

USES AND MISUSES OF CRIMINALISATION

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ABSTRACT

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Which uses of the power to criminalise are *misuses* of that power? When, in other words, is an exercise of the power to create a criminal offence an exercise of that power which cannot be morally justified? This thesis seeks to provide one part of the answer, by addressing an aspect of the question little discussed by criminal law theorists. Thus it seeks not classes of *conduct* which it is impermissible to criminalise, nor classes of *objective* which offence-creators cannot permissibly pursue. Rather the thesis addresses the distinct issue of *means* – of *how* criminal offences (are set up to) bring about their creators' objectives. It asks which means of achieving objectives it is impermissible to employ or make available, and how the power to criminalise must be used to avoid their employment or availability.

In answering these questions the thesis distinguishes a number of *types* of criminal offence, by reference to the means by which the tokens of each (are set up to) achieve objectives. The argument is that to create tokens of these types is often to misuse power, because it is often to employ, or make available, impermissible means. This judgment of impermissibility is a function of a number of principles of political morality, some of which are developed at length in the course of the thesis. No single principle (or set of principles) is presented as an absolute limit on the power to criminalise; but each is part of a complete picture of how that power can permissibly be used, and contributes to vindicating the thesis defended within these pages. That thesis, to repeat, is that some uses of criminalisation are no better than misuses, on account of the means by which the resulting offences (are set up to) achieve their creators' ends.

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CHAPTER 1

INTRODUCTION

1. Three Questions

Recent years have witnessed a revival of interest among criminal law theorists in the subject of criminalisation.¹ Much of the resulting literature, like the literature which came before it, is concerned with a particular set of normative questions about the creation of criminal offences. At the forefront of this set of questions sits what I will call *the content question*, concerning the content which can permissibly be given to any criminal offence.²

The content question: which conduct can, and which conduct cannot, permissibly be made a criminal offence?

Equally prominent, if not more so, is what I will call *the reasons question*, concerning the reasons for which offence-creators can permissibly act when they create a criminal offence.³

¹ As Nicola Lacey recently put it, '[i]n the last few years...criminalisation has been enjoying something of a renaissance as an object of theoretical interest'. Lacey notes that perhaps the principal catalyst here has been the work of Douglas Husak, to which I return below. See Nicola Lacey, 'Historicising Criminalisation' (2009) 72 MLR 936.

² Where by permissible I mean *morally* permissible, rather than permissible in any other sense.

³ When talking here of offence-creators' *reasons for action* I mean to refer to those factors which offence-creators take to justify their creative acts – to what have been called *explanatory reasons* by other writers. Not all such reasons *actually* justify the action they are taken to justify, and thus they are not all what others have called *justifying reasons*: reasons which *do* justify a given action in a given instance. For one account of this divide, albeit one using slightly different labels, see John Gardner, *Offences and Defences* (OUP, Oxford 2007) ch 5.

The reasons question: which objectives can, and which objectives cannot, permissibly provide offence-creators' reasons for creating a criminal offence?

While these questions do not exhaust the field, they are famous questions with famous answers, and much attention has been paid to them when criminalisation has been discussed.⁴

This thesis seeks to make a contribution to the aforementioned revival. But it seeks to do so not by tackling the content or reasons questions. Rather it seeks to make that contribution by attending to the existence of a further question, which must be answered whenever conduct is criminalised with particular objectives in mind, namely *how* will this particular offence achieve the objectives of its creators? To put it another way: by what *means* will this offence – with this content, presented in this way – achieve what there was thought reason to achieve when the offence was made law? So far, of course, this third question, unlike the first two, is normatively inert: it simply asks for an explanation of how a given offence will work. But once we see that this third question exists, we should quickly see that there is a normative equivalent applicable to criminalisation. We should quickly see that we can also ask what I will call *the means question*.

⁴

On one view, the reasons question is the only question that matters: the permissible content of criminal offences *just is* the content which can be given to them by those acting for the right reasons. But this is by no means the only view: we may accept that reducing harm to others is a permissible reason to create an offence, but remain convinced that the only conduct permissibly prohibited in that quest is conduct which causes harm 'non-remotely'. Thereby, one imposes an independent, content-based limit on offences created for the right reasons. This, I think, is the project which occupies those concerned with remote harms – see eg Andrew von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in AP Simester and ATH Smith (eds), *Harm and Culpability* (OUP, Oxford 1996) 259.

The means question: what means are, and what means are not, permissible means by which criminal offences can (be set up to) achieve their creators' objectives?⁵

The present thesis offers a partial response to the means question. Although it will require qualification, here is a first formulation of that thesis.

Thesis 1: when offence-creators create criminal offences which (are set up to) achieve their objectives via certain means, they misuse their power to add offences to the criminal law.⁶

With this in mind one might suggest that my focus can be captured in the following way: it is a focus not on the *what* or the *why* of criminalisation but on the *how*. While this statement is by no means entirely inaccurate, it does threaten to mislead. First, I am not interested in *all* questions about how the objectives of a given offence are (meant to be) achieved. The means question is a huge question, many elements of which are not dealt with by the partial answer offered in this thesis. As but one example, if secret courts have been set up to try suspects without the usual procedural protections, this makes a major difference to how offences will bring about the punishment of offenders, which punishment may well be an objective of the creators of a given offence. What is important here is that the use of such means is not a function of the way any offence has been *defined* or *presented*, but simply of the fact that offences (whatever their presentation or definition) have been placed under the jurisdiction of the secret courts. My own focus is exclusively on matters of

⁵ It is worth noting that one objection to certain means being used is that they provide (greater) opportunities for petty officials to hijack offences and use them to achieve their own illegitimate ends. I pursue this objection in Chapter 3 (text to n 178).

⁶ I make various modifications to the thesis in the remainder of this chapter.

the former kind: on the *content* and *presentation* of particular offence-definitions, and the effect these have on how the objectives of offence-creators will (or are meant to be) achieved.⁷ This suggests that *Thesis 1* should be modified as follows:

Thesis 2: when offence-creators create criminal offences which, as a function of their content or their presentation, (are set up to) achieve their objectives via certain means, they misuse their power to add offences to the criminal law.

Second, the suggestion that my focus is on matters of how *instead of* matters of what and why, is, for reasons already touched on, doubly misleading. First, as we just saw, my focus is on the way in which *what* is criminalised determines *how* objectives are achieved. Second, as the bracketed phrase in *Thesis 2* shows, there is no avoiding offence-creators' reasons even as one focuses on means. For offences are often *set up* to achieve their ends via certain means, such that we cannot understand *why* those offences take the shape they do without first understanding *how* they are meant to achieve their ends. It does not follow that the means question collapses into the reasons question. The latter, as I formulated it above, was (at least partly) a question about the *ends* taken to justify creating an offence in the first place, and I will not tackle that (part of the) question here. What I am noting here is simply that the means question has two dimensions: first, there is the question of the means by which offences will *in fact* achieve their creators' (or other) objectives;⁸ second, there is the question of the means by which offences were *meant* to achieve

⁷ What is the difference between an offence's presentation and its definition? The definition of an offence is a function of the elements of which it is comprised in law. The presentation of an offence is a function of the way in which that definition is brought to the attention of potential offenders (and legal officials, and other interested parties). Both will be of relevance in the chapters that follow.

⁸ Assuming, that is, that officials pick up the means of achieving objectives made legally available to them. As I mention at n 22 below this may not always be the case. When it is not, it remains worth asking whether offence-creators misused their power in making those means available in the first place.

those objectives.⁹ This latter question requires reference to offence-creators' reasons for acting if it is to be answered, and I thus attend to those reasons in this limited way in what follows. The result of all this is that while what I have called *the means question* is indeed the focus of this thesis, answering that question requires attending not just to the *content* of criminal offences, but also to the *reasons* why those contents are what they are. The three questions with which this section has been concerned thus turn out to be more closely related than they first appear.

2. Situating the Inquiry

I have already mentioned that my argument is made against a backdrop of revived interest in criminalisation. But talk of a revival itself points us to the existence of earlier work, brief consideration of which may help further clarify the distinctive features of my discussion. As a way in consider the well-known discussion of the liberal harm principle, defended at various times by J.S. Mill, H.L.A. Hart and Joel Feinberg among others.¹⁰ For present purposes, it is worth noting that the harm principle can be (and frequently is) pressed into dual service: not only does it delimit what amounts to a permissible *reason* for creating a criminal offence, it also sets limits to the permissible *content* of offences.¹¹ It provides answers, in other words,

⁹ I return to some of the complications this distinction creates in the following sections of this introduction.

¹⁰ See JS Mill, *On Liberty* (Penguin, London 1974); HLA Hart, *Law, Liberty and Morality* (OUP, Oxford 1968); Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (OUP, Oxford 1984).

¹¹ Albeit that for both Hart and Feinberg, the principle has exceptions. Hart accepts some criminalisation designed to protect people from themselves. Feinberg accepts criminalisation of some merely offensive (but not harmful) behaviour, and (perhaps) of some free-floating evils. See Hart, *Law, Liberty and Morality* (n 10); Joel Feinberg, *The Moral Limits of the Criminal Law: Offence to Others* (OUP, New York 1988); Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (OUP, New York 1990) 330-331. The dual role of the harm principle has been helpfully pointed out by Michael Moore: see Moore 'A Tale of Two Theories' (2009) 28 Criminal Justice Ethics 27, 28.

to the reasons and content questions.¹² Thus for Mill the only permissible reason for criminalising behaviour is to prevent some harming others; and the only conduct which is permissibly prohibited is that which does such harm.¹³

While the harm principle continues to be discussed, significant attention has also been paid to the role of *wrongdoing* in setting limits to the criminal law.¹⁴ This discussion has given rise to another principle of criminalisation, which Michael Moore has dubbed the *wrong principle*, and which holds that rather than using harm to limit its horizons, the criminal law should instead limit itself to the prohibition of moral wrongs.¹⁵ Once again, the principle can be pressed into dual service, providing answers to both the content and the reasons questions: thus the only conduct which should be made a criminal offence is conduct which is morally wrong, and the only permissible reason for criminalising conduct is precisely that it is such a wrong.

It is on the back of this literature that Douglas Husak has sparked the aforementioned revival of interest. Husak articulates seven constraints on the criminal law, which he claims must be met if criminal punishment is to be

¹² There is, of course, a rival view, according to which the harm principle only demands that whatever one prohibits, doing so must prevent harm which would otherwise occur (at a not disproportionate cost). I set this view aside here. For discussion, see Gardner (n 3) 118-120; Joseph Raz, *The Morality of Freedom* (OUP, Oxford 1986) ch 15.

¹³ Thus Mill not only claims that ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’, he also writes of the ‘sphere of action’ the harm principle protects from prohibition, a sphere covering all those actions which do not directly harm others. See Mill (n 10) 67-72.

¹⁴ Of course on some views of the harm principle, something is only harmful in the sense of relevance to the criminal law if it is also *wrongful*: see Feinberg, *Harm to Others* (n 10) ch 1. We need not discuss this complication here.

¹⁵ See Moore (n 11); Michael Moore, *Placing Blame* (OUP, Oxford 1998). An influential variant of this view, defended by Antony Duff, holds that the only moral wrongs the criminal law should be concerned with are those he calls public wrongs – wrongs which are of concern to the public, while also being wrongs to their victims. For a recent account see RA Duff, *Answering for Crime* (Hart Publishing, Oxford 2007) ch 6.

permissible.¹⁶ It is worth noting that Husak's constraints themselves amount to a mix of constraints on the *what* and the *why*. As far as content is concerned, offence-definitions must capture conduct which is wrongful and deserving of punishment; as far as reasons are concerned, offences must be designed to prohibit a non-trivial harm or evil. Husak also pays notable attention to the *effects* of criminalisation, paying homage to a frequently overlooked body of literature on criminalisation of a more empirical flavour.¹⁷ Thus offences must directly advance a substantial state interest; furthermore, they must be no more extensive than necessary to do this, introducing another content-based limitation on the scope of the criminal law.

Now it is a feature of the literature just discussed that it engages in the search for what Antony Duff has helpfully called 'master-principles' for criminalisation. These are principles which, whether jointly or in isolation, set limits applicable to *any* instance of criminalisation, be it by ruling out the criminalisation *of* A and B, or ruling out criminalisation *for* reasons C, D or E. We may have our doubts about whether any such enterprise could succeed. As Duff puts the point:

each such principle (or set of principles) faces a familiar difficulty. If we give the principle a tolerably determinate meaning that allows it to do substantive work in identifying kinds of conduct that we do have good reason to criminalise, and in setting real constraints on the scope of the criminal law, it turns out to be radically under-inclusive: there are too many kinds of conduct that we surely have good reason to criminalise, but that cannot be captured by the principle as thus interpreted. If, on the other hand, we give the principle a broad enough meaning to avoid this problem of under inclusiveness, it becomes so broad or so vague that it can do no substantive work in guiding or constraining our decisions about criminalisation, and becomes (at best) a rhetorical way of

¹⁶ Douglas Husak, *Overcriminalisation* (OUP, Oxford 2008) chs 2 and 3.

¹⁷ See, for instance, Sanford Kadish, 'The Crisis of Overcriminalization' (1967) 367 *Annals of the American Academy of Political and Social Science* 157.

expressing the conclusion (based on other grounds) that we have good reason to criminalise a certain type of conduct.¹⁸

It is not my aim here to argue that the project of identifying master-principles for criminalisation is doomed to failure. But it is worth noting that if it does fail, those who wish to evaluate instances of criminalisation will be forced to fall back on more piecemeal forms of evaluation, and to invoke a wider range of evaluative tools. It is this rather more modest type of project in which I engage here: I evaluate the means by which some criminal offences (are meant to) achieve objectives, focusing on specific cases where those means are a function of the content and/or presentation of offence-definitions. And in doing so I bring to bear a variety of evaluative tools, ranging from concerns about procedural justice, to concerns about legality, to concerns about the impartiality of government action. None of these is presented as an absolute constraint on criminalisation; but each must be considered if the defensibility of creating a particular offence is to be fully grasped.

It may be objected that having presented my project in the manner in which I presented it above, I must in fact be covertly assuming that the search for master-principles will fail. It may be said that if we do identify master-principles to answer the content and reasons questions, these answers will all but answer the means question. Thus if the only permissible objective of criminalisation is to prevent harm to others, and if we must only prohibit that which *does* in fact harm others, the permissible means of achieving our objective may seem to be determined by these answers. We will prohibit the harmful in the hope that potential offenders will advert to the prohibition and desist, and we will punish those who nonetheless offend in the

¹⁸ RA Duff, 'Towards a Theory of Criminal Law' (2010) 84 Aristotelian Society Supp Vol 1, 19-20.

hope that this will deter them and others from further such behaviour. Thereby (and only thereby) we will achieve our harm-reductive objective.

In reply: that things are so is not at all determined by our answers to the first two questions. To provide just one example, one may prohibit behaviour which does some trivial harm to others without any intention that potential offenders advert to the prohibition, intending only that the prohibition assist officials in prosecuting those thought to have caused this (or a more serious) harm. The intention need not even be that the trivial harm be *reduced*; it may simply be that the prosecutions thereby facilitated will reduce the incidence of other, more serious harms. This is enough to show that the question of means is *not* resolved by our answers to the content and reasons questions, whether or not the master-principles sought by other writers can successfully be identified. If I am right, the means question has been largely overlooked. It is the task of this thesis to do some of the work required to make up for this neglect.

3. Uses and Misuses

To discuss the acceptable objectives of criminalisation – something which, we have seen, has been a focus of the literature at least since Mill – is already to see criminalisation as a tool which can be used for different purposes by the institutions of the state. Of course, states and governments have a variety of tools at their disposal. There are extra-legal tools of governance: the might of arms, the manipulation of financial incentives, the power of propaganda.¹⁹ There are legal

¹⁹ It is true that in many states such tools exist, at least in part, on a legal footing. The point remains however that when one uses arms, money or ideas to govern, one employs an *alternative* to the direct employment of laws to attain political goals. This is all I mean by ‘extra-legal’.

tools of governance in which crime plays no part: the creation of torts, of equitable wrongs, or of duties in public law. Governing through criminalisation is a distinctive way to govern, if only because it is constituted by the legal validation of *offences* (as well as enforcement of suspected violations), and in most cases, if not all, by the legal validation of *punishments* (as well as their imposition on violators).²⁰ But whatever the distinctive features of the criminal law, it remains one tool among others which governments can use to achieve their objectives. My argument here takes this line of thought one step further. Not only do states and governments choose whether to use the criminal law as opposed to some other tool, they also choose *how* to use the criminal law to attain their objectives – they choose the *means* by which the offences they create are to help achieve their objectives; and, in the cases with which I am concerned, they do this by way of the design and presentation of the offence-definition itself.

It is the argument of this thesis that some of these uses of the criminal law are in fact *misuses* – they are misuses of the power to criminalise possessed by certain officials and institutions of the state. Now because I am not answering the reasons question, the type of misuse I am focused on here is not a matter of using power to achieve improper *ends* – it is not akin to an interviewer using a power to appoint, in order to appoint whoever he finds most attractive rather than the best candidate for the job. Rather, it is a matter of using improper *means* to achieve (what may be proper) ends. It is thus more akin to the interviewer who refuses to interview anyone, because he is convinced he can identify the best candidate by sight.

²⁰ I say ‘in most cases’ to leave open the possibility that there need be no punitive liability attached to an offence in order for that offence to be a *criminal* offence. As Victor Tadros has observed, there appears to be some debate on this point among contemporary theorists of criminal law. See Victor Tadros, ‘The Architecture of Criminalisation’ (2009) 28 Criminal Justice Ethics 74.

Although his objective may be the right one, it is wrong to adopt this means of selection when employing the power to appoint.

My claim here is that one may misuse the power to criminalise in a similar way: by creating an offence-definition because it will allow one to obtain (what may be proper) ends, by means which are improper means when exercising that power. What makes employing certain means improper? Simply that to employ these means lacks justification. In what follows I will identify various objections to the employment of certain means, from the fact that some means violate the Rule of Law, to the fact that some impair judicial independence. But for present purposes, the key point to see is that the power to criminalise may be misused in the manner just described: by those with that power creating offences to achieve objectives by certain means, which means are unjustified means whatever one's ends may be.

Now three qualifications are worth noting here in respect of the argument as just presented. First, while I will identify a range of objections to certain uses of the power to criminalise, I do not claim to show that the uses in question can *never* be justified. I will rather claim that the uses in question are open to a whole host of objections, on account of the means employed to achieve offence-creators' objectives. It may thus be said that I do not establish that *any* use of the power to criminalise is actually a *misuse*, as misuses must be unjustified acts and I provide no evidence that justification cannot be found. Whether or not this is a good reply (and I leave this open), my rejoinder is as follows. In light of the many objections which are canvassed in what follows, and the several counter-arguments upon which doubt is cast, the thesis as a whole puts us in a position to adopt the following provisional conclusion: that many of the uses of criminalisation discussed in this thesis are

misuses of power, because the means employed to achieve those offences' objectives will be unjustified means. The conclusion is provisional because it does not rule out the existence of new counter-arguments which *do* justify employing some or all of the means discussed in some or all cases. But it is a strong provisional conclusion: the most obvious, and most obviously weighty, counter-arguments have been considered and found wanting.

Second, this section has occasionally used language which implies that the means under consideration here are always means which offence-creators *intended* to adopt.²¹ It may now be said that it is this implication which makes it plausible to think that power has been *misused*. One of the most obvious ways in which a power can be misused is by those who possess the power deliberately exercising it in ways which are improper, including (in the cases with which I am concerned) deliberately adopting means of achieving objectives which turn out to be improper means.

Notice however that there will also be cases where all we can say with confidence is that improper means have been made available to officials and picked up: where this is the enforcement strategy which eventuates despite the absence of a legislative strategist pulling the strings. This possibility is partly a function of the nature of governance through crime: while such governance certainly *begins* with the design and legal validation of crimes and punishments, to achieve its objectives it necessarily draws on other parts of the apparatus of the state. Police forces are granted powers (and are subjected to duties) to follow up the alleged commission of offences by investigating, arresting, charging and detaining suspects. Courts are presented with cases in which they must adjudicate on whether such allegations are

²¹ The language of employment, for instance, may be thought to imply intentional adoption.

sound, and convict and punish those they find guilty relative to valid offence-definitions. This makes governance through crime *risky* for the creators of offences. Their creations may be applied and developed by these other actors in ways they did not intend or foresee.

