

# Resorting to Crime

The inaugural lecture of James Chalmers, the Regius Professor of Law, delivered in the Bute Hall of the University of Glasgow on 17 January 2013.

**1713:  
2013**

University of Glasgow  
School of Law

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**Regius Chair Tercentenary**

*[www.glasgow.ac.uk/schools/law/tercentenary](http://www.glasgow.ac.uk/schools/law/tercentenary)*

### **Introduction**

Good evening, and thank you for coming. We are very fortunate in the Law School to have fantastic administrative staff. One of them, Jenny Crawford, has put a huge amount of work, for which I am very grateful, into organising tonight. I have been bothering her repeatedly over the last few weeks to ask how many people have registered for the lecture, terrified of speaking to an empty room. I may have been worrying a little too much.<sup>1</sup> I am delighted to see so many people here.<sup>2</sup> I should say in particular that I am very grateful that the Principal and Professor Anderson, the Head of the College of Social Sciences, have given up their time to be here tonight: I know that both of you have a huge number of commitments and I very much appreciate you giving up your time to listen to a lecture outside your own areas of academic interest. I can promise one mention of a Professor of Political Economy over the course of the next hour but less, I'm afraid, on human-computer interaction.

### **The nature of an inaugural**

I can think of no better venue in which to deliver an inaugural lecture, but this is not my inaugural in the strict sense. My first lecture in this institution took place on the 18<sup>th</sup> September last year, in the less auspicious surroundings of the Boyd Orr Building.<sup>3</sup> On that occasion, I gave the third lecture to the incoming class of LLB students, on the subject of criminal courts. Encouragingly, the lecture was followed by a queue of students with questions. The first of these looked at me nervously, before offering my first ever question from a Glasgow student. She said "Could you tell me how I would go about quitting law?"<sup>4</sup> I hope not to elicit the same reaction from you tonight.

Various friends and colleagues have made suggestions as to what I should cover in this lecture. These have included "the history of the Regius Chair", "something interesting" (I can't remember whether that was a rejoinder to the first suggestion), "the Act of 1701", a "manifesto", and a joke about a magic tractor. (I understand that it turned into a field.) And for Shona Wilson, who is I think the only person to have attended both my *real* inaugural lecture at Aberdeen in 2000 and this one, and is now pursuing a PhD on law reform at Cambridge, I will even say something about the Law Commission, which I hope persuades your College that you are entitled to reimbursement of your travel expenses.

It was not until Tuesday that anyone here tonight asked me what my title actually means – collectively, you are taking an awful lot on trust! In this Tercentenary year, it is of course appropriate that I should say something about the Regius Chair and my predecessors in this role. There is more I want to say, of course, although as this is an inaugural lecture I take it that I have thirty years to answer any questions which I raise. A copy of this lecture has been placed on the Tercentenary pages of the School of Law's website and will become available overnight: should you disagree with

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<sup>1</sup> At least, as this text has been finalised for the website prior to the lecture being delivered, I hope so. This paper is the final prepared text for the lecture, but incorporates some minor modifications to text which would not make sense in the absence of the slides which were displayed during it.

<sup>2</sup> See note 1 above.

<sup>3</sup> Coincidentally, this was the date of Kenneth Reid's inaugural (in the modern sense) lecture in the Chair of Scots Law at Edinburgh University, which took place in the Old College at that institution that evening.

<sup>4</sup> She did not quit law.

anything I say, I assure you that the necessary qualifications or explanations will be found in the copious footnotes.<sup>5</sup>

### **The Regius Chairs in Law**

There are five Regius Chairs in Law in the British Isles: in addition to this one, there are the Regius Chairs of Civil Law at Oxford and Cambridge, the Regius Chair of Public Law and the Law of Nature and Nations at Edinburgh,<sup>6</sup> and the Regius Chair of Laws at Dublin. At one time, there were in fact six, Dublin having two,<sup>7</sup> but one of those was discontinued in 1934.<sup>8</sup>

There is, so far as I know, no official list of Regius Professorships. An online encyclopaedia lists around fifty in all disciplines in the United Kingdom and Ireland.<sup>9</sup> Not all of these chairs are currently occupied: at least one of those listed has been abolished.<sup>10</sup> Another is effectively defunct because it exists in a subject which the University concerned no longer teaches.<sup>11</sup> The existence of these professorships is more contingent and arbitrary than the grand titles might suggest. All are of considerable antiquity,<sup>12</sup> and were not necessarily known as “Regius Chairs” at their outset. Such chairs were often simply founded as a chair, with the support of the reigning monarch,<sup>13</sup> and in most cases the only chair in their discipline at the institution when created. Today I am one of over a dozen professors in the Glasgow Law School, together with over twenty lecturers and a considerable number of part-time teaching staff. But it is not so long since the Regius Professor was the only teacher of law in the entire University, and even in comparatively recent times the holder might have been expected personally to deliver the entire course of lectures in Scots law.

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<sup>5</sup> This is not true.

<sup>6</sup> On which, see J Cairns, “The origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair” (2007) 11 Edin LR 300.

<sup>7</sup> See Royal Commission on Trinity College, Dublin, and the University of Dublin. Appendix to the Final Report. Minutes of Evidence and Documents (Cd 3312: 1907) 459. At this time, Trinity College Dublin had six Regius Professorships, including both the Regius Professorship of Law, founded in 1668 and held concurrently with the Chair of Civil Law and General Jurisprudence, and the Regius Professorship of English and Feudal Law, founded in 1761. Election to both posts was by nomination of the Council of the College, subject to the approval of the Provost and Senior Fellows; the latter chair required its holder to be a barrister of two years’ standing. At this time, the chairs were held respectively by H Brougham Leech and J V Hart. The other Regius Professorships were in Divinity (carrying a salary of more than the other five Regius Professors combined), Physic and Surgery.

<sup>8</sup> V T H Delany, “Legal studies in Trinity College, Dublin, since the foundation” (1957) 89 *Hermathena* 3 at 11.

<sup>9</sup> [http://en.wikipedia.org/wiki/Regius\\_Professor](http://en.wikipedia.org/wiki/Regius_Professor).

<sup>10</sup> The Regius Professorship of Humanity at the University of Aberdeen. See P G Walsh, “Souter, Alexander (1873-1849)”, *Oxford Dictionary of National Biography* (2004).

<sup>11</sup> The Regius Professorship of Greek at the University of Aberdeen.

<sup>12</sup> The one exception is the Regius Professorship of Botany at the University of Cambridge, created in 2009 to mark the University’s 800<sup>th</sup> anniversary, when the Queen bestowed the “Regius” title on an existing Professorship dating back to 1724. See “A new Regius Professor for the University”, 24 Nov 2009, available at <http://web.archive.org/web/20100301081207/http://www.admin.cam.ac.uk/news/dp/2009112302>. This article claims that the last Regius Professorship to be created prior to that date was at Aberdeen in 1912, but it is not clear what chair this is thought to be. Ashley MacIntosh was appointed to the Regius Chair of Medicine at Aberdeen in that year, but his predecessor had held the same title (see J S R, “David W Finlay”, *British Medical Journal* 17 Nov 1923, 949). In fact, the chair is thought to be the oldest of all the Regius Professorships: S Targett, “A regius rumble”, *Times Higher Education Supplement*, 1 Mar 1996.

<sup>13</sup> Note, however, that the Regius Professorship of Divinity at Dublin was founded in 1607 and became a Regius Professorship in 1761. See Royal Commission on Trinity College, Dublin (n 2) 459.

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Shortly after my appointment, one of my new colleagues expressed some confusion as to how the School would operate with me in post. There had, he pointed out, never been both a Head of School and a Regius Professor simultaneously during his time at Glasgow. That query seemed to me to be odd: I am simply one professor among many and I do as my Head of School tells me. Mostly.

But if the question seems odd in an era where all professorships are rightly regarded as equal in standing,<sup>14</sup> it is not so strange when the history of the Chair is considered. When it was advertised in 1957, for example, leading to David Walker's appointment the following year, the particulars for the post made it explicit that the holder would bear responsibility for the work of the Department of Scots Law.<sup>15</sup> That was inevitable: there was no other occupied Chair in the Department at the time.<sup>16</sup> This leadership role, however, related to the Department of Scots Law and not to the Faculty of Law as a whole, in which there were two other professors.<sup>17</sup> T B Smith, who played the role of kingmaker in the appointment<sup>18</sup> – more on this later – emphasised to the Scottish Office that the holder of the Chair had to be "*primus inter pares*" in relation to the other two chair-holders.<sup>19</sup> But although that view seems to have been accepted, it was not formally any part of the role.

I mention all this only to indicate that although the Regius Chair is central to the history of the Glasgow Law School, it is not a static institution. The meaning of being the Regius Professor of Law has changed over time, due to context, contingency and the characteristics of the individual holders. The meaning of my tenure in the Chair will fall to be judged at some future date by persons other than me. All I can say is that it is a considerable honour to have been appointed, that I am deeply touched by the confidence placed in me by the University, and that I intend to do my best to repay that trust.

### **Some numbers**

This lecture, in the style of a popular children's programme, is brought to you by the letters ER and three numbers. The significance of the second of these will be obvious: 1713 marks the foundation of the Regius Chair of Law, the tercentenary of which we celebrate this year. In fact, although the Chair was founded in December 1713,<sup>20</sup> the first appointment was not made until January 1714, meaning that we shall be able to celebrate a second Tercentenary next year if this one goes well.

The third number, 3023, I intend to say nothing about at this stage. I doubt that more than three people in the hall will recognise it. But it is thought to be important, and many leading criminal

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<sup>14</sup> The University of Glasgow formally removed distinctions between holders of established and personal chairs in 1995, at which point personal professors became *ex officio* members of the University Senate.

<sup>15</sup> NAS, HH91/8.

<sup>16</sup> There was a Chair of Mercantile Law, but the particulars noted that the University had decided not to fill it and instead to appoint a lecturer in that subject.

<sup>17</sup> The Chair of Jurisprudence (held by Walker immediately before his appointment to the Regius Chair) and the Douglas Chair of Civil Law (then held by J A C Thomas).

