

RE-VISITING THE FRAUD ACT 2006 – A STEP TOO FAR?

Hannah Willcocks

Brought into force on 15th January 2007,¹ the Fraud Act 2006 ('the Act') has now been part of the criminal law of England and Wales for over 12 years. Through the introduction of a new general offence of fraud, its aim was to improve the law by making it:

- a. more comprehensible to juries, especially in serious fraud trials;
- b. a useful tool in effective prosecutions;
- c. simpler and therefore fairer; and
- d. more flexible so able to encompass all forms of fraud² and “*deal with developing technology*”.³

Following the Act's implementation, it has generally⁴ been accepted⁵ that the Act has managed to overcome the vast majority of the difficulties previously encountered with the old offences of deception.⁶ In 2012, in its *Post-Legislative Assessment of the Fraud Act 2006*, the Ministry of Justice ('MoJ') concluded that the aims and objectives of the

¹ The Fraud Act 2006 (Commencement) Order 2006 (SI 2006/3200).

² Law Commission, *Fraud* (Law Com No 276, Cm 5560, 2002), para 1.6.

³ Home Office, *Fraud Law Reform: Consultation on Proposals for Legislation* (2004) p. 5.

⁴ For a contrary view see Anthony Arlidge QC, Jonathan Fisher QC, Alexander Milne QC and Polly Sprenger, *Arlidge and Parry on Fraud* (5th edn, Sweet & Maxwell 2016) 44, para 3-005.

⁵ See e.g. Simester and Sullivan's *Criminal Law, Theory and Doctrine* (5th edn, Hart Publishing Ltd 2013) 610; Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press 2013) 405; Carol Withey 'The Fraud Act 2006 – some early observations and comparisons with the former law' (2007) 71(3) Journal of Criminal Law, 220 – 237, 228 – 236; Nicholas Yeo, 'Bull's-Eye', 157 NLJ 212 & 418.

⁶ i.e. ss15, 15A, 16 and 20(2) Theft Act 1968 and ss1, 2(1)(a), 2(1)(b) and 2(1)(c) Theft Act 1978 (as amended by the Theft Act 1996).

Act had therefore been successfully met.⁷ There have, consequently, been virtually no amendments to the Act since its enactment⁸ and none following the MoJ’s Assessment. Furthermore, whilst the recently published Economic Crime Plan 2019-2022 includes an action plan to consider legislative changes,⁹ the Act appears to have survived the Plan unscathed. Yet neither the 2012 Assessment, nor more recent reviews of the legislative economic crime regime have addressed the most notable criticism made of the Act, namely that the Act’s scope is so wide that it has effectively ‘criminalised lying’.¹⁰ By contrast, this paper seeks to explore this critique in depth.

Underpinning this enquiry is an acknowledgement that the number of fraud offences being committed is still on the rise¹¹ and the instance of fraud is costing the UK more and more money.¹² It is therefore, on any view, vitally important that the UK ensures that it has got the law on fraud absolutely right. Such certainty, however, can only be achieved through a comprehensive assessment of the law. This paper is thus designed to form but a first small step in that comprehensive assessment.

Over-Criminalisation?

One of the most trenchant criticisms to be levied at the Act since its implementation is that it is “*overbroad*”. In his seminal article ‘The Fraud Act 2006 – criminalising

⁷ (Memorandum to the Justice Select Committee, Cm 8372, 2012) para 41.

⁸ Only minor ones to ss. 9 and 10 by the Companies Act 2006.

⁹ HM Government & UK Finance, *Economic Crime Plan 2019-22* (July 2019) 32 – 36.

¹⁰ See e.g. David Ormerod, ‘The Fraud Act 2006 – criminalising lying?’ [2007] Crim LR 193.

¹¹ Crime Survey for England and Wales: : <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearchangingdecember2018> [Accessed May 29, 2019].

¹² Recently estimated at £190 billion: National Crime Agency, *National Strategic Assessment of Serious and Organised Crime* (2019), <https://nationalcrimeagency.gov.uk/who-we-are/publications/296-national-strategic-assessment-of-serious-organised-crime-2019/file> [Accessed May 29, 2019].

lying?’, Professor Ormerod QC argued that s2(1) of the Act appears to have rendered lying a criminal offence of fraud.¹³ Broadly adopted as being correct, that analysis has been expanded upon¹⁴ by others. Recognising that the “reach of the criminal law”¹⁵ has been extended, commentators have observed that s2 of the Act is now “wider than conspiracy to defraud”¹⁶ and potentially criminalises even those who have “taken a reasonable risk”.¹⁷

Similarly s4 of the Act has been labelled “a catch-all provision”,¹⁸ giving rise “to the potential for all sorts of trivial civil law disputes within the family or employment to become issues of criminal law”,¹⁹ including “many traditional breach of confidence fact scenarios”.²⁰ Meanwhile the ambit of section 6 has been noted for encompassing “practically any article”,²¹ whilst the extension of fraudulent trading to include sole traders under section 9 of the Act has been said to make it “close to a general dishonesty offence”.²² Indeed commentators have been quick to observe that the Act has gone much further than the Law Commission’s original Bill.²³

¹³ David Ormerod, ‘The Fraud Act 2006 – criminalising lying?’ [2007] Crim LR 193-219, 196 & 219.

¹⁴ See e.g. Chris Monaghan, ‘Wide of the Mark’ (2009) 153 SJ (40) 12-13.

¹⁵ Simester and Sullivan (n5) 610.

¹⁶ David Ormerod and David Huw Williams, ‘The Fraud Act 2006’ [2007] 1 Archbold News 6-9, 7.

¹⁷ Arlidge and Parry on Fraud (n4) 80-81, para 4-091.

¹⁸ SC Deb (B) 20 June 2006, col 25.

¹⁹ (n16) 8.

²⁰ Ben Allgrove and Simon Sellars, ‘The Fraud Act 2006: Is Breach of Confidence Now a Crime?’ (2009) 4 JIPLP 278-282, 278.

²¹ (n16) 8.

²² Nicholas Yeo (n5) 418.