For present purposes the question raised is the following: if improper means are made available to officials as a function of the definition or presentation of offences,²² and if this was *not* intended by those who created the offences, was the creation of those offences a *misuse* of the power to criminalise? Whether or not it involves a conventional use of the word ‘misuse’, this thesis gives an affirmative answer to this question. The power to criminalise *is* misused whenever means of achieving objectives are made legally available, and offence-creators cannot justify this availability. Thus there may be a duty to ensure that the offences one creates are presented in a manner consistent with the Rule of Law, such that their crime reductive objectives can be achieved via the guidance of legal norms.²³ If this duty is breached the reductive objectives of the offence-creator may well still be achieved, if only by means of surprise enforcement tactics employed by legal officials. But it may still be said that the offence-creator misused its power to criminalise by making these ambush-style tactics a legally available option, *whether or not* this was the offence-creator’s intent.²⁴

²² I refer here to making means *available* because I mean to include consideration of cases where improper means are made a valid enforcement option for officials, whether or not those officials ultimately utilise those means.

²³ And will, if not achieved this way, be achieved by means of enforcement action which *backs up* this guidance: action taken against those who *did* have decent guidance available to them, but who, for whatever reason, did not follow it.

²⁴ I present an argument of this nature in Chapter 3, where I clarify what it is to make means available to legal officials.

Having given no defence of this use of the term ‘misuse of power’, I will simply stipulate that for the purposes of this thesis the power to criminalise can be misused in (at least) the following ways: first, by offence-creators deliberately adopting improper means of achieving their objectives;²⁵ second, by offence-creators making such means available despite having no intention of doing so. Where evidence is lacking that the first type of misuse has occurred, I will nonetheless argue that there has been misuse of the second type. This suggests that *Thesis 2* can be re-stated as follows:

Thesis 3: when offence-creators create criminal offences which are set up to achieve objectives via improper means, or which otherwise make such means available to officials, those creators misuse their power to add offences to the criminal law.²⁶ For the purposes of this thesis, the means in question are those which exist as a function of the content or presentation of offence-definitions.

Third, I have referred throughout this chapter to offence-creators, as well as to what these creators *mean* or *intend* to achieve. Some will immediately object that if these creators are legislatures (on whose say-so legal validity often depends), attribution of intentions to such bodies is straightforwardly fallacious. Legislatures, they will say, are made up of hundreds of different individuals, who may have hundreds of differing intentions about what any offence is meant to achieve. To talk as though a

²⁵ I do not mean that offence-creators must *know* that the means are unjustified, just that they must intentionally use certain means which are unjustified in truth.

²⁶ This formulation excludes cases where the creation of an offence *in fact* results in objectives being achieved via improper means, but where offence-creators neither intended that this be so, nor made these means legally available. I do not discuss these cases in this thesis.

single intent can be attributed to this group is thus to engage in what is no better than a convenient piece of storytelling.²⁷

I have two responses to this challenge. Consider first Douglas Husak's response to a similar objection.²⁸ As Husak notes much of criminal law theory proceeds on the assumption that statutes have purposes which not only exist but can be discerned. Husak is thus willing to assume, at least for the purposes of his work on criminalisation, that difficulties of the sort flagged up here can be resolved. While this may simply appear to amount to a refusal to tackle the objection, there is, I think, a slightly more generous rendition of Husak's thought. The point is that one cannot solve all the foundational difficulties within one's field of inquiry, while having time left to engage in the arguments which take place upon those foundations. This, I suggest, is a point of arguable application to the argument of this thesis. The literature on criminalisation routinely assumes that criminal offences can have objectives: it would make no sense for Mill to say that the only permissible objective of criminalisation is preventing harm to others, if no such objectives could possibly exist. This thesis is an attempt to add to the arguments of Mill and others, by suggesting that they have only noticed one of the normative questions (the reasons question) which such objectives throw-up, while ignoring another (the means question) which is also of importance. The assumption that such objectives can actually exist is thus part of the very foundation on which my argument is built. It cannot be effectively defended without a thesis of its own.

²⁷ Naturally, this objection is less pressing in respect of judicial offence-creation, which despite official claims that judges can no longer permissibly create new offences (for authority in English law, see *Jones* [2007] 1 AC 136 (HL)) continues to occur in substance when judges extend offences in a manner unforeseen by their legislative creators.

²⁸ Husak (n 16) 133-134.

If the first response fails to satisfy, consider a second of a different temper. This response begins by directing attention to the detail of the law-making process. For as J.R. Spencer has pointed out, that process usually begins with a team of officials from a particular government department, who, with the help of legislative counsel produce a draft Bill for the legislature.²⁹ Now it is much less difficult to believe that the draft Bill produced by this team of officials *is* produced with concrete objectives in mind, including concrete ideas about *how* it is to operate. If this is so, and the objection under consideration is otherwise insuperable, talk of the objectives of criminal offences should be read as referring to the objectives of this team of governmental officials, and these agents (rather than legislatures) should be those thought of when mention is made of *offence-creators*.

Now it may of course be objected that once such a move is made, we are no longer really concerned with criminalisation at all, but with the preparatory work which leads up to the making of criminal law. So be it. I do not think this should be thought to weaken the importance of the arguments at issue: those arguments remain just as strong when directed to the officials of government, whose proposals may well be enacted with only modest revisions by overworked legislators. If it is the government (via its team of officials), rather than the legislature (via its constituent legislators), which intends that improper means be used to achieve its ends, it is the former which is misusing power. The mere fact that the power being misused is actually the governmental power to draft criminal offences (and have their proposals

²⁹ At least this is so in English law. The point made in the text could however be made for any legal system in which legislation is drafted co-operatively by a team of officials, whose proposals are subsequently put to those with the power to accept, amend or reject them. For Spencer's discussion, see JR Spencer, 'The Drafting of Criminal Legislation: Need It Be So Impenetrable?' (2008) 67 Cambridge Law Review 585.

voted on by legislators) seems to me to do little to undermine the force of Mill's (or the present) argument. Particularly when legislative debate is limited – and legislators are easily bullied by the executive – the way government goes about its work is crucial. To the extent that it does indeed rely on the intentions of offence-creators, the argument made in this thesis is of corresponding importance.

4. The Structure of the Argument

By now it will be clear that my thesis seeks to make a contribution to (the revival of) normative work on criminalisation. It focuses on a single question, which I have called *the means question*, and which has received little attention when compared to those questions more commonly addressed. The means question concerns the permissible means by which the objectives of those who create criminal offences may be achieved. But the means question is a large question, and I thus restrict my attention to a single element. I focus on the effects which offence-definitions themselves may have – be it via their content or their presentation – on the means by which the objectives of criminalisation are (meant to be) achieved. When this presentation or definition brings unjustified means into the law, the instance of criminalisation in question is a misuse of the power to criminalise.

The structure of my argument in the remaining chapters of the thesis is as follows. I begin in Chapters 2 and 3 by identifying two types of criminal offence which I call *ouster* and *empowering offences*. I argue that to create either type of offence is to make available means of achieving objectives which are subject to numerous objections, and that even where the availability of these means was not *intended* by offence-creators (as is sometimes the case in Chapter 3) those creators

remain in breach of a *duty* not to make such means available. I consider (and reject) some putative justifications for the way these offences are defined and presented, while postponing consideration of further such justifications for Chapter 7. If I am right, the creation of both types of offence frequently lacks justification. When this is so it is a misuse of the power to criminalise.

Chapter 2 discusses the creation of *ouster offences*: offences created to facilitate the conviction of suspected wrongdoers (with whatever further objective in mind), by excising that suspected wrongdoing from the offence-definition. When this strategy is adopted, the objectives of the offence's creators will be achieved (if they are achieved at all) by means of a court process which *denies* the courts the opportunity to adjudicate upon the aforementioned wrongdoing, which wrongdoing justifies their handing out convictions in the first place. I argue that ouster offences are particularly objectionable from the perspective of the virtue of *justice*. The creation of such offences leads to procedural injustice in both pure and imperfect form, and is thus to be avoided on this count alone.³⁰ Not only this, it also threatens judicial independence, as well as several values consequent thereon.

Chapter 3 discusses the creation of *empowering offences*: offences which (by accident or by design) fail to provide adequate guidance to potential offenders, and, in virtue of this very failure, increase official power to achieve objectives by arresting and prosecuting suspects. I argue that empowering offences are particularly objectionable from the perspective of the virtue of *legality*. Not only do such offences violate demands of the Rule of Law,³¹ they make available means of

³⁰ For the distinction between pure and imperfect procedural justice, see John Rawls, *A Theory of Justice* (rev edn OUP, Oxford 1999) 73-78.

³¹ I use the terms 'virtue of legality' and 'Rule of Law' interchangeably here and throughout.

achieving objectives – the exercise of power officials only have *because of the violation just mentioned* - which offence-creators are duty-bound not to make available. I defend the existence of this duty by developing a claim of H.L.A. Hart's, namely that upholding the Rule of Law offers legal subjects a valuable form of protection: it protects them against threats to their autonomy and freedom which the law might otherwise pose.

In both these chapters I provide examples which suggest that offences of the type in question have at least a foothold in English law. While I cannot do the doctrinal work necessary to work out how strong this foothold is, it is at least worth noting that my concerns are not only applicable to a merely imagined legal future. Those concerns – and the thesis more generally - should thus be of interest not only to criminal law theorists, but also to those interested in evaluating the current state of English criminal law.

Chapter 4 addresses three doctrinal phenomena present in a legal system (whenever else they are present) when ouster and empowering offences are created in that system. It argues that in English law the existence of these phenomena has been concealed from view by the officials and institutions of the state. Drawing on the work of Antony Duff, it further argues that whenever the state conceals such phenomena from its people, it breaches a duty to answer for (among other things) the imposition of the criminal law. The chapter thus articulates what is in part a second-order objection: an objection to the (covert) means by which changes are wrought to another set of means – the means by which criminal offences (are set up

to) achieve objectives.³² When this objection bites it is even more difficult to justify the creation of the offences discussed in earlier chapters – that creation must also face up to the breach of a further duty: the state's duty to come clean about the criminal law.

Chapters 2-4 rely in the main on widely-known principles of political morality in order to provide the normative ammunition required to make their arguments. In Chapters 5 and 6, I argue that two less familiar principles should be recognised as part of the morality of state and government. I return in Chapter 7 to the implications of these principles for criminalisation. Chapter 5 defends what I call the *Trust Principle* as well as defending the *Strong View* of that principle.

The Trust Principle: all other things being equal, the modern state ought to deserve the trust of its people.

The Strong View: the modern state's reasons to deserve the trust of its people are reasons of particular strength for the officials and institutions of the state.

The chapter argues that because the populace depends (and is often dependent) on the state in ways which are momentous, pervasive and indefinite, and because this dependence is encouraged in various ways by the state itself, the state faces a weighty demand that it be deserving of popular trust.

In Chapter 6, I defend what I call the *Anti-Partisan Principle*.

³² It argues, in other words, that the means of achieving objectives introduced by ouster and empowering offences, should themselves be introduced *transparently*; that the phenomena required to bring those means into law – such as the creation of offence-definitions which are not set up to guide legal subjects – should not be kept under wraps by the state.

The Anti-Partisan Principle: governments should not behave as political partisans in their relations with the governed.

Political Partisans: political partisans are political entities which behave as if they are agents of some and not others within a given political arena.

The *Anti-Partisan Principle* is opposed to government acting as if it is the agent of select groups of the governed (of ‘us’, of insiders) to the detriment of the remainder of those within its jurisdiction (of ‘them’, of outsiders). Unlike friends and club-members, who often act entirely defensibly when acting as the partisans of their friends or fellow members, governments, I argue, are burdened with strong reasons *not* to be partisans of their kin or their supporters. Instead government ought to be non-partisan (at least between different groups of the governed) on account of specific features of what it is to be a government.

Chapter 7 returns the thesis to its central topic, and discusses a type of criminal offence there called a *prejudicial* offence. Such offences are distinguished from others by the logic which underlies their creation, which logic, I argue, makes that creation especially pernicious. For prejudicial offences can only be thought to serve their creators’ objectives if a statistical assumption is made, which assumption the definition of the offence places beyond legal challenge. That assumption, I argue, is that the class *suspected* of certain wrongs by police and prosecutors will also be (or substantially overlap with) the class *guilty* of those wrongs.³³ It follows that when a prejudicial offence *is* created, the former class are judged in advance of *and without* consideration of the aforementioned guilt in court; they are, instead,

³³ Where to be guilty of a wrong is simply to have committed it in truth.

effectively pre-judged by offence-creators. Ouster offences and some empowering offences are examples of this type of offence, and understanding the prejudicial logic of their creation helps explain why such offences exist.

The bulk of Chapter 7 argues that prejudicial criminalisation is objectionable for reasons not brought out in previous chapters. It begins by arguing that creating a prejudicial offence is a move in conflict with the golden thread identified in *Woolmington v. The Director of Public Prosecutions*.³⁴ It further argues that the move is objectionable from the perspective of the principles introduced in Chapters 5 and 6. A government willing to prejudge suspect classes in this way does not deserve trust, and it is objectionably partisan in the method of governance it chooses to employ.

If I am right, prejudging classes of suspects and shaping the criminal law accordingly, is a use of the power to criminalise which is frequently a misuse. Not only will it often be subject to the objections made in earlier chapters, it will also be subject to the distinct objections put forward in Chapter 7. It is hard to see how such instances of criminalisation could be justified.³⁵ When they cannot, a system of criminal law marked by criminalisation of this type – and if I am right, English criminal law is one such example – is a system marked by misuses of power. It is marked by uses of the power to criminalise which are *misuses* of that power because

³⁴ [1935] AC 462 (HL). Which is not to say that *Woolmington* has been interpreted in any court as having such implications. Nor is it necessarily to say that courts *should* interpret *Woolmington* in this way. It is rather to say that the very concerns which lead judges to assert that guilt must be proved by the prosecution, should lead theorists to endorse a legislative duty to equivalent effect. I argue in Chapter 7 that if this duty is not to be empty of content, it must condemn offences of the prejudicial type.

³⁵ Though I do not claim to have conclusively demonstrated that this cannot be done: see section 3 above.

of the *means* by which the offences created (are set up to) achieve objectives. They are means the creators in question cannot justify making part of the criminal law.

CHAPTER 2

JUSTICE DENIED: THE CRIMINAL LAW AND THE OUSTER OF THE COURTS

This chapter examines a type of criminal offence which is here called an ‘ouster offence’. An ouster offence is a criminal offence with the following characteristics: it is defined by its creator so as to facilitate the conviction of moral wrongdoers (for whatever further objective), a goal to be achieved by means of an offence-definition from which elements of that wrongdoing have been excised. Why will excising elements from the offence-definition facilitate the sought-after convictions? Because those elements will not need to be proved in any court, reducing the prosecutorial burden which would have obtained had the offence captured the moral wrong.

The chapter argues that to create such an offence is – in effect – to oust the criminal courts, by depriving them of the ability to adjudicate on whatever wrongdoing the creators of the offence took to justify conviction. It is true, of course, that the courts continue to adjudicate upon whether the offence was committed, and that ouster offences thus do not exclude the courts entirely. But the argument here is that such offences remain subject to many of the same objections as a formal ouster clause. What are these objections? First, that the creation of ouster offences undermines the ability of the courts to deliver procedural justice in both pure and imperfect form. Second, that it is in conflict with judicial independence. Third, that it reduces executive accountability. Fourth, that it threatens to interfere with the principled development of the law.

1. Ouster Clauses and Ouster Offences

*What areas of government decision-making would be next to be removed from the scrutiny of the courts? What is the use of courts, if you cannot access them?*³⁶

Clause 11 of the Asylum and Immigration (Treatment of Claimants etc) Bill (2004) created a storm of controversy when put forward by New Labour as the solution to mounting delays and increasing costs in the asylum and immigration system. Lord Woolf, in the lecture quoted above, was by no means alone in publicly lambasting the clause. Why such furore? Because Clause 11 attempted to comprehensively remove the ability of the courts to review the legality of decisions made by the Immigration Appeal Tribunal, a tribunal which, pursuant to the Bill, would become the only source of appeal in asylum and immigration matters.³⁷ Denying access to the courts to an entire class of litigants was, the critics claimed, beyond the pale. In the face of enormous criticism, the government backed down and amended Clause 11, denying constitutional lawyers everywhere the chance to see if the judges would, as Lord Woolf had once predicted, act without precedent and refuse to apply a piece of primary legislation.³⁸ The courts retained jurisdiction, and the critics appeared victorious.

Crisis averted. But Lord Woolf's questions hung ominously in the air. What would be the next class of decisions which the government sought to remove from

³⁶ Lord Woolf, 'The Rule of Law and a Change in Constitution' (Squire Centenary Lecture, Cambridge, 3 March 2004) <<http://www.law.cam.ac.uk/faculty-resources/lecture-handouts/3>> accessed 30 June 2009.

³⁷ For discussion of the saga, see Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68 MLR 378.

³⁸ Lord Woolf, 'Droit Public - English style' (1995) PL 56.

the scrutiny of the courts? When would the next ouster clause be brought forward, challenging the role of the judiciary? The argument of this chapter is as follows: that the move which the Labour government sought to make in the immigration context is made *sub silentio* in the criminal law by a type of criminal offence. What's more, there are already examples of this in English criminal law. True enough, in the cases I will discuss there is no formal ouster clause to be seen. The lesson that transparency courts criticism has apparently been learnt. But what happens in substance in such cases remains of the first importance. For if I am right the courts' role is significantly undermined. How so? By the creation of criminal offences which deny the courts scrutiny of the very behaviour which those offences were created to target, and commission of which was taken to justify convictions pursuant to each offence. The role of the courts is thereby cut down. It is limited to establishing the presence of that which (by the offence-creators' own lights) amounts simply to a collection of elements brought into law for the following purpose: to help facilitate the conviction of those who *have* engaged in targeted behaviour. When it comes to that latter behaviour, the courts have no role to speak of. They have, in short, been ousted.

The second half of the chapter argues that the ouster of the courts amounts to an attack on important values which should be respected by the criminal law, and which are central to the proper fulfilment of the judicial role. If I am right it amounts in substance to the realisation of the threat Lord Woolf warned of in the quotation with which this section began.

2. Concepts and Criminalisation

I begin with some conceptual claims about criminalisation. These will be of use in determining what is distinctive about the class of offences I identify as ousting the courts, and will help illuminate the precise way in which the courts have been ousted.

Here is the first claim. Criminalisation – making something a criminal offence – marks out whatever is criminalised as something which, according to the law, must not be done.³⁹ Nor is this marking out typically incidental. In fact, it helps criminal offences play their typical *ex ante* role: because criminalised behaviour is marked as something which must not be done, each offence guides potential offenders away from that behaviour, thereby helping reduce its overall incidence.⁴⁰ And this is not the only effect of criminalisation worth noticing. Barring evidentiary difficulties, engaging in whatever is criminalised makes one's arrest, prosecution, trial and conviction legally legitimate. Criminal offences thus also have a typical role to play *ex post*: they provide grounds for official responses to offending behaviour, including censure, punishment and other forms of negative evaluation.⁴¹

³⁹ This is an oft-made claim: see eg HLA Hart, *The Concept of Law* (2nd edn OUP, Oxford 1994) 27; Andrew Ashworth, 'Conceptions of Overcriminalisation' (2008) 5 Ohio State Journal of Criminal Law 407. I discuss some of the grounds for endorsing it in Chapter 4 (text to n 212).

⁴⁰ At this point, it may be objected that only that part of the offence to which there is no defence is marked out in the manner described. Those troubled by this point should read my discussion as referring only to those cases where no defence is available.

⁴¹ Of course, the offence's *ex post* role is actually more complex. The offence is likely to be only part of a larger decision-rule which officials use to guide their responses to offending behaviour. I cannot discuss this further here. For the concept of a decision-rule, see Meir Dan-Cohen, 'Decision rules and Conduct rules: On Acoustic Separation in Criminal Law' (1984) 97 Harvard Law Review 625.

