative activity of what was then the Department for Trade and Industry can be called Euro SIs, together with 21% of the secondary legislative activity of the Department of Transport.

These figures are significant, because the criminal law has historically had to be a mainstay of EU implementation strategy in many areas of business activity for almost all UK Government Departments, given that there has until relatively recently been no tradition of creating a category of administrative or 'civil' penalties to supplement or replace 'criminal' legislation.<sup>87</sup> A cursory examination of Euro SIs created by secondary legislation in any given year since accession to the EU (further research is needed on this point) often reveals a high proportion that create criminal offences, the bulk of which are usually included by what was MAFF and is now DEFRA. For example, in 2008, it seems likely that over 190 of

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<sup>85</sup> Edward Page, 'The impact of European Legislation in British Public Policy-Making: a Research Note' (1998) 76 *Public Administration* 803.

<sup>86</sup> Such as the Welfare of Animals during Transport Order 1992, discussed above.

<sup>87</sup> Law Commission, n. 34 above. I should not be taken here to be endorsing a clear distinction between 'criminal' law and 'administrative penalties'.

the 440 offences created in that year were meant to give effect to common European standards relating to the single European market.

**(5) ADMINISTRATIVE PENALTIES: THE COUNTER-REFORMATION THINKERS' HOLY GRAIL?**

At this point, I must directly confront the argument that it is not the number of offences that is the problem, so much as the fact that so many of the wrongs concerned are regarded as 'criminal' offences, when they should be treated instead as civil or administrative offences.<sup>88</sup> According to Ashworth and Zedner, '[t]here is a strong argument for confining criminal liability to offences that require fault, and of creating a separate category of MAPs (Monetary Administrative Penalties)[...]'<sup>89</sup> to punish and deter other kinds of wrong. Certainly, few people seriously doubt that there is plenty of legitimate work for civil or administrative penalties to do in some cases;<sup>90</sup> but is the answer really as simple as they suggest? Regrettably, it is not. To begin with, such penalties – MAPs – have been condemned by some as neither fish ('truly' criminal), nor fowl (civil law wrong), or have been branded cheap and not-so-cheerful substitutes for 'truly' criminal law, yet carrying much more severe fixed punishments in some cases than would ever have been imposed through the exercise of a criminal court's sentencing discretion.<sup>91</sup> In that, ironically, the critics of such penalties share common ground with some of the penalties' supporters, who have decried the criminal courts' tendency to take regulatory crime far less seriously than they should, by imposing fines amounting to far less than the costs saved by the offender in committing the offence.<sup>92</sup>

Further, in wishing away regulatory offending as best dealt with by civil or monetary penalties rather than by the 'true' criminal law, counter-reformation thinkers fail to acknowledge that the spread of such penalties can be seen as challenging – rather than embodying or symbolising – the idea that there is something morally distinctive about 'criminal' sanctions. The European Court reserves the right to decide the essentially contested question whether or not an offence is in substance criminal, or a civil wrong, according to a range of criteria it determines for itself. That creates a theoretical and practical vicious circle in relation to the answering of the question: 'what is a criminal offence'? So, any *cordon sanitaire* that a counter-reformation thinker might seek to erect around 'truly'

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<sup>88</sup> See e.g. RA Duff, 'Perversions and Subversions of Criminal Law', in RA Duff, Lindsay Farmer, SE Marshall, Massimo Renzo and Victor Tadros (eds), *The Boundaries of the Criminal Law* (Oxford: Hart Publishing, 2010), at 102-05; Victor Tadros, 'Criminalisation and Regulation', *ibid.*, at 174.

<sup>89</sup> Ashworth and Zedner, n. 73 above, at 33.

<sup>90</sup> See Law Commission, n. 34 above.

<sup>91</sup> Robin White, "'Civil Penalties': Oxymoron, Chimera and Stealth Sanction?" (2010) 126 *Law Quarterly Review* 593; and see the response of Professor Colin Reid to the Law Commission's Consultation paper (text at n. 92 below): [http://lawcommission.justice.gov.uk/docs/cp195\\_Criminal\\_Liability\\_responses.pdf](http://lawcommission.justice.gov.uk/docs/cp195_Criminal_Liability_responses.pdf).

<sup>92</sup> See Law Commission, n. 34 above, Appendix A.

criminal offences, to preserve them from adulteration by mere civil penalties, must inevitably remain porous in practice and contentious in theory. The implications of this have been set out by Reid (if I can be forgiven for citing his work at length):

The important fundamental distinction could be seen as marking out not the criminal law, but those laws through which the state (in whatever form) imposes penalties. The criminal law is only a subset of this bigger genus. Given the proportion of criminal offences nowadays dealt with by fixed penalties and a range of other statutory diversions from prosecution, how much of even the mainstream criminal law lives up to the traditional paradigm of criminal law which entails those accused of offences being brought to trial with punishment being imposed only by a court after due process designed to protect the rights of the accused? The question then becomes one of identifying the fundamental elements, substantive and procedural, which justify the state in imposing penalties of any sort and then finding appropriate ways of applying these in different contexts, only some of which may be “criminal” in our minds, but all of which must provide appropriate safeguards against abuse of state power. Most discussion over “criminalisation” misses out this vital preliminary stage, suggesting that the options are criminalisation or nothing, as opposed to seeing the criminal law as part of this wider penalty-imposing framework.<sup>93</sup>