<sup>18</sup> It seems unlikely that Walker was aware of this. Even if he was, it did not temper his criticism of Smith's own work subsequently. See K G C Reid, "While one hundred remain: T B Smith and the progress of Scots law" in E Reid and D L Carey Miller, *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 1 at 14-15.

<sup>19</sup> NAS, HH91/8, note of meeting between Sir David Milne and T B Smith, 5 May 1958. See also Smith to Milne, 6 May 1958.

<sup>20</sup> With an assignation of £90 *per annum* from Queen Anne. See J W Cairns, "The origins of the Glasgow law school: the professors of civil law, 1714-61" in P Birks (ed), *The Life of the Law: Proceedings of the Tenth British Legal History Conference, Oxford 1991* (1993) 151 at 154.

lawyers and criminologists – for example, Andrew Ashworth,<sup>21</sup> Adam Crawford,<sup>22</sup> Nicola Lacey,<sup>23</sup> Robert Reiner<sup>24</sup> and Lucia Zedner<sup>25</sup> – have cited it in recent years, as have lesser authors such as myself.<sup>26</sup> All these writers have drawn a variety of conclusions from the number, which is thought to tell us something about the state of criminal law in the United Kingdom today. Unfortunately for all of us the number is nowhere near being correct. In an attempt to build suspense, I will say no more about this until later.

### **1451: a prehistory**

The first number is here as a reminder that although the foundation of the Regius Chair represents the origin of the Glasgow Law School in its modern form, legal teaching and scholarship in this institution has a rather longer history. We know, in fact, that legal teaching can be traced back to the foundation of the University in 1451, although we know relatively little about it and it appears to have ceased in the sixteenth century.

Glasgow's place in Scottish legal history prior to the Regius Chair's foundation owes less to this early teaching and more to the contribution of James Dalrymple of Stair, who graduated Master of Arts in 1637 and subsequently taught – probably philosophy – in the University. He went on, of course, to become Lord President, Viscount Stair and the author of *The Institutions of the Law of Scotland*, the foundation of modern Scots law.

Andrew Dewar Gibb, one of my predecessors as Regius Professor of Law, was concerned for some time that Stair's links with Glasgow were not properly recognised. In the early 1950s, he engaged in discussions with Lord Cooper, then Lord President, about the possibility of a memorial. In 1951, Cooper wrote to Dewar Gibb in somewhat negative terms. He had discussed the matter with the Edinburgh legal community, who felt that a memorial to Stair should wait until 1971, when the anniversary of his appointment as Lord President would come around. Moreover, it should not be in Glasgow. Edinburgh was the preferred location, although "[n]o one [was] keen on a statute to be placed anywhere, Edinburgh being choked with statutes". Glasgow University, it was suggested, could erect a "simpler memorial, such as a tablet".

Dewar Gibb's response to this was to arrange for perhaps the least simple tablet imaginable to be erected, in the most prominent of locations, and well before 1971. This tablet sits at the foot of the stairs in the University's Main Building. Although now some distance from the Law School's location in the Stair Building, it was at the time "as near as possible to the Law Class-Room", something which

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<sup>21</sup> A Ashworth and L Zedner, "Defending the criminal law: reflections on the changing character of crime, procedure and sanctions" (2008) 2 Criminal Law and Philosophy 21 at 22 and 32.

<sup>22</sup> A Crawford, "Governing through anti-social behaviour: regulatory challenges to criminal justice" (2009) 49 Brit J Crim 810 at 826.

<sup>23</sup> N Lacey, "Historicising criminalisation: conceptual and empirical issues" (2009) 72 MLR 936 at 938 and 951 (avoiding, however, direct reference to the number).

<sup>24</sup> R Reiner, "Citizenship, crime, criminalization: marshalling a social democratic perspective" (2010) 13 New Criminal Law Review 241 at 259.

<sup>25</sup> Ashworth and Zedner, "Defending the criminal law".

<sup>26</sup> In a piece with Fiona Leverick, whom I would not wish to describe as a lesser author. See J Chalmers and F Leverick, "Fair labelling in criminal law" (2008) 71 MLR 217.

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Dewar Gibb considered important for the encouragement of current students.<sup>27</sup> Whether this accords what Cooper had envisaged I do not know, but he did agree to unveil it.<sup>28</sup>

### **Selecting a Regius Chair**

Although the appointment of a Regius Chair is formally a matter for the monarch, the selection process is in the hands of the University, subject to confirmation by Royal Warrant thereafter.<sup>29</sup> The selection process has varied over time – William Forbes, the first holder, was appointed after the Professor of Greek was appointed to go to Edinburgh and find a suitable candidate.<sup>30</sup>

In modern practice, the recruitment process is the same as for any other Chair, save for the process of submitting the name of the preferred candidate to the Scottish Executive for confirmation. This can take some time – I was not permitted to identify myself as the Regius Chair until almost two months after I arrived at Glasgow. The holder receives a Royal Warrant, now signed by the Queen and the First Minister, and the appointment is announced in the Edinburgh Gazette.

Other steps have changed over time. Andrew Dewar Gibb, when offered the Chair, was sent a form letter requesting that he pay ten shillings stamp duty in order that the Royal Warrant be issued.<sup>31</sup> I received no such letter, thanks to the little-known current suspension of stamp duty for first-time Regius Chair holders. Surprisingly, this innovation has failed to lift the British economy out of economic stagnation, and so the Cabinet Office has announced a programme of quantitative easing, whereby the supply of Regius Chairs in the economy will be significantly increased.<sup>32</sup>

All applicants for any post at Glasgow, no matter its nature, must fill out the same online form. This requires the applicant to declare all their qualifications from Standard Grade onwards. Being an obedient sort of individual – and hopeful that my A in Higher Economics might impress the Principal – I dug out my certificates and completed the form in full.

In the process, I came across a document, which is of interest for a number of reasons. A report from the staff partner in a firm of solicitors, it represents my first real encounter with the discipline of law, when as a school pupil I spent a week in each of two successive years on work experience with an Aberdeen firm of solicitors, AC Morrison and Richards.

Very flatteringly, many friends and colleagues have reacted to my appointment by commenting that I must be the youngest person to hold the Chair. (In academia, the adjective ‘young’ is used in a more flexible manner than in other walks of life.) However, John Millar was 25 when appointed in

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<sup>27</sup> “Twenty Five Years in the Faculty of Law”, delivered to the Juridical Society on 7 Jan 1958. NLS Dep 217, Box 11, folder 4.

<sup>28</sup> Some of his remarks on the occasion are excerpted in D M Walker, *The Scottish Jurists* (1985) 119.

<sup>29</sup> The appointment of Regius Chairs in Scotland has not in modern times been as politically sensitive as in England: see Targett, “A regius rumble”. The position in England has now changed, and appointments are in the first instance a matter for the two universities (only Oxford and Cambridge presently have Regius Chairs) concerned.

<sup>30</sup> Specifically, to “inform himself who is esteemed the fittest to undertake the... profession of Law”. He reported that Forbes was “Esteem’d a man very well skill’d in the Civil Law and Capable to teach the same”. Cairns, “Origins” 155.

<sup>31</sup> NLS Dep 217, Box 3, folder 4.

<sup>32</sup> Cabinet Office, “Queen to bestow new Regius Professorships on outstanding universities”, 12 Oct 2012, available at <http://www.cabinetoffice.gov.uk/news/regius-professorships-universities>.

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1761.<sup>33</sup> It should also be noted that David Walker, although 38 when appointed in 1958, had interrupted his studies to serve in the Second World War, and was appointed to the Regius Chair within a decade of graduating with the degree of LLB. Even more remarkably, this was his second chair.

So I cannot claim any sort of record in that regard. I can, I believe, claim to be the first holder of the Chair to have attended a comprehensive school. As, however, Inverurie Academy has now had an alumnus holding a chair within the Glasgow Law School continuously since 1969<sup>34</sup> (and, indeed, a current visiting professor in the Edinburgh Law School),<sup>35</sup> my kid from the wrong side of the tracks argument is unlikely to convince anyone.

Of more interest, perhaps, are the comments of Morrison and Richards' staff partner on this form, which read as follows :

He is a nice young man but if he wants to become a lawyer, he will have to be more outward-looking. Clients expect to have confidence in their lawyer which does require a more extrovert (without being too extrovert) type of person.

P.S. He was very good at figures. Maybe he should consider accountancy!

I can tell you why I did not consider accountancy. Inverurie Academy had a careers fair one evening where pupils were encouraged to meet local employers. The local accountant told me quite firmly that if I wanted to enter his profession, I would have to play golf. I have played golf. My best round was, I think, a little under 90 strokes. That is a reasonable score for a dilettante playing an 18 hole course. It was not an 18 hole course.

So, I chose law. My experience at Morrison and Richards was important for other reasons. Like all law firms faced with occupying a school pupil for a week, they packed me off to the sheriff court, where I sat listening to the debate on a no case to answer submission in a sexual offences trial. I sat through a lengthy discussion of what sounded like the "More-of principle" – a name which made sense, because it referred to whether the claims made by two separate child victims of sexual abuse could support each other's accounts – and returned later that day to Morrison and Richards' law library to try and work out what it was I had been listening to.

The answer was that I had been listening to a discussion of the *Moorov* doctrine. I learned this from a book entitled *The Law of Evidence in Scotland*, better known as "Walker and Walker". I suspect I am the only legal academic to be now a co-author of the first legal textbook they ever read,<sup>36</sup> in

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<sup>33</sup> He was born on 22 June 1735, with the royal warrant appointing him to the Chair being issued on 15 June 1761 and the University admitting him to it on 15 July that year. See K Haakonssen and J W Cairns, "Millar, John (1735-1801)", *Oxford Dictionary of National Biography* (2004).

<sup>34</sup> Bill Gordon, who attended Inverurie Academy and thereafter Robert Gordon's College in Aberdeen, was appointed to the Douglas Chair of Civil Law in 1969. He became an Emeritus Professor on his retiral in 1999 until his death on the 1<sup>st</sup> September 2012. See P Davison, "Obituary: Professor Bill Gordon", *The Herald* 20 Sep 2012.

