

Article

# When Is an Increase in Criminal Legislation Necessary? Emphasis on Economic Criminality Discussions

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**Abstract:** The objective of this article is to answer the question of when an increase in criminal legislation is necessary. To this end, a review was conducted on the positions that deal directly or peripherally with increases in criminal legislation, with a focus on how these positions relate to increases, such as the more general positions related to “law and social change”, as well as the more specific positions related to penal inflation and “penal populism”. Special reference will be made to the expansion thesis, which, in general, has been well received in Ibero-America. In the second section of this study, the answer to the question is addressed, considering elements from the “law and social change” approach and Sutherland’s reflections on *white-collar* criminality.

**Keywords:** behaviour of the law; increased criminal legislation; criminal inflation; populist punitiveness

## 1. Introduction

It is our understanding that, if there is research on increases in criminal legislation, it should attempt to answer three questions. The first question is: *how does one know when there is more criminality in social life?* The second question is: *when is an increase in criminal legislation needed?* The third, a two-fold question, is: *how much criminal legislation is required and how should it be increased?*

“How to know when there is more criminality within social life,” is not the same as saying, “when is there more criminal legislation,” since, in the latter case, a simple comparative quantification between two specific periods would suffice. By penalisation, we mean the tightening or toughening of social responses and/or sanctions of the actions of individuals or groups in the exercise of their social freedom. In this regard, the studies by Nietzsche in *Zur Genealogie der Moral* and of Foucault in *Surveiller et Punir: Naissance de la prison*, should be considered.

In *Zur Genealogie der Moral*, Nietzsche speaks of a certain mnemonic of the pain that grief produces, of how the physical pain caused by grief is a constant reminder to the subjects of their moral obligations (Nietzsche 1998). This would be the existence of a certain form of criminality within social life and its effects on it. Foucault, by resorting to the idea of discipline, regarding the tree of morals to which the subject must be brought into line (Foucault 1975), when it becomes at the same time a social mode of punishment, could certainly express that the greater the discipline, the greater the social punishment.

Regarding “how to know when there is more criminality within social life” leads to the construction of explanatory theses on the phenomenon, which seek to establish correlations that explain the causes of the increase. Research that only seeks to explain the causes of an increase in criminal legislation would belong to this order as a second level question, (“*what are the causes of the increase in criminal legislation, or why is criminal legislation increasing?*”), in that it would deal with a specific mode of augmentation, such as would-be criminal laws.

“When an increase in criminal legislation is required” is based on the necessary assumption that criminal legislation is a *sine qua non* for social life, as balance in the social system is required for the proper functioning of the social system. Therefore, all abolitionist discussions of criminal law would fall by the wayside in an enquiry with this content since abolitionism does not consider criminal law as socially necessary.



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How to respond to an increase in social criminality concerns how this increase should be managed, i.e., with moral norms or with legal norms, and if the latter, with what type, branch, or sector of law? This question, from the perspective of criminal law, has been answered through the reflections that review the principle of the last resort, and when dealing modernly with the sectorisation of criminal law. For example, as in Hassemer's case, a law of intervention, between nuclear criminal law and administrative sanctioning law (Hassemer 1999), or Silva Sánchez's proposal, for what he calls three "speeds" (Silva Sánchez 2001, p. 183), to which we will refer below.

What is presented here are not questions raised by the crime thesis, whether it concerns the aetiology of crime or the increase in crime, which are different issues from the one presented here. The aetiology of crime fundamentally focuses on the causes of crime, but this is not necessarily related to the increase in criminal legislation. Increasing crime rates, on the other hand, may describe how the amount of a particular crime or group of crimes has increased, i.e., facts already recorded by the law as such. However, this also deflects from the stated subject, as the point is not to offer a general argument about why criminalization is increasing, but in what conditions the penal law should be augmented, with obligation expressed as a need of the social system, not as a moral or axiological obligation.

The present paper has a general objective and three specific ones.

The general objective of this study attempts to answer the following question: "when is it necessary to enhance the criminal legislation considering the existing literature focusing on economic criminality?"

The first objective is to review approaches to criminalisation, but only what could be deduced from the approaches that refer to increases in criminal legislation. This being the case, we address three issues related to the main idea. The first is devoted to a more general topic than criminalisation, such as "law and social change". The second group, which is more related to the so-called continental rights, includes studies on criminalisation through penal legislation. Special attention should be paid to the section on the expansion thesis, due to its wide acceptance in the Ibero-American context, as it develops a series of issues related to the increase in criminal legislation in a more extensive and in-depth manner. The third group is represented by the discussion of Anglo-American origin, such as "law and order", penal populism, and punitive attitudes.

The second objective of this research is to address the second question—"when is an increase in criminal legislation required?"—with the intention of discussing it and offering some answers. The study focuses on it in particular, because we consider it the most important of the three, since it could determine the sufficient level of criminality in a given social system. This second objective seeks to discover what indicators we could count on in order to shed a warning light on when it would be necessary for a system to make use of criminal law in situations not previously regulated by it.

We only refer to the increase in criminal legislation, i.e., laws that establish penalties, not to the increase in decriminalising legislation as some refer to it and not the other way around, i.e., the increase in laws that decriminalise conduct (Preston 2019), which could, in any case, be considered as a sub-topic of an investigation into increases in criminal legislation (but will not be dealt with here).

The third specific objective is to achieve an interpretation model proposal that, considering an economic crime focus, could be applied and implemented to other criminal cases.

## 2. Approaches to Increasing Criminal Legislation

### 2.1. Law and Social Change

In the line of research on "law and social change", the increase in legislation is not a central topic, but rather a derivation that can be made from the topic. An increase in legislation is tacitly referred to when talking about laws that need to be adapted to social change and, thus, the approach would be that the existing laws at the time of a social change are not sufficient to cover certain regulatory needs; therefore, new legislation, i.e., an increase in legislation, is required. From this point of view, an increase in legislation is

seen as positive, because it is understood as necessary (Novoa Monreal 1983; Pound 1927, and as a means to achieve social and economic development (Rosen 1978)).

This prism will be developed further in the second part of our study. We want to point out the relationship between the study of law and social change and the increase in general legislation.

## 2.2. From “Inflation” to the “Expansion” of Criminal Law

### 2.2.1. Positions on “Criminal Inflation”

Beristain, while in Spain, and in his 1979 book, “*Cuestiones penales y criminológicas*”, describes the “tendency” (Beristain 1979, p. 211) to increase European criminal legislation at the time, in areas such as the family (offences against the family), and in other areas, such as sexual offences. Faced with this “danger of criminal inflation (Beristain 1979, p. 210), the author’s position (although exclusively referred to in relation to crimes against the family, especially the crime of economic abandonment) is that, although this area, the familiar, belonged to private law, this, as well as social institutions, failed to regulate it, which would justify criminal intervention, for reasons of necessity, as a form of protection for the family institution, and because a penalty, in this case, can fulfil an intimidating function (however dangerous the father may be, he seeks the protection of his family). However, only economic (not moral) abandonment should be considered, and always as a private offence (private criminal action).