²³ See e.g. Jessica Holroyd, ‘Reform of Fraud Law Comes Closer: Fraud Bill 2005-06’ 69 JCL 503-507, 504; Jennifer Collins, ‘Fraud by Abuse of Position: Theorising section 4 of the Fraud Act 2006’ [2011] Crim LR 513-523, 515 and Arlidge and Parry on Fraud (n4) 118-119, paras 5-012-013 & 5-015.

Also noted is the overlap between offences created by the Act.²⁴ As Nicholas Yeo observes:

*“Most frauds are thefts. Most frauds by failing to disclose are frauds by false representation. Most fraudulent trading is fraud. Almost all conspiracies to defraud are fraud or another statutory offence”.*²⁵

All this readily leads to a working hypothesis that the Act has significantly contributed to the rise of over-criminalisation in this country. According to Pantazis, a new criminal offence was created nearly every day between 1997- 2006.²⁶ Despite MoJ claims to the contrary, further research by Chalmers and Leverick has shown that an additional 634 offences were introduced between May 2010 and May 2011,²⁷ provoking a claim that we were facing “*a crisis of over-criminalisation*”.²⁸

Since then Chalmers, Leverick and Shaw have sought to demonstrate that “*the creation of criminal offences in large numbers is not*” in fact a “*peculiarly modern phenomenon*”.²⁹ What their conclusion seems to ignore, however, is that even taking into account modern developments, the rate of criminalisation ought surely to gradually diminish as a body of criminal offences becomes firmly established. Further, just because a high volume of offences was created in the past, does not necessarily make it acceptable for that practice to continue.

²⁴ See e.g. (n13) 204, (n16) 7; (n4) 116, para 5-003 and Carol Withey (n5) 228 & 236.

²⁵ (n5) 418.

²⁶ Christina Pantazis, ‘The Problem with Criminalization’, (2008) 74 Crim Just Matters 10 cited in Douglas Husak, ‘Reservations about Overcriminalization’ (2011) 14 New Criminal Law Review 97-107.

²⁷ Chalmers and Leverick, ‘Tracking the Creation of Criminal Offences’ [2013] Crim LR 543-560, 544.

²⁸ (n27) 560.

²⁹ James Chalmers, Fiona Leverick and Alasdair Shaw, ‘Is Formal Criminalisation Really on the Rise? Evidence from the 1950s’ [2015] Crim LR 177-191, 191.

Implicit then in the literature discussed is the suggestion that the Act has widened the scope of fraud beyond that which is reasonable with questions being raised as to whether or not certain conduct ought to be either labelled as fraud and / or considered a crime. Yet whilst Ormerod concludes that “*the offences are so wide that they provoke the kind of astonishment that Professor Green expresses when considering the lowest common denominator of the moral content of fraud*”,³⁰ no analysis is offered as to where, from a theoretical point of view, the line ought to have been drawn. Similarly, whilst others have echoed Ormerod’s contention that the Act is overbroad with varying degrees of enthusiasm (its provisions have, for instance, been described as “*wide indeed*”,³¹ “*extremely wide*”,³² “*alarmingly wide*”,³³ “*too broad*”,³⁴ “*very broad*”,³⁵ and “*incredibly broad*”³⁶), noticeably absent (save for one particular exception³⁷) is any theoretical benchmark against which the commentators’ assessments are made. Further, the repeated assumption appears to be made that over-criminalisation can be cured and / or avoided by the exercise of proper prosecutorial discretion.³⁸

This may seem like a harsh criticism of those commentators’ work. It is not intended as such. Their analysis of the Act and its potential ramifications provide much insight and thought into what has been completely uncharted territory. Moreover for many, their purpose was deliberately limited: to explore how the offences would operate in practice and consider whether the problems of the past had once and for all been dispelled.

³⁰ (n13) 219.

³¹ Jennifer Collins (n23) 515.

³² Chris Monaghan, ‘Fraudulent Education’ (2009) 173 JPN 810.

³³ (n4) 119, para 5-013.

³⁴ Nicholas Yeo (n5).

³⁵ Ian Dennis, ‘Fraud Act 2006 – Editorial’ [2007] Crim LR 1-2, 2.

³⁶ Chris Monaghan, ‘To Prosecute or Not to Prosecute? A Reconsideration of the Over-zealous Prosecution of Parents under the Fraud Act 2006’ (2010) 74(3) JCL 259-278, 269.

³⁷ Namely Jennifer Collins’ analysis of s4 (n23).

³⁸ See e.g. Ormerod & Williams (n16) 9; Monaghan (n36) 268 & 277 and Collins (n23) 522.

My purpose is somewhat different. In order to start assessing the true impact of the Act and whether its reported success is misplaced, I must determine first and foremost the extent to which the Act is overbroad. As Douglas Husak explains:

*“The claim that we overcriminalize ... is unintelligible without a baseline or reference point by which such claims can be assessed”.*³⁹

Furthermore, in the context of:

- i) the historical background and recognition that the old statutory law was under-criminalised; and
- ii) a body of opinion that “*the breadth of the offence, far from being detrimental, would be highly beneficial*”,⁴⁰

my assessment must also involve proper consideration of whether over-criminalisation is necessarily a bad thing.

The Task at Hand

How then, should I go about conducting such an enquiry? Clearly the starting point must be to critically evaluate the degree to which the Act offends general principles of criminalisation. An immediate difficulty will lie however in defining what is meant by ‘general principles of criminalisation’, since there currently exists no universal agreement on the subject. A decision therefore needs to be made as to which criminalisation principles I should adopt.

The most fruitful analysis is likely to be generated by applying a complete theory of criminalisation to the Act. Yet whilst many legal philosophers and commentators have devised “*master principles*”,⁴¹ few have actually sought to devise an all-encompassing

³⁹ Douglas Husak, ‘Overcriminalization’, in *Blackwell’s Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell, 2010) Ch. 44, 622.

⁴⁰ Law Com (n2) para 6.7. See also Ormerod & Williams’ discussion of s7’s value: (n16) 9 and Collins’ support of s4’s breadth: (n23) 522.