One way of construing MAPs is simply as a formalised out-of-court disposal by punishment of offending behaviour. If that seems plausible, then the understanding of society as subject to over-‘criminalisation’ is better replaced by a different focus. This is a focus on whether, in regulatory contexts, people are now potentially subject to over-*penalisation* respecting all manner of wrongdoing and risk-taking, rather than simply to over-criminalisation (as counter-reformation thinkers understand that notion). It seems that counter-reformation thinkers do not have a ready answer to that question.<sup>94</sup> Yet, if Reid is right about the terms in which the debate about the legitimacy of state coercion should be conducted, the latter question is as – or more – important than the former.<sup>95</sup>

There have been two recent attempts to theorise administrative penalties in a sophisticated way, with a view to establishing a basis for maintaining the purity of the ‘truly criminal’ prohibition. The first is focused on the idea that administrative penalties are deterrents unaccompanied by official condemnation or censure (parking fines writ large) whereas, normatively speaking, conviction for a genuine

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<sup>93</sup> [http://lawcommission.justice.gov.uk/docs/cp195\\_Criminal\\_Liability\\_responses.pdf](http://lawcommission.justice.gov.uk/docs/cp195_Criminal_Liability_responses.pdf), at para 1.26.

<sup>94</sup> Although I should mention, in fairness, that Ashworth and Zedner point to the possible net-widening effects of being able to impose fixed penalties, and to the fact that fixed penalties will, necessarily, bear down more harshly on offenders with low incomes: Ashworth and Zedner, n. 73 above, at 28.

<sup>95</sup> A point noted by Victor Tadros: see n. 88 above, at 175.

crime involves – or should involve – such condemnation or censure.<sup>96</sup> One difficulty with the theory is that it runs together two slightly different ideas. First, there is the idea of ‘censure’, which whilst obviously a response to wrongdoing, is a narrow concept closely associated with an official rebuke to a public servant for inappropriate behaviour, historically including sexual misconduct and the use of bad language in the legislative chamber: what could be called ‘officials’ censure’.<sup>97</sup> Whilst officials’ censure is unlikely to be imposed except in cases of serious wrongdoing, so that it remains distinct from lesser measures such as official reprimands, there is nothing in the idea of officials’ censure that ties it to serious wrongdoing, as such. Less serious wrongdoing by a very senior trusted official, such as the US President, might call for officials’ censure as much because of the wrongdoer’s status as because the wrongdoing was serious in itself. So, it is strongly arguable that it is misleading to use the concept of ‘censure’ to describe an intrinsic element in the criminal conviction of a private individual. Indeed, in English law, one of the few uses of ‘public censure’ as an intrinsic part of the punitive process – when the Financial Services Authority publicly censures instances of financial wrongdoing – is as a way of penalising wrongdoing *outside* the traditional criminal courts.

By contrast, some might consider the more general concept of ‘condemnation’ as rightly associated with cases where serious wrongdoing is in issue, whatever the status of the wrongdoer; but to use the term ‘condemnation’ to confine the scope of wrongdoing appropriate for criminal conviction seems to beg the question. To describe criminal conviction as concerned, or as ideally concerned, with wrongdoing appropriate for ‘condemnation’ is to foreclose discussion of the very issue to be decided: should criminal liability be confined to wrongdoing that ought not to be merely criticised but condemned? Is condemnation not, in any event, merely very strong criticism, and thus a judgment of degree at one end of a spectrum rather than involving a difference of kind? Duff himself suggest that there can be such a thing as ‘mild’ condemnation, and hence concedes that:

[T]he criminal law need not deal only with serious wrongs – it can also provide modest punishments for offences that are, while still genuine wrongs, relatively minor [...] [R]egulations serve the common good; breaches of them

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<sup>96</sup> RA Duff, n. 88 above, at 102-5; Joel Feinberg, ‘The Expressive Function of Punishment’, in Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970). There is, of course, nothing unique about the criminal law as a means of imposing official censure or condemnation. The removal of a knighthood, medals or other honours, in response to wrongdoing, involves such censure or condemnation.

<sup>97</sup> ‘Punishment in the House’, *The New York Times*, November 18<sup>th</sup> 2010, drawing on Congressional Research Services.

are therefore breaches (often minor breaches) of our civic responsibilities, which merit (often mild) condemnation as wrongs.<sup>98</sup>

The conviction-as-condemnation theory has also been criticized as putting too much emphasis on what is in fact a contingent element of the punishment process. As Tadros puts it:

We can impose suffering on people to deter other people without intending to communicate condemnation for that person's wrongdoing. Also, punishment is not distinctive from civil penalties in imposing suffering on people [...] Fines that are imposed only in order to compensate the victims may make the person who is liable to pay them suffer.<sup>99</sup>

For Duff, administrative penalties 'are not marked, addressed or condemned as wrongs'.<sup>100</sup> However, if, following Tadros, we take the condemnatory element out of this claim as being normatively supererogatory or redundant, then it becomes much less clear how, on the one hand, 'true' crimes, and on the other hand, mere administrative transgressions, are to be qualitatively distinguished.