Together these points raise the question of the criminal law's relationship to wrongfulness. Because a crime is behaviour marked out as that which a) must not be done, and b) renders one liable to conviction and punishment, many Anglo-American criminal law theorists hold that the law portrays criminal behaviour as wrongful.⁴² To put it another way, it is part of the significance of criminalisation – one of its *outputs*, if you like – that anything made a criminal offence is portrayed by the law as a breach of duty. To commit an offence is thus to commit what I will call an *output wrong*: it is to do something which, on account of its criminalisation, the law portrays as wrongful.⁴³

Nor is this the only interconnection between crime and the wrongful. As well as output wrongs, we can also identify what I will call *input wrongs*. An input wrong is a moral wrong, commission of which is taken by the offence-creator to in some way justify creating a given offence. The offence-creator may think there good reason to *reduce* the incidence of a moral wrong, and think that creating a criminal offence will help achieve this. The offence-creator may think there good reason to *punish* a type of moral wrongdoer, and think that a criminal offence is required to do this. There are other justificatory possibilities, and we need not mention them all here. Nor can we yet say what the relationship should be between input and output wrongs. We need only keep in mind that it is in some sense *because* of commission of the input wrong that the output wrong is created.

⁴² For just one endorsement, see RA Duff, 'Theories of Criminal Law', *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed), URL = <<http://plato.stanford.edu/archives/fall2008/entries/criminal-law/>> accessed 30 December 2009.

⁴³ Which is not to say that the law is correct: that the law portrays ϕ ing as wrong may tell us nothing at all about whether it is wrong in a moral (or any other) sense.

In this chapter I am solely concerned with criminal offences which are responses to input wrongs. There are no doubt many such cases. The paradigmatic offences (murder, rape, burglary, theft) are all plausibly thought of in this way. Why make murder a crime? Because to murder someone is to commit a moral wrong, because we want to see less of this moral wrong, and because creating the output wrong will help reduce its commission.⁴⁴ By capturing (at least roughly) the relevant input wrong with a corresponding output wrong we hope to both a) guide behaviour by marking out the prohibited conduct as wrongful, and b) provide a standard for evaluative responses such as conviction and punishment, which responses play their own part in putting people off output, and thus input, wrongdoing.⁴⁵

This introduces the basic ideas which I am using. The following sections put these ideas to use in discussing the offences which are my main concern.

3. Separation and Facilitation

In section 2, I discussed a case where an output wrong was created to (roughly) capture an input wrong. After all, it is because of the latter that the former was created. In the cases with which I am concerned here, an offence-creator intends to *separate* the output wrong from the input wrong. Why? In order to facilitate the

⁴⁴ As will be clear from my describing the input wrong as *murder*, an output wrong which captures this input wrong will be one which provides for the acquittal of justified or excused killers, normally by granting defences in such cases. This means that for my purposes an output wrong still captures the input wrong as long as the defendant is legally entitled to raise points nullifying input wrongdoing. In short, I am not concerned to attack reverse onus clauses in this chapter.

⁴⁵ Why might the input wrong be captured only ‘roughly’? Because the two roles the offence plays (guide and standard of evaluation) may not always wax and wane together. Not all salient evaluative dimensions can feature in the offence-definition if it is to be a serviceable guide for the man on the street, or for the various officials who need to make decisions about violation. A serviceable guide must be relatively simple, while the evaluative complexities embedded in human behaviour are legion.

arrest and conviction of more suspected input wrongdoers. The idea is straightforward: the offence-creator creates an output wrong which merely captures some act A, because it is thought that prohibiting A, rather than the input wrong, will make it easier to arrest and convict the aforementioned suspects.⁴⁶ Once we see that this is the goal, we can see that the prohibition of A is never intended to play the dual role which, as we saw above, is typically played by criminal offences: it is never meant to serve as a guide to that which must (not) be done, nor as a ground for censure and punishment.⁴⁷ One can commit A without doing anything which the offence-creator either seeks to reduce or sees reason to condemn.

As an example, let us assume an offence-creator adverts to the existence of an input wrong of ‘preparing terrorist attacks’. It is thought, let us imagine, that those who engage in such behaviour should be convicted and punished. But instead of trying to capture the input wrong with an output wrong, the offence-creator creates an output wrong of ‘possessing information or items useful to terrorists’, something we may well do every day, because this will make it easier to convict those suspected of preparing terrorist attacks.

It is worth noticing that the phenomenon I am focusing on is not as common as it may seem.⁴⁸ Take an offence like carrying a knife in a public place. Is there not

⁴⁶ That this move is available to offence-creators was noticed by William Stuntz, who offers an extended account of the political incentives which may lead legislators to make it: see Stuntz, ‘The Pathological Politics of Criminal Law’ (2001) 100 *Michigan Law Review* 505, 531, 546-557. The soundness of this political story is not my concern here.

⁴⁷ One might argue that if offence-creators are to bring about this type of change in the purposes of criminal prohibition, they should make the change transparent and not conceal it within legislative language which implies business as usual. I pursue this objection in Chapter 4.

⁴⁸ As the text that follows shows, that phenomenon is narrower than two types of offence commonly discussed in the literature. First, it is narrower than the class of offences which Douglas Husak calls ‘hybrid offences’: offences which capture some behaviour which is (thought) wrongful prior to or independent of the law, as well as some which is not. Second

a separation of input wrong (creating an unjustified risk of stabbings) from output wrong (particular instances of possession) here too? That depends. In some cases the answer is no. An offence-creator may well take every act of public knife-carrying to be wrongful on account of the risk it creates of further wrongs. But the answer may also be yes if the offence-creator accepts that some knife-carriers create no real risk, and so do not act wrongly. Then the output wrong is deliberately over-inclusive relative to the input wrong. But this case remains distinct from the cases in which I am interested, such as the terrorist case discussed above. Why? Because in the knife-carrying case the aim of the offence-creator *remains* that all be guided away from the output wrong, and that those who fail to be so guided be censured and punished. Committing the output wrong is to be *treated* by legal officials as wrongful in all cases (even at the risk of ensnaring some who are morally innocent) and this is thought justified because of the effect it will have in reducing input wrongdoing.⁴⁹

The cases with which I am concerned are different. Here, the output wrong is a mere facilitation device – a way to ease the conviction of input wrongdoers.

it is narrower than the class of offences which Larry Alexander and Kimberly Ferzan call ‘proxy crimes’: offences which prohibit conduct which neither causes nor risks harm, but is correlated with conduct that is itself harmful or risky. See Douglas Husak, *Overcriminalisation* (OUP, Oxford 2008) 106-107; Larry Alexander and Kimberly Ferzan, *Crime and Culpability* (CUP, New York 2009) 66-67.

⁴⁹ Antony Duff has suggested that such an output wrong might also be justified on the grounds that all those who carry knives display the vice of *civic arrogance*: by assuming they can safely carry a knife, each knife-carrier ‘arrogantly claims the right to decide for himself on matters which he, like the rest of us, should not trust himself to decide’. Even if carriage is actually safe, such arrogant conduct is wrongful, and the appropriate object of punishment: see RA Duff, ‘Crime, Prohibition, and Punishment’ (2002) *Journal of Applied Philosophy* 97. Whether or not this argument is sound, it does not apply to the cases I am concerned with in this chapter. As the following paragraph explains, the putative justification of an ouster offence is very different, and does not rely on the thought that offending acts are uniformly wrongful. In fact, those who create ouster offences work on the basis that some such acts both are not wrongful, and should not be treated as such. This makes ouster offences what Duff has more recently called *perversions* of criminal law, though I cannot pursue Duff’s thought further here. See RA Duff, ‘Perversions and Subversions of Criminal Law’ in RA Duff, Lindsay Farmer, SE Marshall, Massimo Renzo and Victor Tadros (eds), *The Boundaries of the Criminal Law* (OUP, Oxford 2010).

Committing the output wrong is *not* thought to justify censure or punishment, nor is the prohibited behaviour something from which the offence-creator intends that one refrain. There are two conceptual steps here. First, there is the separation of input and output wrong. Accordingly, committing the offence is not itself thought to involve doing something morally wrongful. Second, there is the offence-creator's purpose. In the cases I am concerned with, that purpose is not to *prevent* the output wrong because this will reduce input wrongdoing, nor to *punish* output wrongdoing as a way of achieving this. Rather, the purpose of separation is simply to *facilitate* conviction of suspected input wrongdoers.⁵⁰ In short, whatever is captured by the offence-definition is captured in order to facilitate conviction of those thought to have committed an extraneous wrong.⁵¹

Are there any *actual* examples of such a thing in contemporary systems of criminal law? Consider two cases from English criminal law. Section 1(2) of the Terrorism Act 2006 makes it an offence to, *inter alia*, make a statement which is

⁵⁰ Victor Tadros, fastening onto the fact that the intent of offence-creators is sometimes *not* that people refrain from the prohibited behaviour, calls such offences 'intentionally non-ideal'. Tadros' idea is that even in an ideal world, the offence-creator intends that people carry on acting in the prohibited manner. While I have gained much from Tadros' discussion, I find his terminology somewhat unhelpful. The ideal/non-ideal contrast assumes a picture in which the ideal scenario is perfect compliance with the prohibition on its face. Yet the troubling aspect of these offences is precisely that this ideal for law-makers *is being challenged* – the ideal is now that offences serve as efficient facilitation devices, not as standards of behaviour. It is one of the many problems with this new ideal which I am interested in tackling here. For Tadros's treatment, see Victor Tadros, 'Crimes and Security' (2008) 71 MLR 940.

⁵¹ What about pure *mala prohibita*, none of the instances of which were wrongful prior to the intervention of the law? Do these constitute ouster offences? Not necessarily. Take an offence of driving on the right-hand side of the road. Before the law got involved, let us assume, there was no agreed-upon side, and it was therefore not in any way wrongful to drive on the right. However once the legal system picked the left-hand side for people to drive on (and people began to drive on it), it became morally wrongful – because dangerous – to drive on the right. A criminal offence which prohibits driving on the right may be designed to (roughly) capture this moral wrong. If so, it lacks the *separation* feature of an ouster offence. Alternatively, even if it *is* deliberately over-inclusive relative to that wrong, the offence may well remain the type of offence which – like the knife-carrying example given in the text – seeks to deter any and all driving on the left. It would then remain distinct from the offences in which I am interested here, which are designed to attain their goals by means of *facilitative* separation.

likely to be understood by some of those to whom it is published as indirect encouragement to the commission of acts of terrorism, being reckless as to whether such encouragement will take place. Indirect encouragement includes any statement which a) glorifies the commission or preparation of terrorist acts (whether in the past, in the future or generally) and b) is a statement from which members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances.⁵² There need be no intention to encourage anyone to do anything, and no-one need actually be encouraged.

The offence is breathtakingly wide. It arguably catches everyone from outspoken Islamic clerics, to North Korean exiles who criticise their native regime, to those, like Cherie Blair, who express their ability to understand the actions of Palestinian suicide-bombers.⁵³ Such an output wrong clearly is *not* aimed at everyone it technically ensnares. Much of the expression captured is, by common consent, not an appropriate target of criminal prosecution. Indeed, in the lead up to the passage of the 2006 Act, the Home Secretary stressed the importance of the Director of Public Prosecutions consenting to any prosecution.⁵⁴ The implication was that only genuine wrongdoers would be convicted. Who are these people? The targets of the offence, as the government made clear to the Joint Committee on

⁵² Terrorism Act 2006, s 1(3). Glorification includes any form of praise: see s 20(2) of the 2006 Act.

⁵³ As alleged by several MPs: see Greg Hurst, 'Terror Bill rebels cut Labour's majority to one vote' *The Times* (London, 3 November 2005) <<http://www.timesonline.co.uk/tol/news/uk/article585982.ece>> accessed 9 October 2009.

⁵⁴ Charles Clarke, 'Terrorism Bill, the Government's Approach' (Speech to the House of Commons, London, 5 December 2005) <<http://press.homeoffice.gov.uk/Speeches/speeches-archive/12-05-sp-terrorism-bill>> accessed 12 December 2009.

Human Rights, are those who *incite violence* whether generally or specifically.⁵⁵ Incitement to violence, in other words, is the input wrong. It is assumed that discretion will be exercised to ensure that only those committing *this* wrong are convicted, while others technically caught by the offence go about their lives untouched. Why then the innocuous output wrong? Because by removing input wrongdoing from consideration by the courts, a major hurdle to the conviction of suspected inciters is removed.⁵⁶ When so little need be proved, more suspects will surely end up where it is suspected that they belong.

Second, consider section 13 of the Sexual Offences Act 2003. This provides that a person below the age of 18 commits an offence if she would commit the offences created by sections 9 to 12 of the Act were she 18. Section 9 makes it an offence to sexually touch a person below the age of 16.⁵⁷ As such, all sexual conduct between teenagers under 16 is a criminal offence, even when that conduct is entirely consensual and the parties know each other well. Again, this offence surely was not aimed at everyone it technically ensnares. Rather, the output wrong was created in order to ensure it was possible to convict those who *manipulatively* engage in sexual conduct with young persons.⁵⁸ The aim was to have the police pick these people out

⁵⁵ Joint Committee on Human Rights, *Third Report of Session 2005-6, Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005-06, HC 561-I) 17-18.

⁵⁶ It is worth noting that my objection here is not that such broadly-drawn offences give petty officials excessive discretion to choose who to pursue, increasing their power to carry through vendettas against those they despise. I press this objection in Chapter 3 (text to n 178).

⁵⁷ Absent a reasonable belief that the other party is 16 or over. I assume here that the ages of the parties are well-known to each other. Note that touching may be sexual even if it is ambiguous by nature, as long as the purpose of the toucher is to obtain sexual gratification: see s 78 of the 2003 Act.

⁵⁸ The government's command paper concedes these points when it states that 'it is recognized that much sexual activity involving children under the age of consent might be consensual and experimental and that, in such cases, the intervention of the criminal law may not be appropriate'. On the other hand the criminal law 'must make provision for an unlawful sexual activity charge to be brought where the sexual activity was consensual but was also

on the assumption that *they* would be the ones convicted. And the aim was to allow this to happen without the trouble of having a key element of the input wrong before the courts, namely the manipulation itself. This is a transparently facilitative move. It is to target suspected input wrongdoers with the creation of an output wrong designed to facilitate their conviction, and to do so by denying the courts the opportunity to consider the input wrong itself.

4. Ousting the Courts

Now one may accept everything that has been said while wondering what any of it has to do with ouster clauses. After all, the courts are still adjudicating on commission of the output wrong. This alone, one may say, shows that no ouster clause is in effect. This is formally true. But the claim I began with is that the courts have been ousted from exercising their proper role, and this depends on a conception of what that role is. One view which we can quickly dismiss says that the courts properly adjudicate within whatever limits Parliament sets for them. This cannot be right. It cannot be what the 2004 debate was all about, as that was a debate about *where* Parliament was setting the limits. Perhaps then the answer comes at two-levels: if there is a dispute about legal rights, courts must be able to adjudicate. What those legal rights *are* is a matter for Parliament, but once those rights are fixed it is

clearly manipulative.’ See Secretary of State for the Home Department, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (CM 5668, 2002) para 52. Similar sentiments are expressed in the guidance issued by the Crown Prosecution Service: ‘it is not in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties...this is the intention of Parliament’. See Crown Prosecution Service, ‘Legal Guidance: Sexual Offences Act 2003’ <http://www.cps.gov.uk/legal/s_to_u/sexual_offences_act> accessed 10 May 2010.

objectionable to stop the courts adjudicating upon them. In 2004, Parliament stepped over the line from defining legal rights to barring adjudication.

This view is superficially appealing, but it relies on a firm divide between defining legal rights and interfering with adjudication. In truth, to do the former is sometimes to do the latter. For legal rights can be defined so as to detach the law on the books from that which is really taken to justify both the defendant's presence in court and his potential treatment as a criminal.⁵⁹ Adjudication then occurs only in the empty sense of examining legal rights which neither offence-creators nor law-enforcers take to justify initiating the criminal process and seeking its results.⁶⁰ To take an extreme example, we could have a set of offences which captured a range of innocuous quotidian activities, which the legislative and executive branches intended to work as smokescreens used to prosecute (and severely punish) robbers, murderers and rapists. The courts would never get to look at whether any defendant was a robber, murderer or rapist, even as they 'adjudicated' on whether the defendant had brushed his teeth.⁶¹

⁵⁹ Really taken, that is, by those responsible for creating the offence and, in some cases, by those enforcing it on the streets. Of course, *judges* may well believe that committing an offence *itself* justifies their convicting the offender. This is a function of their role in the criminal justice system. But my primary concern, here and throughout, is with the mindset of the *creators* of offences, who, in the cases with which I am concerned, believe that only input wrongdoing (and *not* commission of the output wrong) justifies conviction. It is *their* decision to create offences of this type which I am concerned to attack, not the decision of judges to convict pursuant to them.

⁶⁰ I include the reference to law-enforcement agents to cover cases where offence-creators communicate their facilitative goals to these agents. While this is not a necessary feature of an ouster offence, we saw at n 58 above that it is precisely what has happened in respect of sections 9 and 13 of the Sexual Offences Act 2003.

⁶¹ I assume here and throughout that courts are not at liberty to simply read the input wrong into the output wrong in defiance of statutory wording and legislative intent. In refusing to do this courts demonstrate their respect for the Rule of Law. The importance of this ideal, and some threats criminalisation can pose to it, are the subject of Chapter 3.

My claim is that in such a case the courts have been *ousted* from carrying out their proper role. Yes, the courts look at the legal rights and duties as defined by Parliament. But their jurisdiction to test whether defendants are – by the offence-creator’s own lights – the proper objects of conviction and punishment has been ousted. How has this happened? It results from the output wrongs being separated from the input wrongs in the interests of facilitation. It is the latter wrongs, not the former, that were thought by the offence-creator to justify the pursuit of prosecutions. Input wrongdoing was, where output wrongdoing was not, thought the appropriate object of the condemnation of the criminal courts. But the courts are *denied* the chance to adjudicate on the input wrongs. They do not get to consider whether the defendant is a manipulator or an inciter of violence. In short, the courts have been ousted from considering the input wrongdoing which grounds the very convictions and punishments they deal out. The offences in question are what I am calling *ouster offences*.⁶²

No doubt some will say this discussion has gone awry. We began with Lord Woolf’s claim that courts should not be denied the chance to adjudicate on disputes concerning legal rights. And we have travelled to a claim that the courts should not be denied the chance to adjudicate on the existence of the extra-legal wrongdoing thought by the offence-creator to justify convicting defendants. Isn’t one a technical legal issue, and another a matter of moral desirability? Isn’t one obviously

⁶² One may reply that courts can consider input wrongdoing (or lack thereof) at the sentencing stage, such that the ouster I have discussed makes little difference. This reply is weak. First, to the extent that criminal conviction is *itself* of moral significance this consideration comes too late. Second, courts are still likely to impose sentences in cases where the output wrong *is* proved at trial, but where the input wrong could *not* have been proved had it been part of the offence. This could not have happened were the offence not an ouster. Third, and relatedly, many of the procedural protections which attend proof of the offence are absent at the sentencing stage. The value of these is not insignificant, and is discussed in greater detail below.

problematic as part of the logic of the law, and another a contentious matter of political or moral theory?

Not so. We cling, as did many in 2004, to the value of courts adjudicating legal rights precisely because we see this as having moral value. Lord Woolf and others objected to Clause 11 because they thought there were good moral reasons to have the courts examine disputes over legal rights. These reasons are part of explaining why we care about the judiciary in the first place. What is important to notice is that these very same reasons support courts adjudicating in a way which is more than a mere smokescreen, even if the smokescreen is what the legal rights define. The courts must be able to look at the underlying dispute if they are to avoid being part of the smoke – they must not be denied the chance to adjudicate on whatever really explains the defendant’s presence in court, and is really thought to justify his conviction.⁶³ If they are so denied, many of the reasons for having courts look at our legal disputes at all are undermined. In the following sections, I describe some of these reasons, and defend the claim that the type of offence I have outlined is objectionable by their lights. I begin with reasons of justice.

5. Justice and the Courts

One must be careful when speaking of justice if one is not to be misunderstood. To ensure this, we will be diverted from our main project for several pages. This is essential to clarify the claims I am making.

⁶³ Again, it is not the courts’ perspective, but that of offence-creators (and law-enforcers) in which I am interested when I talk of ‘real’ explanations and justifications. I will assume from now on that this point is clear.