⁴¹ As termed by Duff and Others, *Criminalization: The Political Morality of the Criminal Law* (2nd edn, Oxford Scholarship Online 2015) 44 and evidenced by A P Simester and Andreas Von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2014) 32, para 2.5.

theory. Some have tried but failed.⁴² Many have suggested that no such theory is possible.⁴³ Douglas Husak, by contrast, has sought to formulate a comprehensive normative framework and in so doing, has drawn upon the work of others.⁴⁴ His theory therefore lends itself easily to the task in hand. Legal moralists might also lay claim to having a readily applicable and complete theory that could be used however, it is clear that the Government specifically tried to avoid legal moralism when framing the wording of the Act.⁴⁵ Thus to try and apply it when it was rejected by the Government seems a pointless exercise.

The approach I shall adopt then is to apply Husak's theory to the provisions of the Act. Where, however, his theory struggles (Husak himself acknowledges that applying certain of his constraints will be difficult),⁴⁶ help will be sought from elsewhere.

Analysis

Husak's normative theory comprises seven different constraints, each of which “*seeks to limit the authority of the state to enact penal offences*”.⁴⁷ If an offence complies with all seven, its criminalisation is deemed to be justified. An examination is therefore required of each constraint and how it relates to the Act. The only offences that will not be included are fraudulent trading and conspiracy to defraud since both offences existed under the old law. They can therefore be said to fall outside of the Act for these purposes.

Non-Trivial Harm / Evil

Husak's first constraint provides that:

⁴² See e.g. Duff and Others, (n41) 1-2.

⁴³ E.g Devlin P., ‘Morals and the Criminal Law’, in R. Dworkin (ed.), *The Philosophy of Law, Oxford* (OUP 1977) 66-82, 76 and Ashworth & Horder (n5) 22.

⁴⁴ Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008).

⁴⁵ See e.g. SC Deb (B) 20 June 2006, Col 5.

⁴⁶ (n44) 157 & 177.

⁴⁷ (n44) 55.

*“criminal liability may not be imposed unless statutes are designed to prohibit a nontrivial harm or evil”.*⁴⁸

From a non-moralist perspective, this is uncontroversial.⁴⁹ The focus here is on what the statute is designed to prohibit, i.e. the “*rationale or objective given by the legislators*”.⁵⁰ Fortunately, Hansard is able to assist.⁵¹ The Act was clearly designed to prohibit the harmful effects of fraud in all its forms.⁵² The purpose behind the Act appears therefore to meet this first non-trivial harm constraint with little difficulty.

Wrongfulness

Husak’s next constraint demands (as do nearly all theorists)⁵³ that:

*“penal liability may not be imposed unless the defendant’s conduct is (in some sense) wrongful”.*⁵⁴

However Husak leaves it to the reader to “infuse” this constraint “*with substantive content*”.⁵⁵

What then is the conduct which according to the Act is wrongful? The Law Commission, appeared to consider that any conduct involving deception is, by its very nature, “*prima facie wrongful*”.⁵⁶ But is it really that simple?⁵⁷

⁴⁸ (n44) 66.

⁴⁹ See e.g. Simester & Von Hirsch (n41) 38, para 3.1.

⁵⁰ (n44) 69.

⁵¹ See in particular HC Deb 12 June 2006, cols 534 – 583.

⁵² (n51) cols 546 & 552.

⁵³ Green refers to a ‘*dissenting handful of radical scholars*’: Stuart P. Green, *Lying Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2006) 42.

⁵⁴ (n44) 73.

⁵⁵ (n44) 76.

⁵⁶ (n2) para 5.51.

⁵⁷ See e.g. Green (n53) 76 who shows it is not.

Section 2 of the Act renders a person guilty of fraud by false representation if they:

- a) dishonestly;
- b) make a representation;
- c) which is (and they know it is, or might be) untrue or misleading; and
- d) they intend, by making it, either:
 - a. to make a gain for themself or another; or
 - b. to cause a loss to another or to expose them to a risk of loss.

Since there is no need for the deception to be operative upon V, nor for D to actually succeed in making a gain or a loss, as Ormerod rightly points out, the section appears to criminalise lying.⁵⁸ Consider, for example, a lie told to a beggar that one has no change when in fact one has £2.50 in one's pocket. The statement is untrue and one knows it is, intent to gain includes keeping what one has got (s5(3))⁵⁹ and lying is generally considered to be dishonest. Thus all the elements of the offence are potentially made out. Whilst the government did not appear to "see anything wrong with the philosophical principle"⁶⁰ behind this section, Ormerod is more troubled. The Law Commission having seemingly accepted that dishonesty alone ought not to make conduct wrongful,⁶¹ Ormerod queries what additional "*identifiable morally dubious conduct*"⁶² is present in lying. His question is deserving of attention. Whilst few would probably object to the concept that a lie which is intended to trick a vulnerable person into parting with all their possession should be a crime, the same cannot be said for the lie told to the beggar. Since both however are lies, this tends to suggest that the wrongfulness of a lie may depend on the type of lie it is.

How then, can one determine which lies are wrongful and which are not? In the absence of a theory of wrongfulness (which Husak accepts would constitute a life's work to devise),⁶³ I propose to devise a set of lies which not only comprise all the elements of

⁵⁸ Ormerod (n13) 196.

⁵⁹ And, as Ormerod reminds us, intent to cause loss includes causing V to lose something to which he is not entitled but might have obtained: (n13) 204.

⁶⁰ SC Deb (B) 20 June 2006, Col 7.

⁶¹ Law Com (n2) paras 5.19 and 5.28.

⁶² (n13) 201.

⁶³ (n44) 177.

a s2 offence but which also, constitute examples of the types of lie identified by the moral philosopher Sissela Bok.⁶⁴ Each of the lies will then be scrutinised from a moral perspective (using Bok's analysis) to determine whether or not they fulfil Husak's wrongfulness constraint.