In his 1982 article “The inflation of criminal law and administrative law”, Martínez-Buján postulates that we are witnessing a double inflationary process, in both criminal law and administrative law. Due to the profound changes in social relations experienced in the transition from a classical liberal state to a social state based on the rule of law, there has been an “increase” in new types of criminal offence (Martínez-Buján 1981, p. 199) different from traditional criminal law. The author points out that “advances in the field of technology and the relations of modern life, inspired by social progress, have given rise to new forms of delinquency” (Martínez-Buján 1981, p. 200). Therefore, in order to avoid a criminally inflationary process, the doctrine suggests decriminalisation and the transfer of conducts to administrative law. The problem for Martínez-Buján is that this redirection has provoked an inflationary administrative process, as the sanctioning power of the administration has increased. Furthermore, this would imply that this sanctioning activity is not covered by principles of criminal and procedural law, such as the *non bis in idem* principle, the reversal of the burden of proof on the defendant, and the abolition of the principle of procedural publicity. Given that there are two inflationary processes, it is necessary to rethink the offences in each sector of the law, in order to achieve an adequate redistribution between the two. However, for the author, no ontological criteria allows a distinction to be made between criminal and administrative offences, and recourse must be had to political-criminal criteria. Thus, and following some guidelines with respect to these criteria, petty offences and offences of ineffective criminalisation (smuggling) should be decriminalised and “administrativised” or redirected to administrative law. He points out that the doctrine of the Spanish Constitutional Court has determined that criminal and procedural principles should also be extended to administrative sanctioning law. He adds that the constitution subjects the power to impose penalties to judicial control; thus, reducing the scope for discretion, and that the contentious-administrative appeal can therefore be based on the unconstitutionality of the administrative act or regulation. Therefore, the intervention of criminal law would be required when administrative sanctions prove to be insufficient for the protection of legal assets, considering the fragmentary nature of criminal law, by which the acts that are most harmful to legal assets are sanctioned. Thus, and finally, certain conducts should be decriminalised and redirected to administrative law; other conducts should be “de-administrativised” and criminalised; if there is a coincidence of regulation, the *non bis in idem* principle should be applied and eliminate repetition of the double regulation.

Ferrajoli in *Diritto e ragione* 1989 notes a crisis in the law for various reasons, a crisis that is aggravated by “legislative inflation”, partly due to an emergency criminal law enacted in Italy to combat the mafia and terrorism, which he calls “penal inflation” (Ferrajoli 2004, p. 10), with identical replication in other European states, such as Spain, where Italian police and emergency legislation is influential. This criminal inflation has also been caused by the lack of separation from administrative law, largely due to a lack of confidence in political and administrative controls. A reflection of the latter would be the contraventions converted into crimes, or the introduction and proliferation of crimes without harm, such as those against morality or the state, or crimes of abstract danger (Ferrajoli 2004, pp. 411, 417, 475). The author points out that the current experience of European legislation runs counter to the minimisation of criminal law, which should have as its sole vocation the protection of legal assets, and a reduction in criminal procedural law’s scope for discretion (Ferrajoli 2004, pp. 10–11).

### 2.2.2. Expansion Thesis

The German thesis on a specific criminal law emerged in connection with the phenomena described by Risikosoziologie, mainly in Ulrich Beck and his *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (Beck 1986), and even later under the influence of Luhmann’s (1991) *Soziologie des Risikos* (Lesitschnig 2011; Prittwitz 1993), is the so-called *Risikostrafrecht* (“criminal law of risk”) (Albrecht 1995; Prittwitz 1993; Seelmann 1992; Wolter 1981). Although the idea of a *Risikogesellschaft* (“risk society”) was not without its critics (Grundmann 1999a, 1999b; Japp 1999), and still conceived as *demodé* in 1999 (Bora 1999, p. 10), the fact is that, in law, it is considered a true “change of perspective” (*perspektivenwechsel*) (Bora 1999, p. 11), being paradigmatically used in the analysis of environmental criminal law (Köck 1999; Seelmann 1992). This issue would later be extended to drug offences and terrorism (Brunhöber 2018).

It is this discussion that the book by the Spanish criminal lawyer Jesús María Silva Sánchez “*La expansión del derecho penal: aspectos de la política criminal en las sociedades postindustriales*”, in its two editions (1999, 2001), imports or internalises to Spain, which is then replicated in Latin America (Silva Sánchez 2001), but with an important ingredient, which is to link this criminal law of risk to the increase in criminal legislation.

In 1999, the first edition of *La expansión del derecho penal: aspectos de la política criminal en las sociedades postindustriales* (The Expansion of Criminal Law: Aspects of Criminal Policy in Postindustrial Societies) was published in Spain. Broadly speaking, the book aims to describe what has happened to European criminal legislation, i.e., the “tendency” of criminal legislation to increase in number and scope (Silva Sánchez 1999, p. 4). This increase would not extend to the common areas of criminal law, known as “nuclear criminal law” (crimes against life, against property, against sexuality, etc.), but to new areas, particularly socioeconomic and environmental crimes. However, this increase in criminal legislation is due to causes stemming from what the sociologist Ulrich Beck calls the “risk society” (Beck 1986). This is what he calls “expansion”.

Now, this risk society would result in a series of factors that would lead to an increase in criminal legislation, such as the production of human risks and technical failures, the fear of risks, which would increase the so-called crimes of commission by omission; the crisis of the welfare state model, which would increase unemployment rates, transforming this population into a risk for others, such as street crime; the social conformation of passive subjects, such as pensioners, consumers, etc., who, together with the risk of being victims of crime, demand protection; the social identification of the majority with the victim of crime, which leads to a greater proliferation of reckless crimes and crimes of danger, the social identification of the majority with the victim of crime, which, together with the crisis of the welfare state, has led to the use of criminal legislation against companies and white-collar crime, together with an increase in the strictness of juvenile criminal responsibility; the discrediting of other instances of protection, such as the absence of social ethics, civil law as a model of protection through insurance and the lack of recourse to administrative

bodies, due to the discredit resulting from corruption; the atypical managers of morality, which is basically the left, demanding more criminal legislation; disdain for forms, which would lead to the privatisation of the criminal problem, such as police and private prisons, renouncing principles, such as innocence, guilt, and due process; a greater criminal demand from society, by the state and individuals.

As this new criminal legislation presents characteristics that move it away from the so-called nuclear criminal law, and with it, from the principles and guarantees of which criminal law is covered, and although the author expresses his discomfort in the face of its increase, he proposes a sectorization of the this legislation, which he calls “second speed” (Silva Sánchez 1999, p. 124), and regarding nuclear criminal law, the “first speed” (Silva Sánchez 1999, p. 124), is applied to a type of legislation to which the highest penalties are associated.

The second edition of *La expansión* introduces the analysis of *Feindstrafrecht* or “criminal law of the enemy”<sup>1</sup>, to which he gives his consent in his introduction, dedicating a third sector of regulation within criminal law to it which the author calls “third speed” (Silva Sánchez 2001, pp. 183–84). Broadly speaking, he calls this, and the forms of traditional criminal law that are being hardened, “intensification” (Silva Sánchez et al. 2003).

This must refer to a certain type of specific criminality, firstly, organised crime and terrorism as collective criminality; secondly, violent, and repeated sexual and domestic violence as “serious individual criminality” (Silva Sánchez et al. 2003, p. 114), and thirdly, the criminality of marginality and immigration, which translates into the commission of minor property crime, or professional property crime.

### 2.2.3. “Law and Order”, “Criminal Populism” and Back to Risk

“Law and order” being a Goldwater concept referring to his opposition to the civil rights movement in the U.S., it takes a turn on the position on criminal policy towards the tightening of criminal laws in the U.S.<sup>2</sup>, which paid off in the political candidacies of the republicans (Wood 2014). A similar version takes place in England with Bottoms’ so-called “populist punitiveness” (Bottoms 1995, p. 40), a kind of political exploitation of what politicians believe to be popular sentiment on crime, hence, a politicisation of crime, which pursues public support for harsher penalties, detached from their social and penological consequences, such as deterrence or reparations (Wood 2014). In short, tough responses to crime, such as a campaign slogan and government programme. The victim, the abused, the people fearful of crime, are put at the centre of the discussion (Garland 2002). If penal policy in England and Wales between 1945 and 1990 involved a set of closed-door decisions by a small male elite, involving a group of politicians, government officials, academics, private bodies, and senior members of the judiciary, to the exclusion of the public, with Tony Blair’s “New Labour”, penal policy was about bringing the public into the discussion about crime and punishment (Ryan 1999), which means that “New Labour” in the UK sought to combine a message about “law and order” in addressing the social causes of crime (hard on crime, hard on causes crime). This policy has spread to the U.S. and elsewhere. (Johnstone 2000).