Tadros himself has an alternative theory aimed at maintaining a realm of purely criminal law, distinct from the world of administrative penalties. On his account, penalties are not aimed at making people suffer in order to deter others. On the contrary, for him, penalty schemes have no pretensions to deter at all, for all the suffering that the imposition of the penalties may cause. For Tadros, penalties are aimed instead at 'redistributing benefits and burdens'.<sup>101</sup> He continues, 'penalties are aimed at ensuring that the costs of breaching regulations are borne by those who breach it rather than those that suffer from the breach'.<sup>102</sup> Ingenious though the theory is, I suggest that it turns out to be possibly even less convincing than the censure-or-condemnation theory it is meant to replace. To begin with, Tadros's theory about official responses to regulatory wrongdoing: that, 'penalties are aimed at ensuring that the costs of breaching regulations are borne by those who breach it',<sup>103</sup> does not reflect current practice, and it would be grossly unjust if it were to do so. Many of the significant costs of implementing regulatory penalties – the employment of officials, outlay in relation to any investigation and the making of findings, together with the costs of fine recovery and of conducting appeal hearings – must in fact commonly be borne by the state

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<sup>98</sup> RA Duff, n.1 above, at 173-74. Quite rightly, Duff adds that a system of administrative penalties can still co-exist with a criminal law that extends to minor wrongs.

<sup>99</sup> Tadros, n. 88 above, at 174.

<sup>100</sup> RA Duff, n. 88 above, at 103. Accordingly, Duff recommends the introduction of a specific category of 'administrative offence', a category for transgressions that do not involve 'public wrongs' worthy of censure, wrongs that, 'properly concern us all as citizens'. Such a scheme is likely to be fraught with difficulty and controversy, whether or not it has been made to work in some jurisdictions: see the criticism of the idea by the Law Commission, n. 34 above, para 3.28-36.

<sup>101</sup> Tadros, n. 88 above, at 174.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

rather than by the offender. This is simply because it would be unduly harsh and out of proportion to make the wrongdoer bear all these costs, other than in exceptional cases.<sup>104</sup> So, it is not strictly true to say that penalty schemes aim to ensure that, ‘costs of breaching regulations are borne by those who breach it’, nor, in any legal system that aspires to do justice in a fair and proportionate way, should it ever be true. At a deeper level, though, the theory fails to identify what is in fact a distinctive role for penalties for breach of an obligation in a regulatory scheme, separate from the role of behaviour-influencing taxation.

Suppose that it is true, as Tadros claims, that the point of penalties is solely to ‘redistribute[e] benefits and burdens’<sup>105</sup> as between those governed by the regulatory scheme and those not governed (but possibly affected) by it. It then becomes unnecessary, and possibly distorting, to distinguish between a redistributive tax on certain kinds of regulated conduct and a penalty scheme for engaging in certain kinds of regulated conduct; but that seems wrong. Suppose we wish to improve the environmental conditions in a traffic-bound city centre, and we intend to make car users pay the costs of that. Amongst other things, we could choose either or both of charging an advance fee for bringing a car into the centre at certain times,<sup>106</sup> or imposing a penalty on those found driving in the centre at certain times. Traditionally – and in my view rightly – the latter is a distinctive deterrent strategy based on the creation of a *malum prohibitum*. Morally speaking, amongst other things, when pursuing such a strategy it will be improper for an official to say, ‘Actually, we don’t care if people are left undeterred by and are willing to pay the fines, because that means more money for environmental improvements’. When the pursuit of regulatory penalties is not motivated in part by their potential to deter, it is wrong to seek to impose them.<sup>107</sup> In particular, it will be improper to use them solely for redistributive purposes, in such circumstances. Naturally, when a penalty scheme is introduced as part of a redistributive revenue-raising exercise, it may be tempting to judge its overall success in that exercise by the financially enriching side-effects that punishing law-breakers has. Taking that approach, a penalty scheme may turn out to be relatively inefficient as a revenue-raising mechanism if law-breakers are simply too few, as well as when they are too hard or too expensive to catch, or when extracting fines from them proves too difficult. As a penalty scheme, though, its function is to deter by the threat or imposition of a financial set-back proportionate to the *malum*

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<sup>104</sup> See, for example, the Citizens’ Advice Bureau’s report, *Uncivil Recovery*, into the disproportionate nature of the costs imposed on employees guilty of minor infractions, when charged for civil recovery actions undertaken by private firms at the behest of the employer: [http://www.citizensadvice.org.uk/index/policy/policy\\_publications/uncivil\\_recovery.htm](http://www.citizensadvice.org.uk/index/policy/policy_publications/uncivil_recovery.htm).

<sup>105</sup> Tadros, n. 88 above, at 174.

<sup>106</sup> This option assumes that no penalty scheme is needed, because the fee is effectively impossible to avoid: say, barriers or traffic officers automatically turn back all drivers who try to enter the centre without payment of the fee beforehand, or the like.

<sup>107</sup> This claim intentionally over-states my case, to aid clarity in casting doubt on Tadros’ theory. In fact, the motivation for imposing a penalty can be just deserts-based, but I will not go into that issue here.

*prohibitum* in issue. So, the scheme should not be judged, as such, principally by the amount of money it raises through failures in point of deterrence; that would be perverse.

By contrast, a strategy of charging an *ex ante* fee to drive in the city centre may have a simple redistributive function at its heart, revenue-raising for environmental improvements being its intended effect. In such a case, a transport official may quite properly say, 'if, in spite of the fee, people want to keep driving in the same numbers into the city centre, that is fine by us, because it means more revenue for environmental improvements'. In pursuing the fee-charge strategy the authority may also wish to deter entry into the city centre, something it may try to do by imposing a fee sufficiently high that more people than before will simply avoid coming into the centre; but all that shows is that it can be appropriate for officials to use taxes (or advertising, or other strategies) to influence behaviour, as well as to raise revenue.