The principal objection to the beggar lie being a crime must surely be that it is a white lie. This is the first type of lie identified by Bok.⁶⁵ Less harsh than simply refusing to give money, the lie is told primarily to avoid hurting the beggar's feelings. It is of course strictly speaking dishonest in the ordinary sense of the word since it is not true, but does that render it sufficiently wrongful to justify making it a crime? The Law Commission appeared to think not when they conceded that "*a general dishonesty offencewould trivialise the law and extend its scope too far*".⁶⁶ So we need to identify its "*additional morally dubious conduct*".⁶⁷ Yet according to Bok there is none: "*white lies, where truly harmless and a last resort ... can be accepted as policy*".⁶⁸ Thus from a moral perspective, it fails Husak's wrongfulness constraint. Before we mark it down as the first example of over-criminalisation by the Act, however, we need to be sure that it has been rendered a crime. When one actually applies the legal test established in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*,⁶⁹ would it really be considered dishonest by the ordinary standards of reasonable and honest people? I suggest not. As Carol Withey observes,⁷⁰ the lie's purpose "*might result in a reasonable honest person concluding that his lie was in fact honest*".⁷¹ To suggest that it has become a crime under s2 therefore seems somewhat far-fetched.

⁶⁴ Sissela Bok, *Lying: Moral Choice in Public and Private Life* (2nd edn, Vintage Books 1999).

⁶⁵ Bok (n64) Ch. V, 57.

⁶⁶ (n2), para 5.38.

⁶⁷ (n2) para 5.28.

⁶⁸ (n64) 72.

⁶⁹ [2017] UKSC 67.

⁷⁰ Carol Withey (n5) 225.

⁷¹ A view with which Ormerod also agrees.

However according to Bok, not all white lies can be dismissed as trivial.⁷² She gives the example of a lie told in a reference.⁷³ Done to help an applicant secure a job, the lie possesses the *mens rea* of a s2 offence since it will necessarily involve an intent to expose another to a risk of loss (the other being the competition).⁷⁴ Furthermore, although it may depend on the extent of the lie and the job involved, it is likely to satisfy the test of dishonesty in *Ivey*.⁷⁵ Bok explains that “*the practice obviously injures those who do not benefit from this kind of assistance in a haphazard and inequitable way*”.⁷⁶ From Husak’s perspective then, there is a legitimate basis for the lie’s criminalisation (at least at this stage) since it is discriminatory and therefore wrongful.

Bok’s next type of lie is one told in a crisis.⁷⁷ Consider an example adapted from Kant: a murderer asks where his soon to be victim has gone.⁷⁸ He tells D he will rob him and take all his money if D does not tell him. D tells him but, to both protect V and himself (and his money), lies in so doing. Has s2 criminalised such a lie? Clearly D has made a false representation which he knows to be untrue and has done so intending to gain (keep his money) but is he *Ivey* dishonest? I would suggest not. In such a crisis, most people would surely expect D to lie? Interestingly, Bok agrees: “*preferable to a policy of honesty at all times*”, “*the test of public justification could be satisfied*”.⁷⁹ Thus this type of lie appears to be neither ‘wrongful’, nor a crime. What then of lying to liars (Bok’s 3rd type of lie)?⁸⁰ Consider a game of poker. D will make numerous false representations during play, fully intending to make a gain / cause a loss in so doing. But, provided D is playing within the rules, no-one is seriously going to consider her to be dishonest applying *Ivey*. She is, after all, playing a game. As Bok explains, where there is mutual deceit “*the practice is voluntarily and openly*

⁷² (n64) 60.

⁷³ (n64) 68.

⁷⁴ See (n59).

⁷⁵ See also Monaghan (n14).

⁷⁶ (n64) 68.

⁷⁷ (n64) Ch. VIII, 107.

⁷⁸ Cited by Bok at (n64) 108.

⁷⁹ (n64) 109.

⁸⁰ (n64) Ch. IX, 123.

undertaken, and terminable at will. It can then overcome most of the objections that deceit would otherwise provoke".⁸¹ This illustrates again then that not all lies have in fact been criminalised by the Act.

Imagine next the scenario in which state officials are looting property. D tells them he has not got any valuable possessions whereas he has in fact hidden them in the attic. He has made a false representation which he knows to be untrue and does so, in order to secure his possessions (thus fulfilling both s5(3) and 5(4) of the Act). Moreover, the state officials would consider him dishonest (although query whether honest and reasonable people would?). In lying to his enemy, D is potentially guilty under s2. He could claim duress but since the threat is to his property, his defence is unlikely to succeed.⁸² Interestingly, here Bok is dubious about D's behaviour. Whilst she accepts that on occasion such lies to enemies are "*especially excusable*", she warns that they are "*weighted with very special dangers... of bias, self-harm, proliferation, and severe injuries to trust*".⁸³ She accepts, however, that "*whenever it is right to resist an assault or a threat by force, it must then be allowable to do so by guile*".⁸⁴ So if D honestly, even if mistakenly, believes the officials have no right to seize his property, then his lie may well be justified (mistaken belief being permissible in self-defence / defence of property). The Law Commission deliberately excluded a defence of belief in claim of right from s2.⁸⁵ In so doing, they have it would seem, breached Husak's 2nd constraint.

Bok's 5th type of lie is one told to protect a peer or colleague.⁸⁶ Supposing a consultant physician informs his hospital management that a fellow surgeon does not have a drug habit (when he knows in fact that the surgeon is a cocaine addict) because he does not want his colleague to lose his job.⁸⁷ Given the clear risk of harm to patients many might regard such a false representation as dishonest. Bok certainly seems to think so. If she

⁸¹ (n64)130.

⁸² *DPP for Northern Ireland v Lynch* [1975] AC 653.

⁸³ (n64) 143.

⁸⁴ (n64) 144.

⁸⁵ (n2) paras 7.59 – 7.72.

⁸⁶ (n64) Ch. XI, 146.

⁸⁷ An intent to make a gain for another under s2(1)(b) and s5(3).

is right, such lies have not only been criminalised under the Act but also, since they take “*on a shared responsibility for the malfeasance*”,⁸⁸ they satisfy Husak’s wrongfulness constraint.

This brings us then to lying to the sick and dying.⁸⁹ Suppose a doctor treating a terminally ill, privately paying, woman is asked whether anything can be done to save her life. He replies that she could undergo a certain painful treatment, but fails to mention that there is only a 0.5% chance of success as he does not want to destroy her hope. His statement is “*intentionally deceptive*” so meets both Bok’s definition of a lie⁹⁰ and the requirements of section 2(2). Furthermore, since intention includes foresight of a virtual certainty⁹¹ (that he will be paid when she undertakes the treatment), his liability under the Act will rest on whether he is considered dishonest. From Bok’s moral perspective such a lie is rarely justified⁹² as it robs an individual of their autonomy.⁹³ It therefore satisfies Husak’s wrongfulness constraint.