Sometimes justice is used as a synonym for rightness. When used thus, the claim that something is unjust tells us little absent a fully worked out theory of right and wrong. But justice is also used in a narrower sense, to refer to a distinct virtue. This is the sense used by John Rawls when he says that ‘the concept of justice applies whenever there is an allotment of something rationally regarded as advantageous or disadvantageous’.⁶⁴ And it is what H.L.A Hart refers to when he writes that justice is ‘concerned with the adjustment of claims between a multiplicity of persons’.⁶⁵ Putting these two definitions together, we can see that justice is a matter of *who* is due *what* and *why*. As Rawls observes, doing justice is about allocating *benefits and burdens* (the ‘what’). As Hart observes, it is about allocation to and from *persons* (the ‘who’) based on what those people can properly claim *as their due* (the ‘why’). We do justice, then, only when the following is true: when we allocate the right people the right things as determined by the right reasons.⁶⁶

Even when speaking of this specific virtue however, as I will from now on, there is much complexity. There are different types of justice. Sometimes a benefit is due to X from Y as compensation, and there is much to say about what, if anything, grounds an entitlement to compensation. Sometimes a burden is due to X because deserved, and there is also much to say about what, if anything, makes a burden deserved. Burdens and benefits may be due to X and Y alike as part of a just distribution, and it has been the concern of much political philosophy to argue about what exactly makes a distribution just.

⁶⁴ John Rawls, *A Theory of Justice* (rev edn OUP, Oxford 1999) 7.

⁶⁵ HLA Hart, *Punishment and Responsibility* (2nd edn OUP, Oxford 2008) 21.

⁶⁶ As well as Rawls and Hart, this account of justice draws inspiration from the account provided by John Gardner: see Gardner, 'The Virtue of Justice and the Character of Law' (2000) 53 *Current Legal Problems* 1.

Nor is this the only layer of complexity which emerges. Our picture only becomes more complicated when we factor in procedures. For as Rawls noticed, a procedure may interact with what is just in a number of ways.⁶⁷ A procedure may make a just result *more likely* by increasing the probability of the right people getting the right things. A procedure may *ensure* a just result, by guaranteeing that the right people get the right things. And a procedure may *constitute* a just result when following the procedure just is giving the right people the right thing for the right reasons, and doing so in the right way.⁶⁸ I will follow Rawls in calling these options imperfect, perfect and pure procedural justice.

Notice that this immediately suggests a further distinction between cases. In some cases what is primary is that the right people get the right things. We as observers need to know what the right reasons *are* in these cases in order to identify who the right people are and whether they are getting as much they should. But no allocator need attend to those reasons in order to produce a just result. One may hit the target more frequently by ignoring the considerations which make a burden deserved by X but not Y than one would if one actually attended to those considerations when deciding. A procedure can help in such cases whenever using that procedure increases the hit rate.

In other cases one does not look first to whether the right people have the right things to test the justice of an allocation. Rather what comes first is the *why* and the *how* - the reasons why the allocation was in fact produced by those who

⁶⁷ Rawls (n 64) 73-78.

⁶⁸ As I discuss in section 8 below, sometimes *how* one goes about allocating matters in addition to *why* one allocates as one does. One must conduct one's allocative business in the right way if one is to be fully procedurally just.

produced it, and the manner in which those reasons were attended to when the decision was made. If decision-makers allocate by attending to, and acting for, the right reasons in the right way, the outcome is just *whatever that outcome may be*. If decision-makers fail to do this, the outcome is unjust, even if that outcome is identical to what it would have been had they not so failed. In some such cases following a particular procedure just is to consider and act for the right reasons in the right way. Following that procedure *entails* doing justice.

With all this in mind, we are faced with a diversity of routes to *injustice*. One may give the wrong things to the right people. One may give the wrong people the right things. And in some cases one may act unjustly simply by giving things to people without acting for the right reasons (or without considering them in the right way). The more *imperfect* one's procedural justice the more likely one is to realise the first or second of these failings. The less *pure* one's procedural justice the more one instantiates the third failing by moving away from a procedure which, in the pure case, entails that one is giving the right people the right things for the right reasons (and doing so in the right way).

One final point. Injustices can be more or less grave. Sometimes this gravity is *internal* to the concept of justice. Thus gravity may vary with the 'what': it is a graver injustice to give severe burdens to the wrong people than to misallocate trifling ones. But gravity may also vary with moral factors external to the concept of justice as here defined. The injustice may be all the greater if the wrong burdens are

imposed *intentionally* rather than negligently, *actively* rather than by omission or *deliberatively* rather than spontaneously.⁶⁹

We can see this internal/external distinction at work again if we consider reasons and procedures. In cases with an element of pure procedural justice, gravity can vary internally the further decision-makers diverge from rightful consideration of the right reasons. It is a graver injustice for an interviewer to refuse someone a job because of their race (an irrelevant consideration) than it is to refuse them because the interviewer overemphasises the importance of teamwork (a relevant consideration). It is more of an injustice for a judge to dismiss a claim in court without considering the claimant's case, than it is to do so having considered the claim perfunctorily. Yet the injustice may also vary with external factors. The race/teamwork example gets some of its power from the assumption that while the interviewer may have been *unaware* of his bias towards teamwork, such that he was at worst negligent in overemphasising it, he must have known of his racial bias when he acted.

We now have a grasp of justice. But what has this to do with the courts? Are they the type of institution which can conceivably promote justice? Is it a black mark against them if they are unjust, or are other virtues more appropriate to their mission? Let us begin with the first question. Courts are adjudicative institutions – they deal with contested matters of law. As John Gardner has noticed, this alone gives their job the *form* of justice. For courts must, when adjudicating, allocate. As Gardner puts it, discussing a case of breach of contract which has reached the courts:

⁶⁹ I say 'may' because this is clearly not the place to add to the forest of literature discussing the doctrine of double effect and the act/omission distinction.

...at this point, the court cannot but face up to the question of who is to bear the costs of the alleged breach and in what proportion, and on what grounds, etc. It is now a situation in which there are no winners without losers, no gains without losses, and questions about how to allocate these gains and losses cannot but arise.⁷⁰

We need not follow Gardner in assuming that the court's question is always whether one party should gain *at the expense of the other*. Sometimes the question for the court is just whether the defendant is going to *lose*: is he, at the end of the trial, going to be burdened with conviction and punishment or not?⁷¹ What remains is the insight that the court's job is an essentially *allocative* one. Even criminal courts must decide who (here the defendant) should get what (here a conviction), and for what reasons. They too must follow trial procedures which allow certain facts to become reasons for a particular allocation, and which exclude others or require that they be considered only in certain ways. The point here is that this inescapably orients the criminal courts towards allocation and thus towards justice. If this is right, not only is justice the type of thing courts may conceivably promote, doing justice is also a crucial part of their mission.

6. Two Theses

We have examined the nature of justice, as well as the courts' role in promoting it. The question for us now is whether there is anything objectionable about ouster offences from the perspective of justice. I will defend two theses.

First, the *Imperfect Procedural Justice Thesis*. According to this thesis, creating an ouster offence is likely to lead to the conviction of more who are

⁷⁰ Gardner (n 66) 18-19.

⁷¹ A point well made by Hanoch Sheinman: see Sheinman, 'The First Virtue of the Law Courts and the First Virtue of the Law' (2007) 13 Legal Theory 101.

innocent of input wrongdoing. As input wrongdoing is what is thought to justify the said convictions, there are, by the offence-creator's own lights, likely to be more unjustified, and so unjust, convictions.

Second, the *Pure Procedural Justice Thesis*. According to this thesis, having that which justifies conviction in issue before the courts partly constitutes the justice of the outcome. Because ouster offences exclude the input wrongdoing which justifies conviction from the purview of the criminal courts, such offences render the outcome of the criminal process *pro tanto* unjust.

7. Imperfect Procedural Justice

John Rawls wrote that the criminal trial is a form of imperfect procedural justice.⁷² What did he mean by this? He meant that the processes of the courts during a trial are a way of making it more probable that the right people get the right things by the lights of the right reasons. In the case of a single trial this may be cashed out as follows. The right person is whoever committed the offence. The right things are the burdens of conviction and punishment. And the right reason, at least superficially, is the very guilt which I just mentioned. The criminal trial is a procedure which strives imperfectly to realise the perfectly just set of outcomes in which all and only those guilty of an offence are convicted.

We need not disagree with Rawls' claim that some features of the criminal trial are indeed oriented towards ensuring that the guilty are convicted. I say 'some' because there are no doubt features which are aimed at other (sometimes conflicting)

⁷² Rawls (n 64) 74-75.

values, some of which will be discussed in this section and the next.⁷³ Let us grant however that anything recognisable as a criminal trial will have the pursuit of accuracy as a central justifying aim, where an outcome is accurate if it convicts those who are in truth guilty, and acquits those who are in truth innocent. With perfect accuracy, Rawls claims, comes perfect justice.

We should be wary however of succumbing to the view that the justice of the criminal trial varies only with those factors which promote accuracy *relative to the elements of the offence-definition*. For an output wrong may be such that even if it is accurately proved in court, it remains an open question whether the defendant did that which is taken to justify his conviction. As we have seen, an offence may prohibit what the offence-creator believes is utterly innocuous, the intention being to ensnare and punish serious input wrongdoers, and there may then be little justice in convicting everyone against whom the elements of the offence are proved. Indeed, perfect accuracy relative to the requirements of the offence would be no indication of perfect justice.⁷⁴ Only ensuring accuracy relative to the presence of serious wrongdoing would ensure that the right people (those guilty of that wrongdoing) got the right things (the burdens of conviction and punishment), making the outcome more perfect by the lights of justice.

⁷³ For discussion of some of these values, see Mirjan Damaska, 'Truth in Adjudication' (1998) 49 Hastings Law Journal 289.

⁷⁴ Hart seems to disagree when he writes of one prosecuted under controversial laws that 'if he has broken such laws "voluntarily" (to use Professor Hall's expression), which in practice means that he was not in any of the excusing conditions, the requirements of *justice* are surely satisfied'. See Hart (n 65) 37. Here Hart seems to suggest that voluntary violation of a rule suffices to make criminal punishment just, whatever the rule may be. This cannot be right. To inflict criminal punishment pursuant to a rule prohibiting what was evidently innocuous conduct would be a paradigmatic *injustice* – it would be to impose harsh burdens on people who did nothing to justify such an imposition and would thus give the wrong people the wrong things for the wrong reasons.

What is important for our purposes is that the creator of an ouster offence underwrites what is, by its own lights, a greater likely rate of unjust outcomes. How does the offence-creator do this? By ensuring that the input wrongdoing which it takes to justify conviction is excluded from judicial consideration. By the offence-creator's own lights, justice demands that only those who are guilty of that wrongdoing be convicted, for it is input wrongdoing which grounds both creation of the offence, and conviction of defendants pursuant to it. Yet ouster offences *deprive* the courts of the opportunity to adjudicate on the very issue of input wrongdoing. The courts can do little to ensure that those who are convicted are actually input wrongdoers because elements of the input wrong are excluded from judicial consideration. Unless there is some fluke by which everyone who is convicted is indeed guilty of the input wrong (even though this is not adjudicated upon by the courts) the offence-creator's actions seem destined to make the criminal trial a *much less perfect* example of procedural justice. This is so even where, as it has been throughout this paragraph, a just outcome is defined relative to the offence-creator's own views. More people who are not guilty of the input wrong will (by the offence-creator's own lights unjustly) end up being convicted.⁷⁵

Now the advocate of ouster offences may accept the claim that ousting the courts is likely to increase the conviction rate among those who committed no input wrong. But he may respond by claiming that *not* ousting the courts is likely to lead to the acquittal of many who *did* commit that wrong. After all, the standard of proof in the criminal courts is high, and the burden of proof is most often with the

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To repeat: I do not claim that the courts are at fault here, or make any claims about how they should act. My argument is directed to the creators of ouster offences. I claim that they should not create such offences because this makes the justice handed out by the criminal courts increasingly imperfect *by the creators' own lights*.

prosecution. Convictions, simply put, are made hard to obtain. The objector may claim that the upshot is clear: there will be procedural injustice whether we oust the courts or not. So far we have been given no reason to favour one type of unjust outcome (mistaken conviction) over another (mistaken acquittal).

One response to this objection is to deny the assumption that ousting and not ousting are likely to produce even roughly equivalent rates of unjust outcomes. Even if elements of the criminal trial do tend to favour acquittals, the trial is still self-consciously oriented towards the pursuit of accuracy. To remove the input wrong from the purview of the courts is to eliminate from the criminal process the institution which provides the most rigorous consideration of whether that wrong occurred. Ouster offences, it might therefore be claimed, are a sure-fire way to bring about far more mistakes than would otherwise occur.⁷⁶

In the absence of empirical evidence, I cannot pursue this response here. Rather let us assume for a moment that both ousting and not ousting will produce roughly the same number of mistakes. The objection can still be answered by considering the *gravity* of the relevant mistakes. Increasing the number of wrongful convictions is a grave injustice on both the internal and external dimensions isolated above.⁷⁷ Internally, to inflict the ‘what’ on the wrong person is to impose particularly grave burdens on that person. Criminal punishment has the potential to retard the personal autonomy, self-respect and reputation of the victim.

⁷⁶ Where a mistake occurs whenever D is convicted without having committed the input wrong taken to justify his conviction. William Stuntz gives a further reason to think that ouster offences will increase the number of mistakes produced by the criminal process. As he points out such offences make transparent to D that his chances of successfully securing an acquittal are slim, even if he did not in fact commit the input wrong. D who is innocent of this wrong may thus plead guilty, rather than endure the cost and strain of a criminal trial, which, as he can see, is anyway highly likely to end in conviction. See Stuntz (n 46) 537.

⁷⁷ See text to n 69 above.

Imprisonment is only the most obvious case: pursuit of one's goals is interrupted if not destroyed entirely; one has to cope with the stigma of authoritative condemnation; and one's family, friends, and those one will come to know in an official capacity will be aware of the conviction and all its overtones.

Externally, the injustice of wrongful conviction has increased moral salience lent to it by another virtue - the virtue of humanity. There is particular inhumanity in the active, intentional and considered infliction of the burdens described above. For some this is so in every case of criminal punishment. For others it is only so if the individual is innocent. We need not arbitrate between those views here, for both sides agree that it is inhumane to inflict such burdens on the innocent, and this is the scenario under discussion here.⁷⁸ Such inhumanity can only increase the gravity of the injustice involved.⁷⁹

What then of mistaken acquittals? Some would doubt that what happens here can be described as an injustice at all. Who, these writers ask, is the supposed injustice an injustice *to*? For them, injustice inheres in the violation of rights, and this creates the difficulty of locating a right-holder who has a right that the guilty party be punished.⁸⁰ Perhaps there is such a right-holder. Perhaps the *victim* has such

⁷⁸ The defendants in question are innocent in the sense that they have done nothing which – by the offence-creators' own lights – can justify their being convicted or punished. The fact that they may well have committed an offence does not alter this fact.

⁷⁹ Is criminal punishment, even of the innocent, always inhumane? Does it, in other words, always amount to the (intentional) infliction of suffering on those who have done nothing to deserve it? Perhaps not – small fines or minimal community sentences may not cause any suffering at all. But we should not be too sanguine about this. Even fines can cause great strain if one has difficulty paying, or finds oneself unable to pay, leading to a likely prison term. Furthermore, the after-effects of any conviction may be painful, be it socially, professionally or psychologically. For discussion of the virtue of humanity, see Gardner (n 66).

⁸⁰ Mill held a view of this type. See JS Mill, *Utilitarianism* (Parker, Son and Bourn, London 1863) ch 5.

a right, though we should be wary of assuming this just because the victim might think it so. Perhaps it is the populace as a collective which has the relevant right. Needless to say the issue cannot be resolved here. But notice that if this view of justice is correct, it places a substantial hurdle in the path of the objection made above. For it must first be shown that someone has the right to have others punished, only after which there is any injustice at all in mistaken acquittal. Not only that, but it is much more plausible to think that there *is* a rights-violation in the case of mistaken conviction (a violation of the innocent person's right not to be subjected to the burdensome treatment described above), and a significant one at that.⁸¹ As such, there is on this view a plausible injustice involved in mistaken conviction, and an uphill battle to find any injustice at all in mistaken acquittal.

We need not press here the merits of this view of justice. The allocative view I endorsed above does not entail (though it need not deny) that one must find a rights-violation to find an injustice. On the basic definition, it is enough to find benefits and burdens which have been wrongly allocated. The mistakenly acquitted *is* the right person to bear the burdens of conviction and punishment, yet he never does. So we can accept that there is an injustice. But even here, the gravity of the injustice pales in comparison with that involved in mistaken conviction. Yes, the acquitted enjoys benefits he should not have had. Yes, the victim and/or those close to him may be tormented by the absence of justice, whether this manifests itself as anger, frustration, grief, fear or regret. In some cases torment ruins lives. But it is the crime itself, not the perpetrator being free, which is responsible for most such cases. What is crucial is the following: on the internal dimension of gravity, no burden of comparable significance to that imposed on the innocent convict is imposed on

⁸¹ For an argument that there is such a right, see Husak (n 48) 93-101.

anyone by a mistaken acquittal. Nor, on the external dimension, is there comparable inhumanity involved. A mistake is made, but it is one which leaves one too many people *without* grave burdens, and to the extent that it does itself torment the victim and those close to him, torment is an unintended by-product of the decision, not the very purpose of what was done.

The objection thus fails. We have seen that having the input wrong taken to justify conviction in issue before the courts is likely to produce a higher rate of just outcomes than would excluding it, and that this is true by the offence-creator's own lights. But even if we grant an unlikely equivalence, *graver* injustice results from excluding the input wrong and underwriting an increased risk of mistaken conviction, than from including it and underwriting the opposite risk. If this is right, to create an ouster offence is (by one's own lights) to create procedural injustice of the imperfect kind. My first thesis is accordingly borne out.

8. Pure Procedural Justice

In this section I argue that a criminal trial can not only make a just outcome more likely, it can also be partly *constitutive* of a just outcome. I further argue that this is only so when that which is taken to justify the conviction of the defendant is in issue at trial. The outcome of a trial for an ouster offence is therefore *pro tanto* unjust because the issue of input wrongdoing is excluded from such a trial. If my argument is correct, the criminal trial is more than just an example of imperfect procedural justice. It is an example of what Rawls calls pure procedural justice as well.

We can concede upfront that we can and do talk as though burdens and benefits being delivered to the right people constitutes justice all on its own. If a

murderer is struck by lightning when the police lack the evidence to convict, we might casually say that justice has been done. Similarly if a football team is wrongly awarded a penalty but the taker misses it, we might say that justice is done when he misses. In both cases we speak of justice because what looked like being a benefit which the recipient was not due (the freedom of the murderer or the scoring of a goal), ends up being taken away all the same. The individual in question is put in the position he should have been in, so that the improper allocation which we deemed unjust is substantially corrected.

I think we should often take a different view. Consider the loved ones of the murderer's victim. They might view the imposition of burdens as only part of what justice demands. They could intelligibly claim that justice was not done (or not done fully) because they never got their day in court. They never got to see that the burdens which the murderer deserved (and we can assume *arguendo* that being struck by lightning was at least what he deserved) were imposed for the right reasons. They never got to see those reasons declared publicly and given the authoritative imprint of the law. And they never got the chance to see the defendant account for himself and for his actions.⁸²

Now one might reply that the loved ones could not object if, instead of being struck by lightning, the murderer was bundled off by the state in secret and detained. Perhaps they would know that this was done as a punishment and thus know that it

⁸² For an extended treatment of the idea that an 'account' is given by a defendant in a criminal trial, see RA Duff, Lindsay Farmer, SE Marshall and Victor Tadros, *The Trial on Trial Vol. 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, Oxford 2007). Of course if the defendant pleads guilty, the account provided by the defendant will be minimal. However it is far from unintelligible to claim that this minimum is still a requirement of justice – that the defendant should still have to publicly accept blame and receive authoritative condemnation and punishment before the law.

was done for the right reasons. But I contend that they might still sensibly complain that justice was not done. Why? Because the case against the murderer – the evidence of his culpable wrongdoing - was never presented in court for all to see, nor addressed in argument, nor approved authoritatively in court. My claim here is that the importance of this should not be dismissed. Where the relevant arguments, rules and decision-makers are shrouded in mystery, no allocation can truly be endorsed as a resolution by those so completely shut out. Only a procedure which can demonstrate that the decision was made in the right way (based on the right evidence, applying the right standards, decided by the right people) can justify our accepting it as allocative closure. If this is right, we have a sense in which justice must be *seen in order to be done*. This is overlooked when the real case for one's conviction remains behind closed doors.