### INDIVIDUALISM AND CORPORATE CRIMINAL LIABILITY

In critically analysing 39 new offences of this kind created in a single year, 1997, Ashworth finds yet more to disagree with about supposedly modern trends in criminalisation than the sheer number of offences and the proliferation of regulatory offences. He divides them for the purposes of analysis as follows:

1. Thirteen requiring proof of intention or recklessness, most concerned with the provision of false information.
2. Nine strict liability offences, with defences placing the burden on the accused;
3. Eight omission-based offences, with defences placing the burden on the accused;
4. Six strict liability offences, with no applicable defences.<sup>108</sup>

He then goes on to say:

[T]he bulk of new offences are characterised by three features – strict liability, omissions liability, and reverse onus provisions for exculpation. All these features lie a considerable distance from the conception of criminal laws held by many university teachers and criminal practitioners. Indeed, they are inconsistent with prominent elements of the rhetoric of English criminal law – that there is a presumption that *mens rea* is a prerequisite of criminal liability, that liability for omissions is exceptional, and that “one golden thread”

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<sup>108</sup> Ashworth, n. 1 above, at 227-28.



running through English criminal law is that the prosecution bears the burden of proving guilt.<sup>109</sup>

There are three points to be made about the claims just set out. First, there is absolutely nothing new (post-1945) about the presence of strict liability and omission-based liability, reverse burdens, or the criminalisation, without more, of the provision of false information. The 1920 legislation considered earlier has many such provisions, and Maitland was moved to remark on them in his work on constitutional law 30 years before that.<sup>110</sup> They are part of what has for long been the ‘natural law’ of regulatory strategy and enforcement (broadly, rational choice theory) that has for hundreds of years cast a barely acknowledged shadow over the vaunted ‘golden thread’ thesis.<sup>111</sup>

Secondly, the foundations of Ashworth’s argument seem surprisingly contentious.<sup>112</sup> Do we really know if it is true that reverse onus provisions, together with strict and omissions-based liability, detract equally and to the same extent from the conception of criminal law held by most university teachers and criminal practitioners? Even if they do, what do these groups – or majorities within them - have in common that makes their conception of the criminal law the right normative starting-point, and not just a focal point for a liberal rallying cry against a perceived curse of modernisation? Thirdly, Ashworth does not use as an organising distinction whether or not the offences in question are regulatory in character, even though he acknowledges that, ‘the bulk of the new offences may be described as “regulatory”, in the sense that they form part of statutory schemes for the regulation of certain spheres of social or commercial activity, and are generally enforced by the regulatory authority rather than by the police’.<sup>113</sup> This is a significant point in this context, because I suggest that some of the concerns that Ashworth raises about the breadth of criminal liability draw their moral strength from a supposition that it is an individual, not a business, facing conviction.

Ashworth has a strong preference for the use of intention and recklessness as fault elements in any ‘criminal’ law; indeed, he goes so far as to say that these fault elements should be intrinsic to the ‘paradigm crime’.<sup>114</sup> Further, he is not – with some important exceptions<sup>115</sup> – a supporter of the widespread use of criminal liability for omissions. Taking the issue of fault elements first, even when the criminal liability of individuals is in issue, one may question the claim that intention or recklessness should be intrinsic to the ‘paradigm crime’. In France – not especially noted for the brutality of its criminal code – criminal liability for

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<sup>109</sup> Ashworth, n. 1 above, at 228 (footnotes omitted).

<sup>110</sup> See text at n. 136 below.

<sup>111</sup> See, for example, the early regulatory scheme set up under the Knackers Act 1786.

<sup>112</sup> For an argument similar to Ashworth’s, see Husak, n.1 above, at 34.

<sup>113</sup> Ashworth, n. 1 above, at 228.

<sup>114</sup> Ashworth n. 1 above, at p. 241.

<sup>115</sup> Ashworth, n. 4 above.

negligently caused harm is possible for a number of stigmatic offences against the person.<sup>116</sup> In English law, rape is a paradigm crime, but few would now be prepared to argue for the old view that the fault element should be an intention to have non-consensual sexual intercourse, or subjective recklessness as to whether such intercourse might take place, rather than some form of negligence as to the absence of consent.<sup>117</sup> The fact that intention and recklessness may be highly morally significant in some contexts – in the civil as well as in the criminal law – does nothing to show that they are, or should be, of intrinsic significance within the criminal law as a whole.<sup>118</sup> This is well illustrated by the fact that when companies are accused of offences, there are in fact serious objections to the use of intention and recklessness as fault elements. If subjective fault elements are used in the definition of crimes aimed at companies, this almost inevitably entails the application of the 'identification' doctrine of corporate criminal liability to such elements.<sup>119</sup> According to that doctrine, if the company is to be found guilty of an offence involving proof of fault, an individual company director (or equivalent person) must be found to have possessed the relevant fault element at the time in question.<sup>120</sup> As is well-known, the larger the company and the more diffuse, regionalised or contracted-out its operations, the less likely it is that any director (or equivalent person) will have actually known or suspected that an employee might commit a criminal offence involving proof of subjective fault.<sup>121</sup>

It is not surprising, thus, that when corporate liability is in issue, Governments of different political stripes have preferred to shift the burden and costs of proof of lack of fault to the company, by moulding a broader conception of fault to fit the goals of regulatory compliance. Governments have frequently done this by requiring the company to prove not that it was unaware of and intended no wrongdoing (a negative), but that it exercised all due diligence and took all reasonable steps to avoid the wrongdoing being committed (a positive).<sup>122</sup> As many commentators have pointed out, this broader perspective on fault enables legal analysis to be applied to the way that corporate systems operate to reduce or increase risks, rather than to be applied simply to what particular individuals knew or did not know at a given moment. The broader perspective is also, though, sufficiently flexible to accommodate the fact that, in the case of sole

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<sup>116</sup> French Penal Code, Articles 221-6, 222-19.