In fact we do not need to keep going to see the pattern emerging. Bok’s remaining lies (namely those told for the public good,⁹⁴ deceptive social science lies⁹⁵ and paternalistic lies⁹⁶) do not add anything new.

Where then does this leave us? Bok’s theory of moral philosophy appears to show that (contrary to expectations) section 2 only criminalises conduct that is in fact wrongful in some identifiable way over and above dishonesty. Only with lies to enemies does Bok waiver. Not all lies will therefore amount to frauds by false representation. Rather, a distinction seems to lie between those lies which involve a technical intention to gain

⁸⁸ (n64) 158.

⁸⁹ (n64) Ch. XV 220.

⁹⁰ (n64) 13.

⁹¹ *R v Woollin* [1999] 1 AC 82.

⁹² (n64) 238.

⁹³ (n64) 237.

⁹⁴ (n64) Ch. XII, 165.

⁹⁵ (n64) Ch. XIII, 182.

⁹⁶ (n64) Ch. XIV, 203.

/ cause loss (e.g the lies to the beggar and murderer) and those which involve a genuine intent to deceive (e.g. the discriminatory reference and the colleague protecting his own). That distinction was one that Ormerod argues ought to have been made apparent in the wording of the Act.⁹⁷ The difficulty is that it has not been, thus creating a risk that prosecutions may nevertheless occur in breach of Husak's wrongfulness test.

So far I have concentrated on s2 but to gain an assessment of the whole Act, the other sections must not be neglected.

Section 3 provides that a person is guilty of fraud by a dishonest failure to disclose. According to the Law Commission, the wrongful conduct here is "*some kind of deception by omission*".⁹⁸ Given that the section's ambit is limited to where there is a legal duty to disclose, it may seem difficult to argue against that contention.⁹⁹ More troubling from Husak's perspective however is that despite the Law Commission's proposal that D would only be liable where she knows or is aware of her legal duty,¹⁰⁰ s3 includes no such requirement. It therefore "*appears to create strict liability as to the existence of the duty*"¹⁰¹ and in so doing, immediately offends the wrongfulness constraint.¹⁰²

Under section 4, a person is guilty of fraud by dishonest abuse of position. Through careful analysis, Jennifer Collins reveals that "*it is the disloyalty of abusing a position of trust which is the moral wrong at the heart of the offence*".¹⁰³ Adopting that view, the wrongfulness requirement is therefore made out.

⁹⁷ (n13) 197.

⁹⁸ (n2) para 7.22.

⁹⁹ Although beware the assumption that unlawfulness = wrongfulness: Simester & Von Hirsch (n41) 25, para 2.3(b).

¹⁰⁰ (n2) para 7.30.

¹⁰¹ Ormerod (n13) 206.

¹⁰² Husak (n44) 74-75.

¹⁰³ Collins (n23) 521.

That then brings us to section 6 of the Act: possessing an article for use in fraud. Although the Solicitor-General¹⁰⁴ and subsequently the case of *R v Sakalauskas*¹⁰⁵ have made it clear that the offence requires proof that D actually intended to use the article for the purposes of a fraud, the wording of the section suggests otherwise. For Husak it would therefore offend the wrongfulness constraint by virtue of appearing to be a strict liability offence, yet Simester and Von Hirsch offer an alternative view. In their opinion, provided the culpability element of the wrongdoing “*is at least implied*”, then the offending conduct may be criminalised.¹⁰⁶ In any event, given that *Sakalauskas* has now made the position explicit, it seems unlikely that Husak’s objection would survive. With both section 6 and section 7, providing the ‘fraud’ the articles are designed to be used in involves wrongful conduct, then D’s behaviour will be wrongful too.

Finally then, section 11 prohibits the obtaining of services with intent to avoid payment. Not paying for something that one is legally obliged to pay for is clearly wrongful on one view. Yet one only has to look at statistics regarding the number of television licence evasion offences committed¹⁰⁷ to query whether that is a view shared by everyone. Similar to music piracy (as to which see Husak),¹⁰⁸ it appears that a large proportion of the population see no difficulty with obtaining certain services for free. The difficulty here therefore is that Husak’s constraint depends upon one’s moral viewpoint. The most that can be said at this stage, therefore, is that it is uncertain whether s11 satisfies either the wrongfulness constraint or indeed Husak’s next constraint.

Desert Constraint

This constraint provides that:

¹⁰⁴ HC Deb 12 June 2006, Cols 541 – 542.

¹⁰⁵ [2013] EWCA Crim 2278, [2014] 1 WLR 1204.

¹⁰⁶ Simester & Von Hirsch (n41) 30.

¹⁰⁷ 162,869 offences according to the average statistics for 2014-2015: Mark Button, ‘Fraud and Punishment’ [2017] 167 NLJ 18-20, 18.

¹⁰⁸ (n44) 25.

“punishment is justified only when and to the extent it is deserved”.¹⁰⁹

However Husak makes “*little effort*” to demonstrate how it should be applied in practice, so assistance is needed from elsewhere. Duff and others use lying under the Act as an example of a substantive criminal offence that may “*not involve wrongfulness that is serious enough, or of the right kind, to warrant its criminalization*”.¹¹⁰ Simester and Von Hirsh express a similar view regarding “*ordinary mendacity*”.¹¹¹ Clearly there is cause for doubt as to whether s2 of the Act satisfies this 3rd constraint. Consider again some of the lies that have survived thus far. Would one regard the overly enthusiastic referee to be deserving of criminal punishment? And what of the doctor whose lie to his dying patient is well-intentioned? Or the consultant who refuses to become a whistle-blower?