As a consequence of these policies, the Crime and Disorder Act 1998, which was replaced by the Criminal Behaviour Orders under part 2 of the Anti-Social Behaviour,

<sup>1</sup> The criminal law of the enemy is the thesis of the German criminal lawyer Günther Jakobs. In broad terms, it has a variant according to which the German Criminal Code (StGB) is mainly a criminal law aimed at the citizen, which contains all liberal principles and all limitations of the state’s power vis-à-vis the criminal individual. This law would be addressed to the “citizen” (Bürger), and would constitute a criminal law of the citizen (Bürgerstrafrecht). However, within this set of rules there are others that deviate from these principles, such as those that punish attempted crimes, or crimes of abstract or presumed danger, or those in which certain characteristics of the perpetrator of the crime are pursued. These rules would no longer be aimed at the citizen, according to Jakobs, but at another type of subject, which he calls the “enemy” (Feind), who would therefore form another law, the criminal law of the enemy (Feindstrafrecht). These rules should therefore be separated from those of the citizen, so as not to contaminate them. This being the case, the law that corresponds to the citizen should be applied to him, with greater guarantees, and where the penalty can fulfil a function of general negative and positive prevention, leaving the criminal law of the enemy to the latter, who, as a subject who has separated himself from the law, the penalty fulfils the purpose of innocuisation (Jakobs 1985, 2004, 2006).

<sup>2</sup> “Law and order” is a political slogan that was used by Senator Barry Goldwater in his campaign for Arizona, USA, in 1964. See for this, (Flamm 2005).

Crime, and Policing Act 2014, introduced, at the time, anti-social behaviour orders, which made it possible to criminalise various minor or petty offences or subjective assessments of dangerousness through the legal definition of “conduct which caused or was likely to cause harm, harassment, alarm or distress” (art. 1(1)2). This “detail” alone means pushing back the limits of punishability to the private sphere, increasing criminality through legislation.

On the other hand, so-called *punitive attitudes* would be a consequence. Perceptions of crime and punishment mean placing the public’s opinion and position of crime and punishment at the centre of the discussion. It seems that fear of crime and economic insecurity are prime predictors in the demand for tough criminal policies (Costelloe et al. 2009). The greater the ignorance of the criminal justice system, the more punitive the attitudes will be (Kääriäinen 2019), concerning, above all, the lack of familiarity with crime (Simmler et al. 2021) rather than the theoretical approach to it (Shelley et al. 2011). The perceptions of crime and punishment, in balance, can be predictors of increased criminal legislation, if they are solely considered the defining elements of criminal policy, as might occur in a context of punitive populism.

Today, there is a new landscape, where, politically, risks are brought to the centre of discussion and their influence on criminological aspects.

According to Pratt, the use of preventive criminal law was viewed with suspicion in the 1960s–1980s in the Anglo-Saxon world, so that by the early 1980s, preventive criminal law, in his opinion, seemed to have fallen into a terminal coma (Pratt 2020). However, neo-liberalism began to make use of preventive criminal law from 1980 onwards, in the face of what were considered various individual risks to the population, such as beggars, gang members, sex offenders released from prison, and potential terrorists. While criminal law was used preventively to combat risks to people’s security and, thus, made use of “more control”—in economic matters, less control of economic risk was used. This would have led to a financial crisis, where the banking crisis of 2008 was a turning point, which not only affected the economy, but also undermined social cohesion, leading, for example, to little or no social interaction, reduction, or dissolution of the nuclear family, and increased anxiety about “neo-liberalism’s unwanted human by-products”, such as the homeless, the mentally ill, beggars, gang members, paedophiles, sexual predators, and terrorists, which did not exist before 1980 (Pratt 2020, p. 282). This preventive criminal law began to be used by criminal populism in a similar, but more “expansive” way (Pratt 2020, p. 277). For example, sexual predator laws and public protection orders in countries such as the U.S., Australia, and New Zealand allowed for indefinite detention in the face of ongoing risk to individuals. Preventive criminal law thus took the form of control orders (Pratt 2020).

Political behaviour involves maintaining an attitude of risk denial (Currie 2020, p. 306). The political message has been to recover certain national identities, such as in the U.S., with Trump’s narrative, generating a new demand for control and security, e.g., the narrative of Trump or Bolsonaro in Brazil, or, for example, cases surrounding modern immigration (Pratt 2020). Thus, in this case, according to the opinion of Weber and Powell, post-conviction deportation, which would merge the administrative and criminal paradigms, would be applied as a reduction of risk through deportation, but at the same time, a criminal law of the enemy would be applied, since preventive law is used against someone who, like the “enemy” conceptualised by Jakobs, has not internalised the norms of the people, nor shares the same myth of origin, so that their loyalty can be questioned. This would be the hypothesis of a “pre-crime” typical of an “enemy crimmigration” process (Weber and Powell 2020, pp. 246, 265) and, therefore, anti-democratic in nature.

Moreover, the aforementioned “risk denial” has had repercussions on criminological views, on various aspects, such as racial violence or mass shootings. In the latter case, for example, research has minimised this risk, showing insecurity in universities as an exception, or linking the case of shootings to the deteriorated mental health of the shooters (Currie 2020).

There seems to be a slow decline in the perception of risk. Some (more extreme) say that “risk society” and its impact on criminal policy and criminal law has ended

(Weber and Powell 2020). Other authors believe that the “crime is perceived as merely one more problem to manage rather than the most significant one” (Pratt and Anderson 2020, p. 13). According to Simon, the current vision would not be towards concepts, such as “law and order”, but to have less fear of crime, and more support for policies to control crime risk, which would be due, in part, to a generational issue, given the existence of a millennial population, where these individuals, having entered adulthood in the years of crime decline, unlike boomers, who entered adulthood in times of high rates of violent crime, do not have the same demands as boomers for greater crime control, precisely because of the lack of fear that prevailed in the past (Simon 2020).

### 2.3. Observations

#### 2.3.1. General Observations

All the authors who put forward the positions on penal inflation, and Silva Sánchez with his thesis on the expansion of criminal law, refer to one factor in the increase in criminal legislation, i.e., the insufficiency of social–political bodies and administrative law as a cause for resorting to criminal legislation, with some sanctioning it positively for certain sectors (Beristain), others being critical (Martínez-Buján, Ferrajoli), and others only describing it (Silva Sánchez).

The Spanish authors (Beristain, Martínez-Buján, and Silva Sánchez) understand it as an advance of a criminal legislation different from traditional criminal legislation; and as for the increase, opinions differ.

Beristain sanctions it as “necessary” in accordance with what is “protected”, with the expectation that the penalty can have an intimidating effect in the case, and under the criminal procedural requirement of being considered a crime of private action. Thus, if for the doctrinal trend pointed out by Beristain this increase in criminal legislation was “inflationary”, for him, in accordance with the above arguments, it was not. For Martínez-Buján, it seems that any increase in criminal legislation is “inflation” whether this increase is desirable or undesirable. Under this predicament, the author accepts such an increase when administrative sanctions prove insufficient for the protection of legal assets. Ferrajoli only criticises such criminal inflation, arguing that the only object of criminal law should be the protection of legal goods.

In our opinion, the virtue and merit of Silva Sánchez’s thesis lies in three aspects.