Nor is this the only available complaint. Our hypothetical defendant was never called to answer for himself and his actions at the bar of the court. He was spared the pressure we all face when we do wrong (be it breaking one's friend's vase, or being hateful to others) to explain ourselves as rational agents be it by denying, clarifying or accepting the charges made against us. As others have put it, to call the defendant to account in this way is one way of taking his wrongdoing seriously – of setting up the public sphere so that important facets of our everyday moral lives are not lost to institutional bureaucracy.⁸³

Notice that this is not to take sides in a debate over the respective rights of victims and defendants within the criminal justice system. It is not to say that 'victims' justice' is paramount and should be championed in 'rebalancing' the

⁸³ Duff et al (n 82) 137.

criminal justice system. On the contrary, the same point can be made if one steps into the defendant's shoes. The defendant might claim that even if he *is* guilty of the murder, justice demands that he be tried. Specifically, he may say, it demands that he have the opportunity to give an account of himself before he is convicted – that he be allowed to give his side of the story even if that only amounts to putting the record straight about matters of detail which fall short of justifying or excusing his actions. Furthermore, the defendant may claim that justice demands he be allowed to hear the reasons why he is to be convicted and have those reasons approved or rejected by an impartial judge of law. This, it might be said, is what it means to take *him* seriously as a rational agent with a distinctive story to tell and life to lead.⁸⁴ In short, the defendant might intelligibly say it was no justice to be bundled off by the state in the back of a car even if he was guilty and even if he would have been put in prison anyway.

So from both perspectives the argument is that there is more to justice than perfect accuracy. Even if we could know that some defendants were guilty, and even if not having trials were just as accurate overall, justice would still demand the availability of the form of public accounting and authoritative judgment which inheres in the criminal trial. In short, making such trials available to defendants is partly *constitutive* of doing justice.

This argument gains extra force when one considers the burdens consequent on criminal conviction. For these are put forward by the state as, and widely believed to be, the consequence of specific court procedures. Because this is so, these burdens become labels which represent, by design, an authoritative and

⁸⁴ Duff et al (n 82) 138.

impartial statement that the defendant has been proven guilty in court.⁸⁵ Such labels have a special salience out in the world because of the courts' reputation as doers of justice. The defendant is labelled a criminal in general terms, but is also labelled in various more specific ways, some more general than others.⁸⁶ He may be a sex offender, and he may be a rapist or a child molester. If the latter, he may be despicable enough to warrant community service or 5 years in jail. Each element has important repercussions. Such information is known to the defendant, to those he knows, and to those he will come to know.

What is particularly important here, to repeat, is that these labels are, by design, imprinted with the authority of the courts. People are supposed to, and do, believe that the labels imposed on the defendant are the result of it having been proved in court that he is a wrongdoer, a sex offender, a rapist, etc. But what happens when the labels do not match what the courts have actually had established before them? In such cases, the only reason to believe the labels are appropriate is that an offence-creator or law-enforcement agent believed it to be so. From the perspective of the courts, the appropriate labels can only be 'suspected rapist', 'suspected sex offender', 'suspected wrongdoer'.

⁸⁵ Or at least has had a fair opportunity to plead not guilty, and have it proved in court that the relevant labels should apply. In what follows I focus on the injustice which occurs when defendants plead not guilty, but an equivalent argument can be constructed for guilty pleas – see n 87 below.

⁸⁶ The idea that criminal conviction 'labels' offenders has become a popular one since being brought into mainstream criminal law theory by Andrew Ashworth. For a recent statement see Andrew Ashworth, *Principles of Criminal Law* (6th edn OUP, Oxford 2009) 78-80. For Ashworth, to advocate fair labelling is to advocate offence-definitions which appropriately reflect the wrongdoing of the offender. As the text indicates my concern is related but distinct.

If these latter labels reflect reality, offences may mask the truth. Offenders can be labelled sex offenders regardless of what has been proved against them. To maintain such smokescreens – to pretend that the labels handed out are the product of the processes of the courts – is to perpetuate another injustice. For even if the burdens are accurately imposed, the labels which come with them have a salience justified only if the courts have indeed determined that they are warranted. The grounds of these labels make essential reference to the wrongdoing with which the offender is branded *having been in issue in court*.⁸⁷ Where this is not so, those grounds are absent. It is an injustice to impose the label nonetheless.

Let us return to ouster offences. These offences impose the burdens of conviction and punishment without the input wrongdoing thought by the offence-creator to justify such burdens having ever been in issue in court. It is a defining feature of these offences that the output wrong (on which the courts adjudicate) is separated from the input wrong, and constituted by elements designed to facilitate convictions. As such, many of the considerations mentioned above as constituents of a just outcome will be absent from the courtroom. There will be no account given, publicly or otherwise, by the defendant for his alleged input wrongdoing. There will be no authoritative finding that the defendant committed that wrong. There will not even be a case put forward by the prosecution that the defendant committed the input wrong, as this is quite simply irrelevant to the case.

⁸⁷ This is true of defendants who plead not guilty and are convicted. Where defendants plead guilty, there remains a parallel objection, namely that the grounds for labelling the defendant a rapist or terrorist are lacking, if the defendant lacked a fair opportunity to make the case that he is no such thing. Why think this? Because without such an opportunity a guilty plea cannot fairly be interpreted as an acceptance that such labels are rightly applied, which acceptance is just what the labels imposed imply that the defendant has given.

Instead, the entire trial revolves around *something else* – around output wrongdoing which, as we have seen, is not taken by the offence-creator to justify convicting anybody. This alone shows how severely the element of pure procedural justice in the criminal trial has been undermined. And the injustice only increases when the defendant is convicted and labelled pursuant to merely *suspected* input wrongdoing – when he is branded a sex offender or a terrorist – even though nothing of the sort has been proved in court. As I have argued, this is an injustice because the grounds of such labels make ineliminable reference to the courts having determined that the defendant is the wrongdoer his labels imply he is.⁸⁸ This never occurred. Accordingly, ouster offences create pure procedural injustice as well.

9. Desert

I have argued that justice opposes the existence of ouster offences. One possible reply invokes reasons of desert. It may be said that those accused of committing ouster offences have committed such evils that they deserve nothing less than the conviction and punishment which ouster offences facilitate. It may even be said that the accused have committed such evils that they do not deserve procedural justice itself. After all, so the argument goes, these people are terrorists or sex offenders. They deserve nothing better than our condemnation. There is, as a result, nothing wrong with convicting them, and nothing wrong with using an ouster offence to do it.

⁸⁸ Or, where defendants plead guilty, to the defendant having had a fair opportunity to make his case that he is no such wrongdoer: see n 85 above. An ouster offence deprives the defendant of this opportunity, because it demands that the courts ignore his case that at least some of the elements of the alleged wrongdoing were absent. After all they are no part of the offence-definition.

This argument quickly unravels. It invokes reasons of desert to justify creating an ouster offence. Reasons of desert are reasons of justice. They are reasons to give certain people ('the who') certain burdens ('the what') for the reason that they deserve it ('the why'). Yet we have repeatedly seen that in order to do justice, by the lights of offence-creators themselves, we must not oust the courts. If we really want to know who deserves to be convicted and punished we need to have input wrongdoing (that which *makes* defendants deserving) in issue before the courts. This is the best way to find out who actually *does* deserve conviction, and to do so while minimizing the risk of the grave injustice of mistaken conviction. But this means it is only at the conclusion of, and *with*, a non-ousted judicial process that we can know who deserves what: not before, and certainly not without. Furthermore, we have seen that such a judicial process is *constitutive* of a just outcome. It is a necessary part of making either a conviction or acquittal a just one. It follows that the argument from desert is both hollow and partial. Hollow, because it invokes reasons of justice to justify offences which *themselves* make doing justice less probable, while all the while making grave injustice more probable. Partial, because it ignores the pure procedural element of justice, which provides further reason not to create offences of this type.

10. Judicial Independence

If the above argument is correct, ouster offences are objectionable because though they technically bring about an extra-legal ouster, this nonetheless imperils one of the core reasons for having courts in the first place and thus for objecting to any ouster at all. I now deal somewhat more briefly with a number of further reasons to object to ouster offences.

One way to further explicate what has gone wrong with ouster offences is via the idea of judicial independence. Judicial independence is a somewhat murky notion, and the murkiness stems in part from its multifaceted nature. We may conceive of judicial independence as normatively inert or normatively charged. We may conceive of it as an attribute of each judge (does Judge A always favour big business?) or a collective attribute of the judiciary (are the judiciary a tool of the ruling class?). We can discuss internal interference (was Judge B moved by bias in writing that judgment?) or external interference (was Judge C bribed by the executive before writing his speech?). We can discuss particular cases (is Judge D inappropriately related to one of the parties?) or the very presence of a judge on the bench (is Judge E only on the bench because of his political views?). Much depends here on *prior* theories which determine what we take judicial independence to require: theories of adjudication which restrict the reasons to which judges should appeal; theories of the separation of powers, which determine which external influences judges must ignore, and how judges should be appointed.

I am interested in judicial independence as an ideal. Any plausible view of the judicial role will claim that the judiciary should be independent in some way. Following Pamela Karlan, we can say that any plausible view will take a position on both the negative and positive aspects of judicial independence – the freedom *from* and the freedom *to*.⁸⁹ If the judiciary are to be anything more than an extension of the other branches of government, they must have freedom *from* being made the instrument of those branches. And this freedom from is valuable because it gives

⁸⁹ Pamela Karlan, 'Two Concepts of Judicial Independence' (1999) 72 Southern California Law Review 535.

them the freedom *to* adjudicate in a way that, as we have seen, contributes to doing justice.

My argument here is that ouster offences threaten judicial freedom from the executive and legislature. This may sound implausible. After all, the judiciary are entirely free to adjudicate on whether the output wrong was committed using whatever theory of adjudication is consistent with judicial independence. There are no guns being held to the heads of judges in or out of the courtroom, so where lies the objection?

Recall first that ouster offences do not merely capture an input wrong, leaving it to the judges to decide who is guilty of committing it. Rather, offence-creators create an output wrong designed to facilitate the conviction of more of those suspected of input wrongdoing. But notice what this does to the role of the courts. The courts are substantially disabled from *standing against* those executive bodies whose mission is to facilitate the conviction of suspects by tracking them down and getting them to trial, because the courts can no longer demand proof of executive suspicion. No longer are the courts a significant counterweight to police and prosecutors whose goals are, at least in part, to put suspects where they are thought to belong.⁹⁰ Of course, the courts remain *self-consciously* adjudicative as they always were – demanding proof before a suspect can be convicted. But the reality of their adjudication is that it operates within parameters set to facilitate conviction of suspects *without* proof of that of which they are suspected. The courts' freedom from becoming part of the facilitative process is thus undermined.

⁹⁰ The increase in the power of law-enforcement officials which results from this move is the subject of Chapter 3.

The last paragraph moved quickly, so let me explain. Prior to ouster offences, the courts' role was clear. Courts cared not whether the defendant was a suspect. They demanded *proof* of his guilt before any conclusions could be drawn, and thus stood in the way of those seeking to have the suspect put away on the basis of suspicion. As Viscount Sankey LC put it in one of the most beguiling passages in English legal history, '[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'.⁹¹ If this cannot be done, the suspect is not to be convicted.

Ouster offences do not change this in self-conscious terms. Courts are still adjudicating on whether the output wrong took place at the defendant's hands. If this cannot be proved, the suspect is acquitted. But we must again look to substance not form. The only reason the output wrong exists at all is as yet another mechanism aimed at facilitating conviction of suspects: of suspected manipulators and suspected inciters of violence. The offence-creator did not care whether that wrongdoing could be proved in court – it deliberately prevented the judiciary from requiring this. Instead, it decided to do what it could to facilitate the conviction of suspects without such a requirement. And in doing so it made the courts part of the facilitation, by limiting them to asking whether the defendant committed an offence which was only created in the first place *because it helps facilitate conviction of more defendants*. The courts are no longer free *to* challenge suspicion because they are not free *from* the bodies seeking to facilitate conviction on the basis of that suspicion. The courts' freedom from the other branches (the condition of their freedom *to*) is therefore undermined.

⁹¹ *Woolmington v The Director of Public Prosecutions* [1935] AC 462 (HL) 481. I discuss the relevance of *Woolmington* for criminalisation strategies of the type in question here in Chapter 7 (text to n 391).

11. Interpretation and Accountability

We have already seen one important consequence of the conclusion reached at the end of the last section, namely that the courts' capacity for doing justice is impaired. We can now examine further values dependent on the courts' freedom *to*, which are retarded when their freedom *from* is undermined.

First, consider the judicial ability to develop the law. Statutes routinely leave a whole host of questions about their interpretation open. What does 'inflict' mean, and how should it be interpreted in novel situations where there is no physical contact? How broad is 'appropriation' and how is the idea of 'dishonesty' to be developed? This is the diet of the appellate courts when considering criminal matters. And judges are able to develop the blunt terms used in statutory formulations when and because the moral wrong aimed at by the definition is clear and the correspondence between input and output wrong is close. To use a term employed by John Gardner, judges can develop a moral map of the crime by using the input wrong to inform and develop the output wrong.⁹²

The pay-offs here can be seen by recalling the dual role typically played by criminal offences. They serve as guides to action and standards for evaluation. Where an input wrong is used to develop a closely corresponding output wrong, the output wrong is likely to track moral concepts and moral beliefs which are part of the public culture of the society in question. This helps ensure the law is an adequate guide to permissible conduct, furthering the Rule of Law.⁹³ Similarly, where the

⁹² John Gardner, *Offences and Defences* (OUP, Oxford 2007) 225.

⁹³ On the connection between the Rule of Law and guidance, see Joseph Raz, *The Authority of Law* (OUP, Oxford 1977) ch 11. For further discussion, see Chapter 3 (text to n 106).

courts have developed a moral map of the crime they can develop the output wrong in a manner which makes its evaluative role morally defensible – those condemned for committing the output wrong are, or are more likely to be, moral wrongdoers.

Take theft as an example. This output wrong was intended to track a closely corresponding input wrong, familiar to all and sundry in colloquial terms as ‘stealing’. If an element of the output wrong is unclear, it is clear that the input wrong can be used to give direction to legal development – what should ‘dishonesty’ mean? What does ‘appropriation’ need to mean to make the offence track the underlying wrong? Obviously judges do not always get it right. But they at least have the tools to do so.

The problem arises when a gap is deliberately created between the input and output wrongs – where much of the latter has no relationship to the former, and is not thought to be something people should be guided away *from* or negatively evaluated *for*. Then the judiciary are up the creek without a paddle. For they have little or no compass to help develop the output wrong. It was not, after all, *supposed* to correspond to the input wrong, so this is no guidance if Parliamentary intent is to be respected.⁹⁴ In truth, the output wrong is a facilitation device masquerading as the ordinary guidance-giving, evaluation-producing criminal offence. How to develop the masquerade may not be clear, and is highly unlikely to result in a reliable guide

⁹⁴ As mentioned earlier, this provides one reason why judges cannot take what may appear to be an easy way out of the ouster offence problem, and simply read elements of the input wrong into the output wrong: it is, in many such cases, the clear legislative intent that this not be done. That judges are constrained both by statutory wording and established principles of interpretation, is one demand imposed upon them by the ideal of the Rule of Law. Ouster offences could thus be seen to pose a dilemma for judges, who can do justice only at the expense of legality, or uphold legality only at the expense of doing justice. The demands of the Rule of Law will be the focus of Chapter 3.

to behaviour or defensible standard for condemnation. That the courts will nonetheless have to convict and punish anyone shown to have committed the output wrong only helps chip away at their moral authority.

Consider a second problem created by the attack on freedom from, and consequent lack of freedom to. This is the damage done to the valuable role of the courts in subjecting the exercise of government power to critical scrutiny, and in holding the government accountable for what it seeks to do through the criminal law. It is crucial to see that when ouster offences prevail, the actions of law-enforcement and prosecutors are insulated from scrutiny. If police and prosecutors are tracking down input wrongdoers ('arrest and prosecute those suspected of terrorism') but the output wrong they are utilising defines some lesser act ('it is an offence to express support for rebellious figures') the court process is constrained by the latter and cannot scrutinise power exercised under the former. Thus the defendant cannot attack the police's lack of evidence that he is a terrorist, for this is not the relevant offence. The judge can rarely put the prosecution under fire for its decision to bring a weak case to court, because the offence requirements only demand proof of some lesser activity, not the terrorist activity the prosecution is really all about. And it becomes harder for any jury to exercise its discretion to pour scorn on the state's attempt to convict by rejecting its case – after all, the requirements of proof have been deliberately reduced.

This is not all. The actions of police and prosecutors may well merit deeper systemic scrutiny relative to the norms which they are following. But as these norms have been deliberately divorced from the offence-definition under which defendants are pursued in court, the offence-creator has removed the said actions from

accountability through the courts. Practices of discrimination or partiality which might have been exposed by judicial broadsides are insulated. The public scrutiny which might follow this exposure of dubious practices is less likely to ever see the light of day. This is a dark reality for open government. It further tells against the existence of ouster offences.

12. Conclusion

Let us conclude by returning to where we began. Lord Woolf wondered where the next attack on the judicial role would come from. I have argued that we cannot conceive of the judicial role as the mere freedom to adjudicate on whatever legal rights Parliament defines. We must also attend to what Parliament's definition of legal rights does to a conception of the judicial role which includes the freedom to do justice in individual cases, scrutinise government power, and develop the law in a principled fashion.

Lord Woolf was particularly worried about ouster clauses - those clauses which deny the court the opportunity to adjudicate on disputes about legal rights. He was right to be. Among other things, adjudication by the courts in such matters is needed to do justice, hold the government to account, and develop the law. But if these are some of the reasons to worry about ouster clauses, they are equally reasons to worry about what I have called ouster offences. These offences oust judicial consideration of the wrongdoing thought by offence-creators to justify conviction pursuant to the offence. If this wrong is excluded from judicial consideration the value of the judicial function is undermined in much the same way as it is by an

ouster clause. Justice cannot be done. Scrutiny cannot be brought to bear. The law is harder to develop in a principled manner.

All of which leads us back to another of Lord Woolf's extrajudicial musings. Should judges defy Parliament where their role has been so significantly undermined? There are complex arguments here, a full treatment of which is beyond the scope of this thesis. If the courts should act, perhaps the solution lies in the creative use of defences, particularly those which do not rest on a statutory footing. Or perhaps judges should simply make clear that where it is obvious that the legislature and executive *themselves* do not believe some act grounds punishment, the judges will not convict without more. This would indeed be to act without precedent. Alas, it cannot be further discussed here.

Our current project is to articulate a set of objections to ouster offences, as the first strand of an argument that to create such offences is a misuse of the power to criminalise. It is only the first strand because I have not considered one obvious response, namely that ouster offences increase *security* and can be justified on these protective grounds. I consider the merits of this argument in Chapter 7.⁹⁵ What this chapter *has* done is explain the particular means by which those who create ouster offences seek to achieve their objectives: they seek to facilitate the conviction of more suspected wrongdoers (for whatever further objective), by means of offence-definitions which excise elements of that wrongdoing from the law. I have argued that there are many reasons to think these means are *improper* means, and that, absent justification, those who create such offences misuse their power to add to the criminal law.

⁹⁵ Text to n 459 of ch 7.