To adapt Feinberg’s rules of thumb,¹¹² the less wrongful or harmful the lie, the more likely the desert constraint will surely be offended. It is worth reminding oneself here that the definition of ‘false’ under s2(2)(a) completely ignores¹¹³ Stuart Green’s persuasive claim that, “*other things being equal, merely misleading is less wrongful than lying*”.¹¹⁴ Consequently, there will inevitably be many cases of misleading deceptions that will fail to meet Husak’s desert constraint.

So far as sections 3 and 4 of the Act are concerned, Husak offers more assistance. Private wrongdoing, according to his theory, never renders “*persons deserving of state punishment*”.¹¹⁵ Thus any family disputes under s4 which are not of real public concern will fall foul of the desert constraint. The same might be said presumably for breaches of confidence or disclosure by employees. Indeed, the majority of respondents to the

¹⁰⁹ (n44) 82.

¹¹⁰ Duff & others (n41) 9.

¹¹¹ Simester & Von Hirsch (n41) 23.

¹¹² Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (OUP 1984) 216.

¹¹³ Ormerod (n13) 198.

¹¹⁴ (n53) 78 - 79.

¹¹⁵ (n44) 83.

Law Commission's Consultation Paper agreed that mere non-disclosure should not be sufficient for an offence of deception.¹¹⁶ By contrast, Collins argues strongly in favour of section 4: "*Disloyalty is criminalised because it has a corrosive effect on ... the importance of trust relationships*".¹¹⁷ Yet even she accepts that without a sensible prosecutorial policy in place the section criminalises too many.¹¹⁸

With regard to sections 6 and 7 of the Act, Feinberg's 'Standard Harms Analysis'¹¹⁹ may help. Since there is nothing valuable or reasonable about either intentionally possessing items for use in fraud or making / adapting / supplying such items, the risk of harm happily outweighs the value of the conduct and justifies its prohibition. Simester and Von Hirsch's Extended Harm Principle regarding prophylactic crimes reaches a similar conclusion albeit by a different method.¹²⁰

Burden of Proof

According to this constraint, "*those who propose to enact a criminal offence must provide reason to believe that it satisfies our test of criminalisation*".¹²¹ Given the extensive reasoning provided by the Law Commission and the Home Office as to the Act's justification, this constraint is easily met.

Substantial State Interest

This 'external' constraint requires that "*the state must have a substantial interest in whatever objective the statute is designed to achieve*".¹²² Where the purpose of the Act is designed to prevent economic harm, that will qualify as a "*compelling and .. substantial*"¹²³ interest in many instances. However, private wrongs will offend this constraint since even though they may be of legitimate state interest, they will not "*meet*

¹¹⁶ See (n2) para 7.23.

¹¹⁷ Collins (n23) 522.

¹¹⁸ As Dominic Grieve recognised: HC Deb 12 June 2006, Col 550.

¹¹⁹ As termed by Simester & Von Hirsch (n41) 55, para 4.2.

¹²⁰ (n41) 79 – 84.

¹²¹ Husak (n44) 100.

¹²² (n44) 132.

¹²³ (n44) 138.

the standard of being substantial".¹²⁴ Thus ss 3 and 4 of the Act may, for the same reasons outlined under the desert constraint, offend here.

Advancement of That Interest

Next one must determine "*whether the law directly advances*" the "*substantial state interest*".¹²⁵ In light of the number of successful prosecutions that have taken place under the Act, the MoJ have argued that this requirement is being met.¹²⁶

However, because the Act has created both an inchoate offence of fraud and 'risk prevention offences'¹²⁷ under ss6 and 7, before it can satisfy his 5th and 6th constraints, Husak adds some extra demands:

- i) "*the substantial risk requirement*";
- ii) "*the prevention requirement*"; and
- iii) "*the consummate criminal harm requirement*".¹²⁸

Applying the first two to sections 2 and 3, does a substantial risk of economic harm really arise even where D's false representation or failure to disclose has no effect on V? And do the sections actually decrease the likelihood of another person's economic rights being prejudiced or exposed to the risk of prejudice any more than the offence of attempt? Section 6 was designed to catch those who possess articles for use in fraud within their own homes. Yet on the face of the statutory wording, is the risk that the article might be used to commit a harmful fraud really prevented by criminalising D who has it sitting in his cupboard with no plan to use it? The fact that the Court of Appeal has now ruled that D must also have an ulterior intention, would suggest not.

Necessity

Finally:

¹²⁴ (n44) 138 & 142.

¹²⁵ (n44) 145.

¹²⁶ See (n2). Though note the loophole in s11 identified in: David Ormerod, Reply to the 'Letter to the Editor' [2007] Crim LR 661-664, 664.

¹²⁷ (n44) 38.

¹²⁸ (n44) 161-162, 165-166.

*“the state must show that the challenged offence is no more extensive than necessary to achieve its objective”.*¹²⁹

Examination reveals three reasons why the Act does not appear to comply with this constraint.

Firstly, the fact that ss2-4 and 11 lack a defence of belief in claim of right means that the defendant who honestly believed that she had a right to do what she did is nevertheless liable to arrest and prosecution “*with no guarantee of acquittal*”.¹³⁰ Similarly the absence of a defence of public interest¹³¹ puts D at the whim of the prosecution and the jury’s interpretation of dishonesty. Failing to incorporate those defences into the Act clearly offends against Husak’s 7th constraint, rendering the offences wider in their ambit than necessary.

The second reason rests upon the Act’s creation of an inchoate fraud offence. To use the simple question posed by Arlidge and others: “*why, in circumstances where it is not clear whether anyone has actually been defrauded*” would “*a conviction of attempt or conspiracy not suffice?*”¹³²

Thirdly, the lack of specificity in the wording of section 6¹³³ leaves it open to misuse.

According to Husak, overlapping offences present the “*easiest case*”¹³⁴ of demonstrating over-criminalisation in light of this 7th constraint. There is however no simple exercise that can be conducted to determine the exact degree to which the Act overlaps with other offences. That said even a brief, unsophisticated analysis can demonstrate that there is significant overlap with other statutes. In fairness to the Act,

¹²⁹ (n44) 153.

¹³⁰ Ormerod (n13) 200 – 201.

¹³¹ See (n2) paras 7.73 – 7.77.

¹³² See (n4) 44, para 3-003.

¹³³ See Ormerod (n13) 210 – 212.