The first of these is to bring together, under a single prism, both discussions of criminal law, around a simple description: the tendency of criminal law to its (then) current growth. He calls this “expansion”. In doing so, he attempts to explain the “expansion” of both groups of legislation (criminal law of risk and criminal law of the enemy) under the same set of social causes.

The second is to situate the criminal law of risk within a panorama of tension with the minimalist positions in criminal law, both German (the Frankfurt School, mainly) and Italian (*Diritto penale minimo*).

A third aspect is to apply the thesis of the contamination of the *Bürgerstrafrecht* with the *Feindstrafrecht* of Jakobs<sup>3</sup>, but now regarding the criminal law of the environmental risk of companies, in order to propose, for this criminal law of risk, more lenient legal-penal consequences, such as the application of a fine instead of imprisonment, understanding this to be fully appropriate for both traditional criminal law and criminal law of the enemy.

Indeed, when Jakobs proposes that the “enemy” (Feind) should be subject to a criminal law separate from the criminal law of the citizen (*Bürgerstrafrecht*), hence a criminal law of the enemy (*Feindstrafrecht*), he does so in order to not contaminate the criminal law regime of the citizen, which has the guarantees of liberal criminal law and the sanctions that fulfil the function of bringing him back into that regime when he has committed a crime. In the case of the enemy, the sanction does not produce this effect, because he has definitively separated himself from the law, so that, since the guarantees of the criminal law of the

<sup>3</sup> See explanatory note N°2.

citizen cannot be applied to him, he has no choice but to defend society from the enemy, annulling or inoculating him by means of a penalty that fulfils this function. Therefore, it separately categorises two types of rights (Jakobs 1985, 2004, 2006). Silva Sánchez applies this same scheme, but to the criminal law of risk: we have a nuclear criminal law, with the guarantees and rights of classical (liberal) criminal law, and with sanctions, such as imprisonment; at the same time, we have a criminal law of companies, to which, in order to establish their liability, the strict rules of imputation of criminal liability applied to natural persons (classical criminal law) are made more flexible. Since flexible rules of imputation would have to be applied to this sector, equally flexible or lighter sanctions, such as fines, should be applied proportionally. However, to not “contaminate” (this is what we say) classic criminal law with these flexible rules of imputation, it is better to separate it from the former and sectorise it.

Silva Sánchez’s proposal has not been exempt from various criticisms.

Thus, for Gracia Martín, Silva Sánchez’s proposal belongs to a discourse of resistance typical of a liberal state, which is repugnant to a modernisation of criminal law typical of a social and democratic state of law, which calls for the criminalisation of certain areas of criminality, such as that of the most favoured economic sectors. (Gracia Martín 2003). Díez points out that Silva Sánchez tries to respond in the same way to two different phenomena that go in opposite directions, such as economic criminality and a more classical “law and order” style of criminality (Díez 2005, 2007). Lorenzo criticises Silva Sánchez’s simplification of the causes of violent crime (illegal immigration, drug use, or unemployment), where much more violence comes from criminal organisations. On the other hand, he rejects the idea that socioeconomic crimes cannot belong to the hard core of criminal law or that they are less serious than classic crime, as he considers the enormous destructive and destabilising potential of these crimes for the social structure to be evident (Lorenzo 2003). Militello objects to the oversimplification of modern criminal law, which is more complex than that proposed by Silva Sanchez, by presenting “expansion” as negative and penal reduction as positive. He also criticises, as a methodological error, the abandonment of the social discourse on the subject of the criminality of the underprivileged, in order to focus on the criminality of the powerful, despite the fact that, at least in the Italian context, the return to traditional criminality has led to a more radical resizing of the criminal prosecution of marginalised subjects. In addition, he finds it difficult to remove the prison sentence from the area of economic crimes, which he considers forms of aggression no less dangerous than the traditional ones, especially those more directly linked to violence and intimidation, which would be difficult to replace with alternative sanctions (Militello and Sanchez 2004).

We have previously expressed criticism of certain defects in the basic theory used by Silva Sánchez, such as Beck’s theory of risk, which are being transferred to the expansive thesis (e.g., the fact that there is a metonymy between dysfunctionality in the production of capital and risk, since some of the effects of dysfunctionality in the production of capital, such as industrial and environmental risks, are placed as the main ones in the social theory of risk, but where causes (such as dysfunctionality in the production of capital) are relegated to the background, causing a displacement of the social problem from the real problem. This means that the expansive thesis, by “translating” the theory of risk into a penal key, imports this problem, focusing its discourse on the risks with penal consequences, but displacing the problem of the dysfunctionality of capital, which would bring with it, at the same time, dysfunctions, such as socioeconomic criminality itself. A second criticism is the problem that arises as a consequence of Beck’s approach of acting first, then becoming conscious (Beck 1986). Beck postulates the inversion of Marx’s formula of consciousness/acting for acting/consciousness, or in Cartesian terms, one could say that he inverts the maxim “I become conscious, ergo I act”, for “I act, ergo I become conscious”. However, such a reversal of the formula produces problems of rationality in the political sphere of political–criminal and penal decisions. If the administrative acts of government and legislative acts of a political–criminal nature are based on acting



before, and becoming aware afterwards, the state's irrational actions are highly likely to be irrational. Moreover, if the state takes measures to increase criminality under this premise, it would be nothing more than a reactive criminal policy, close to the informal and private reaction of individuals. Thus, the "objective" aspect of punishment demanded by Liszt is subjectivised (Liszt 1986), and the policy of the state itself becomes an informal reaction. Apart from this, he criticises the solutions offered by Silva Sánchez more from a general methodological point of view than from his scientific presentation in the two editions of his book "The Expansion of Criminal Law", because the political-criminal solution given by Silva Sánchez in the first edition, with regard to socioeconomic crimes, was at least logically coherent in pointing out a direct proportionality: if nuclear criminal law is based on principles, guarantees, and strict rules of imputation, and as such, it also corresponds to a penalty of equal severity, such as deprivation of liberty (imprisonment), then socio-economic crimes, which are based on principles, guarantees, and lax rules of imputation, would be subject to the same laxer penalty as nuclear criminal law, as would be the case for the author, the penalty of a fine. The second edition represents a break in this coherence, since it introduces the "third speed", which is the regulation of the criminal law of the enemy, which consists of principles, guarantees, and lax rules of imputation, but corresponds to a severe penalty, such as imprisonment. The logic of proportionality is broken, because it breaks its own basis of argumentation based on direct proportionality, and without methodological justification, it makes use of inverse proportionality in this case (Carrasco Jiménez 2016, 2017b).

In our opinion, and in accordance with the objective of the research carried out here, the main criticism that we could make is that of reducing the spectrum of analysis for the explanation of causes (*why criminal legislation increases*).

In other words, by adopting a theoretical construction, such as the sociology of risk for criminal law, explanations are reduced to those that sociology of risk provides for the explanation of causes of social phenomena. This means closing the diaphragm (like a photographic camera) for other factors that could explain increases in criminal legislation in a different way. This is so, since the expansive thesis circumscribes the increase in criminal legislation to a specific moment, but this makes us lose sight of what is general in the increases in criminal legislation, if we analyse longer periods, which implies that these increases cannot be explained by social phenomena located in the immediate or contingency, but would be explainable by causes anchored in longer periods of time.

An example of this is that, in considering the beginnings of the risk society as the time to produce phenomena related to the rise of criminal law, Silva Sánchez only commits the last 20 years, counting backwards from the year of the 1st edition of "The Expansion...", i.e., approximately from the Chernobyl disaster in 1986. However, Jakobs himself, for his "criminal law of the enemy"—which is, after all, the "intensification" in "The Expansion..."—considers the rules that give rise to it, many of them have originated in the StGB since 1872 (Jakobs 1985), which makes one consider a much longer time span than just 20 years in the production of the phenomena of "intensification" of criminal law.