<sup>117</sup> For the old view, see *DPP v Morgan* [1976] AC 182.

<sup>118</sup> For criticism of Ashworth's view that the importance of a principle can be broadly measured by the generality of its application, see John Gardner, 'Ashworth on Principles', in Lucia Zedner and Julian V Roberts, *Principles and Values in Criminal Law and Criminal Justice* (Oxford: Oxford University Press, 2012), at 7-10. For more discussion of the role of intention and recklessness in regulatory contexts, see the Conclusion below.

<sup>119</sup> Law Commission, n. 34 above, part 5.

<sup>120</sup> *Tesco Supermarkets v Natrass* [1972] AC 153 (HL).

<sup>121</sup> For a full discussion, see Law Commission, n. 34 above, Part 5.

<sup>122</sup> See the Law Commission's discussion of, in particular, the use of criminal legislation in the consumer protection field, n. 34 above, paras 3.83-3.112. For an appraisal of the role of proving due diligence, see Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004).

proprietorships or their equivalent, it is not so much rule-governed ‘systems’ that guide business decisions but individual effort and care.<sup>123</sup>

Ashworth himself is amongst a number of commentators who have called for a more punitive approach to wrongdoing by companies,<sup>124</sup> although the focus of such calls is almost always medium to large-sized businesses that are far fewer in number than sole proprietorships or their equivalent (although they generate a greater share of GDP). Accordingly, in what follows, I shall also assume that the focus is medium to large-sized businesses. At issue is the extent to which the understanding and shape of the criminal law should be driven by values central to individual human lives, such as treatment with concern (as capable of emotional suffering) and respect (as capable of giving an intelligent conception of the good intrinsic value in their lives), dignity and personal autonomy. In Ashworth and Zedner’s account of criminal law, such values drive what they call their, ‘liberal conception of the criminal law that treats individuals as autonomous moral agents [...]’.<sup>125</sup> However, the nature of companies is such that they do not need to be treated with concern in the sense just given, because the stigma of conviction cannot induce emotional suffering in these bodies as such, they do not have any dignity to be trampled on by reverse burdens of proof, and they do not have any personal autonomy to be threatened by omissions-based liability or by the imposition of risk-based penalisation. Penal legislation directed at such companies must be both morally permissible and the best option in the circumstances, it must allocate burdens in a fair way, and it must be proportionate (all of which is also true in relation to individual criminal liability), but beyond that it need not reflect the much fuller range of concerns at issue when individuals face penalisation. There is no space to deal with these issues adequately here, but let me by way of example look at two questions bearing on the issue of personal autonomy: the risk-based nature of much regulatory criminal law, and its reliance on omissions-based liability.

As we have seen, regulatory criminal law frequently adopts an anticipatory perspective on penalisation,<sup>126</sup> being comprised largely of so-called prophylactic crimes, offences where, ‘the risk of [...] harm does not arise straightforwardly from the prohibited act. It arises only after further human interventions either by the original actor or by others’.<sup>127</sup> Engaging in a form of regulated trading without a licence is perhaps a good example. In itself, such a practice may pose no risks of harm on a given occasion; but sooner or later, if people engage in the regulated trade without meeting the licensing conditions necessary to engage in that trade,

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<sup>123</sup> This is acknowledged, for example, by the Law Commission in its recognition that less may be expected of small firms in terms of bureaucratic accountability, when it comes to putting in place adequate systems to prevent bribery: Law Commission, *Reforming Bribery* (Report No. 313), part 6.

<sup>124</sup> Ashworth, n. 1 above, at 251.

<sup>125</sup> Andrew Ashworth and Lucia Zedner, ‘Prevention and Criminalisation: Justifications and Limits’ (2012) 15 *New Criminal Law Review* 542.

<sup>126</sup> See Horder, n. 5 above.

<sup>127</sup> Simester and von Hirsch, n.1 above, at 79.

the risk of harm from poor trading practices will rise to unacceptable levels.<sup>128</sup> Even so, Ashworth and Zedner criticise the criminalisation of much risk-based offending on the following basis:

To hold a person responsible now for her possible future actions (i.e. without proof of an intent to do the actions), as may occur in respect of pre-inchoate liability and crimes of possession, is objectionable in principle, since such a prediction “denies my responsible agency by treating me as someone who cannot be trusted to guide his actions by the appropriate reasons”.<sup>129</sup>

One difficulty with this argument is its narrowness. It relies on there being a distinction of great moral significance between simple possession, and an intention to do something (wrong) in relation to the thing possessed; but in many instances this distinction is not morally significant.<sup>130</sup> Very commonly, when the law imposes restrictions on possession, it does so because to possess the thing is *thereby* to become morally responsible for its treatment in a certain (harm-reducing or welfare-enhancing) way, irrespective of one’s intentions in that respect. An example might be the possession of animals, whether domestic pets (the keeping of which is governed by the Animal Welfare Act 2006), or dangerous wild animals (governed by the Dangerous Wild Animals Act 1976). To be in possession – and especially, of course, to be an owner – of a protected animal is in and of itself to be under an obligation to treat that animal in a certain way, whatever one’s intentions with regard to it; and the heavy regulatory structure governing the treatment of animals in all manner of contexts reflects this.<sup>131</sup> So, to give a memorable example from the early Victorian era, simply by coming into possession of an eagle, a jackal and a bear when he came up to Christ Church, Oxford, Frank Buckland (son of the famous naturalist, William Buckland) came under an obligation to treat those animals in a certain way. Breach of that obligation is now rightly treated as a criminal offence under the Dangerous Wild Animals Act 1976 Act.<sup>132</sup>