¹³⁴ (n44) 158.

however, the three primary complaints made by Husak about overlapping offences require careful examination.

His first complaint arises out of new laws designed to catch technological innovations. In his view such laws are unnecessary since they “*contain countless overlapping offences, with newer, more specific statutes supplementing older, more generic crimes*”.¹³⁵ This criticism cannot however be levied at the Act. Prior to 2007 defendants were escaping conviction precisely because the old law was too rigid to cope with modern technology. Indeed historically the law of fraud has suffered due to its reliance upon mutually exclusive offences¹³⁶ with both Parliament and the Court of Appeal having to resort to swapping¹³⁷ or effectively ignoring wrongful convictions,¹³⁸ or even “*stretch[ing] the definition of the offence*”¹³⁹ to ensure justice was done. The Act has therefore deliberately created a new generic offence to supplement the older more specific offences.

Secondly, Husak maintains that the “*proliferation of these statutes leads to increased punishments*”.¹⁴⁰ When applied to the law in this country, this contention is not persuasive. Following the case of *R v Rimmington*,¹⁴¹ prosecutors in England and Wales must not charge a common law offence purely in order to circumvent a maximum statutory sentence set down by Parliament. Similarly, the courts will be astute to any attempt to try and exclude a defence by manipulating the offences charged:

¹³⁵ (n44) 37.

¹³⁶ See for example the difficulties incurred with the common law offence of larceny and the statutory offence of obtaining property by false pretences discussed in G.H.L Friedman, ‘Property in the Law of False Pretences’, (1957) 20(5) MLR 464-472 and Roy Stuart, ‘Law Reform and the Reform of the Law of Theft’ (1967) 30(6) MLR 609-634, 617 & 620.

¹³⁷ See e.g. s44(3) & (4) Larceny Act 1916.

¹³⁸ E.g. *R v McHugh* (1977) 64 Cr. App. R 92.

¹³⁹ J.R. Spencer, ‘Criminal Law and Criminal Appeals – the Tail that Wags the Dog’ [1982] Crim LR 260-282, 272.

¹⁴⁰ (n44) 37.

¹⁴¹ [2005] UKHL 63.

*R v Asfaw (United Nations High Commr for Refugees intervening).*¹⁴² Furthermore, the Definitive Sentencing Guidelines on Fraud and Money Laundering group like offences together, so the risk of punishment being increased is fairly minimal.

Finally, Husak relies upon the premise that “*the main effect of these overlapping statutes is to allow charge stacking that threatens with increasingly severe punishments*”.¹⁴³ This argument loses considerable force when set against both the rule against duplicity and the Definitive Sentencing Guidelines on Totality that are both strictly adhered to in this country. Charge stacking is simply not permitted here.

¹⁴² [2008] 1 AC 1061.

¹⁴³ (n44) 38.

Results

To summarise then (in an unconventional but hopefully useful fashion), by applying Husak's normative theory of criminalisation to the Act, we have broadly seen that:

	S2	S3	S4	S6	S7	S11
Non-trivial harm	✓	✓	✓	✓	✓	✓
Wrongfulness	✓♦ but !	X	✓	✓°	✓	?
Desert	X / ✓	X*	✓ but !	✓°	✓	?
Burden of Proof	✓	✓	✓	✓	✓	✓
Substantial State Interest	✓	X / ✓	X / ✓	✓	✓	✓
Advancing Substantial State Interest	X / ✓	X / ✓	✓	X□	✓	X / ✓
No more Extensive than Necessary	X	X	X	✓ but !	✓	X

Key:

✓ = complies with constraint

(♦ lies to enemies are excluded here given Bok's uncertainty)

X = offends constraint

X / ✓ = depends upon the case

? = depends upon one's moral viewpoint

but ! = dependent upon prosecutorial discretion

° = where ulterior *mens rea* is included in the offence

□ = on the face of the statute (i.e. without the ulterior *mens rea* included)

* = according to the majority view

Interestingly given the real concerns about s2 and lying, the analysis reveals that it is s3 that is the most troublesome offence in terms of over-criminalisation. Sections 2 and 4 both offend at least one constraint and potentially more whilst section 7 of the Act is the only offence that can be fully justified. Section 6 on the face of the statute would have offended at least 3 of the constraints, however, the requirement of an ulterior *mens rea* inserted by *Sakalauskas* has reduced its scope considerably. Meanwhile s11 raises some interesting issues. Worryingly, if one sets aside Parliament's aims (i.e. delete the non-trivial harm and burden of proof constraints) and concentrates on what has actually been criminalised (the remainder), one sees that the Act offends every single constraint, often in a number of ways. In light of these findings, it would seem that the Act is extremely broad and that the hypothesis that the Act has made a significant contribution to the over-criminalisation of financial crime would appear to be correct.

The first obvious criticism that could be made here, however, is that if there are flaws in Husak's theory, then there will be flaws in my analysis. That is a criticism which I must openly accept. However, by referencing and using the theories of other scholars as well throughout the analysis, I hope I have gone some way to reducing any bias and in particular, have provided some comfort where different approaches converge upon the same answer.¹⁴⁴

The second contention that could be made against my findings is that in the vast majority of instances the practical effect of the over-criminalisation is of limited effect and / or can be cured by the proper and sensible exercise of prosecutorial discretion: by focussing on Husak's theory and its application to the statute, I have adopted a positivist view which fails to acknowledge the realities of the law in practice.¹⁴⁵ This argument fails, however, to appreciate two important points.

¹⁴⁴ See Douglas Husak, 'Convergent Ends, Divergent Means: a response to my critics' (2009) Criminal Justice Ethics Vol. 28, No.1, 119-134, 120 on this point.

¹⁴⁵ A view propounded by Duff and Others (n41) 3 and endorsed even by Husak (n39) 623.