This also implies that the role of government administrations in the U.S. in international matters is not considered, both with their own law and their influence on the world, and that this has repercussions on both their own criminal law and that of other states influenced by their policies. Even before the first edition of "The Expansion...", Sáez Valcárcel in Spain called the U.S. position in criminal policy, especially in the field of drugs, an "expansion" (Sáez Valcárcel 1989).

Now, concerning the question to be investigated here—"when is an increase in criminal legislation required?"—the answer is based on the justification and/or legitimisation for the increase, specifically for all positions outlined in the first part (penal inflation positions/expansion hypothesis), and would be justified, and/or legitimised by the existence of "new" legal interests or goods. In this case, it would rather be doctrines of the justification of the increase in legislation.

Mainly the positions would be aimed at answering the third question mentioned at the beginning—“*how should such an increase be made?*”—which implies a concern about the administration of an increase in criminal legislation already in place, and is therefore methodologically more closely linked to the behaviour of criminal policy. Secondly, an attempt is made to answer the questions—“*what are the causes of the increase in criminal legislation?*” or “*why is criminal legislation increasing?*”—and the sub-theme within the main question, “*how to know when there is more criminality within social life*”. Punitive populism is directed in the same direction, since, as an observation, it emphasises a factor in the increase in criminal legislation that would be related to what Silva Sánchez described, which is, the atypical managers of morality and identification with the victim of crime, with the difference that punitive populism is directed more towards the use of severe criminogenic discourse for political ends.

Punitive populism may have increased the possibilities of criminality by introducing more control and surveillance into people’s civil lives, i.e., preventive criminal law, which would increase criminal law. Currently, there seems to be a dispute or tension in the field of risk, between maximising its possibilities and, thus, anxiety and fear, and minimising it to the point of negation. In turn, punitive attitudes would fall into the latter typology, but in a different way. In our view, they would make a different causal description, focusing on the public’s knowledge and perception of crime. In relation to punitive populism, political decision-makers would consider this element as central, especially when it comes to toughening criminal legislation and achieving electoral goals (and tougher means more criminal law).

### 2.3.2. A Missing Factor of Analysis: The Rise of Legislation through Manipulation of Perception

Nagel, on the subject of law and social change, speaks of certain *stimuli* (stimuli) (Nagel 1970, p. 485). According to the author, these include normative principles, the pressures of interest groups, the values of legislators and judges, and social change.

Criminal populism and punitive attitudes lead us down an uncomfortable, but no less certain, path, which is the management or manipulation of public opinion with criminogenic objectives. In a way, the *labelling approach* walks on the edge of this slope, if we talk about manipulation of state instruments, such as criminal law, which is not surprising, since “legal forms have proven to be easy to manipulate for surprisingly selfish personal and political ends” (Fowler and Grossman 1974, p. 276). Whether manipulating reality to create laws or using existing ones, manipulation aims to provide an apparent justification to the population by pursuing aims and objectives other than those stated. The means to do so is to intervene in the population’s perception. Not surprisingly, many studies establish the relationship between manipulation and perception at the level of a critical mass or public opinion (Harambam 2021; Kerby and Marland 2015; Koppang 2009; Margolis and Mauser 1989; McGraw 1998; Syuntyurenko 2015). Whatever the dynamics or sociodynamics, the stimuli for the creation of a law of which Nagel speaks could well be concealed. This is already studying the form of the stimulus or factor in the genetics of law, and in the rise of criminal legislation, through a different prism.

This is how this can be seen in covert terrorism. In the face of the existence of what we could call “common” terrorism, there is another type of terrorism, which, although one of its characteristics is the terrorist organisation, its origin is not entirely found in groups that are admittedly anti-systemic. On the contrary, its elements are intrasystemic, and they use precisely this characteristic to cover up their terrorist activity and aims. Hence, we call it “covert” terrorism. Such terrorism has led to an increase in criminality, and to an increase in criminal legislation. The historical expression of this, which is basically the model of observation we are considering, is the “stay-behind” terrorism, a historical fact that has been proven and academically studied (Calleja 2017; Ganser 2004, 2009, 2014).

This phenomenon basically consists of the creation and support of “stay-behind” groups in Europe by the American and British secret intelligence services (CIA, MI5), NATO, and some states and state officials, which operated throughout the “cold war” and

whose reason for their formation was to combat a supposed Soviet invasion, being used as a breaker of social protest movements and as an army in political destabilisation operations (Pichler 2009).

The methods used were the propagation of fear (Ganser 2004) with the aim of “destabilising public order in order to stabilise the political order and to justify a repressive intervention that would be greeted with relief by the population” (Pichler 2009), among them the tightening of criminal legislation (Ganser 2004).

Thus, in Italy, and with the action of the “stay-behind” of “Gladio”, it gave rise to a whole period of terrorist agitation known as the “Anni di piombo”, which brought about a series of criminal, procedural, and/or citizen control laws, such as the Legge Reale n. 152 of 22 March 1975 (Legge n. 152/1975), which grants a series of powers to the police and prescribes offences against public order.

Although some people were imprisoned, as in the case of Vincenzo Vinciguerra, others, such as Delle Chiaie, were strangely spared conviction (Arias 1989; Calleja 2017), although he was involved in a number of international events. In Spain, he collaborated in the murder of a judge and his possible involvement in the death of some labour lawyers in Atocha Street (García 1987). Contacted by Pinochet’s secret service, DINA (Camarasa and Prieto 2014; Cavallo 2008; Cook 2014, p. 287; Dinges 2005; Martorell 1999; Peña 2010) cooperated with that body in acts of sabotage and counter-intelligence, and in the killing and torture of individuals (El Mostrador 2003). He also carried out other assassinations in the company of other “Gladio” soldiers, such as Mauricio Girogi and Augusto Cauchi, who were in Chile, together with five other members of the neo-fascist group, a whole group that also participated in the attack against Bernardo Leighton (El Mostrador 2003; McFarren and Iglesias 2013; Peña 2010; Rivas 2007). He then went on to advise Pinochet on strategic communications and counter-information, providing him with a house and office. He later moved to Argentina (El Mostrador 2003).

Outside Italy, it was discovered that stay-behind groups were operating in at least 15 European countries, including Germany, Spain, Switzerland, France, Belgium, whether in concomitance with the secret services of each country, but always in collusion with the CIA and MI6. Because of its operation, it gave rise to various events, such as the terrorist attack on Oktoberfest in Munich on 26 September, 1980.

The expression of terrorism described above reveals a number of characteristics: (a) the existence of terrorists connected in transnational organisational networks; (b) networks made up of state intelligence apparatuses, state officials, groups, corporations, individuals, etc.; (c) pyramidal structure, the base of which is unknown to the top; (e) the existence of a machinery designed to cover up for those responsible at the top and, thus, to disrupt, obstruct, or redirect the attention of investigations in other directions, or towards other perpetrators, whether they are eternal members of the organisation or those responsible at the bottom of the pyramid; (f) terrorist attacks aimed to make citizens consent, to diminish their freedom and increase the power of law enforcement agencies in a broad sense; (g) the real terrorist target is hidden, and instead false actors and targets are revealed to the public.

These characteristics make its presence felt in other cases treated as ordinary terrorism, whether domestic or transnational. These could be the cases of the Oklahoma City bombing in 1995, known as the “OK bombing”, and 9/11 in New York in 2001. Both events led to an increase in criminal legislation in the U.S. and laws limiting civil liberties, such as the Public Law 104–132 or “Antiterrorism and effective death penalty Act of 1996”, known as AEDPA; and the “Patriot Act” or “USA Patriot Act” of 2001, respectively. Both instruments granted unprecedented intervention powers to the Federal State in U.S. history (Beall 1998; O’Byrant 2006; Orye 2002; Raab 2006; Tompkins 2002; Whitehead and Aden 2002).