<sup>35</sup> Harvey McGregor QC, who attended Inverurie Academy and thereafter Scarborough Boys' High School. See CV available at <http://www.hailshamchambers.com/barristers/harvey-mcgregor-qc.asp>.

<sup>36</sup> It may not have been the first legal text of any sort which I read. Either around the same time or earlier, I read S R Moody and J Tombs, *Prosecution in the Public Interest* (1982), a copy of which was held by the Carnegie Public Library in Inverurie.

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doing so citing the appeal from the first trial they ever saw.<sup>37</sup> I am very grateful to Margaret Ross for giving me the opportunity to be involved in revising and updating this classic text.<sup>38</sup>

My use of the library is, even today, recorded in Morrison and Richards' records (according to which I seem to have been capable of borrowing a book and returning it the previous day). This includes the consultation of my predecessor David Walker's classic text on *The Scottish Legal System*, although I have no special recollection of it.

I do recall, however, that one wall of the library contained a set of the now defunct *Statutes in Force*. *Statutes in Force* was a collection of over 100 brown loose-leaf binders, designed to hold the complete and up to date text of all United Kingdom Acts of Parliament. By the time I found myself in Morrison and Richards' library, it was already a dismal failure, increasingly out of date.<sup>39</sup> But I knew nothing of its deficiencies, and I distinctly remember being surprised that "all the law" took up such a relatively small amount of shelf space. It struck me that a diligent student could conceivably memorise the entire contents of such a set of volumes, and thus know the complete law of the land. You will deduce from this absurd thought that I had yet to attempt reading a statute at this point. There is, however, something of importance in this naïve observation which I shall return to later. But first, given that this is the Tercentenary year, I should say something about my predecessors.

### **The eighteenth century: auspicious beginnings**

I do not want to say too much about the Regius Chair in the eighteenth century. This is in part because of pressure of time, but also because so much work has been done on the early history of the School of Law by John Cairns, to whom Glasgow owes an enormous debt. Anything I could say on the subject would be a pale and inadequate summary of John's detailed and scholarly accounts, which I commend to you.

There were four holders of the Regius Chair in the eighteenth century. Of the middle two – William Crosse and Hercules Lindseay – there is little to be said. Crosse treated the chair as a sinecure and was after a few years replaced by Lindseay.<sup>40</sup> Lindseay published nothing, but all the evidence points to him having been an able teacher, well respected by his colleagues.<sup>41</sup>

The contribution of the first and last holders of the chair in the eighteenth century, however, is far more significant. William Forbes, the first holder, is best known for his somewhat neglected *Institutes of the Law of Scotland*, published in two volumes.<sup>42</sup> The first dealt with private law, the second with criminal. Many modern academics publish too much (or, as Kenneth Reid has put it, write too much and read too little).<sup>43</sup> Not so Forbes. He wrote a *Great Body of the Law of Scotland*, a

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<sup>37</sup> *Smith v HM Advocate* 1995 SLT 583.

<sup>38</sup> The gap between the first and second editions of *Walkers on Evidence*, at 36 years, may be some sort of record.

<sup>39</sup> P Clinch, "Statutes probably not in force" (1994) 15 Stat LR 64.

<sup>40</sup> See J W Cairns, "William Crosse, Regius Professor of Civil Law in the University of Glasgow, 1746-1749: a failure of enlightened patronage" (1993) 12 History of Universities 159.

<sup>41</sup> See Cairns, "The origins of the Glasgow law school" at 185.

<sup>42</sup> In 1722 and 1730.

<sup>43</sup> "Smoothing the rugged parts of the passage: Scots law and its Edinburgh chair", 18 Sep 2012, <http://www.youtube.com/watch?v=YTFW7XXqBxY>.



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“gigantic seven-volume manuscript”<sup>44</sup> held in the Glasgow University Library which he never published. The value of Forbes’ work is not in doubt, and there is good reason to hope that greater use will be made of it in the future. Thanks to the efforts of Ross Anderson and Ronan Deazley, and the support of the University’s Chancellor’s Fund, the *Great Body* is now available online.<sup>45</sup> In addition, the *Institutes* have very recently been reprinted by the Edinburgh Legal Education Trust. If I may be permitted a sales pitch, I would draw your attention to the limited number of discounted copies available for sale at tonight’s wine reception: get yours while stocks last!

To Millar, it is impossible to do justice in the time here and I will not attempt it. He published widely, but rather than being concerned with doctrinal law, his work is perhaps best characterised as social theory and history, and so his name is not as recognisable to Scots lawyers as it should be. As a teacher, he radically overhauled and expanded the curriculum, making Glasgow Britain’s leading law school, to which students resorted from all quarters of the country.<sup>46</sup> His success in the Chair is unparalleled. Unfortunately, the momentum he developed was entirely lost after his death in 1801.

### **The nineteenth century: decline**

The story of the Regius Chair in the nineteenth century is not a happy one. David Walker, Regius Professor from 1958 until 1990, has offered blunt assessments of the nineteenth-century professors in his *History of the School of Law*, and a sufficient picture can be obtained by quoting from his commentary.

Robert Davidson, appointed in 1801, “probably owed his appointment to being the son of the Principal: He seems to have been competent... in 1802 and 1803 he had no students at all.”<sup>47</sup>

Allan Maconochie, appointed in 1842, “left no published work [but] seems to have made a genuine effort to teach his subject”.<sup>48</sup> George Skene, appointed in 1855 “merely read lectures to the class... ‘though earnest and conscientious, [he] had no illumination’”.<sup>49</sup> He was succeeded in 1867 by Robert

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<sup>44</sup> “...which must provide the fullest account of available of Scots law in the early eighteenth century”. H L MacQueen, “Introduction” in W Forbes, *The Institutes of the Law of Scotland* (Edinburgh Legal Education Trust reprint, 2012) v at vi.

<sup>45</sup> <http://www.forbes.gla.ac.uk/contents/>.

<sup>46</sup> See the quotes offered by J W Cairns, “‘Famous as a School for Law, as Edinburgh... for medicine’: legal education in Glasgow, 1761-1801”, in A Hook and R B Sher (eds), *The Glasgow Enlightenment* (1995) 133 at 134.

<sup>47</sup> Walker, *A History of the School of Law, the University of Glasgow* (1990) 39. That was particularly distressing given Millar’s great success in the Chair. It has been suggested that student numbers had declined towards the end of Millar’s tenure. See J D Mackie, *The University of Glasgow 1451-1951: A Short History* (1954) 166 n 3. Mackie argues that Millar, “[I]ike other Professors... may have gone on too long” (234, see also 187) 234. However, the only evidence Mackie offers for this is Davidson’s own low student numbers. As John Cairns has demonstrated, they do not support this conclusion, and the available evidence is to the contrary: J W Cairns, “From ‘speculative’ to ‘practical’ legal education: the decline of the Glasgow Law School, 1801-1830” (1994) 62 *Tijdschrift voor Rechtsgeschiedenis* 331 at 334-335.

<sup>48</sup> Walker, *History* 40.

<sup>49</sup> Walker, *History* 55, quoting D Murray, *Memories of the Old College of Glasgow: Some Chapters in the History of the University* (1927) 232. Murray goes on to say (at 234) that “though George Skene was not a distinguished professor, he was an excellent man. What he lacked was animation; he did not do himself justice... he was a Scottish gentleman of the finest type”.

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Berry, who “did not write and left no particular reputation”.<sup>50</sup> Finally, Alexander Moody Stuart held the chair from 1887 to 1905. “He too made no particular mark in the law.”<sup>51</sup>

“In truth”, Walker concludes, “the Regius Professors of the nineteenth century were a mediocre bunch”.<sup>52</sup> In his work on *The Scottish Jurists*, he ignores them, mentioning only that after John Millar the chair “was held by several undistinguished persons”.<sup>53</sup> Certainly, they left no scholarly mark: Davidson seems to have been the only one to have published anything on law.<sup>54</sup> Walker describes his contribution as a “small book on Scottish poor law”.<sup>55</sup> This is unusually charitable: the “book” is all of 12 pages long.<sup>56</sup> Twelve pages of scholarship in a century – one page every eight and a half years – is a poor record. Why was this so?

We might note, first, that the problem was not unique to Glasgow. The position elsewhere is instructive. The Regius Chair at Edinburgh, while held with great distinction by James Lorimer from 1862 onwards, was vacant for a lengthy period in the middle of the nineteenth century.<sup>57</sup> Around that time, a Select Committee of the House of Commons was appointed in 1846 to inquire into the state of legal education in England and Ireland. In the course of their researches, they looked into the activities of the Regius Professors there. The picture was not attractive.

Joseph Phillimore, Regius Professor of Civil Law at Oxford from 1809 until 1855, reluctantly admitted to the Committee that his subject had not been taught at Oxford for over a century.<sup>58</sup> His duties, the Committee concluded, had “dwindled down to a mere sinecure”.<sup>59</sup> Matters were somewhat better at Cambridge, where the Regius Professor had “generally a good attendance on his lectures, but not such as to be called a very large one”,<sup>60</sup> although the other professor – the Downing Professor of English Laws – did not teach at all.<sup>61</sup> The Regius Professor at Dublin gave evidence as follows:<sup>62</sup>

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<sup>50</sup> Walker, *History* 55. Berry has, however, been credited with reviving the teaching of civil law in 1873-74: J Coutts, *A History of the University of Glasgow* (1909) 452.

<sup>51</sup> Walker, *History* 56.

<sup>52</sup> Walker, *History* 56.

<sup>53</sup> Walker, *Scottish Jurists* 410. He mentions Davidson, but only in a list of many students of David Hume’s “who later attained distinction”: 319.

<sup>54</sup> Skene, however, had previously published *The Chronology of the Old Testament, and its Connection with Profane History* (1836).

<sup>55</sup> Walker, *History* 39.

<sup>56</sup> R Davidson, *A Short Exhibition of the Poor Laws of Scotland*, 3<sup>rd</sup> edn (1816).