CHAPTER 3

GUIDING THE PEOPLE OR EMPOWERING THE STATE? ON CRIMINALIZATION AND THE RULE OF LAW

This chapter examines a type of criminal offence which is here called an ‘empowering offence’. An empowering offence is a criminal offence which - on account of features of its definition or presentation - increases the power of law-enforcement agents to achieve their creators’ (or their own) objectives. How so? By eliminating obstacles to those officials arresting and prosecuting *intra vires*, when they believe arrest and prosecution will help achieve those objectives.⁹⁶ To say that power has been increased, of course, is to implicitly invoke a baseline relative to which that increase has occurred. Here, that baseline is the power granted to law-enforcement agents by what is here called a ‘guiding offence’. A guiding offence is a criminal offence with the following two features: first, potential offenders were meant to refrain from the conduct prohibited by the offence-definition;⁹⁷ second, there are no definitional or presentational obstacles to potential offenders complying with that definition,⁹⁸ where compliance involves doing as the offence-definition

⁹⁶ This chapter thus shifts the focus of the thesis in the following sense. While Chapter 2 focused on the implications of uses of the power to criminalise *for the courtroom*, Chapter 3 focuses on a different set of implications: the implications for those officials who decide who to bring to the courtroom in the first place and for what. References to ‘officials’ in what follows should be construed accordingly.

⁹⁷ Meant, that is, by the offence-creator, and barring cases where there is a legally-recognised defence. For defence of the claim that offence-creators can be said to have intentions, see Chapter 1 (text to n 28 – n 29).

⁹⁸ For the sake of clarity, let me make clear that the set of obstacles I am interested in does not include the following: obstacles which are a result of implacable opposition to *any* offence seeking to reduce the harm or punish the wrongdoing which the offence-creator seeks to reduce or punish. As I use the terms, this is not an obstacle which is a function of the way the offence-creator has *defined* or *presented* the intended offence. Rather it is a function of the very *existence* of the kind of offence the offence-creator intended to create. The restriction to definitional and presentational obstacles is a result of the set of limitations on scope introduced in Chapter 1 (text to n 7).

requires (at least partly) because it requires it.⁹⁹ An empowering offence is a criminal offence which lacks one of these features, and which grants legal officials greater power on account of this fact.¹⁰⁰

The chapter identifies two sources of tension between empowering offences and the ideal of the Rule of Law. It first argues that empowering offences violate the demands of the Rule of Law. The argument here is that those demands are violated *because of what empowering offences are not* – because they lack one or other of the definitive features of a guiding offence. It is then argued that empowering offences pose a deeper threat to the Rule of Law. This time, the threat is posed *because of what empowering offences are* – because failing to adhere to the Rule of Law makes them more, and not less, effective in their own uncharacteristic way.¹⁰¹ The Rule of Law's place in the criminal law is thus made more precarious on account of the availability of such offences: not only does that availability reduce the pressure on offence-creators to adhere to the Rule of Law, it also creates pressure to violate the ideal's demands.

The chapter concludes by arguing that offence-creators should nonetheless resist the pressure, because to create an empowering offence is often to misuse the power to criminalise.¹⁰² Why so? Because to create such an offence is to make

⁹⁹ Another way to put the same point: guiding offences do not present obstacles (of the definitional or presentational kind) to the offence-definition becoming an *explanatory reason* for potential offenders: to it coming to figure in an account of why those potential offenders refrain from crime.

¹⁰⁰ Note that it is not a necessary feature of an empowering offence that its creator *intended* it to increase the power of officials in the way it does.

¹⁰¹ Section 2 below explains the sense in which the means of achieving objectives made available by empowering offences are *uncharacteristic*.

¹⁰² The definition of 'misuse of power' being used here was provided in section 3 of Chapter 1 (text to n 25).

available means of achieving objectives (the official exercise of the increased power discussed above) which means exist precisely because the demands of the Rule of Law are not met. I argue that this is often a misuse of power by defending a single legislative duty - a duty to create offences which *do* meet the ideal's demands, such that the means of achieving objectives made available by law are *Rule of Law-reliant* means.¹⁰³ To breach that duty (without justification) is to misuse the power to criminalise, and to create an empowering offence will often be to do precisely that.

The chapter is structured as follows. Section 1 offers an account of the Rule of Law, and of the characteristically legal *modus operandi* which makes the Rule of Law a specific virtue of laws and legal systems. Section 2 addresses the aforementioned sources of tension between empowering offences and the Rule of Law. The upshot – unpacked at the start of section 3 – is that *if* offence-creators are duty-bound to uphold the ideal, the creation of empowering offences will (absent some justification) be a misuse of the power to criminalise. The remainder of section 3 substantiates the aforementioned assumption: it offers several reasons to believe that violating the Rule of Law *matters*, with particular attention to the way it is violated by the creation of empowering offences. It argues that (exceptional cases aside) the Rule of Law protects the personal autonomy of potential offenders against threats to that autonomy which the law would otherwise pose. It further argues (again exceptional cases aside) that the Rule of Law guarantees a measure of valuable freedom, whichever of two conceptions of freedom turns out to be correct. It follows, I argue, that offence-creators have a duty to uphold the Rule of Law, and to restrict the criminal law to means of achieving objectives which are Rule of Law-

¹⁰³ I explain the italicised term in section 2 below. Means are only available to officials in the sense being used here, if those officials can use those means without acting outside the scope of their legal powers.

reliant. When empowering offences are a result of a breach of duty which lacks justification, the creation of such offences is a misuse of the power to criminalise.

1. The Rule of Law

The virtue of legality, or the Rule of Law, is a highly contested concept.¹⁰⁴ Resolving the contestation, even if it *is* both possible and desirable, is not the work of a single discussion. But there is an influential tradition of thought about the Rule of Law, on which I will draw here, which does have the merit of answering two questions which a satisfactory account of the virtue should answer. This tradition, I will suggest, can tell us both why the Rule of Law is a *virtue*, and why it is a virtue of laws and legal systems *in particular*.

It is of course true that those who dissent from the tradition I rely on here will not be persuaded to change their minds. My intent after all, is not to argue for, but rather to draw upon, one influential way of thinking about a concept. If it helps, I invite readers who prefer a different account to disregard my use of the term ‘Rule of Law’, and attach another to the phenomena which I place under that heading. This, I hope, will allow them to endorse all that I say if the arguments I make are sound. For even if I am wrong to find the aforementioned tradition of thought attractive *qua* thought about the Rule of Law, it remains the case that the ideas put forward by the said tradition (under whatever label they are put forward) help us see

¹⁰⁴ Perhaps essentially so. See Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) *Law and Philosophy* 137. I use the terms ‘virtue of legality’ and ‘the Rule of Law’ interchangeably.

something important about the offences I discuss in this chapter.¹⁰⁵ I argue for this latter claim in due course.

The tradition on which I draw here finds its principal contemporary exponents in Lon Fuller and Joseph Raz.¹⁰⁶ For these authors, the Rule of Law is a virtue for law which demands that legal norms have what it takes to *guide* conduct. There are two dimensions to the idea of guidance here, which should be (but are not always) distinguished. On the first, legal norms provide (good) guidance when those norms specify how those to whom they apply ought to behave in the eyes of their makers. In the criminal law context, offence-definitions provide such guidance when they specify what, according to offence-creators, potential offenders should (not) do.¹⁰⁷ I will call this the dimension of *normative* guidance. It is the demand for normative guidance which lies behind Antony Duff's claim that offence-definitions should be set up to communicate reasons for action to citizens: they should capture that which law-makers honestly believe to be (publicly) wrongful, and which, in their view, legal subjects should not do.¹⁰⁸ The same point was also made by H.L.A. Hart, who wrote that offence-definitions should 'guide individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of

¹⁰⁵ As a result of this focus, I will largely confine my discussion of the virtue to its operation in the criminal law context.

¹⁰⁶ See Lon Fuller, *The Morality of Law* (rev edn Yale University Press, New Haven 1969); Joseph Raz, *The Authority of Law* (OUP, Oxford 1977) ch 11.

¹⁰⁷ As Chapter 2 pointed out (text to n 43 above), offence-definitions *appear* to provide such guidance because they portray what is prohibited as wrongful. But to guide people away from *doing* when, by one's own lights, *doing* is *not* something from which those people should refrain, is to provide *poor* guidance in what the text dubs the normative sense.

¹⁰⁸ For a recent statement of this view, see RA Duff, *Answering for Crime* (Hart, Oxford 2007) 86. I prefer the term 'legal subjects' to Duff's favoured 'citizens', as it is not clear to me that legal norms should be directed only (or principally) to the latter class, which will usually comprise only a sub-set of the former.

obedience’.¹⁰⁹ The reader may wonder what alternative offence-creators have, but here is one: they could draft offence-definitions which throw criminality’s cloak across a much wider range of conduct, only some of which, on their own view, is conduct to be avoided. As Duff and Hart recognise this would be to give up on what I am calling normative guidance: on the idea that offence-creators should, via their offence-definitions, set out how law-subjects ought (not) to behave. If I am right, it would be to give up on one dimension of the ideal of the Rule of Law.

On the second dimension, legal norms have what it takes to guide when it is at least possible for those to whom the norms apply to find out what they require, and, if they so decide, to do what is required. Those norms are *better* guides when people can find out what is required of them without undue difficulty, and can – again without undue difficulty – put a decision to do what is required into practice.¹¹⁰ The idea here is that a good guide is one you can *follow*, as well as one who tells you where he believes you ought to go.¹¹¹ I acknowledge, of course, that in using the term ‘undue difficulty’ I introduce a degree of vagueness into my account of the Rule of Law. But that term, I think, is necessary to make sense of the following thought: that something has gone awry with the Rule of Law when knowledge of the law is available only to those with legal education, or when ever-changing legal prohibitions make compliance a feat in itself.¹¹²

¹⁰⁹ See HLA Hart, *Punishment and Responsibility* (2nd edn OUP, Oxford 2008) 44.

¹¹⁰ Of course, there may be internal obstacles to compliance: a murderous temper for instance. The idea is not that the law must be easy to avoid even for the murderous, but that the law must provide the opportunity for the murderous to avoid it if they conquer their murderous instincts.

¹¹¹ This latter dimension is insisted upon by the demand for normative guidance.

¹¹² The term also ensures that the bar is not set too high. As Timothy Endicott has argued no plausible ideal could demand that it never be *at all* difficult to work out (and do) what the law requires of us. The ideal could not, for instance, demand that legal norms never use

This second dimension of the idea of guidance – call it the dimension of *practical* guidance – helps explain the many overlapping lists of desiderata associated with the Rule of Law:¹¹³ laws must be publicly knowable, comprehensible, clear, non-retroactive, and so on, because such things are required if people are to be able (without undue difficulty) to ensure their compliance with the law.¹¹⁴ As Raz makes clear, all such desiderata are desiderata just to the extent that they help make legal norms better guides for legal subjects.¹¹⁵ In an important footnote, Fuller also recognizes this. He accepts that the desiderata can be seen as so many tools for guaranteeing to all a meaningful ‘possibility of obedience’, where this involves not just conforming by accident, but having the chance to obey: to find out what the law requires of one and do it.¹¹⁶ This possibility is realised precisely when legal norms are, in the terminology I am using, good practical guides.¹¹⁷

terms which are in any way vague, or that judges never change the law in ways which were in way unpredictable. If I am right, the Rule of Law need demand nothing of the kind. See Timothy Endicott, ‘The Impossibility of the Rule of Law’ (1999) 19 *Oxford Journal of Legal Studies* 1.

¹¹³ Which is not to say that it is the only explanation: if the law is to communicate to legal subjects that they have reason to do X but not Y, it had better be comprehensible and clear else they get the wrong message. The need for (good) normative guidance thus also helps explain the desiderata listed in the text.

¹¹⁴ As well as the lists put forward by Raz and Fuller, further mutually supportive accounts include: John Finnis, *Natural Law and Natural Rights* (OUP, Oxford 1980) 270-5; Andrei Marmor, ‘The Rule of Law and its Limits’ (2004) 23 *Law and Philosophy* 1; Matthew Kramer, *Objectivity and the Rule of Law* (CUP, Cambridge 2007); Nigel Simmonds, *Law as a Moral Idea* (OUP, Oxford 2007).

¹¹⁵ Raz, *The Authority of Law* (n 106) 214. Not all authors in the tradition explicitly mention the guidance idea as the one which justifies bringing together the desiderata selected. However, the various value-laden rationales given for doing so (protection of liberty, the space to craft one’s own identity) all seem to pre-suppose the provision of practical guidance, which allows legal subjects to comply with the law without undue difficulty.

¹¹⁶ Fuller (n 106) 70.

¹¹⁷ I take no position here on whether a ‘formal’ or ‘substantive’ conception of the Rule of Law should be preferred. First, because I suspect that the debate is misconceived: the desiderata outlined by Fuller and Raz are supposedly part of a *formal* conception, but many (the demand for clarity for instance) relate to the substance of legal norms. Second, and even if the previous sentence is mistaken, I see no need to take a position on the issue here. My focus on the two forms of guidance is consistent with the existence of so-called *substantive*

Now none of this yet tells us anything much about the two matters which I claimed ought to be resolved by a satisfactory account of the Rule of Law. We appear to be no closer to explaining why the Rule of Law is a *virtue*, nor to explaining why it is a virtue *for laws and legal systems* in particular. For some, the answers are moral answers: the Rule of Law is a virtue of laws and legal systems because it is of *moral value* to legal subjects. We will come to some of the reasons for this claim later when we consider why violating the Rule of Law might be thought to matter. For now let us focus on another answer. Why, let us ask, have some claimed not that the virtue of legality is a *moral* virtue, but that it is a *specific* virtue of the type of thing which we call law?

Joseph Raz makes a claim of this sort from which there is much to learn. Raz claims that ‘it is of the essence of law to guide behaviour through rules and courts in charge of their application’.¹¹⁸ What does he mean by this? First, he is *not* saying that there is no valid law if legal norms cannot, or were not designed to, guide behaviour. We must leave any pre-occupation with validity behind for present purposes. Second, he *is* saying that reflection on the systems of governance we call legal systems reveals that they characteristically achieve their goals by means of legal *norms*: by means of laws created in order to guide the behaviour of legal subjects. This is, in short, the *modus operandi* characteristic of the thing we call law.¹¹⁹

demands omitted from the Fullerian/Razian conception. But it is *also* consistent with there being independent reasons to resist any such extension.

¹¹⁸ Raz, *The Authority of Law* (n 106) 225.

¹¹⁹ Which is not to say that other normative systems do not share this feature. Thus I do not take Raz to be claiming that the demands of the Rule of Law are demands *exclusive* to law. Rather, I take him to be claiming that those demands are *specific* to law in a different sense: in the sense that they make law a better example of what it characteristically is - a normative

Now the fact that a *modus operandi* is characteristic of law leaves open that some laws, or some areas of law, do not characteristically utilise it. Safe to say, however, that the criminal law – our focus here – is not one such area. Thus in the words of H.L.A. Hart, ‘the characteristic technique of the criminal law is to designate by rules certain types of behaviour as standards for the guidance either of the members of society as a whole, or of special classes within it’.¹²⁰ Having received such guidance those addressed by it ‘are expected, without the aid of officials, to understand the rules and to see that the rules apply to them and to conform to them’.¹²¹ It is a mistake, then, to suggest that the criminal law characteristically operates by means of the threat of sanctions alone, even if that threat itself *does* provide a form of guidance, and even if that guidance is (as it may well be) extensionally identical to the offence-definition with which those sanctions are associated.¹²² For this ‘economy of threats’ overlooks the role which offence-definitions *themselves* characteristically play, as norms set up by their creators to guide potential offenders, which guidance helps achieve the reductive effects those creators sought to achieve.¹²³

Now it is *because* of this characteristically legal mode of operation that the properties which make laws better guides are part of a specific virtue for law: the virtue of legality, or the Rule of Law. A virtue of a thing is an excellence of that

system established to achieve the goals of the creators of legal norms. I expand on this point in the text following this footnote.

¹²⁰ H.L.A. Hart, *The Concept of Law* (2nd edn OUP, Oxford 1994) 38.

¹²¹ Hart, *The Concept of Law* (n 120) 38-9.

¹²² Even if, in other words, the sanctions guide people away from all that the offence-definition prohibits, by presenting them with obvious prudential reasons to desist from that behaviour.

¹²³ The phrase economy of threats is Hart’s: see Hart, *Punishment and Responsibility* (n 109) 40. Note that none of this is to say that the threat of sanctions does not standardly provide a prudential incentive to conform to offence-definitions. It simply claims that it is not the threat of sanctions *alone* which does the work. I return to this point in section 2 below.

thing, and the excellences of things depend on their natures.¹²⁴ It is a virtue of human beings that they are just. This is an excellence for human beings because we can respond to, and are thus bound by, reasons of justice. Offering guidance is a virtue of law, *and a specific one at that*, because law is a system of norms created to achieve various goals, which goals, as we just saw, it characteristically achieves via the guidance of those norms. A system *of this type* works more effectively (more excellently, if you like), *precisely as such a system*, when better guidance is provided by its norms. And as we saw above, that guidance is better when two things are true: when legal norms capture that which, in the eyes of their creators, should and should not be done; and when those norms are such that those to whom they apply can (without undue difficulty) do as the norms require.

Applied to the criminal law: if offences are to help achieve their creators' reductive goals (in the characteristically legal way), they had better provide *practical* guidance so people can (without undue difficulty) discover and comply with the law. If they do not, offending will likely either continue unabated,¹²⁵ or cease for reasons which have nothing to do with the characteristically legal.¹²⁶ Either way, those offences will not be effective in the characteristically legal way.

¹²⁴ A point made by Aristotle, and picked up by Joseph Raz. See Aristotle, *Nicomachean Ethics* (Terence Irwin tr, 2nd edn, Hackett Publishing 1999) Book 1 Ch 7; Raz, *The Authority of Law* (n 106) 225-226.

¹²⁵ Perhaps ratcheting up the sanctions handed out for offending would encourage legal subjects to comply with offence-definitions even when this is difficult to do. There is a point, however, at which this is no longer to rely on the characteristically legal *modus* at all – at which one is relying on the bare threat of sanctions to achieve one's objectives, rather than the normative guidance of offence-definitions.

¹²⁶ As when, for instance, the threat of sanctions becomes the only reason for compliance. This demonstrates that there is an internal limit to the strategy I considered in the previous footnote. One can only go so far in using sanctions to make the characteristically legal *modus* more efficient. Eventually, one simply abandons reliance upon that *modus* entirely.

Nor should the need for *normative* guidance be overlooked. If offences simply cover swathes of behaviour innocuous in the eyes of their makers, offences will cease to specify what should (not) be done by those makers' own lights. One possible consequence of this is popular disregard: innocuous (but prohibited) acts may simply continue, making offence-definitions obviously ineffective. But even if people do begin to refrain from the innocuous this does not mean the characteristically legal *modus operandi* is in effect: for objectives are no longer being achieved by means of norms set up to guide legal subjects, but by means of conforming responses to mere *pseudo*-norms, the effect of which is to send people in directions they were never meant to go.

Let us take stock. The previous four paragraphs offered an answer to the two questions with which I began this section. Why is the virtue of legality a virtue, and a virtue of laws and legal systems in particular? We have seen that the virtue of legality is better instantiated the better the law guides conduct. Now we can also see that when this is so – when the law does guide well – laws and legal systems do that which they exist to do, *in the way they characteristically exist to do it*, and do so more effectively than they otherwise would. In short, to instantiate the Rule of Law in a legal system or sub-system is to make that system or sub-system a *better* example of what it essentially is – a system of norms created to achieve objectives via the guidance of the subjects of the law.

It is worth noting that it is no reply to all this to say that we could do things *more* effectively with violence handed out by a legion of formidable overseers who turned up on doorsteps each week. This would only be to *abandon* the characteristically legal *modus operandi*: we would no longer be seeking to achieve

our objectives through the guidance of a system of norms. While there may be desiderata internal to this type of practice ('punch hard to save bullets') these are not the desiderata internal to governance by law. It is of course true that different virtues may be applicable to different modes of governance. But this tells us nothing about the specific virtues of law.

2. Empowerment

a) Uncharacteristic Possibilities

If the previous section is correct, the Rule of Law is a specific virtue of the criminal law because criminal offences are characteristically set up to operate by guiding potential offenders, and because attaining the virtuous heights makes this mode of operation effective. This section examines some implications of that argument for criminalisation.