Moreover, at the same time, in the situations described above, there were multiple inconsistencies and unintended effects, such as unconsidered evidence, concealment of other evidence and information, grossly negligent investigations, intentional misinformation, manipulation of the facts by political authorities, etc. (Gage and McGee 2012; Hoffman 1998; Hughes 2020; Koppang 2009; Nowosielski 2006; Thompson 2006; Wallace and Stuchell 2011;

Wyndham 2017). In addition, review studies reflect the disputes and lack of consensus on something that should not be complex to determine, such as the collapse of three buildings (Eastman and Cole 2013; Wyndham 2017), and empirical studies from the hard sciences, not yet refuted, such as those that found residues of nanothermite-type explosives used by the military in the debris from the collapse of the twin towers (Harrit et al. 2009); such as the discovery of carbon nanotubes from nanothermite-type military explosives in the lungs of rescue workers and victims of the collapse (Wu et al. 2010); such as the fact that the nature of the waves, their velocities, frequencies, and magnitudes invalidate the official explanations that the collapse of the twin towers was caused by aircraft crashes, and that only explosives could have been the cause of such seismic waves (Rousseau 2012). This is the same interpretation that literature holds in relation to the official thesis of the FBI building attack (Ok bombing): the seismic waves produced by the attack suggest that there were more than one explosion, in contrast to the official thesis of just one bomb (Holzer et al. 1996). All of this would indicate that, in both cases, the official thesis could be called into question. Moreover, the notion that the 9/11 attacks served to drive political agendas is proposed in the literature (Kellner 2004).

Therefore, it would not be strange to think of the current functioning and conformation of “stay-behind” groups, as proposed by some authors (Ganser 2014). If history does not repeat itself, it, at least, rhymes, and if it is possible to observe a general pattern, there could be a certain historical continuity, beyond just “risk society”. Such a phenomenon could constitute a factor that would steadily increase the criminal legislation of states, but in the face of which it would be necessary to determine the real causality of such phenomena before simply increasing criminal legislation.

### 3. How to Answer the Question When an Increase in Criminal Legislation Is Needed

#### 3.1. Social Change as a Starting Point

Nagel, in an editorial, and in an overview of the 1970 issue 4 of the journal *American Behavioural Scientist*, establishes a systematisation in dealing with the subject of law and social change, which for him should be summarised in four questions: (a) how would one measure the relationship between law and social change? (b) How and when does social change produce legal change? (c) How and when does legal change produce social change? (d) How do the two forms of change interact with each other? (Nagel 1970). For the first question, the author provides examples of studies, which found that legal change did not have a valid causal relationship with a reduction in motor vehicle death rates. For the second question, he exemplifies this with two kinds of studies: one, more general, setting out the relationship between the changing social environment and the responses of legislators and judges to that changing environment; the other, more specific, describing the historical social forces responsible for moving the criminal law from punishment to deterrence to rehabilitation. For the third question, the author exemplifies this, as in the previous case, with two kinds of studies: one, value-free, in which the effects of the law on behaviour and attitudes are described; the other, value-based, in which certain objectives are taken as given, and then policies are described that would optimise or satisfy those objectives. For the fourth question, the author points to Marxist theories as discussing the relationship between social change and legal change in a reciprocal way, in part, because of Marxist studies of the relationship between infrastructure and superstructure proposed by Marxism. Within this whole scheme, we believe that the first question is part of the third question, as it is only a quantitative variant of it, and that it constitutes a sub-study on the social effects of the law. Therefore, for us, only the last three questions correspond to a study of law and social change.

Now, of these three new questions, it is the first that relates to a study of increases in law.

In *law as an obstacle to social change* (Novoa Monreal 1983), Novoa reflects on how and why law can become an obstacle to social transformation. There—as in *is there also a critical limit to legislation?* (Novoa Monreal 1974)—points out that stagnation is a defect of positive

law in itself, and that the purpose of the liberal foundations since Napoleon is that the law should be perennial and unalterable, so that its obligatory content remains crystallised in time, until another legislative declaration. However, social life is not immutable, having a mobility like that of an organism, which is why there is a distancing, a dissociation between the law and the reality to which it is to be applied. The procedures for amending the law, because they are lengthy in time, can also produce a delay that contributes to the law becoming obsolete. Technological and scientific changes, as well as changes in social structures, are challenging traditional law. After the two great wars, there would have been an increase and acceleration of a “process of law production” (Novoa Monreal 1983, p. 50). The studies seem to propose that law and social change have, in their natural meaning, different “speeds”, and that they are not systematically incorporated into traditional legislation, remaining dissociated as if they belonged to different legal systems, resulting in overcrowded and disorganised legislation.

The studies propose that law and social change have—to use the term in its natural meaning—different “speeds”. However, two things should always be considered. The first is that, when talking about law and social change, it is important to consider “law” rather than just the law, since it is precisely the activity of the judge in applying it that constitutes an element that has, as one of its objectives, to update the law in the face of the changes that have occurred at the social level. Secondly, when we speak of social change, we are referring to a profound transformation of social relations. This means that the activity of the judge in its updating does not withstand a transformation at this level, which would simply lead to a straightforward legal reform.

However, if we make the proviso, what is of interest for the present study is the behaviour or mechanics that occur in the law, in the face of social life, and how the law covers sectors not previously covered by the same law, in the face of social change.

The behaviour of criminal law in the face of social life is more restricted than in other branches of law, especially in continental law, due to the principle of legality, but this does not mean that judicial activity does not update criminal law in the face of social life.

Ultimately, this judicial application determines the elasticity of the law, i.e., its ability to be applied to social facts. If judicial application is not capable of giving elasticity to the law; that is, of making it feasible to apply to the present through judicial interpretation, it is possible that the law has already entered obsolescence; that is, it is not capable of adapting to social changes, and a legal modification becomes necessary (Carrasco Jiménez 2017a), which would constitute an increase in criminal law<sup>4</sup>.

### 3.2. *The White-Collar Crime and Reflections on Their Criminal Nature*

Sutherland defines *white-collar crime* as “violations of the law by people in the upper socio-economic class” (Sutherland 1949, p. 19), and from there, he conducts a review of various offences by subjects of this species. Regardless of the series of issues that can be inferred and have been inferred from Sutherland’s work, there are specific issues to which we will draw attention, and which would indicate characteristics of white-collar crime.

White-collar crime not only injures individuals, but also produces important changes in the institutions of a society. Individuals in this type of crime have acted out of self-interest and not with the cooperative life of society in mind. It can be observed that these individuals show contempt for the law. It is also observed that, although these subjects break the law, they do not see themselves as criminals, but as respectable citizens.

One issue that Sutherland finds is some importance of the definition of crime, but only as a means of determining whether conduct should be included within the scope of a theory of criminal behaviour, to which he asks a question that seems to us central, and that is, “are the illegal acts of corporations, which have been tabulated above, cognate with the burglaries, robberies, and other crimes which are customarily included within the scope of theories of criminal behaviour?” (Sutherland 1949, p. 30). The key point

<sup>4</sup> This will not be dealt with in detail here, and the relationship between judicial activity and criminal inflation will be dealt with in later works.

here is undoubtedly the term “cognate”, and as a synonym for “analogous”, “similar”, or “comparable”.