<sup>57</sup> In addition, John Cairns and Hector MacQueen have referred to the “largely undistinguished men” who held the Edinburgh Chair of Scots Law in the second half of the nineteenth century: J W Cairns and H L MacQueen, *Learning and the Law: A Short History of the Edinburgh Law School* (nd, 2006 or 2007) 15.

<sup>58</sup> B Nicholas, “Jurisprudence” in M G Brock and M C Curthoys (eds), *The History of the University of Oxford. Volume VII: Nineteenth-Century Oxford, Part 2* (2000) 385, at 385. Phillimore appears to have published some law reports but little else: see N Doe, “Phillimore, Joseph (1775-1855)”, *Oxford Dictionary of National Biography* (2004).

<sup>59</sup> *Report from the Select Committee on Legal Education, Together with the Minutes of Evidence* (PP 686, 1846) iv. The committee found that the “department of Common Law is somewhat more efficiently managed”, with a course of 24 lectures being delivered (ibid).

<sup>60</sup> *Report from the Select Committee on Legal Education* v. Geldart, the Regius Professor, did not give evidence. Starkie, the Downing Professor, was asked whether Geldart’s lectures were better attended than his ones had been and replied “Yes, I think more; but I do not think it is a very large attendance” (Q30.)

<sup>61</sup> *Report from the Select Committee on Legal Education* v, recording rather curiously that there were “no lectures given, and no attendance whatever”.

## *Resorting to Crime*

How often in a year are you required to give lectures? – The charter says twice a week during the College term.

At what hour in the day? – Nine o'clock in the morning.

Are the lectures generally well attended? – No, I should say not.

His attendance “did not exceed seven”, consisting of barristers rather than students, to whom no fees were charged: “if there were any fees there would be no attendance at all”.<sup>63</sup> Allan Maconochie’s average attendance of 30 students<sup>64</sup> was stellar by comparison.

But that is a comparison, not an explanation, and the different model of legal training in Scotland at the time undermines its value. A more direct explanation is that the chair was not, at the time, a financially attractive proposition to a first-rate lawyer. It had been suggested to George Jardine, the Glasgow Professor of Logic, that his son might seek the chair on Millar’s death. Jardine’s response is instructive: “None who like the Bar and have any prospect of rising there could be tempted by it”.<sup>65</sup> The Chair seems also to have been relatively poorly paid, at least in the latter half of the century, compared to other professorships in the University.<sup>66</sup>

John Cairns has charted how the Glasgow Law School declined over this period as it moved from the “speculative” education of Millar to Davidson’s self-described “practical” approach. That did not change with Davidson’s departure. Indeed, it was given emphasis by the fact that Maconochie’s 1842 appointment was, unlike his predecessors, to teach “Scots law” and not civil (that is, Roman) law. This, it seems, was because the Glasgow legal profession had made representations to the Lord Advocate that the function of the chair should change in this way.<sup>67</sup> Maconochie was still required to teach civil law if sufficient students requested it, and appeared keen to do so, but they did not.<sup>68</sup> He saw this as evidence of a change in the kind of education which students wanted. When Millar had lectured, he said, “men’s minds were particularly turned to the discussions then going on in Europe regarding the principles of government”. A course of lectures such as Millar’s, he thought, “would draw no attendance now in Glasgow”. He ascribed this to:<sup>69</sup>

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<sup>62</sup> *Report from the Select Committee on Legal Education* QQ 2830-2832.

<sup>63</sup> *Report from the Select Committee on Legal Education* vii.

<sup>64</sup> *Report from the Select Committee on Legal Education* Q 3886. It is not clear how many students attended the Vinerian Professor’s lectures at Oxford: his (J R Kenyon’s) evidence was that “there has been very little disposition to attend; but there is an increasing disposition now” (Q 1455). The Downing Professor at Cambridge had “somewhere about 10 or 12” students in his first year; “the next year not so many”; he had not lectured since (Q 26).

<sup>65</sup> Cairns, *Decline*, 339 (citing Jardine to Hunter, 16 July 1801, GUL, MS Gen 507/118).

<sup>66</sup> See e.g. Scottish Universities Commissioners, Ordinance (No. 25), Glasgow No. 3 (1893) 8-9. This does not appear to have changed with Gloag’s appointment: see Annual Statistical Report by the University Court of the University of Glasgow to the Secretary of State for Scotland, under the provisions of section 30 of the Universities (Scotland) Act, 1889, for the year 1905-06 (1907).

<sup>67</sup> *Report from the Select Committee on Legal Education* Q 3885. Subsequently, Skene’s appointment referred to the “sole profession of law”. Walker says that this “was the basis of the claim sometimes asserted by successors that they would, if they chose, teach Roman law or Hindu law and could not be stopped from doing so”. Walker, *History* 41.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Report from the Select Committee on Legal Education* QQ 3935-3936.

...the utilitarian notions of the present day; that where a young man does not see the immediate advantage which he is to reap by undergoing any particular course of instruction, he will neglect it, and adopt only that which is to be immediately conducive to his patrimonial advantage... I always find that when my lectures are to be upon the history or principles of our jurisprudence, the attendance of students is comparatively small; but when I lecture upon the mercantile parts of our system of law, and more especially when last winter I delivered lectures upon the statutes relative to joint-stock companies, my class-room was crowded.

Seduced by a badly-remembered golden past, academics are prone to characterise their students as instrumental and strategic, not interested in learning for learning's sake like their predecessors. Perhaps, nearly two centuries after Maconochie, we might at least have the wit to avoid parroting complaints of such antiquity.

### **The twentieth century: revival**

The fortunes of the Regius Chair changed dramatically when, upon Moody Stuart's retirement in 1905, William Gloag was appointed. Even before then, Gloag had already made a greater contribution to scholarship than all the Regius Professors since Millar combined, having co-authored a significant volume on *Rights in Security and Cautionary Obligations*.<sup>70</sup> But it is his classic work on *The Law of Contract*<sup>71</sup> and his co-authorship of Gloag and Henderson's *Introduction to the Law of Scotland*,<sup>72</sup> today in its thirteenth edition,<sup>73</sup> which have ensured his leading place in Scottish legal history. He is also the only Regius Professor ever to have published a book of poetry.<sup>74</sup> And unlike me, he could play golf, scoring a hole in one in the 1907 Senate Match between the Universities of Aberdeen and Glasgow.<sup>75</sup>

Considered a distinctive personality<sup>76</sup> and an inspired teacher,<sup>77</sup> Gloag was described by Andrew Dewar Gibb as "beyond all question the most remarkable legal scholar who has ever held this Chair".<sup>78</sup> David Walker, by contrast, thought that Gloag's *Contract* contained "many flaws" and that Gloag and Henderson "cannot be said to be a satisfactory book at all".<sup>79</sup> On the basis of this evaluation, he concluded that Gloag was "the outstanding jurist of the century".<sup>80</sup>

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<sup>70</sup> W M Gloag and J M Irvine, *Law of Rights in Security, Heritable and Moveable, Including Cautionary Obligations* (1897). See A J M Steven, "One hundred years of Gloag and Irvine" 1997 JR 314. Irvine was to become Professor of Scots Law at the University of Aberdeen two years later, serving until 1919. See M C Meston, "The civilists of Aberdeen: 1495-1995" 1995 JR 153 at 164.

<sup>71</sup> W M Gloag, *The Law of Contract* (1914), 2<sup>nd</sup> edn (1929). See H L MacQueen, "Glory with Gloag or the stake with Stair? T B Smith and the Scots law of contract" in Reid and Carey Miller (eds), *A Mixed Legal System in Transition* 138 at 140-141.

<sup>72</sup> W M Gloag and R C Henderson, *Introduction to the Law of Scotland* (1927).

<sup>73</sup> H L MacQueen (ed), *Gloag and Henderson: Introduction to the Law of Scotland*, 14<sup>th</sup> edn (2012).

<sup>74</sup> W M Gloag, *Carmina Legis, or Verses Illustrative of the Law of Scotland* (1920). See also J Blackie, "A serious poem by Gloag" (2005) 9 Edin LR 331.

<sup>75</sup> H MacQueen, "Gloag's golf: a past Master", *Scots Law News* 10 Apr 2012.

<sup>76</sup> Walker, *Scottish Jurists* 411.

<sup>77</sup> A F Rodger, "Gloag, William Murray (1865-1934)", rev *Oxford Dictionary of National Biography* (2004).

<sup>78</sup> A D Gibb, "Law", in J B Neilson (ed), *Fortuna Domus: A Series of Lectures Delivered in the University of Glasgow in Commemoration of the Fifth Century of its Foundation* (1952) 157 at 167.

<sup>79</sup> Walker, *Scottish Jurists* 412-413.

<sup>80</sup> Walker, *Scottish Jurists* 413.

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On Gloag's death in 1934,<sup>81</sup> he was succeeded by Andrew Dewar Gibb. Gibb had studied under Gloag and was then leading a peripatetic and contradictory existence as simultaneously Lecturer in English Law at Edinburgh and Lecturer in Scots Law at Cambridge. That made him, perhaps, uniquely qualified to lecture on the relationship between the two systems.<sup>82</sup> Gibb was a significant figure both academically and politically: he had been a Unionist candidate twice in the 1920s and a founder of the Scottish National Party in 1934, serving as its chairman from 1936 to 1940.<sup>83</sup> He published on Scots law, English law, and politics,<sup>84</sup> leaving a considerable body of work, the diversity of which has proved difficult for subsequent commentators to analyse.<sup>85</sup>

Gibb's contributions to legal academia beyond publication appear to have been important, yet little recognised. He was critical of the *Juridical Review*, at the time the only legal journal in Scotland of an academic nature. Its content, he said, was "extremely diffuse", and "one gains the idea that the editor is casting around desperately for something to publish".<sup>86</sup> Gibb led efforts to remedy the situation, with an initial proposal to create a new periodical resulting in the reconstitution of the *Juridical Review* as a universities' journal on a model which continues to the present day.<sup>87</sup> We know similarly that he was instrumental in the development of *Scottish Current Law*, a crucial service in the days before electronic databases,<sup>88</sup> and active in the reform of the law degree,<sup>89</sup> but his contributions both to legal publishing and legal education have yet to be properly detailed or assessed. Like Gloag before him, he lived in one of the houses in Professors' Square. This proximity to the teaching rooms had enabled Gloag to offer alcoholic breakfasts to select students: it is said that it enabled Gibb to turn up to 9am lectures wearing pyjama bottoms, combined with a suit jacket, tie and academic gown.