A second, related difficulty with Ashworth and Zedner’s argument is its over-robust individualism. Buckland, no doubt, thought that his intentions were benign, and – given that he was acknowledged as an authority on animals – would

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<sup>128</sup> This claim assumes that the licensing conditions in question are indeed necessary and appropriate for reducing risks of poor trading practices to acceptable levels. In that respect, there are many studies that engage in economic analysis of licensing conditions. See, for example, John W Borowski and Gerard CS Mildner, ‘An Economic Analysis of Taxicab Regulation in Portland, Oregon’, [http://cascadepolicy.org/pdf/env/taxi\\_reg.htm](http://cascadepolicy.org/pdf/env/taxi_reg.htm).

<sup>129</sup> Ashworth and Zedner, n. 73 above, citing RA Duff, n. 1 above, at 165.

<sup>130</sup> Elsewhere, Ashworth has in fact conceded that there may be a case for the criminalisation of possession beyond cases in which the possession is motivated by an intention to do some future (harmful) action: see Andrew Ashworth, ‘The Unfairness of Risk-Based Possession Offences’ (2011) 5 *Criminal Law and Philosophy* 237.

<sup>131</sup> See the statutes mentioned in the text following n. 60 above.

<sup>132</sup> For the full story, see Noel Annan, *The Dons* (London: Harper Collins, 1999), ch 2. Buckland named the bear Tiglath-Pileser, and dressed ‘Tig’ in a cap and gown before taking him to wine parties where Tig could be hypnotised for the amusement of other guests.

certainly have regarded any regulatory state restrictions on his possession of the animals as, to use Ashworth and Zedner's words, 'objectionable in principle [...] by treating [him] as someone who cannot be trusted to guide his actions by the appropriate reasons'. The introduction of a standard-setting licence to engage in conduct only on certain conditions is an expression of the perfectly legitimate belief that, were no such standard enforced, too many individuals wishing to engage in that conduct may indeed turn out to be people who, 'cannot be trusted to guide [their] actions by the appropriate reasons', in a context where a free-for-all approach may lead to unacceptable levels of risk of harm. In many areas of activity, individuals act in conditions of far more imperfect knowledge than the state and the experts who inform the state's decisions, as well as differing greatly in the level of their personal commitment to a concern for preventing harm, in the resources they have that can be devoted to promoting the safety of others, and so on. Trusting the individual to do the right thing, then, may quite often turn out to be a wrong and unacceptable option, particularly when the chances of an individual devising his or her own harm-free path inevitably depend on the way in which many others potentially affected seek to determine their own paths.<sup>133</sup> This is not, of course, to advocate universal nanny-state paternalism. In introducing licensing schemes for a restricted range of activities, a government is not denying to an individual the right to determine for him or herself what ends (including that activity) to pursue in the exercise of his or her autonomy. For good harm-prevention reasons government is, instead, simply setting down a structure within which that end may more safely be pursued, in the light of the need to accommodate others' possibly cheek-by-jowl pursuit of their own ends, and so on.<sup>134</sup>

More pertinently, the difficulty with the argument is that its application to corporate liability is far from secure. In relation to the liability of mentally competent and mature individuals, Ashworth and Zedner are only on strong ground when a pre-inchoate offence is concerned with conduct based on reasons the appropriateness of which it would be better to leave the individual him or herself to determine. An example might be the decision to buy potentially dangerous items such as a kitchen knife, weed killer, pain killers or bleach. In such cases, the chances of misuse may be too small, the importance of expert guidance too negligible, and the cost of regulation too high bearing in mind the numbers of people engaging in the conduct perfectly safely, for state intervention to be

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<sup>133</sup> In short, Ashworth and Zedner, overlook the state's need to impose rules that have binding force even when in particular circumstances individuals may be confident that will do better if guided by reasons they bona fide regard as appropriate: see John M Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), ch IX, XI, XII.3.

<sup>134</sup> It follows, I think, that licensing schemes may have to be ruled out completely, in that they inappropriately trespass on autonomy, only where the intrinsic value of the activity harmless-in-itself lies in the very fact that it is engaged in, for example, spontaneously, as an expression of creative freedom, through the dictates of religious faith, privately, and in other analogous examples; but that is not a point that can be argued here.

worthwhile. These considerations may or may not be decisive in any given case, quite apart from any personal autonomy-based consideration militating against intervention. However, companies cannot enjoy personal autonomy. So, whatever other reasons there may be against the criminalisation of activity companies engage in, the protection of personal autonomy will not be amongst them.<sup>135</sup> Corporate activities may generate a great deal of autonomy-enhancing value for those who work in them and for the public at large,<sup>136</sup> but that value is not value intrinsic to companies' own 'lives'. So, whilst Governments may, perhaps wrongly, fail to trust companies to be guided by appropriate reasons, such a failure cannot manifest an improper interference with personal autonomy in the way that it can when a government treats a mentally competent individual person in such a way. To give a simple example, section 387 of the Companies Act 2006 requires a company to keep proper accounting records that show its financial position reasonably accurately. By contrast, an individual is under no such duty in relation to his or her financial affairs even though the imposition of such a duty might be socially beneficial; and the explanation for that is very much the one that Ashworth and Zedner offer, in terms of the importance of personal autonomy.