He answers this question, noting that, yes, they are cognates, through with two arguments: (a) the fact that these conducts have already been found against by U.S. laws and courts, independent of the subject matter jurisdiction of the court, but found against under conditions, such as a criminal offence; (b) the fact that all these laws and judgments have a “logical basis” in the *common law*.

It seems that what Sutherland wants to express in these cases is that a first indicator of the presence of criminal acts would be the existence of a legal reprobation of these conducts analogous to the criminal one within the system. A second indicator, to Sutherland, seems to be that such acts would respond to laws analogous to those that already constituted law in the USA.

Regarding the first indicator, Sutherland describes that, in his time, there were some *laws* and judgments, regardless of the subject matter jurisdiction that a judge had, which condemned, in one way or another, conduct with economic content (such as *antitrust*, false advertising, anti-labour, anti-industrial property judgments) and which consisted of social harm described as “misconduct”, “discrimination”, “injustice”, “unfairness”, “discrimination”, “injustice”, “injustice”, “discrimination”, “injustice”, “injustice”, “injustice”, “discrimination”, “injustice”, “injustice”, “injustice”, “discrimination”, “injustice”, “infringement”, and persons or social institutions wronged and affected (competitors, institution of free enterprise, patent institutions, consumers by arbitrary pricing, fraud, employees by coercion of employers, the public by interference with trade by strikes and factory closures, copyright).

As for the second indicator, Sutherland would be relating it to the fact that such laws and/or judgements had a “logical basis” in the *common law* (false advertising: fraud and theft; labour coercion: extortion) and as an adaptation of the *common law* to modern social organisation.

Thirdly, this adaptation of the common law to modern social organisation that Sutherland points out seems to indicate a criminal law that adapts to social change, but insofar as the new conducts are related to a common trunk of criminal conducts, that is, as if they were versions or modalities of traditional or nuclear criminal conducts. This could also mean that each social change would bring new forms of crime, because it previously brought new social practices.

Thus, in the situation described above, a blank area, or an area not covered by the criminal law would be indicated. We are indicating a blank sector or one that is not covered by criminal legislation, which would not alter social equilibrium. On the contrary, the imbalance is already there, because, as a result of the social change brought about by the breakneck speed of information technology, there are new versions of the same logical basis, which would make it necessary, in order to recover this balance, to cover this blank area with sufficient criminal legislation.

If Sutherland established, as a parameter, a body of law that “criminalised” acts of *white-collar crime*, in order to point out the “criminal” character—then it is a point that is still accepted by some critics of the substantiality of white-collar crime (Aubert 1952, p. 266).

Clinard, following Sutherland’s tracing, and on a point that the same author made in white-collar crime (Sutherland 1949, pp. 164–75), focuses its observation on the Emergency Price Control Act of 1942 and the Second War Powers Act, both of which established a series of “criminal” rules for white-collar conduct deemed to be administrative offences (Clinard 1946).

Clinard research aims at describing violations of price and rationing regulations issued by the Office of Price Administration (OPA) in the U.S. during wartime, principally violations committed by wholesalers and retailers and manufacturers. He points out that these OPA regulations and orders act as controls on the behaviour of almost all consumers in the United States, and almost all persons engaged in commercial activities are governed by one or more of the specific commercial regulations. Such controls on business were

the most drastic ever issued in this country. Prior to the OPA regulations, many of the practices targeted for restriction were legal practices carried out by businesses that resulted in shortages and maldistribution of supplies. These measures were widely supported by the public. Clinard notes that there has been much debate as to whether these violations actually constitute crimes and answers this question by drawing on Sutherland and Jerome Hall. While the former states that the nature of a crime is not wilfulness nor the imposition of punishment, but that the unlawful act is punishable (Sutherland 1944). Hall, for his part, points out that the distinction between crimes and torts, and between criminal and non-criminal, are artificial and theoretically illogical distinctions (Hall 1943). On this basis, Hall infers that almost all violations of the OPA regulations constitute criminal acts, and that even violations of the Emergency Price Control Act are defined by Congress as socially harmful and a violation of the law, with the only limitation being that criminal sanctions are used only in cases where the violation was deliberate, although the author notes that criminal sanctions were not mandatory either, leaving the possibility of alternative measures entirely to the OPA (Clinard 1946).

Hartung, on the subject of white-collar crime, and in relation to the same object of Clinard's study, studies violations of Office of Price Administration regulations in the wholesale meat industry in Detroit, and the points he considers for discussion are: (a) the factual basis on which white-collar crimes should be considered criminal; (b) whether an act committed without deliberate intent should be considered criminal; (c) the importance of white-collar crimes to current criminological theories, and; (d) a characteristic of these crimes, which distinguishes them from ordinary crimes and which has special significance to the community. He points out that, in his opinion, criminology should not be concerned with what a crime should be, but with what it is, and it is a crime that is prescribed as such by a legislative body, which also determines its punishment. He does not believe that, in determining a criminal act, like Clinard, one should be concerned with whether it was intentional, since it would have been recognised by both the law and the OPA enforcement policy that unintentional violations had as detrimental an effect as deliberate ones. Based on an analysis of data, he rules that acts where there is an absence of intent to violate are nonetheless criminal acts if they meet the tests of formally defined social harm and the possibility of legal sanction. He further notes that, The Emergency Price Control Act and the Second War Powers Act had established a number of offences and penalties for them. He notes that these (administrative) offences tend to resemble the more usual criminal offences in a number of respects, such as in the conduct of the subjects of the offence, in the character of both inadvertent and deliberate acts. He further adds that in these white-collar offences, the characteristic is that there is a chain of offences, so that, if the offence was committed by the wholesaler, all successive secondary wholesalers and even the retail outlet were progressively involved; if the offence was by a secondary wholesaler, all stages after him were involved. Such offences did not stop until the final consumer paid the financial amount involved in all the offences in the given chain, i.e., paid more for his products than he should have had to pay according to the law (Hartung 1950).

### *3.3. Inferences from This Section*

Despite the differences between Clinard and Hartung, there are issues that both recognise the situation as similar. Both understand that, although they are administrative-type laws, they are in the presence of criminal offences rather than administrative offences. They also both agree in recognising social harm as an element in the consideration of the conducts that are at the core of the offences, as well as in the observation on the lack of intentionality in the offences in order to consider the criminal nature of the conduct, and, furthermore, the similarity of these conducts with criminal offences.

Despite Hartung's reluctant view of the somewhat more "ontological" search for crime, the following expression of his, in relation to the infractions punished under The Emergency Price Control Act and the Second War Powers Act, leaves more than just the strict identification of crime with a legally determined and punishable (punishable) act:

“the repeal, abrogation, or expiration of these laws and regulations removed what were formerly violations of them from the classification of criminal. They may be just as irritating, immoral, or abominable today as they were in June, 1946, but they are no longer criminal” (Hartung 1950). This is interesting, because, although Hartung restricts the possibility of the concept of crime to legal determination, he still recognises the reprehensibility of these acts.

However, a central point, no doubt, is the question of Sutherland’s affinity or analogy between the offending conducts in the white-collar and classical criminal offences, which Clinard and Hartung seem to agree is an important factor in the determination of criminal conducts.