David Walker, his successor, claimed that towards the end of his tenure Gibb was "a rather depressed, disappointed man, feeling that he had not achieved what he had wanted or hoped to do".<sup>90</sup> Perhaps it was not always clear what Gibb had wanted or hoped to do: he told the publishers W. Green in 1946 that he was "writing or editing no more law books for a long time ever".<sup>91</sup> Over the

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<sup>81</sup> It is indicative of Gloag's modest personality that his short will stated that he "should desire to be cremated, with as little ceremony as possible". Typescript extract of holograph will of William Murray Gloag, NAS/IRS20/137.

<sup>82</sup> On 27 May 1936, he delivered a "Special University Lecture on Laws" at King's College London, with the title "The inter-relation of the legal systems of Scotland and England".

<sup>83</sup> E A Cameron, "Gibb, Andrew Dewar (1888-1974)", *Oxford Dictionary of National Biography* (2009).

<sup>84</sup> *Scotland in Eclipse* (1930), *Scottish Empire* (1937) and *Scotland Resurgent* (1950).

<sup>85</sup> See, however, L Farmer, "Under the shadow over Parliament House: the strange case of legal nationalism", in L Farmer and S Veitch (eds), *The State of Scots Law: Law and Government After the Devolution Settlement* (2001) 151.

<sup>86</sup> "Proposed Universities Law Legal Journal", dated 1/12/53. NLS Dep 217, Box 3, folder 1.

<sup>87</sup> "Twenty Five Years in the Faculty of Law", delivered to the Juridical Society on 7 Jan 1958. NLS Dep 217, Box 11, folder 4. See also "Note on the Juridical Review", 17 Feb 1956, NLS Dep 217, Box 3, folder 1.

<sup>88</sup> T B Smith, in an appreciation delivered at Gibb's memorial service (1974 SLT (News) 38), suggested that Gibb had not received enough credit for this.

<sup>89</sup> A D Gibb, "Reform in the Scottish law school: a lecture not yet delivered" 1943 JR 152.

<sup>90</sup> Walker, *History* 58.

<sup>91</sup> Gibb to G R Thomson, 14 July 1946, NLS Dep 217, Box 3, folder 1.

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next decade, he supplied Greens with two more editions of Gloag and Henderson,<sup>92</sup> a new edition of his own *Preface to Scots Law*,<sup>93</sup> and four brand new books.<sup>94</sup>

Following Gibb's retiral, David Walker was appointed to the Regius Chair in 1958, shortly after his 38<sup>th</sup> birthday. Just as Gibb had studied under Gloag, Walker had studied under Gibb. The process was a prolonged one: the Scottish Office had invited applications by the 8<sup>th</sup> February that year, but Walker was not notified that he was to be offered the chair until late May. In his *History of the School of Law*, he suggested that this was because the Scottish Office had thought him too young to hold the post.<sup>95</sup>

In fact, Walker's age never entered into the question. The Scottish Office, which handled the recruitment process directly, was concerned that it had only received two applications.<sup>96</sup> Walker was the only applicant from within Scotland; the other candidate was Scottish and had studied law at Aberdeen, but had pursued his academic career in Canada.<sup>97</sup> Both were regarded from the outset as strong candidates, eminently appointable, with Walker the stronger of the two. The civil servants, however, seemed worried purely about the numbers: something had surely gone wrong in the process if the field was so limited.

The Scottish Office was concerned, therefore, that steps should be taken to expand the field. The process followed seems, in retrospect, somewhat farcical. Names were sought and received from various quarters. Discussions ensued between the University Principal, the Scottish Office, the Lord Advocate and the Court of Session judge Lord Cameron. Eventually, it was accepted that there was no point in approaching any of the individuals whose names had been mentioned to ask whether they wished to be considered. There was no way in which any of them could be considered a better candidate than Walker. The futile escapade was brought to an end, and the Principal told Walker that he had the post.

In all of this, a crucial role was played by T B Smith, then Professor of Scots Law at Aberdeen and shortly to take up the Chair of Civil Law at Edinburgh, and often portrayed as a combative rival to Walker. Smith was regarded both by the Principal and the Scottish Office as the obvious adviser on the issue. His advice was pivotal. He dismissed suggestions by the Lord Advocate that the post might not have been properly advertised to members of the Bar. Anyone potentially interested and

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<sup>92</sup> He co-edited three editions of *Gloag and Henderson*: A D Gibb and N M L Walker (eds), *Introduction to the Law of Scotland*, 4<sup>th</sup> edn (1946), 5<sup>th</sup> edn (1952) and 6<sup>th</sup> edn (1956). The timing of his comments to Thomson may indicate that producing the fourth edition had not been a pleasant experience, but that is speculation.

<sup>93</sup> A D Gibb, *A Preface to Scots Law*, 2<sup>nd</sup> edn (1950). The first edition had been published in 1944. A 3<sup>rd</sup> (1961) and 4<sup>th</sup> (1964) followed after his retiral from the Chair.

<sup>94</sup> *Law from Over the Border: A Short Account of a Strange Jurisdiction* (1950); *Perjury Unlimited: A Monograph on Nuremberg* (1954); *Fragmenta Legis* (1955); *Judicial Corruption in the United Kingdom* (1957).

<sup>95</sup> Walker, *History* 65.

<sup>96</sup> See NAS/HH91/8. This was seen internally as surprising given that a "large" number of enquiries (nine) had been received from individuals who did not submit applications. This mismatch is, however, readily explicable. With at most two exceptions, those who requested copies of the terms and conditions but who submitted no application were unqualified for the chair, as having no knowledge of Scots law. The necessity of this was not explicit in the advertisement, but the requirement to take responsibility for the Department of Scots Law, as set out in the particulars, should have made this clear. One enquirer, L A Sheridan (later founding Dean of the Faculty of Law in the University of Malaya, now the National University of Singapore) did press the point. The Secretary to the University Court (Hutcheson) was consulted, confirmed that a knowledge of Scots law was essential, and this was duly relayed to Sheridan by the Scottish Office.

<sup>97</sup> Ian F G Baxter, then Professor at the Osgoode Hall Law School.

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qualified would have been aware that Gibb was due to retire.<sup>98</sup> “Academics”, he said, “like Regular Army, are as a rule keen students of necrology.”<sup>99</sup> Walker was the “outstanding man available”;<sup>100</sup> the lack of other applicants could be explained by the assumption that his appointment was “virtually a foregone conclusion”.<sup>101</sup> It was Smith’s counsel which secured Walker’s appointment to the chair.

Walker’s contribution to Scots law has never been properly evaluated. Given its scale, it perhaps never can be. Both Smith and Walker were deeply concerned about the lack of literature on Scots law, but they attacked the problem in very different ways. Alongside his own substantial scholarly contributions, Smith was instrumental in establishing the Scottish Universities’ Law Institute and the *Stair Memorial Encyclopaedia*, thereby encouraging academics and practitioners to write widely across the entire sphere of Scots law.<sup>102</sup> Walker had a different approach: he would do all the writing himself.

That is a caricature of the differences between the two men, but Walker’s published output defies belief. He has been described as “perhaps the most prolific legal writer in the British Isles”.<sup>103</sup> This is surely true, and perhaps best illustrated by a photograph of his works (displayed in the lecture) rather than an attempt to list them all.<sup>104</sup> It is emphasised further by his single-handed *Oxford Companion to Law*, published in 1980, recording his opinions on everything from A and B lists to the Belgian jurist Franciscus Zypaeus. It is not without its flaws, as another distinguished Glasgow graduate was to point out. Perhaps if only David Walker could produce a book such as the *Commentary* single-handed, only Alan Rodger could write an essay-length review of the results.<sup>105</sup> But it is an astonishing accomplishment by any standard. There is now a *New Oxford Companion to Law*, published in 2008. While Walker wrote his alone, the *New Companion* required 710 authors.

In a 1993 article, shortly after his tenure in the Chair came to an end, he explained that he had written so much for two reasons: first, because when he began to write, “there was a desperate need in Scotland for new, modern textbooks on all the central subjects of private law”,<sup>106</sup> but also because of:<sup>107</sup>

...an incurable disease with which I became afflicted in student days and for which no one has been able to offer any palliative. It is called *daimonia scribendi* – the existence within me

<sup>98</sup> And again, salary was an issue: “these legal chairs had little, if any, financial attraction to outstanding members of the legal professions, as the salaries attached compared unfavourably with those of Sheriff-Substitutes”. Note of meeting between Smith and Milne, 5 May 1958.

<sup>99</sup> Smith to Milne, 6 May 1958.

<sup>100</sup> Smith to Maclay, 20 Jan 1958.

<sup>101</sup> Smith to Milne, 6 May 1958.

<sup>102</sup> Reid, “While one hundred remain”, 25-27. See also K G C Reid, “The third branch of the profession: the rise of the academic lawyer in Scotland”, in H L MacQueen (ed), *Scots Law into the 21<sup>st</sup> Century: Essays in Honour of Bill Wilson* (1996) 39.

<sup>103</sup> B A Garner, *Garner on Language and Writing: Selected Essays and Speeches* (2009) 358.

<sup>104</sup> He is not one of the Walkers of *Walkers on Evidence*. As it happens, he had intended to be initially – the book was to have been by Walker, Walker and Walker – but as the preface to the first edition records, he had to withdraw due to pressure of work.

<sup>105</sup> A Rodger, “Good companion” (1981) 1 OJLS 257.

<sup>106</sup> D M Walker, “How I write” (1993) 4 Scribes Journal of Legal Writing 65 at 68. This was one contribution amongst a number which the journal’s editors had solicited from “some of their favorite legal writers”, inspired by Bertrand Russell’s essay of the same name.

<sup>107</sup> Walker, “How I write” at 69.