An analogous point can be made regarding liability for omissions. Extensive liability for omissions in business contexts has been around for a very long time. In the late 1880s, in his discussion of active duties, FW Maitland was moved to observe that:

[I]f one takes up any business or employment, if one begins to build a house or thinks to open a lodging-house, or keep a trading ship or be a baker or be a chimney sweep, straightway one comes into contact with a mass of statutory rules, and if one keeps all the rules expressly laid down by statute still one is not safe, one may come across the rules, orders and regulations which some Secretary of State or central board has been empowered to make [...]<sup>137</sup>

Omissions-based liability may threaten personal autonomy. This is because, in requiring positive action, it severely restricts the range of choices or activities someone may engage in at a given moment. By contrast, a prohibition on actively doing something merely forbids someone from making a given choice or engaging in a particular activity, from an otherwise limitless number of permissible choices or activities.<sup>138</sup> However, if, as entities, companies cannot enjoy personal autonomy, the special wrong involved when liability for omissions undermines individuals' personal autonomy is absent when such liability extends to

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<sup>135</sup> By that, I mean that companies, even though they engage in these activities, cannot generate for *themselves* any intrinsic value through, in Raz's words, 'controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives': Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), at 369.

<sup>136</sup> On this, see Jeremy Horder, 'Strict Liability, Statutory Construction, and the Spirit of Liberty' (2002) 118 *Law Quarterly Review* 458.

<sup>137</sup> Maitland, n. 6 above, at 505.

<sup>138</sup> See further, Andrew Simester, 'Why Omissions are Special' (1995) 1 *Legal Theory* 311.

companies.<sup>139</sup> There is, for example, a very great deal of difference between, on the one hand (to give the classic example), imposing on individuals enjoying a day at the beach a duty to help someone in peril at sea, and on the other hand, placing a duty on a ship's master to provide assistance to another ship in distress at sea. The former may be objectionable as an unwarranted threat to the personal autonomy of those enjoying their day at the beach, whereas the latter has long been a relatively uncontroversial legal requirement.<sup>140</sup> Although the ship's master's obligation to rescue is an obligation placed on an individual, the obligation engages the master in his professional role as a representative of the company, as not as an autonomous private citizen.

## CONCLUSION

I believe that neutrality on the question of whether there are 'too many' criminal offences is the best approach for criminal lawyers, whose primary task is to analyse such claims in the different contexts in which they come to prominence, historically, politically, and so on. In that regard, though, it must be recognised that the criminal law is no longer the weapon of choice that it was, for those seeking to regulate conduct in a large variety of contexts. The Regulatory Enforcement and Sanctions Act 2008 was meant to put the criminal law firmly in its place as a means of pursuing only repeated or 'serious' wrongdoing in regulatory contexts, with other kinds of warning and sanction playing a much more prominent role at the front line.<sup>141</sup> It is clear that many regulatory and enforcement bodies support that kind of approach in general, but in their responses to Law Commission's proposals, trading standards bodies also unintentionally revealed the inevitable ambivalence and difficulty involved in deciding when and whether conduct constitutes 'serious' wrongdoing. This is hardly surprising, given the inherent vagueness of the term 'serious', and the sheer range of factors that may bear on an evaluation in that respect.<sup>142</sup> The Association of Chief Trading standards Officers said, for example:

Sometimes [it may be] appropriate to prosecute *less serious* crime – [it] can be effective for tackling *more serious* issues e.g. under Cancellation of Contracts Concluded in a Consumer's Home or Place to Work Regulations 2008.

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<sup>139</sup> Moreover, risks associated with liability for omissions can be managed or out-sourced by a company in a way that an individual, in the nature of things, cannot do.

<sup>140</sup> 'A master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so [...]': 1974 International Convention for the Safety of life at Sea, ch 5 Regulation 33(1).

<sup>141</sup> See the discussion in Law Commission, n. 34 above.

<sup>142</sup> On this, see Horder, n. 5 above.

Initially [it] may appear waste of courts time and disproportionate to [the] scale of offence, but doorstep crime is usually overpriced, prevalent, can lead to serious fraud, and shown to be linked to distraction burglary. Prosecution for fraud or attempted [fraud] will be considered if possible but where [there is] no evidence, [and] circumstances suggest the offender would have progressed to more serious offending had enforcement agencies not stepped in, prosecution under Regulations may be only option for Trading Standards Services.<sup>143</sup>

Against that background, the Office of Fair Trading highlights the difficulty of trying to hive off criminal offences from other measures aimed at regulatory compliance, in essence because of the vagueness of 'seriousness' when it comes to an attempt to confine the criminal law to 'serious' offences:

Our concern is that all or most breaches of the law that we and partner authorities enforce can sometimes demand prompt use of criminal sanctions. Most kinds of regulatory breach are capable of incorporating conduct that involves serious malpractice and/or a serious threat of harm to consumers, for example, rogue traders overcharging vulnerable consumers for unnecessary work [...] it would be undesirable (and challenging) to reframe the law such that parties are subject to criminal prosecution only where significant harm results and/or there is evidence of a high level of culpability. Under-enforcement would reduce the incentive for traders to comply not only with the law, but with the preliminary (or soft enforcement approaches) widely used by enforcement authorities as a mean of gaining compliance without resort to the courts.<sup>144</sup>

One important reason for thinking that the criminalisation of conduct – such as, say, a negligent failure to return accounts on time – may be justifiable even though it is not 'serious' lies in these consultation responses. There is obviously a difference between, on the one hand, the seriousness of a piece of conduct as a wrong, and on the other hand, an evaluation of the seriousness of wrongdoing in context. The definition of a crime is better suited to capture the former, because the delineation of culpable conduct can normally be made a relatively clear-cut matter in regulatory contexts.<sup>145</sup> The prosecutorial or sentencing decision-making stage is the best forum in which to address the latter, on which many incommensurable factors, and matters of degree, will have a bearing. In that regard, in regulatory contexts, the fact that wrongdoing was engaged in intentionally or recklessly may simply be one dimension respecting which the

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<sup>143</sup> n. 93 above, para 1.90 (my emphasis).