Firstly, just because the concern as to over-criminalisation in the context of the Act appears to be theoretical as opposed to practical does not necessarily make it any less valid. To rely upon prosecutorial discretion is to a large extent “*incompatible with the rule of law*”¹⁴⁶ and offends against the principle of maximum certainty.¹⁴⁷ Furthermore it ignores the fallibility of human nature. Those who prosecute are not bound by the same strictures as legislation: true the Crown Prosecution Service’s (‘CPS’) ‘Legal Guidance on the Fraud Act 2006’ touches upon the appropriateness of prosecution in particular scenarios, however that Guidance can be changed whenever the CPS wishes and is open to interpretation in any event.¹⁴⁸ Furthermore, it is only applicable to the CPS. Unlike other offences,¹⁴⁹ Fraud Act offences are likely to be used by a number of prosecution agencies. Thus the CPS Guidance cannot ensure “*fair, consistent and transparent decision-making*”¹⁵⁰ in the same way as other CPS Policies do. Indeed alternative solutions for dealing with fraud are being used by different justice systems whose “*quality*” is apparently difficult to assess and whose lack of “*transparency*” and criminal justice system safeguards is, in some instances, a concern.¹⁵¹ Meanwhile private prosecutors are not bound by any policies at all. Whilst they can be challenged once proceedings are started, by that point it is already too late.¹⁵² In an era where such prosecutions are appearing to gain favour,¹⁵³ this raises a real issue.

Added to this is the fact that reliance upon prosecutorial discretion cannot always remedy the Act’s violations of fair labelling since the Act fails to make any distinction between the gravity of different types of fraud. In addition, it has criminalised conduct

¹⁴⁶ Husak (n44) 27.

¹⁴⁷ Ashworth & Horder (n5) 56 & 65.

¹⁴⁸ www.cps.gov.uk/legal/d_to_g/fraud_act/#charging.

¹⁴⁹ E.g. tax offences which are usually dealt with by HMRC as explained in Peter Alldridge, ‘Criminal Justice and Taxation’ (1st edn, OUP, 2017) Ch. 7.

¹⁵⁰ David Ormerod, ‘Prosecution Policies’ [2012] Crim LR 653-655, 654.

¹⁵¹ Button (n107) 19.

¹⁵² Just as lenient sentences are too late in cases of murder and duress: *DPP v Lynch* (n82) 696 (per Lord Simon).

¹⁵³ See e.g. Melinka Berridge, ‘Private Prosecutions and the Shape of Things to Come’ (2017) 161 SJ 15.

that does not really have deception as its gravamen. To return to the lies, would one ordinarily classify the hospital consultant who refuses to expose his colleague as a fraudster? Or the professor who exaggerates his students' abilities to help them secure their first job?

Lest it should be criticised that the above examples are purely hypothetical, consider the case of *R v Gayle*.¹⁵⁴ Gayle was an office manager for DHL at Heathrow Airport. He was convicted under s4 after accepting £100 in return for placing a crate on a plane bound for America with false documentation stating that the goods inside the crate were 'known cargo' when in fact they contained an illegal drug. Although strictly speaking this was a fraud under s4, surely the gravamen in this offence lay in the fact he took a bribe / became involved in a drug importation? Put another way, the financial interests of DHL were hardly jeopardised by his actions. On the evidence, Gayle could have been charged with bribery at common law or corruption, both of which would more accurately have reflected his wrongdoing. As *Arlidge & Parry on Fraud* notes, there is no need to "stretch the fraud offence"¹⁵⁵ in such circumstances.

Similarly, in *R v Ogden and Others*¹⁵⁶ the defendants were convicted of conspiracy to convert criminal property when on the facts they had simply agreed that one of the defendants would supply the other with drugs. The Court of Appeal acknowledged that by their ruling "*every person who buys 'illicit' drugs even for their own personal use may also be guilty of [money laundering]*" but the Court had confidence that "*good sense*" amongst prosecuting authorities would prevail.¹⁵⁷ It is difficult to share such confidence, however, when the case itself provides a blatant example of the principle of fair labelling being wholly ignored in circumstances where a statute permits a wide interpretation.

Thus whilst I readily concede that my application of Husak's constraints to the Act is undoubtedly influenced by a primarily positivist viewpoint, case law in practice goes

¹⁵⁴ [2008] EWCA Crim 1344.

¹⁵⁵ (n4) 147, para 6-066.

¹⁵⁶ [2016] EWCA Crim 6, [2017] 1 WLR 1224.

¹⁵⁷ para 56.

some way to supporting that analysis. True, the majority of cases appear to have been sensibly prosecuted but the fact that a few have not, means that we cannot simply dismiss the above findings as mere academic problems. Duff and others have suggested that any theory of criminalisation ought to address this issue head-on.¹⁵⁸ I respectfully agree but in the absence of such a theory currently and against a background where the courts have made it clear that it is for Parliament to set the boundaries of the law,¹⁵⁹ the concerns must surely remain valid.

Finally then, two questions remain. Firstly, is the hypothesis that the Act has contributed to over-criminalisation actually correct? In other words, given that overlapping offences have always existed in fraud, is it right to assume that the position is now worse than it was before? Secondly, even if it is, bearing in mind that any law of fraud needs to be flexible, is that necessarily a bad thing?

Research has shown that trying to count the number of offences that overlap is not a productive exercise.¹⁶⁰ Furthermore issues as to overlapping offences are not, as discussed earlier, a particular concern in this country. Rather it is the impact upon the rule of law which is the most troubling consequence of the Act. The fact that there were overlapping offences previously does not change that. Nor does the fact that the law obviously needed to be made more flexible.

Consequently, it seems that the hypothesis that the Act has made a significant contribution to over-criminalisation has been borne out.

Conclusion

It was acknowledged at the start of this paper that it is generally accepted that the Act has managed to overcome the vast majority of problems that plagued the old offences of deception. It therefore clearly represents a significant improvement in that regard. However, as the above analysis demonstrates, this has only been achieved through significant over-criminalisation and thus at the expense of the rule of law.

¹⁵⁸ (n41) 3 & 10-11.

¹⁵⁹ *R v Jones et al* [2006] UKHL 16, [2007] 1 AC 136.

¹⁶⁰ Chalmers & Leverick (n27).

Clearly further research and enquiry into other aspects of the Act's impact is required before conclusions can be offered as to its overall effect on the law to date and whether or not its reported success has been misplaced. This is therefore but a first step towards completing that comprehensive assessment but hopefully one that has shown that such further enquiry is merited.