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of a tyrannical daimon that relentlessly pursues me with whips and scorpions if I do not do something every day, evening, weekend, holiday and any other time not absolutely spent on eating and sleeping (and formerly teaching, examining, and administering). I get a little relief daily from a medicine called *canis ambulation* (walking the dog), and during our summer vacation I take treatment called *montium peregrinatio* (walking the hills) and frequent doses of *librorum lectio* (reading books). Writing has been my consuming interest and hobby to the exclusion of sports and relaxations, and I have enjoyed it.

Walker was succeeded in the chair in 1991 by Joe Thomson. As Joe is present tonight, and still very active as an academic, it would be wrong of me to embarrass him by listing his many accomplishments. His contribution to Scots law, both in this chair and in his role as a member of the Scottish Law Commission, is widely recognised by both academics and practitioners and deservedly so. It is an honour to succeed him.

### **The end of generalism?**

These, then, are the men who I follow in the Chair today. (And they are all men: it is a matter of some regret that save for Frances Moran's appointment to the Dublin Regius Chair of Laws in 1934, there have as yet been no female occupants of any of the Regius Chairs in Law.<sup>108</sup>)

All of the twentieth century appointees to the Glasgow Chair produced generalist texts on the subject of law. Gloag co-authored *Introduction to the Law of Scotland*; Gibb wrote his *Preface to Scots Law*; Walker his *Principles of Scottish Private Law* and Thomson his *Scots Private Law*. But generalism of the sort embodied in the Chair has been under increasing pressure for some time as the body of the law has grown.

As early as 1821, the American Supreme Court Justice Joseph Story had identified the problem in the most memorable of terms. The "mass of the law" and the "ponderous volumes, which the next half century will add to the groaning shelves of our jurists", threatened "the fearful calamity... of being buried alive, not in the catacombs, but in the labyrinths of the law".<sup>109</sup> The solution, he thought, was regular codification and recodification, reducing the past "to order and certainty".<sup>110</sup> None of this has happened in this jurisdiction – indeed, Story's proposal of regular recodification has perhaps not taken root anywhere. But lawyers have not yet been buried by their books. With the aid initially of all manner of indexing and digesting schemes and more recently the technology of electronic databases, we have devised ever more elaborate means for keeping abreast of a literature which grows exponentially. A resort to specialism has necessarily been part of this process.

Generalism is sustainable (and necessary) for a longer period in a small jurisdiction. Probably no holder of the two great chairs of English law – the Downing Professorship at Cambridge and the Vinerian Professorship at Oxford – has produced a generalist text since William Geldart's *Elements of*

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<sup>108</sup> Moran was one of the first women to be admitted to the Irish Bar and also, in 1941, the first woman to become Senior Counsel in Ireland. See I Bacik, C Costello and E Drew, *Gender InJustice: Feminising the Legal Professions?* (2003) 58-61.

<sup>109</sup> J Story, "An address delivered before the Members of the Suffolk Bar, at their anniversary, on the fourth of September, 1821, at Boston" (1829) 1 *American Jurist* 1 at 31.

<sup>110</sup> At 32.



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*English Law* in 1907,<sup>111</sup> a book which Gibb saw as a model for his own *Preface to Scots Law*.<sup>112</sup> In an unpublished talk, probably delivered in the late 1940s, Gibb drew attention to this problem.<sup>113</sup>

The 230 odd years which have passed since 1713 have been marked by an amazing growth in the complexity of our civilization. The law too has in that period grown infinitely more complex since law inevitably reflects the nature and quality of a civilisation. Thus it has been found necessary as time went on to add to the students' knowledge of the Civil Law a rather sketchy outline of the principles of the law of Scotland, a more detailed knowledge of the complicated land laws, the law of the constitution, international law, jurisprudence and mercantile law.

He was less than impressed by the University of Glasgow's response, commenting that:

Few chairs have been created and it has to be recorded that an ancient University which boasts a professorship of Heat Engines, still lacks a Chair of Jurisprudence. There is, mercifully, contemporary evidence of a more enlightened policy in the future.

A Chair of Jurisprudence was created by the University in 1952, and first held by David Walker.

I mention this not because I want to say anything in particular about generalism. If it is dying, that death is probably both regrettable and unavoidable. To borrow an old joke, we live in times when everyone is becoming more and more knowledgeable about less and less, and we will soon have professors who are unsurpassed in their knowledge of nothing at all. But I want to express some self-doubt at this point. Although I have written on private law and the Scottish legal system more generally, I am primarily a criminal lawyer. What precisely, am I doing in a chair of Scots law?

### **Criminal law's place**

To answer this question, I want to make a detour to Dublin, to consider the views of another Regius Professor. The wonderfully named Mountifort Longfield was a generalist *par excellence*, having been not only the Regius Professor of English and Feudal Law in that institution but also the Professor of Political Economy.<sup>114</sup> He explained his approach to teaching law as follows:<sup>115</sup>

I try to take a two years' course; in the course of two years to go through the body of law, except that I have never lectured on criminal law, not considering it worth calling the attention of students to. There are no fixed principles in it, except that men must not commit certain crimes, and if they do, there are certain punishments.

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<sup>111</sup> The Vinerian Chair, which will fall vacant with Andrew Ashworth's retirement in 2013, was advertised in 2012 on the basis that the successful candidate "will be a leader in scholarship and teaching in one or more of the areas within the field [of English law]". University of Oxford, 'Job description and selection criteria: the Vinerian Professorship of English Law' (2012) 1.

<sup>112</sup> See correspondence with W Green in NLS Dep 217, Box 3, item 6.

<sup>113</sup> "The Faculty of Law in the University of Glasgow" (nd). NLS Dep 217, Box 11, folder 6.

<sup>114</sup> A A Tait, "Mountifort Longfield 1802-1884: economist and lawyer" (1982) 133 *Hermathena* 15. Longford was appointed to the Chair of Political Economy in 1832 and to the Regius Chair of English and Feudal Law in 1834. He resigned the former – which had a maximum tenure of five years – in 1836.

<sup>115</sup> *Report from the Select Committee on Legal Education* Q 2835.

## Resorting to Crime

In the 1910-11 academic year, when Gibb was Gloag's student in Glasgow, Gloag delivered 92 lectures, of which it seems that only the last two contained any discussion of criminal law.<sup>116</sup> I say "it seems" because Gibb slept in on the day of lecture 90 and missed it, and was honest enough to record this for posterity in his notes. The content of lecture 91 seems, however, obviously to have been the start of Gloag's treatment of the subject, and so we can safely say that two lectures it was.<sup>117</sup> This compares with, for example, 24 lectures on the law of obligations.<sup>118</sup>

Was that adequate? David Walker thought the treatment "had to be" very brief, because Gloag's task of "covering the main topics of the whole private law in less than 100 lectures" was "impossible".<sup>119</sup> The latter claim may be true, but there is an interesting assertion of priority here. Criminal law is recognised as essential to a complete course in Scots law, even if it had sometimes been omitted. But on Gloag and Walker's account, the most cursory of nods would suffice. Criminal law was to be resorted to for completeness, nothing more.

Gloag did (along with Henderson) include a chapter on criminal law in his *Introduction to the Law of Scotland*, but it does not suggest that either author was much interested in the subject: it bears a striking similarity to the corresponding chapter in Erskine's *Principles*, the textbook it was intended to replace. It does not survive: the editors of the tenth edition announced that they had felt the time was right to excise the chapter (but without explanation).<sup>120</sup> Gibb certainly was interested in criminal law, and lectured rather more extensively on it. Walker may not have been, but he once wrote a book chapter on the topic perhaps just to show that he could.<sup>121</sup>

The place of criminal law in the Scots law curriculum has varied over time. We know that the two great eighteenth-century Regius Professors, Forbes and Millar, were both deeply interested in the subject and devoted significant attention to it.<sup>122</sup> That level of attention seems to have diminished greatly when Millar was succeeded by Davidson.<sup>123</sup> David Hume, Professor of Scots Law at Edinburgh from 1786 to 1822, described criminal law as "certainly the noblest and most interesting part of [the lawyer's] profession"<sup>124</sup> and devoted a separate summer course to it.<sup>125</sup> These lectures formed the basis for his *Commentaries*, the outstanding work on Scots criminal law for some time and by some

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<sup>116</sup> Gibb's notes of Gloag's lectures (and others) are held by the National Library of Scotland (NLS Dep 217, Box 12, item d). These meticulous notes of one Regius Professor's lectures by his eventual successor are a tragically under-utilised resource.

<sup>117</sup> Walker (*Scottish Jurists* 411) says "two or three", perhaps on account of Gibb's notes.

<sup>118</sup> 14 on contract, six and a half on delict, and three and a half on prescription and remedies.

<sup>119</sup> Walker, *Scottish Jurists* 411.

<sup>120</sup> W A Wilson and A D M Forte (eds), *Introduction to the Law of Scotland*, 10<sup>th</sup> edn (1995) ix.

<sup>121</sup> D M Walker, "The interaction of obligations and crime", in R F Hunter (ed), *Justice and Crime: Essays in Honour of the Right Honourable the Lord Emslie* (1993) 15.

<sup>122</sup> This is self-evident from the treatment of criminal law in Forbes' *Institutes*. On Millar, see J W Cairns, "John Millar's lectures on Scottish criminal law" (1988) 8 OJLS 364.

<sup>123</sup> See Cairns, "From speculative to practical" 352-355, comparing the headings of lectures in Millar, Hume and Davidson's lectures. Davidson's lectures have a single heading "Of crimes", while Millar has five relevant headings along with two more relating (one only in part) to criminal procedure. But the headings are not equivalent to individual lectures and so, not having consulted the original materials, I make this claim tentatively.

<sup>124</sup> D Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, 4<sup>th</sup> edn (1844) i, 2.

<sup>125</sup> Cairns, "Millar's lectures" 396.