The first point to notice is what the argument cannot show: it cannot show that offence-creators should view the Rule of Law as of more than *contingent* worth. For offence-creators may accept the argument of the previous section, with its recognition of a *modus operandi* characteristic of law. They may further accept that such a *modus operandi* is more effective when the Rule of Law is observed. But they may also acknowledge that when it comes to creating individual offences there are *uncharacteristic possibilities* – offences which operate by means other than the guidance offence-definitions are designed to give, the efficacy of which thus does not hinge on upholding the Rule of Law. Once this is grasped an offence-creator may grant the conceptual point, namely that because of the way (criminal) law

characteristically works the Rule of Law is its specific virtue. But the offence-creator may nonetheless point out that whether there are grounds to uphold the ideal remains an open question, because while the case for the Rule of Law-as-virtue is a case based on *effectiveness*, offences which work in uncharacteristic ways can be effective without the Rule of Law.

Notice also that when uncharacteristic possibilities are perceived as eligible options, offence-creators striving for efficacy are released from certain pressures: pressures produced when the characteristically legal *modus operandi* is the only *modus* in town.¹²⁷ For when the options *are* so restricted, and offence-creators wish to reduce wrongdoing, they had better create offences which allow people to avoid that wrongdoing for themselves: they had better create offences which can guide potential offenders, else their creations fail to achieve the initial reductive goal. Once uncharacteristic possibilities are acknowledged, this pressure is relieved – reductive goals can be achieved by means of offences which operate *without* such guidance. This breaks up an important marriage between legislative self-interest and the Rule of Law. When this marriage was extant, laws which were tools for their creators were necessarily also tools for their subjects. To achieve an objective (say, eliminating murder) would require that one create an offence which people could attend to and avoid. And, precisely because of this, the law allowed people to plan their lives within its bounds, serving *them* by removing the prospect of unwelcome legal interruptions. This marriage is broken up by uncharacteristic possibilities, which enable legislative self-interest to be promoted without the Rule of Law. The moral importance of this divorce is a matter to which I return in section 3.

¹²⁷ I do not mean to say that there has ever been a time in which offence-creators saw themselves as having only one option. My claim, in other words, is not a historical claim.

b) Empowering Offences

I have written of uncharacteristic possibilities when it comes to the *modus operandi* of criminal offences. The remainder of this chapter focuses on what I earlier called an ‘empowering offence’, which I will argue makes available one such possibility. An empowering offence (EO) can be briefly defined as follows:

EO: a criminal offence which - on account of features of its definition or presentation - increases the power of law-enforcement agents to achieve their creators’ (or their own) objectives.¹²⁸

Several features of this definition warrant further discussion. First, I limit the factors by which the relevant power can be increased in accordance with the limitation on the scope of this thesis set out in Chapter 1.¹²⁹ Thus only definitional and presentational factors are relevant here. Second, the increase in power I have in mind here is not itself (though it may be a consequence of) an increase in *legal* power. Law-enforcement agents have greater power in my sense whenever there are fewer obstacles to their achieving objectives in the following way: by arresting and prosecuting suspects in a manner which is legally *intra vires*.¹³⁰ It is true, of course, that modifying the *legal* power to arrest and prosecute will often remove certain obstacles, and thus increase official power in the sense being used here. I will consider such a case shortly. But it is crucial to see that obstacles may *also* be

¹²⁸ The reference to officials’ *own* objectives is included because, as I argue in the text to n 178 below, it is an important consequence of creating an EO that officials have greater power to hijack offences and pursue their own ends.

¹²⁹ Text to n 7 of ch 1.

¹³⁰ Thus if there is a legal power of arrest only where relevant officials have reasonable grounds to believe an arrestee has committed an offence, it would be *ultra vires* to make an arrest where such grounds are lacking.

removed despite the legal power to arrest and prosecute remaining unchanged. I will consider a case of this type in a moment also. The key point is that the power I have in mind is *distinct* from the legal power to arrest and prosecute: it is measured by the ability of law-enforcement agents to get things done *using* their legal powers and *within their limits*.

Third, note that the increase in power here is relative to a specific baseline: to the power granted law-enforcement agents by a *guiding offence*. As the introduction pointed out, a guiding offence is a criminal offence with two distinctive features: first, an offence-definition with which potential offenders are meant to comply;¹³¹ second, an absence of either definitional or presentational obstacles to compliance with that definition, where one only complies with Ω if the existence of Ω figures among one's reasons for doing as Ω requires.

The question which remains is how these different points are connected: how exactly *do* the definitional and presentational features which distinguish empowering from guiding offences *also* increase the power of officials to achieve (their or other) objectives? To answer, let me first offer some examples. I will then attempt to restate the connection in more general terms.

Consider first what I will call a *type-1 empowering offence*. A type-1 offence is defined so as to prohibit acts which offence-creators do not mean to eliminate despite their prohibition. Either the offence-creator means for some of the offending behaviour to continue, or the offence-creator is simply indifferent to its continuation. It follows that the offence is not a guiding offence. But how exactly does a type-1

¹³¹ At least where there is not a legally-available defence.

offence increase the power of officials? It does so in the following way. Because the offence prohibits a range of acts innocuous by its creators' own lights, officials possess the legal power to arrest people for those acts, and the innocuous is all there need be evidence of at each stage of the criminal process. It may still be wondered how this would help achieve any particular objective. But take a case where offence-creators wish to punish, or reduce the incidence of, certain harmful acts. When officials suspect that an individual has committed, or will commit, one of those acts, they can arrest, prosecute and obtain a conviction without needing to provide any evidence of the harmful act itself.¹³² They can thus bring about *either* the punishment of the suspected harmdoer (helping achieve a retributive objective), *or* detention thought likely to deter the suspect or others from committing harmful acts in future (helping meet a reductive goal).

The key point here is the way in which this contribution to the aforementioned objective(s) is brought about: it is brought about by *circumventing* the obstacles posed by the need for evidence of more than the innocuous, and thus by circumventing obstacles which would have been posed by a guiding offence.¹³³ It follows that officials *do* have greater power to achieve objectives pursuant to a type-1 empowering offence, because it is much easier for officials to arrest and prosecute

¹³² The structural similarity with what the previous chapter called ouster offences should be clear. Indeed, an ouster offence is one instance of a type-1 empowering offence, because ousting the courts is one of the very things which can increase the power of law enforcement agents to successfully arrest and prosecute, while also making it the case that the offence-definition is no guiding offence. One of the points being made here is that the *separation* of input and output wrong which is characteristic of an ouster offence, also has an effect on hurdles faced by officials *outside* the courtroom. Note however that ouster offences are marked by a separation which is deliberately *facilitative*. This is not a necessary feature of an empowering offence.

¹³³ Remember: a guiding offence would only capture that which, by the creators' lights, should cease to occur. It thus would not capture that which the offence-creator takes to be innocuous, and evidence of more than the innocuous would be required at each stage of the criminal process.

suspects. Notice also that the increase in power at issue here results from (though is not identical to) an extension in *legal* power: an extension to the range of acts for which officials can arrest and prosecute *intra vires*, which in turn removes the need for evidence of that which would have been more difficult to prove.¹³⁴

Two examples from English law should help make the point clearer.¹³⁵ First, consider section 8 of the Terrorism Act 2006. Section 8 makes it an offence to attend any place where training is being provided for purposes connected with terrorism, if one believes, or could not have failed to understand, that the training is for those purposes.¹³⁶ One need not give or receive any training oneself, nor need one assist, encourage or otherwise interact with those giving or receiving training. Indeed, it does not even matter what reasons one had for attending. One may have attended simply out of curiosity. One may have done so to gather intelligence, or put an end to training one knew was taking place. One may have done so simply because it was one's job to do the cleaning up. In all such cases one commits an offence under section 8.

¹³⁴ We should not ignore the fact that officials only have greater power here if they both a) know that their legal powers have been extended, and b) grasp how to use them without committing self-defeating errors. It follows that *officials* require a form of guidance from the law if empowering offences are to work. I will later argue that empowering offences are poor guides for *potential offenders*.

¹³⁵ While my principal objective here is theoretical – to explain the distinctive features of empowering offences, and evaluate their creation – I think some (albeit limited) doctrinal work worth doing for two reasons. First, because the present thesis is intended to be of interest not only to philosophers of criminal law, but also to those interested in the evaluation of English criminal law doctrine (see section 4 of Chapter 1). By providing some examples of how the ideas contained in this thesis can be used to do this doctrinal work, I hope to make the thesis more accessible to this second audience. Second, because I suspect that the use of examples helps make the philosophical claims clearer, by illustrating how they apply to different instances of criminalisation.

¹³⁶ Relevant training includes training of the type detailed in s 6(1) of the 2006 Act. As well as training in the use of noxious substances, this covers 'the use of any method or technique for doing anything else that is capable of being done for the purposes of terrorism' and 'the design or adaptation for the purposes of terrorism...of any method or technique for doing anything'.

Did the offence-creator really mean for potential offenders to refrain from all such acts? There is obvious reason to say no: even those working undercover for the police will offend when they infiltrate groups providing relevant training. It is difficult to believe that such work was no longer meant to be done. Nor can the intention really have been that owners, employees and users of public spaces of all stripes disrupt their own lives or neglect their duties when they believe training is taking place on-site. It follows that this is no guiding offence.

As a second example, consider section 2(1) of the Fraud Act 2006. It is an offence under section 2(1) to dishonestly make a statement which one knows may be misleading, with intent either to gain thereby, or to expose another to a risk of loss. No-one need be misled, and no-one need gain or lose.¹³⁷ One might initially think this a straightforward example of a guiding offence. But a moment's reflection suggests otherwise. Was the aim really to stamp out the telling of fibs by customers seeking a discount, or by drinkers trying to get their companions to buy them the next round? Was it designed to so alter the modern commercial landscape as to eliminate the use of advertising puffs which exaggerate the merits of a product? The answer, surely, is no. And if this is right, potential offenders were not meant to refrain from various prohibited acts. We are not dealing with a guiding offence after all.

Now it remains to be shown that either of these offences is an empowering offence. It remains to be shown, in other words, that either offence *increases the power of officials*, precisely because of the definitional features discussed in the

¹³⁷ Under s 5 of the 2006 Act, the gain or loss which the perpetrator intends must be in money or property.

previous paragraphs. To see that they do, return first to section 8 of the Terrorism Act 2006. We have seen that section 8 was not meant to eliminate all offending acts. What it presumably *was* meant to do is make possible the pre-emptive prosecution of a certain group of conspirators, aiders and abettors: those present where training takes place because they are party to a terrorist plot. And section 8 increases the power of officials to do just this, by ensuring that mere attendance at a known training ground suffices to commit the offence. It follows that this is the only thing of which there need be any evidence to prosecute, and that the obstacles to successful prosecution are extremely limited. Had the offence-creator created a guiding offence, prohibiting only that which it took there to be decisive reason not to do, those obstacles would surely have been more difficult to pass. If this is right the power of officials has indeed been increased.

The same point can be made about section 2 of the Fraud Act 2006. Section 2 makes it an offence to make many statements which the creators of the offence were, as we saw above, surely content to continue. But precisely because so many statements are covered by the offence, the wrong-making features of at least some of these statements have been written out of the law. When officials wish to arrest or prosecute people for making such statements, their power to do so effectively has been increased: they do not need any evidence of the wrong-making features, removing the obstacles a guiding offence would have posed to successful prosecution.

Consider now a second type of empowering offence which I will call a *type-2 empowering offence*. Type-2 offences have one of the following features: either a) the very existence of the offence is little-publicised (and therefore little-known), or

b) the scope of the liability it imposes is little-publicised (and therefore little known).¹³⁸ When a) is true, the offence-definition will rarely figure among potential offenders' reasons for doing as the law requires. To the extent that the offence achieves anything, it thus will not typically do so because the offence-definition is taken by potential offenders to disclose reason not to offend. There is, in short, a presentational obstacle to this being the case. When b) is true, the offence-definition may well figure in potential offenders' reasons for doing *some of* what the law requires, but will rarely figure in their reasons for doing *what few know it requires*. To the extent that this part of the offence-definition achieves anything, it thus will not do so because it is taken by potential offenders to disclose reason not to offend. There is, in short, a presentational obstacle to this being the case. As a result, neither a) nor b) is a guiding offence: there are presentational obstacles to potential offenders complying with the offence-definition.¹³⁹

How exactly does a type-2 offence increase the power of officials? It does so in the following way. Because (the scope of) such an offence is little-known, it will likely be committed by many who would not have offended had they known of its existence (or its scope). These offenders thus become subject to legal powers of arrest and prosecution to which they would not have been subject had the offence been better publicised (and the presentational obstacle removed). When officials believe there are reductive or retributive (or other) pay-offs to be had, they can proceed to arrest or prosecute such persons *intra vires*, ambushing them with

¹³⁸ I explain why the phrase outside the brackets will tend to translate into the phrase within them in Chapter 4 (text to n 199).

¹³⁹ Which is not to say that there will be constant offending. As made clear in the text to n 99 above, compliance with an offence-definition requires that one avoid offending (partly) *because of* the offence-definition. Those unaware of the existence of an offence thus will not comply even if they do not offend.

liability they did not know they had incurred. It follows that the very lack of publicity which ensures that a type-2 offence is *not* a guiding offence also increases official power to achieve objectives: the obstacle which might have been posed by suspects having assiduously ensured their compliance with well-publicised offence-definitions, is rendered no obstacle at all when they have unknowingly committed a little-publicised equivalent.¹⁴⁰

There are many arguable examples of type-2 offences in current English criminal law. Consider for instance the continuing development of public order law, which apparently now makes it a crime to wear clothes expressing anti-government sentiment, as well as to read out the names of war dead at the Cenotaph.¹⁴¹ Consider also the recent explosion of ‘anti-terror’ offences. One may now commit an offence if one takes informative photographs of members of the police or armed forces,¹⁴² or if one possesses information of a kind which is likely to be useful to terrorists.¹⁴³

¹⁴⁰ Note that this increase in official power occurs despite officials’ *legal* power to arrest and prosecute remaining unchanged. In contrast to type-1 offences, which provide officials with the legal power to arrest and prosecute for a broader range of acts, type-2 offences achieve their empowering effects by means of presentation alone, and leave the range of arrestable/prosecutable acts untouched.

¹⁴¹ There are a number of cases where publicly donning clothing bearing the phrase ‘Bollocks to Blair’ has apparently been enough to bring the threat of prosecution. This is presumably pursuant to s 5(1) of the Public Order Act 1986, which makes it an offence to display any writing which is abusive or insulting, within the hearing or sight of a person likely to be caused alarm or distress thereby. While it may be a misreading of the offence to assume it covers clothing of this kind, the authorities’ interpretation is by no means implausible. Similarly, one of the first convictions pursuant to s 132 of the Serious Organised Crime and Police Act 2005, which prohibits protest within a mile of Parliament, was of a woman who merely read out names at the Cenotaph. See on both Patience Wheatcroft, ‘Wear an anti-Blair jacket... and you’ll have your collar felt’ *The Telegraph* (London, 30 Apr 2006) <<http://www.telegraph.co.uk/comment/personal-view/3624668/Wear-an-anti-Blair-jacket...-and-youll-have-your-collar-felt.html>> accessed 1 Feb 2010.

¹⁴² Section 76 of the Counter-Terrorism Act 2008 makes it an offence to elicit or publish information about present or past police constables or members of the armed forces if it is ‘of a kind’ likely to be useful to terrorists. Naturally, this led to opposition from photo-journalists concerned about their freedom to report on the activities of the police and the military. But the offence potentially captures the activities of many private individuals, journalistic or not.

¹⁴³ Section 58 of the Terrorism Act 2000. As with many of these offences (including the example discussed in the previous footnote) there is a defence of reasonable excuse

Finally, consider the law on sexual offences – significantly altered by the Sexual Offences Act 2003 – which makes offenders out of many who honestly believe their acts are consensual, as well as many whose acts *are* consensual and entirely innocuous as a result.¹⁴⁴ None of the changes in question were highly publicised even when they involved substantial changes in the law. Many potential offenders are presumably unaware either that such offences exist at all (think of section 76 of the 2008 Act), or that the offences in question are of the scope they are (think of sections 9 and 13 of the 2003 Act).¹⁴⁵ It is precisely because this is true that some will stumble inadvertently into offending which they would otherwise have avoided. The power of officials is increased as a result.

We have now discussed two distinct ways in which the power of officials can be increased by the definitional or presentational features of an offence, specifically those which mean the offence in question is not a guiding offence. Obstacles to successful arrest and prosecution can be eliminated or reduced - and the power of officials increased - *either* because obstacles exist to potential offenders finding out about and complying with the law, *or* because offence-definitions

available here. But this is by no means as helpful as one might think. While the Court of Appeal initially held that *any* non-terrorism related purpose would suffice to establish a reasonable excuse, the House of Lords recently held that illegal or otherwise frivolous purposes do not suffice. On the facts this meant that a prisoner playing a practical joke on his prison guards was convicted of a terrorist offence. The liability created here is thus much broader than it appears. For the House of Lords' decision, see *R v G* [2010] 1 AC 43 (HL). For comment, see Antje du-Bois Pedain, 'Terrorist Possession Offences: Curiosity Kills the Cat?' (2009) CLJ 261.

¹⁴⁴ For example, the law on rape was widened by s 1 of the 2003 Act, such that one requires a reasonable and not just honest belief in consent. Whether or not this was an improvement, it is a significant change, and should have been better publicised than it was. In addition, a whole host of new offences concerning sexual activity with minors now exist, including the example discussed in Chapter 2 (text to n 57), which captures many innocent, consensual acts between teenagers.

¹⁴⁵ Further examples where publicity has been lacking, with ignorance the (defensible) result, are discussed in Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it' (2011) 74 Modern Law Review 1, 7-18.

effectively scale back the evidential demands of the criminal process. The following sub-section discusses the implications of all this for the Rule of Law.

c) The Rule of Law Revisited

In this section, I make two arguments which address the relationship between empowering offences and the Rule of Law. First, I argue that empowering offences are inconsistent with demands of the Rule of Law discussed in section 1 above.¹⁴⁶ Second, I argue that empowering offences make the realisation of the Rule of Law *precarious*, because they offer offence-creators what section 2(a) called an uncharacteristic possibility: they offer means of attaining objectives which are not *reliant* on the Rule of Law, and which *become more effective* (in their uncharacteristic way) the more egregious the violation. The Rule of Law's place in the criminal law thus cannot be founded on effectiveness alone. In section 3, I present a different kind of argument in favour of the Rule of Law and against the uncharacteristic possibility: I argue that to create empowering offences is a misuse of the power to criminalise.

Here is the first argument. We saw in section 1 that the Rule of Law demands that legal norms be (good) *normative* and *practical* guides. What we have also seen is that each empowering offence lacks at least one feature of a guiding offence. My argument here is that it is on account of this lack that the Rule of Law is violated. First, consider those empowering offences which prohibit conduct from which their creator does not mean for potential offenders to refrain. In the examples discussed above some of this conduct was surely meant to continue; in other cases,

¹⁴⁶ Text to n 106 – n 117.

the offence-creator will simply be indifferent. These type-1 empowering offences fail as *normative* guides. Why? Because as I argued in section 1, a normative guide specifies what, according to its creators, potential offenders should (not) do. Type-1 offences prohibit a range of conduct and thus *portray* that conduct as wrongful, when only a sub-set of that conduct is conduct from which – by the offence-creators’ own lights – potential offenders ought to refrain.¹⁴⁷ To create such an offence is thus to create something which *masquerades* as a norm, but in fact directs its addressees in ways at odds with what they really ought (not) to do.¹⁴⁸ If section 1 is correct that the Rule of Law demands normative guidance, we have our first violation of the ideal.

Consider now the second type of empowering offence discussed above: those offence-definitions which pose definitional or presentational obstacles to potential offenders’ compliance. In the examples discussed above the obstacle was a lack of publicity, which, I claimed, is likely to lead to some being ambushed by criminal liability.¹⁴⁹ These type-2 empowering offences fail as *practical* guides. Why? Because as I argued in section 1, practical guidance requires that potential offenders be able to find out what is required of them, and use their newfound knowledge to

¹⁴⁷ The claim that offence-definitions *portray* the prohibited as wrongful – and thus as conduct which should not be done – was introduced in section 2 of Chapter 2 (text to n 43 above). This portrayal, and the specific means by which it is accomplished, are further explored in Chapter 4 below (text to n 211).

¹⁴⁸ Really, that is, according to the offence-creator, whether or not the offence-creator’s view is morally defensible. I assume throughout that the Rule of Law does not demand that the law guide people in ways which are morally sound. This, I assume, would be a substantive demand too far whatever else one’s conception of the ideal contains. Were things otherwise we would only know what the Rule of Law demands once we have worked out the implications of our remaining ideals.