<sup>144</sup> [http://lawcommission.justice.gov.uk/docs/cp195\\_Criminal\\_Liability\\_responses.pdf](http://lawcommission.justice.gov.uk/docs/cp195_Criminal_Liability_responses.pdf), para 1.6.

<sup>145</sup> Which increases its value, in terms of the need to comply with fair warning requirements of what is criminally prohibited, for the purposes of Article 7 of the European Convention. Naturally, I am aware that many offences draw on (un)reasonableness, or on similarly vague terms, to define wrongful conduct.



wrongdoing was serious in context; that fact alone cannot wholly convincingly be understood as involving the crossing of a unique threshold separating criminal from civil liability.

Consider this example. Suppose (1) that Company D negligently fails to return accounts, (2) that such conduct fits the definition of an offence, and (3) that Company D has on three occasions negligently failed to return accounts in spite of warnings received. A regulator or prosecutor is more likely to say – and probably rightly so – that Company D is now guilty of ‘serious’ wrongdoing that warrants criminal proceedings. We can, of course, make no sense of the idea that repetition of the offence makes wrongdoing more serious unless we have a basic offence to be repeated; but a similar point could be made about, for example, an offender’s failure beforehand to seek the help of a regulator in an effort to reduce the risk of the offence occurring, or of an offender’s failure to put in place safeguards recommended by a regulator prior to the commission of the offence.<sup>146</sup> In neither of these examples, though, is it true to say that it is the intentional or reckless character of the wrongdoing that plays a unique role in making it serious. Indeed the presence of these fault elements may play no such role at all. Suppose, in the example just given, that between each negligent failure to return accounts on time, the company was taken over and new directors appointed who were unaware of previous failings. In such a case, the repetition of the offence by the company can still make the offending behaviour more serious, even if it is admitted that the offence was never committed intentionally or recklessly. The presence of intention or recklessness can sometimes add something to the seriousness of offending in regulatory contexts, but it is not as such the key to understanding the seriousness of such offending.

So far as regulatory criminal offences are concerned what is needed is, first, an appreciation of the historic role they have played: forming part of the structure of a regulatory arm to the state that has made possible the promotion of public goods across many fields of human activity, at a level and with a breadth unimaginable 300 years ago. In saying that, I fully acknowledge that regulatory offences have rarely been enforced, and when they have been enforced it has, historically, often been in a corrupt, discriminatory or class-biased way.<sup>147</sup> My point concerns the perceived importance to legislators of integrating criminal law into regulatory schemes of virtually all kinds. Secondly, counter-reformation thinkers need to confront the reality that the substantive and procedural lines between ‘truly’ criminal offences and ‘merely’ administrative penalties have begun to become, and will continue to become, more blurred. This will happen as elements of arbitrariness, anomaly, and inefficiency involved in keeping them wholly separate undermine the goal of proportionate enforcement practice, and

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<sup>146</sup> In the UK, some 70% of small businesses seek official advice or guidance at some point on their business practices.

<sup>147</sup> See, e.g. Steadman, n. 8 above.

create unfairness from the point of view of those targeted by one form of penalisation rather than the other. In that regard, the introduction by schedule 17 of the Crime and Courts Bill 2012 of Deferred Prosecution Agreements that (in spite of the agreement to defer) can incorporate a financial penalty, is a good example of how such blurring is being used to escape the arbitrariness or unfairness that may come about through an insistence on such separation. The counter-reformation has arrived, predictably enough, just when the changing landscape of sanctioning is threatening – for perfectly understandable reasons – to make a nonsense of the idea that (putting aside the special case of liability to a term of imprisonment), in seeking to identify what fairness in procedure requires, one must first decide whether or not the proceedings or the punishments are ‘criminal’.

Thirdly, what should be acknowledged more clearly is the legitimacy of the ‘two cultures’ of criminal law that now, very broadly speaking, exist side by side as modes of governance (albeit with much blurring and cross-application). On the one hand, there is penal liability imposed on individuals, where both the limits and the nature of liability must be shaped by values such as dignity, personal autonomy, concern and respect. On the other hand, there is penal liability imposed on companies, where these values have little or no application, and where instrumental considerations of efficiency play a legitimate role in penalisation decisions, even though values such as fairness and proportionality also play an important role. Counter-reformation thinkers have sought to generalise some of the values that are significant when determining individual liability, in order to make them definitive of criminalisation as a whole, even though those values are not at stake when corporate criminal liability is in issue. Their omission, then, is to fail to acknowledge the plurality of values that legitimately affect criminalisation decisions (and penalisation decisions more generally), something reformation thinkers did not fail to do, even if reformation thinkers themselves failed to draw sufficient attention to the general importance of values such as fairness and proportionality in the taking of such decisions.