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distance. By contrast, his successor in the chair, Bell, ignored the subject altogether. In turn, he was sharply criticised by his own successor for so doing.<sup>126</sup>

But I do not want to be too critical. The fact is, Longfield had a point and was honest enough to admit it. Criminal law *was* devoid of fixed principles. The attempts by earlier scholars and lecturers to categorise and order offences created the illusion of principles where they did not exist. One nineteenth century Scottish text gave up on these attempts and simply listed crimes alphabetically in the form of a dictionary,<sup>127</sup> and a modern text which will see its sixth edition published next month takes a similar approach.<sup>128</sup> Criminal law's lack of principle made it impossible to give a short overview of the topic, and Gloag's two lectures lack any coherence. The only way to give a proper account of the criminal law was to aim at comprehensiveness.<sup>129</sup> That explains why in the eighteenth and nineteenth century, some teachers developed the subject into a separate summer course.<sup>130</sup> That would not, however, have been attractive to professors with limited interest in the subject.<sup>131</sup>

Hume's masterful *Commentaries* are sometimes described as "principled",<sup>132</sup> but in fact he was quite explicit that he had "no intention of bringing forward a Philosophical Treatise of Criminal Jurisprudence" or to attempt to ascertain "on abstract and universal principles, the nature of the several offences".<sup>133</sup> His *Commentaries* are not unprincipled in any pejorative sense, but they are an attempt comprehensively to document, systematise and understand the great body of the criminal law, not to reduce it to the fixed principles which Longfield found lacking. There are many magisterial works from which key points, capable of exposition in a lecture or two, can be distilled. Hume's *Commentaries* is unquestionably magisterial, but it is not and was never meant to be a work capable of such reduction.

But just as legal generalism becomes less and less feasible as the body of the law grows, so does an attempt to treat the criminal law in a comprehensive fashion as the legislature resorts ever more frequently to that device. When Macdonald, later Lord Justice-Clerk, published his *Practical Treatise on the Criminal Law of Scotland* in 1867, he sidestepped this problem, stating at the outset that he would deal only with those offences punishable by death or immediate imprisonment.<sup>134</sup> Dealing with other offences would take up too much space, and they could not in any case "truly be

<sup>126</sup> J S More, *Lectures on the Law of Scotland* (J McLaren ed, 1864) vol 1, 15.

<sup>127</sup> J W Angus, *A Dictionary of Crimes and Offences According to the Law of Scotland* (1895). A second edition was published in 1915 and a third in 1936.

<sup>128</sup> P Hamilton, *A Fingertip Guide to Criminal Law*, 6<sup>th</sup> edn (2013).

<sup>129</sup> Note also Erskine's statement that 'the Doctrine of Crimes, if properly explained, would take up a whole Course of Lectures by itself': Cairns, "Millar's lectures" 395, quoting from Signet Library, MS 7 (law), vol 2, 313.

<sup>130</sup> Such as Hume, and also Bayne (the first Professor of Scots Law at Edinburgh). Millar's lectures on criminal law at Glasgow were more detailed but did not, as has sometimes wrongly been suggested, form a separate summer course. See generally Cairns, "Millar's lectures".

<sup>131</sup> It also raises the question of how attractive such courses were to students in comparison to the general Scots law course.

<sup>132</sup> See e.g. G H Gordon, *The Criminal Law of Scotland* (1968) 3-4 (referring to Hume's discussion of the "principles of Scots criminal law"). Of course, much depends on what a "principle" is taken to be in this context. See L Farmer, "The idea of principle in Scots criminal law", in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 86.

<sup>133</sup> Hume, *Commentaries* i, 14.

<sup>134</sup> J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (1867) 1 ("those offences only, for the suppression of which the law has entrusted the judge or magistrate with the power of pronouncing a sentence of death or immediate deprivation of liberty, without the offender being entitled the option of paying a pecuniary penalty").

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described as crimes”.<sup>135</sup> There is something to be said for this limiting device – although as Macdonald himself admitted, it was far from perfect.

It was not until 1959, when perhaps the most important PhD thesis to be completed in this law school was submitted, that matters changed. That was Gerald Gordon’s *Criminal Responsibility in Scots Law*,<sup>136</sup> and I am greatly honoured by Sir Gerald’s presence here tonight.

Gordon’s work – later published, in expanded form, as *The Criminal Law of Scotland* in 1968, was genuinely principled in a way that previous treatments of Scottish criminal law had not been. In a similar vein to the groundbreaking English work of Glanville Williams a few years earlier,<sup>137</sup> it sought to impose “some sort of theoretical order”<sup>138</sup> on the law, focused on individual responsibility and reflecting the author’s dual philosophical and legal training. In its published form, it differed significantly from Williams’ work, in that it addressed both the “general part” and the “special part” – that is, particular crimes. The latter part, save for homicide, had not formed part of Gordon’s thesis, but the Scottish Universities’ Law Institute felt it necessary to make the book a more attractive commercial proposition.<sup>139</sup> Principles, set alone, do not sell well.

There has been much disappointment expressed about the fact that Williams never wrote a “special part” for English law. But that is perhaps not surprising: Williams had at length defended the view that a crime was simply anything which could be prosecuted in the criminal courts, and that further definition was neither possible nor helpful.<sup>140</sup> If that view is taken to its logical conclusion, the special part is unwriteable. There is too much criminal law, and has been for a very long time, for anyone to attempt that enterprise without becoming demented.

But somehow, we still teach and write on criminal law, and most of us stay relatively sane. How?

### **Varje abstrakt bild av världen är lika omöjlig som ritningen till en storm**

Or, in English, every abstract picture of the world is as impossible as the blueprint of a storm. I use this quote, from the Nobel Prize winning poet Tomas Tranströmer, for two purposes. First, to illustrate the curious coincidence that both Andrew Dewar Gibb and I spent time learning Swedish for reasons which seem equally obscure in each case.

Tranströmer does not deny the existence of abstract pictures in this line – that might be an odd thing for a poet to do. The problem is both their impossibility and their necessity. In teaching or writing on criminal law, we offer an abstract picture of it, selecting from its chambers in a way which we hope makes some sense of the topic, but which can never be a true blueprint of our subject. The topics we cover in our courses and books are arbitrary and contingent. Almost all criminal law courses and books spend a considerable amount of time on the law of homicide. Why? We rarely think about this. If pressed, we might say it is an important offence which we use to illustrate

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<sup>135</sup> Ibid. Macdonald’s work went through five editions, the last being published in 1948, and was the standard work on Scottish criminal law prior to G H Gordon, *The Criminal Law of Scotland* (1968).

<sup>136</sup> This thesis is now available electronically via the Glasgow Theses Service, at <http://theses.gla.ac.uk/2753/>. This archive primarily contains theses submitted relatively recently, but a number of other older PhD theses have been made available. In addition to Gerald Gordon’s, these include William McBryde’s *Void, Voidable, Illegal and Unenforceable Contracts in Scots Law* (1976), at <http://theses.gla.ac.uk/2488/>.

<sup>137</sup> G L Williams, *Criminal Law: The General Part* (1953).

<sup>138</sup> Farmer, “The idea of principle” 98.

<sup>139</sup> Farmer, “The idea of principle” 98 n 56.

<sup>140</sup> G Williams, “The definition of crime” (1955) 8 CLP 107.

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general principles. But in fact, the entire structure of homicide is a mess which is replicated nowhere else in the criminal law. Perhaps it is because it is so serious – but few courses discuss the offence of genocide. Perhaps that is because it is serious and actually prosecuted in the Scottish courts – but few courses do more than touch on offences such as causing death by dangerous or careless driving.

Practice is by no means uniform, but most (not all) university criminal law teachers say little or nothing about road traffic offences, misuse of drugs or offensive weapons, crimes far more commonly prosecuted than some of those which we lecture on. And, like many law teachers, we say relatively little about statutes for no reason other than an instinctive aversion to them, preferring to concentrate on the humanity of case law.

I do not mean to condemn the enterprise of teaching criminal law, and I am as guilty as anyone else of any charges I might lay here. Much of what we do, we do for a reason, and it can be justified – although we have rarely bothered to articulate those justifications and I am not sure that we have much sense of what they are. But we should pause to consider whether the abstract picture we are offering is really “the criminal law”. We operate on the understanding that criminal law is a device by which the community calls serious offenders to account for their wrongs. And criminal law is an important part that – but only in part.

### **Resorting to crime**

Earlier on in the lecture, I mentioned the number 3023, and it is to that number that I now turn. This number came to prominence in August 2006, when it was reported in the press that this was the number of offences which New Labour had created since coming to office in May 1997: almost one for every day in office.<sup>141</sup> This represented everything that was wrong about New Labour. They had been “seduced by the politics of penal populism”,<sup>142</sup> seeing the criminal law as “a multi-purpose solution to contemporary social ills”.<sup>143</sup> The idea that New Labour had resorted too readily to the criminal law gained considerable traction, and the Coalition government committed itself to “introduc[ing] a new mechanism to prevent the proliferation of unnecessary new criminal offences”.<sup>144</sup> When the press release announcing this was issued, the next paragraph committed the Coalition to criminalising the possession of illegal timber:<sup>145</sup> a sensible editor moved the two commitments rather further apart in the final document.

The figure of 3023 was important, because it evidenced the fact that we have practically no systematic understanding of what the criminal law actually is. Let me demonstrate by inviting you to play a short game. Take the following supposed offences (under English rather than Scots law):

- Wearing armour in the Houses of Parliament
- Handling salmon in suspicious circumstances
- Dying in Parliament
- Allowing a boy under the age of 10 to see a naked mannequin

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<sup>141</sup> N Morris, “Blair’s ‘frenzied law making’: a new offence for every day spent in office”, *The Independent* 16 August 2006. Fiona Leverick and I deal with the origins of this figure in more detail in “Quantifying criminalisation”, to be published later in 2013.

<sup>142</sup> D Wilson, “Seduced by the politics of penal populism”, *The Independent* 16 Aug 2006.

<sup>143</sup> A Crawford, “Governing through anti-social behaviour” at 826.

<sup>144</sup> HM Government, *The Coalition: Our Programme for Government* (2010) 11.

<sup>145</sup> And its import: see sections 10 and 11 of the text at <http://www.guardian.co.uk/politics/2010/may/12/lib-dem-tory-deal-coalition>.