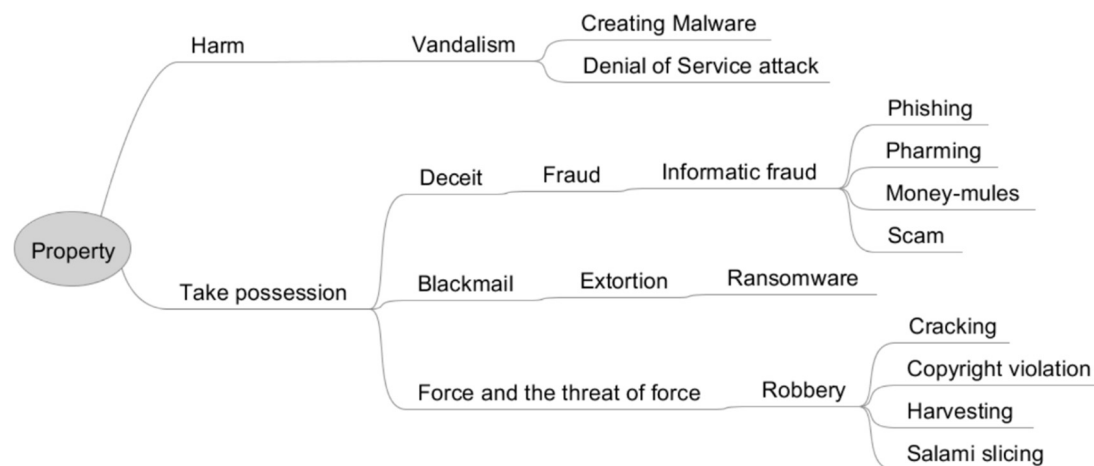
Thus, and from what has been said, it can be inferred that the same logical basis would assume that criminality refers to a limited and defined set of socially harmful conducts; thus, constituting a kind of “infrastructure” from which other new conducts are derived by analogy.

For example, and as shown in Table 1, a logical basis for crimes against property can be established by defining, firstly, its basic conduct, which in the example is “appropriation of another’s property”. Secondly, determining the structural element, which in general terms for us, would be the element that defines the basic conduct, and which, in the specific example, is the “absence of consent of the owner to the appropriation”. Thirdly, in Table 1 the “means used for carrying out the conduct” is visualised. The above elements would constitute the logical basis. A second part, which can be observed in Table 1, in the right column, is constituted by the offences or type of offence to which each mean corresponds, which would be derived from this logical basis. Due to their derivative nature, they must be the “superstructure” of this logical basis.

As Figure 1 shows, it is possible to establish a constellation of conducts that can be derived, for example, for cases of computer crime, which is not yet considered a criminal offence in some criminal laws, for example, in the current Chilean legislation.

**Table 1.** Infrastructure (logical base) and superstructure of crime against property. Source: own creation.

Logical Base			Superstructure
Basic Conduct	Structural Element	Media	Crime Figure
Appropriation of not owned object	absence of owner’s consent to appropriation	Deceivment Force/intimidation blackmail with initial consent to hold breach of trust	fraud Stealing/usurpation extortion misappropriation theft



**Figure 1.** Constellation of criminal conduct between property crime and cybercrime. Source: own elaboration.



In this case, between the regulated area and the new unregulated area, as in any similarity, there is no identity, but identity in a set of characteristics, and the difference in a set of accidental characteristics.

However, another scenario occurs when modalities of already existing offences are constituted as offences (typifying, in the jargon of some continental systems), or aggravations of an offence, when these modalities do not alter the intensity of the situation already legally described in a specific offence. This is, for example, what happens in Chile with looting, where, due to the looting that occurred during the social outbreak of 18 October, 2019, art. 449 ter was incorporated into the Chilean Penal Code, by Law N°21.208 (30 January 2020), an aggravating circumstance to crimes against property in cases of looting. In this case, it is not that a new hypothesis was added to the already existing offence of burglary or offence of theft, such as stealing things in places where their safeguards were just destroyed, but rather that burglary or theft was added to the situation of looting, to aggravate criminal responsibility. Thus, there is a perfect identity between the crimes of burglary or theft and looting. In both, the logical basis is the same, but also the legal object, such as movable property. Therefore, looting, as conduct, was perfectly covered by the crime of burglary. The modality of acting “on the occasion of a public calamity or disturbance of public order” (Art. 449 ter) does not intensify the situation, i.e., it neither adds to the seriousness of the act nor increases its danger.

In the case of computer crime discussed here, this area not regulated in Chilean legislation constitutes a case of the need for criminal legislation, because there is a set of facts that imply that a subject obtains a social advantage over another or other subjects, on whom a social disadvantage falls, in analogous terms, to an area already regulated by criminal legislation. We could then point out that, in this case, and following the terminology used for inflation of criminal legislation or “criminal law inflation” (Carrasco Jiménez 2017b, pp. 78–80), in this area, there would be deflation of criminal legislation, since criminal legislation would be insufficient. On the contrary, in criminal looting law, the looting conduct stated in the Article 449 ter does not add relevant legal information that was not already included in burglary crime or theft crime. Consequently, an aggravation of looting would be inflationary for us.

#### 4. Conclusions

To discuss increases in criminal legislation, a review of the causes should first consider whether such an increase responds to certain social transformations that produce blank areas of criminal legislation. It should also critically consider the causes that, on a naïve realist level, are indicated as possible increases. In this way, it could perhaps be possible to determine the need for criminal legislation, on the one hand, and, on the other hand, its total inappropriateness.

However, in accordance with what has been said, in response to the question regarding when there is a need to criminalise, the answer would be, “when new versions of socially harmful conducts arise that are analogous or equivalent to the same logical basis of conduct previously determined as a crime, and insofar as the absence of criminal legislation, would produce a dysfunctionality or imbalance in the social system in sectors not covered, or in targets in situations similar to sectors covered by criminal legislation.”

Therefore, in accordance with the above, not every increase in criminal legislation is identified as inflation of criminal law, as the respective authors reviewed noted, since the term criminal inflation, they note, is a synonym of increase (Beristain), and/or as something socially inconvenient (Buján-Pérez, Silva Sánchez, Ferrajoli), or rather, dysfunctional. If we consider this, only increases in criminal legislation that do not provide coverage in white sectors, analogous (same rationale) to others where such coverage does exist, could be considered as inflation of criminal law. On the contrary, and following a similar conceptual content, situations where there is no such coverage could be said to be deflation of criminal law or “criminal law deflation”, and, thus, a need to cover the target.

Thus, this way of understanding a need for criminal legislation is far from an explanation of the legitimisation of an increase in criminal legislation as attempted by the previous authors, because it focuses on factual and concrete grounds.

On the other hand, and with regard to the question on how to respond to an increase in social criminality, although it is not the main object of this research, we could outline—perhaps for future studies—that a sectorisation of the law, as proposed by Jakobs or Silva Sánchez, is perhaps a good political–criminal solution.

In the case of white-collar crime, Clinard provided some empirical evidence indicating that, for corporate crime, imprisonment produces a greater preventive effect than fines, and that short prison sentences have a better effect than heavy fines. This is in contrast to marginal crime, where, faced with a fine that cannot be paid, imprisonment is preferred (Clinard 1946). Therefore, in the latter case, the sanction would have no preventive effect, and on the contrary, would contribute to the economic impoverishment and de-socialisation of economically disadvantaged sectors.

In addition, it is generally stated that economic criminals have certain characteristics that are different from ordinary criminals, e.g., they do not see themselves as criminals, they are not observed as such by society (Sutherland 1949), they are fully socialised, have established families, and no criminal records (Clinard 1946). This could lead us to think that it would not be possible to apply the same criteria for assessing criminal conduct to them as to ordinary or classic offenders, especially if such background is taken into account in determining specific criminal liability and punishment, as in the case of attenuating or mitigating circumstances that might not apply to economic crime, or which are observed in a different way to those of classic crimes. Therefore, a sectorisation of socio-economic crime is not unreasonable, but not, as Silva Sánchez postulates, because of a differentiation in the rules of imputation, but rather because it is necessary to evaluate, in a different way, the concrete criminal liability of the subjects of this type of criminality, and, with this, the rules relating to the mitigation of conduct, and the type of effect that the sanctions produce on these subjects.

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