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Do you think these are crimes? Give it some thought while I explain the background. I mention these because they have all been listed in the media as examples of crazy laws at one time or another. Last year, the Law Commission for England and Wales decided to perform a public service by researching a whole number of supposed “crazy laws” and publishing the true position. The Law Commission, and its counterpart the Scottish Law Commission, are statutory bodies tasked with keeping the law under review and recommending reform. Law Commissioners are some of the most learned lawyers in the country.

So you can rely on what the Law Commission says. Or you should be able to, but with an embarrassing lack of confidence in its own abilities, it headed up the list with a disclaimer that “readers should not rely on it without conducting their own research”.<sup>146</sup> Never mind. What are the answers?

The first two are in fact offences, under the 1313 Statute Forbidding Bearing of Armour and the Salmon Act 1986.<sup>147</sup> So now you know. The third is not. (You might think that in any event it would be difficult to prosecute someone for an offence of “dying”, but we used to prosecute dead people for treason in Scotland, even digging up their corpses to present before the court, so it is not impossible.<sup>148</sup>) And the fourth, which was publicly listed as an offence by a Swansea firm of solicitors in 2006?<sup>149</sup> Here is the Law Commission’s response :

“No evidence.”

Let me emphasise that: “no evidence”. The Law Commission does not know what the law is. How is anyone else supposed to?

### **The chaos of the criminal law**

How could the Law Commission not know whether something was a criminal offence or not? The answer is that our criminal law is far more chaotic than we generally admit. Offences might be found anywhere in the vast range of statutes enacted and statutory instruments made each year.

Nevertheless, that is a closed list of material, well documented in commercially available databases. Surely the Commission could confirm that it contained no mannequin-related offences? But it is not just Parliaments and Governments who make criminal law. In another recent project, the Law Commission estimated that criminal law could also be made by 486 local authorities, an unspecified number of trading standards authorities and “over 60” national regulators.<sup>150</sup> Note that “over 60”. Not only do we not know how many criminal laws exist, we are not even sure how many *legislators* there are. Nor is there any systematic publication of the offences which they create.

Were you shocked when I said that New Labour had created 3023 criminal offences in ten years? Perhaps you remembered that I had said earlier on that the figure was badly wrong, and chalked it up to media hyperbole. There was never much reason to think it reliable. It had been compiled by the efforts of the Liberal Democrats, who had struggled for years to extract information from different government departments about how many offences they were creating. But it is difficult to

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<sup>146</sup> Law Commission, *Legal Curiosities: Fact or Fable?* (2012), available at [http://lawcommission.justice.gov.uk/docs/Legal\\_Oddities.pdf](http://lawcommission.justice.gov.uk/docs/Legal_Oddities.pdf).

<sup>147</sup> Section 32.

<sup>148</sup> See W K Dickson, “The Scots law of treason” (1898) 10 JR 243.

<sup>149</sup> “Where mince pies break the law...”, *BBC News Online* 23 Dec 2006. Mince pies do not break the law.

<sup>150</sup> *Criminal Liability in Regulatory Contexts* (Law Com CP No 195, 2010) para 1.21.

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see how they had arrived at their final figure, because they had been stonewalled so often. Not because the relevant departments didn't want to tell them, but because they didn't know themselves.

The only way to find out how many offences are being created is systematically to review the legislation produced each year (although even that will give an incomplete picture, because of the other legislators I mentioned just now). It is a tedious job, and while various academics have expressed the view that someone ought to do it, none of them has cast themselves in the role of someone.

If you have remembered my thoughts about the statutes in Morrison and Richards' library, or the comments of their staff partner on my work experience report, you may have sensed where this is going, you may have sensed where this is going. Fiona Leverick and I, along with a research assistant, Peter Lewin, have attempted to make a start on just this task. I have said nothing about Fiona Leverick so far, so it is at this point that I should embarrass her by emphasising just how lucky I have been to have worked with her, first at Aberdeen, then at a distance for some years when she moved to Glasgow and I to Edinburgh, and now in the same institution again. All my most valuable work has been done in conjunction with her (you may safely assume that the better parts of those works are hers and not mine) and I would undoubtedly not have been appointed to this chair were it not for the opportunity I have had to work with her over the years. Both of us were also extremely fortunate to have been taught criminal law by Michael Christie and Chris Gane.

Our work identified 1395 offences created by the New Labour government. You may be relieved to learn that matters are not as bad as the media suggested. But 1395 offences is still a lot. Also, I'm taking advantage of the fact that you are now tired and thinking about the wine reception to play a little trick on you. We did identify 1395 offences. But we were only looking at a single year. 1395 is the number of offences created by New Labour in the twelve months after the 1997 general election. This suggests that New Labour might have created something in the region of *fourteen thousand criminal offences* in its first decade. Of course, we cannot know whether the rate of creation remained constant over that time, although we have as yet no reason to think that the first year was atypical. And crucially, at this stage in our research, it is not yet possible to identify the rate at which criminal offences are repealed, although it will be eventually. Many of these offences will have been the result of legislative churn as legislation was consolidated or replaced.

But, you might think, most of this isn't "real crime". Whatever that means. In the absence of any better definition, we might take Macdonald's dividing line of imprisonment: an offence is only a "real crime" if you can be sent to jail for committing it. On that basis, New Labour created 906 real crimes in its first year, hardly a more encouraging figure.

I said earlier that the Coalition had sought to do something about this. Its solution is a purely administrative one. A civil servant who wants to create a criminal offence must send an email to [offencesgateway@justice.gsi.gov.uk](mailto:offencesgateway@justice.gsi.gov.uk) asking for permission, and the Secretary of State decides whether permission is to be granted. There is no identified test to be applied, although there is a list of factors to be taken into account.<sup>151</sup>

Has this worked? Possibly. The Ministry of Justice published figures of the number of criminal offences created in the year before and after the Coalition took power, purporting to show a drop of

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<sup>151</sup> Ministry of Justice, *Criminal Offences Gateway Guidance* (2011).

just over 60% in the number of offences created.<sup>152</sup> But our research suggests that the Ministry has somewhat undercounted the number of offences it created in that year – they think it was 174; it was actually 608<sup>153</sup> – and as we have not yet examined the previous year ourselves, we cannot judge their claim.

But a reason to think that it might have made a difference is offered by this table.

**Total number of offences created in England and Scotland, 97-98 and 10-11  
(including both Westminster and Holyrood legislation)**

<b>Geographical applicability</b>	<b>1997-1998</b>	<b>2010-2011</b>
England	1235	608
Scotland	1238	1222

In brief, twice as many criminal offences were created applying to Scotland in the first year of the Coalition government than were created applying to England. At first sight, these figures seem to imply that the Scottish Government has been much more willing to resort to the criminal law than its Westminster counterpart. However, much more work has to be done to understand the difference.

### **The concept of criminalisation**

Criminalisation is a tricky concept, and means many different things. Nicola Lacey has observed that we should distinguish between “formal” criminalisation – the law on the books – and “substantive” criminalisation – the law in action.<sup>154</sup> We actually know a great deal about substantive criminalisation, through official statistics and empirical research, although as with most subjects we will never know as much as we might like to. The surprising thing is that we have next to no systematic knowledge about formal criminalisation. It is tempting to respond “so what”: surely only substantive criminalisation matters? But aside from the fact that substantive criminalisation requires formal criminalisation as a pre-requisite, the data we have on substantive criminalisation will never show us the full picture. Any data available always invites us to consider a different stage: when we look at prosecution figures, we should think of alternatives to prosecution; when we look at alternatives to prosecution we should think of informal interactions by police and regulators; when we look at informal actions we should think of the steps people take to comply with the criminal law without official intervention. Understanding formal criminalisation is no magic bullet: it is simply one element of a complex reality. And the “headline figures” I gave you earlier, while striking, are in many ways a trivial matter – since no-one knows how many criminal offences there ought to be, simply knowing how many there are would not actually tell us very much. It is the more detailed analysis – which could occupy many lectures – that is more enlightening and useful.

<sup>152</sup> Ministry of Justice, *New Criminal Offences: England and Wales 1<sup>st</sup> June 2009-31<sup>st</sup> May 2011* (2011).

<sup>153</sup> Actually, the time periods we have assessed are slightly different, and our figure of 608 corresponds to only 157 identified by the Ministry over the same time period. The difference exists in part because the Ministry appears to have missed some offences entirely, but also because of differences in approach to the question of how “a” criminal offence has been committed. These are discussed further in J Chalmers and F Leverick, “Tracking the creation of new criminal offences”, in progress, and space precludes a full explanation here, save to note that the Ministry’s approach makes any count overly dependent on the vagaries of drafting technique, so that it cannot be assumed to have resulted in an accurate comparison between the two years.

<sup>154</sup> Lacey, “Historicising criminalisation”.



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In a draft paper which Fiona Leverick and I circulated to colleagues late last year, we described this lack of knowledge as “embarrassing”, which provoked an interesting response: a number of our commentators took issue with this. *They* were not embarrassed, although I think they thought someone ought to be. But it is embarrassing: those of us working in the field teach criminal law without really knowing what criminal law is. There is a temptation to focus on what we see as “fundamentals”, treating all these new offences as noise to be disregarded. But that is to ignore the fact the fundamentals were only ever deductive principles discerned from the great body of the criminal law. The idea that we can disregard that ever greater body and cling to what we know best as the wreckage accumulates around us has little to commend it.

### **The future**

I said earlier that I had thirty years to answer any questions posed tonight, and I hope you will forgive me for taking advantage of at least some of that time. It has been fashionable in recent years to make claims of overcriminalisation, claims which are almost self-evidently correct. The restatements and reformulations of general principle which have flowed from those debates are hugely valuable, but demonstrate a huge gulf between theoretical accounts of the criminal law and the practical reality. Until we understand what the criminal law actually is, how governments resort to it, why they do so, and what alternative strategies might be advocated, our efforts to temper criminalisation are likely to be of limited success.

I do not offer that quite as a manifesto. In any case, we know what happens to manifesto commitments. And I hope that my contribution in this Chair will not be confined to the issues I have discussed tonight. Nevertheless, I hope I have given you some hope that my tenure in the Chair might be of some value. And if not, wine has been provided for you to drown your sorrows.

Thank you for listening.