¹⁴⁹ There are various other ways in which such obstacles could be produced: by extremely unclear offence-definitions, for example. The conclusion as regards the Rule of Law would then be much the same as the one presented in the text.

do what the law requires.¹⁵⁰ It requires, in other words, that potential offenders be able to *comply* with the law. Furthermore, the Rule of Law requires that compliance be possible without undue difficulty. It requires, in other words, that there not be genuine *obstacles* to compliance.¹⁵¹ It follows that when an offence is defined (say, because extremely unclear) or presented (say, because extremely hard to discover) such that genuine obstacles to compliance *are* presented, the offence-definition fails to meet the demand for practical guidance. Here, then, is the second violation of the demands of the Rule of Law.¹⁵²

Now the reader may claim that this is not much of an argument: that once I defined empowering offences in the way I did, it was fairly obvious that they would be offences which violate demands of the Rule of Law. Whether or not this is fair, my principal goal here is not simply to show that empowering offences violate the ideal.¹⁵³ It is rather to show two further things, both of which are less clear: first that empowering offences pose a deeper challenge to the Rule of Law, because they

¹⁵⁰ Text to n 110 above.

¹⁵¹ Couldn't there be obstacles which it is not unduly difficult to surmount? And if not, did I not surreptitiously define empowering offences so that one of their features is a straightforward failure to meet a demand of the Rule of Law? In reply: an obstacle which presents no undue difficulty is no genuine obstacle. It is true that this means that all empowering offences violate the Rule of Law. But it does not follow that they should simply have been defined in these terms. It took much of section 1 to defend the claim that the Rule of Law demands the practical guidance which such obstacles impair. It took much of section 2 to explain that posing such obstacles could increase the power of officials – something which not all violations of the Rule of Law will do – but which *is* necessary if an offence is to count as empowering. The current paragraph thus joins the dots laid down by previous sections. I do not claim that it does anything more.

¹⁵² You may deny that the examples from English law given above are examples of liability which is unduly difficult to discover. But as Chapter 4 argues this must be put in the context of the legal system as a whole: a system containing many thousands of criminal offences, which lacks a system by which knowledge of changes to the law are brought reliably to public attention. Those who doubt that there is a violation of the Rule of Law here are thus referred to the following chapter for further argument.

¹⁵³ Some of my reasons to think the charge unfair are found at n 151. I am also sceptical of the claim that offences which were never meant to produce perfect compliance, are obviously offences which violate any demand of the Rule of Law. One of the burdens of this chapter has been to argue that the Rule of Law demands normative guidance, a demand offences of the type just mentioned fail to meet.

make available means of achieving objectives which are an uncharacteristic possibility: which do not rely on (and are more effective without) the Rule of Law, and thus make its place in the criminal law less secure than first appears. Second, that making such means available is often a misuse of the power to criminalise, because of the existence of the legislative duty I defend in the following section.

Let us thus turn to the first of these tasks, and to the second of the arguments to be made in this section. I argued in section 1 of this chapter that (criminal) law has a characteristic *modus operandi*: that it characteristically achieves its effects by means of the guidance of legal norms.¹⁵⁴ The better those norms are along the two dimensions of guidance I distinguished, the more effective those norms will be in this characteristic way. Now it is true, of course that legal norms are often backed up by (the availability of) sanctions, and this may seem to amount to an *independent* means by which law is characteristically effective. In fact, the alleged independence is illusory. For whenever those norms have what it takes to guide legal subjects, the availability of sanctions plays its part in *reinforcing* that guidance – it provides potential offenders with extra incentive to follow the guidance on offer.¹⁵⁵ The legal powers required to bring it about that sanctions are imposed, are thus themselves contributions to this norm-bolstering endeavour. It follows that when the characteristically legal *modus operandi* is in effect, both sanctions, and the legal

¹⁵⁴ Text to n 119 above.

¹⁵⁵ Perhaps there is an exception. As I pointed out at n 126 above, sanctions can become so prominent in a legal system that the law's normative message is drowned out. When this occurs, one no longer utilises law's characteristic means at all, because objectives are no longer achieved by means of the guidance of legal norms. The point here is similar to a point once made by Andrew von Hirsch about criminal *punishment*. For von Hirsch it is a valuable feature of punishment that it sends a (censorious) normative message to the punished, which he worries can be drowned out by excessive hard treatment. My thought here applies this insight to the workings of offence-definitions themselves. See Andrew von Hirsch, *Censure and Sanctions* (OUP, Oxford 1993) 42-43.

powers required to bring about their imposition, play a *supporting* (rather than a *leading*) role in the workings of the criminal law.¹⁵⁶

If this is right, the criminal law characteristically achieves its objectives via means which rely for their effectiveness on observance of the Rule of Law: on offence-definitions which do their work by guiding legal subjects, which guidance is bolstered by the availability of legal sanctions in support. Let us call the means in question *Rule of Law-reliant means*. In section 2(a) I discussed what I called *uncharacteristic possibilities*: means of achieving objectives which do not depend on observance of the Rule of Law. My argument here is that empowering offences make available one such possibility: a way of achieving objectives which is not reliant on the Rule of Law, but which is more effective *the more egregious* the Rule of Law violation.

We have already seen that empowering offences fail as normative and practical guides. We have thus seen that they do not meet the demands of the Rule of Law. But we have also seen that such offences *remain effective*. How so? By making available alternative means by which objectives can be achieved: by increasing the power of *officials* to achieve objectives via arrest and prosecution, an increase achieved by virtue of the very features which prevent adherence to the Rule of Law. In the process officials' legal powers are cast in a very different role: far from bolstering the guidance of legal norms, their exercise is the way objectives are achieved in the absence of that guidance.

¹⁵⁶ A point well-made by HLA Hart, when he wrote that the officially-directed rules which make provision for the imposition of sanctions 'make provision for the breakdown or failure of the primary purpose of the system'. What I am adding here is that the existence of those powers is partly justified by the contribution it makes to the effectiveness of the primary purpose. See Hart, *The Concept of Law* (n 120) 39.

In fact the position is even worse for the Rule of Law. For the means in question are not only means which do not rely on meeting the ideal's demands; they are means which are usually *more* effective the further we get from doing so. Why so? Because as section 2(b) showed us, the poorer the normative guidance offered by offence-definitions becomes, the lower the evidentiary demands of the criminal process in real terms: the more innocuous the behaviour one prohibits, the easier it is to find the evidence one needs to prosecute successfully.¹⁵⁷ And the poorer the practical guidance which offence-definitions provide, the more likely those definitions are to ambush those who would not otherwise have offended.¹⁵⁸ By that very token, obstacles which would have been posed to successful prosecution are removed, and official power increased: more people whose prosecution can contribute to official objectives will have unwittingly made their own prosecution legally *intra vires*.

Empowering offences thus make available the following (uncharacteristic) means of achieving objectives: *the exercise of increased official power to get things done by arresting and prosecuting suspects, which power officials possess precisely because the Rule of Law is not upheld*. Now the upshot of all this is by no means benign for the Rule of Law. There has been protracted debate over whether even the most *evil* of law-makers would still have prudential reasons to uphold the ideal when pursuing their evil objectives.¹⁵⁹ If I am right here, there is a flip-side to this debate which remains underexplored: the question here is whether law-makers pursuing the objectives pursued by a *morally upstanding* criminal law – the reduction of

¹⁵⁷ Text to n 132 – n 133.

¹⁵⁸ Text to n 138 – n 140.

¹⁵⁹ For rival contributions, see Kramer (n 114) and Simmonds (n 114).

wrongdoing; the punishment of wrongdoers – *themselves* have (adequate) prudential reasons to uphold the Rule of Law.¹⁶⁰ For the suggestion here has been that there is a *rival* way of making the criminal law effective: one can make available the uncharacteristic means made available by empowering offences, and thereby achieve one's objectives without requiring the Rule of Law.

It follows that the Rule of Law's place in the criminal law is far less secure than it may appear. True enough, the law's characteristic means require observance of that ideal to be effective. But there are uncharacteristic possibilities which offence-creators can pursue, and which become more, and not less, effective as the Rule of Law is undermined. To the extent that offence-creators come to see these possibilities as eligible options, the Rule of Law is at risk of becoming an increasingly precarious ideal. Its continued observance is instead fated to rely on other arguments: on the kind of *moral* argument to which this chapter now turns.

3. The Rule of Law and Legislative Duty

If the case for the Rule of Law cannot be made with prudential arguments alone, the case remains to be made that the criminal law should operate by *Rule of Law-reliant means*.¹⁶¹ The argument of this section is as follows: to create an empowering offence is to misuse the power to criminalise, on account of the (uncharacteristic) means of achieving objectives which such offences make available to officials. To

¹⁶⁰ I do not claim to have resolved this debate. I leave open whether the prudential reasons to uphold the ideal are stronger than the prudential reasons to violate it. My argument has rather been that the prudential reasons do not obviously point one way, even for those with what are generally taken to be morally upstanding ends.

¹⁶¹ The case remains to be made, in other words, that criminal offences should offer good normative and practical guidance, and thus achieve objectives by guiding legal subjects away from crime, with the power to impose sanctions serving to support this primary means.

make those means available is a *misuse* of power because it breaches a single legislative duty: a duty to create offences which meet the Rule of Law's demands.¹⁶² If those demands are met, officials will no longer possess the power granted by empowering offences. The exercise of their legal powers to arrest and prosecute will once again back up (rather than replace) norms which guide potential offenders. The means of achieving objectives made available by the criminal law will then revert to those *characteristic* means which rely on the Rule of Law.

Why, though, should we accept the initial premise of the argument: that offence-creators have a duty to uphold the Rule of Law? The following paragraphs make two arguments to this conclusion: first, that the Rule of Law protects legal subjects against threats to their personal autonomy which the law would otherwise pose; second, that the Rule of Law provides legal subjects with a measure of valuable freedom, whichever of two rival conceptions of that ideal turns out to be correct.

The first argument can be introduced by returning to the work of H.L.A. Hart. We saw above that in *Punishment and Responsibility*, Hart stressed the importance of offence-definitions which offer guidance to legal subjects.¹⁶³ One of his claims, which this section can be seen as an attempt to fully work out, is that having such guidance offers each potential offender a form of *legal protection* – that

¹⁶² Victor Tadros has suggested that there may be a *right* to a criminal law which legal subjects can use to guide their conduct. While Tadros does not connect the guidance idea with the Rule of Law, and does not distinguish the types of guidance distinguished here, this section can be seen as an extended defence of his general proposition. If offence-creators have a duty to uphold the Rule of Law, and if this duty is a function of the interests of legal subjects, then on at least one view about rights, legal subjects have a right to observance of the Rule of Law. For Tadros' claim, see Victor Tadros, 'Crimes and Security' (2008) 71 MLR 940, 956-957.

¹⁶³ Hart, *Punishment and Responsibility* (n 109) 40-50.

it ‘protects the individual against the claims of the rest of society’ as those claims are given effect to through the criminal law.¹⁶⁴

Now the obvious questions for Hart concern what exactly this protection amounts to and what value it has. We can make progress in answering by recognising that when individuals have *practical* guidance – when they can (without undue difficulty) discover the content of criminal offences and ensure they avoid committing them – they also have a measure of *security* against arrest and prosecution. Why so? Because they can each ensure that they avoid criminal liability entirely, and thus put themselves beyond the reach of official powers of arrest.¹⁶⁵ The risk of being ambushed with criminal liability, and all its attendant consequences, is thus removed as long as one takes reasonable care to apprise oneself of the law. It is the removal of these risks in which the security offered by the Rule of Law resides.

Now it hardly bears pointing out that the security in question is security of great importance. After all, one is being secured against the full force of the criminal process, from the trauma of being arrested and detained by the police, to the stigma imposed on one by criminal conviction, to the deliberately imposed hardships of criminal punishment in whatever form. When spelt out, Hart’s argument thus runs as follows: when the Rule of Law is observed, ordinary citizens are secured against the law in a manner which is of no little value to them. Whatever social goal arrest and

¹⁶⁴ Hart, *Punishment and Responsibility* (n 109) 44.

¹⁶⁵ You may say that they have such security only if enforcement-action is not *ultra vires*. True enough. But that this is so is pre-supposed by the idea that the Rule of Law is observed, and it is the value of that ideal that we are considering here.

prosecution is thought to serve, we can each ensure that such a fate does not befall us.

In fact, we can go further. For when the Rule of Law is observed, people cannot only passively avoid crime. They can also actively plan out their lives safe in the knowledge that the law will not creep up on them as they select and pursue their goals. This hints at a connection between the Rule of Law and the ideal of personal autonomy, albeit one we must state carefully if we are not to err.

The first step is to get clear about the ideal in question. As Joseph Raz has argued, an autonomous life is one actively shaped by the one who lives it – a life made up of goals wholeheartedly selected (and successfully pursued) from among a range of valuable options.¹⁶⁶ It follows from this characterisation that there are various factors which can help or hinder an autonomous life. Consider four such factors. First, the more hazardous the *pursuit* of the options available to one, the less likely one is to succeed in pursuing those options, and thus in giving the shape one wants to one's life. Second, the more hazardous each available option appears to one, the harder it is to wholeheartedly *commit* to its pursuit in the first place.¹⁶⁷ Third, the greater the risk attached to one's options, the less the all-things-considered *value* of those options, and, in time, the less obvious it becomes that one has valuable options at all. Fourth, the less one can *know* about the options available to one, the less one gives shape to a life one has chosen and the more one lives by merely taking stabs in the dark.

¹⁶⁶ Joseph Raz, *The Morality of Freedom* (OUP, Oxford 1986) chs 13-14.

¹⁶⁷ With the important exception of those options the hazardous nature of which is part of the appeal.

Now we must accept even the best of guidance from the criminal law does not guarantee that such hindrances will not afflict subjects of the law. Most obviously, it is at least conceivable that criminal offences could offer exceptional guidance while prohibiting so many options as to leave no adequate range.¹⁶⁸ Because choosing prohibited options would be to risk arrest, conviction and punishment, the *value* of such options would be significantly impaired. It would be far harder to *commit* to those options wholeheartedly, and their *pursuit* would be liable to devastating interruption. Even if some of the prohibited options could be said to remain of value, a life running the gauntlet in this way is hardly the autonomous ideal. Nor is it only nightmare scenarios that enable us to see the point. Clearly there are many *other* sources of hazard which may hinder the shaping of one's life, be they other parts of the law, natural disasters, or the interference of private individuals. However exemplary the criminal law's guidance, any such factor may hinder one in leading an autonomous life.

Such remarks may drive us to the conclusion that no connection exists between the Rule of Law and personal autonomy. But such a conclusion would be too quick. We should begin by noticing that because the Rule of Law demands not just practical but *normative* guidance, there are reasons to doubt that the nightmare scenario would ensue, at least in those societies with which we are familiar. To see the point, recall that a good normative guide prohibits only that which, in the eyes of its creators, potential offenders should not do – that which, in short, those potential offenders should be guided away from by the law. Now it is surely highly

¹⁶⁸ As I mentioned in the text to n 159 above, there is a lively debate over whether there would be good *reason* for rulers heinous enough to prohibit so much to stick to the Rule of Law. I cannot engage in this debate here. In what follows, I confine my discussion to rulers of a less heinous (but hopefully more realistic) kind. For discussion, see Kramer (n 114); Simmonds (n 114).

improbable that offence-creators who stuck to the creation of normative guides would prohibit so much of value as to leave no adequate range of valuable options. This is even less likely when we realise that these offences would also be *practical* guides, and thus well-publicised to potential offenders. To publicly prohibit so many valuable options would be to deter those who would otherwise engage in them with potentially devastating costs. Such a scenario would be economically (many productive activities *are* valuable options), socially (unrest and disorder would surely be inevitable), and politically (who would vote for that?) disastrous. We need not pay it any further attention here.

Now I have already noted that even in the non-nightmare world there remain many threats to autonomy which derive from sources external to the criminal law. Those threats are diverse, and many cannot be eliminated. What we should not do is jump from this realisation to the conclusion that if we uphold the Rule of Law we do nothing for anyone's autonomy. On the contrary, we eliminate one major threat to the autonomy of all who are subject to the law: we eliminate the threat which would otherwise be posed *by the criminal law itself*. This threat may not seem great, but it should not be underestimated. A criminal law which turns its back on the Rule of Law, and instead embraces the means which empowering offences make available, is one which puts the ability to live an autonomous life very much in jeopardy.

To see how, consider first the *pursuit* of one's options. When criminal offences are little-publicised (as are type-2 empowering offences) or prohibit the innocuous (as do type-1 empowering offences), it is far more likely that potential

offenders will stumble unwittingly into crime.¹⁶⁹ Once they have, they are liable to arrest and prosecution, and to the disruption of their future plans which these steps may bring about. When the Rule of Law is upheld these obstacles to conformity disappear. Good normative guides do not prohibit the innocuous, and good practical guides are necessarily well-publicised. With such guidance one is better able to ensure that the pursuit of one's options is secured against interference from the criminal law.¹⁷⁰ In doing so, one increases one's control over one's future, and improves one's prospects of living the life one has chosen.

Second, consider committing wholeheartedly to the valuable options one wishes to pursue. If offences fail as normative guides and prohibit the innocuous, committing to many such options may necessitate committing crime. The experience of English law demonstrates the danger here, both to protestant expression and intimate private acts.¹⁷¹ If such offences become publicly known an inhibitive effect is likely. It may be said that the answer is to keep these offences under wraps – to make them not only type-1 but type-2 empowering offences as well. In truth, this strategy risks making things worse: as soon as people become aware that *some* little-publicised prohibitions exist, the chilling effect just mentioned is only likely to

¹⁶⁹ Why is this true of a well-publicised prohibition of the innocuous? Because even well-publicised laws will not be known to all. Some people will act in reliance on the thought that innocuous behaviour is unlikely to be prohibited by the criminal law – why, after all, would there be a duty not to do it? They will be shocked to discover that they have nonetheless committed an offence.

¹⁷⁰ Assuming, that is, that law-makers and law-subjects share a view of what is innocuous. If they do, the creation of good normative guides will reduce the prospect of ambush raised by empowering offences. I assume that the two views at least roughly converge in what follows.

¹⁷¹ As we saw in section 2 (text to n 141) many acts of protest which do little to provoke, incite or inconvenience anyone are now prohibited in English law, largely as a result of the Public Order Act 1986 and the Serious Organised Crime and Police Act 2005. As we also saw, intimacy between minors which becomes sexual, and possession of information which could be of use to terrorists, are also criminal offences thanks to the Sexual Offences Act 2003 and the Terrorism Act 2000. While I discussed these offences as type-2 empowering offences, it should be clear that these are at least arguable examples of type-1 offences as well.

expand.¹⁷² It becomes harder to commit not only to options one knows to be prohibited, but also to those *which might be*, and which might thus one day lead to one's arrest.

A criminal law which violates the Rule of Law thus undermines people's capacity to commit to valuable activities. More strongly, the law brings itself into tension with rights to freedom of expression and respect for privacy which the law itself endorses.¹⁷³ It necessarily discourages, sometimes by prohibiting, expressive and private acts; and in doing so it further empowers the state's own officials. When the Rule of Law is upheld worries of this kind should be minimal. One can find out (without undue difficulty) which options are permitted, and thus commit to them without fear of the criminal law. In addition, valuable activities are less likely to *themselves* be prohibited – after all, offence-creators are unlikely to prohibit such acts when they create good normative guides.

Finally, consider one's knowledge of the options one is choosing. When the existence or scope of offences is difficult to discover, the true nature of one's options is harder to come by: it is harder to know when one is taking on the risk of arrest and prosecution, and when one is freeing oneself from that very risk. When this is so and one does not take up the challenge of ascertaining the content of each

¹⁷² How could one come to know this? In various ways: from seeing those one knows arrested for doing nothing obviously criminal, to discovering an offence which criminalises the innocuous and realising there may be many more.

¹⁷³ In English law, the Human Rights Act 1998 incorporates Article 8 (right to respect for private life) and Article 10 (right to freedom of expression) of the European Convention on Human Rights into the domestic legal system. Whether, as currently interpreted, these legal rights would be held to be inconsistent with the examples I have discussed cannot be resolved here. Of more concern is that such offences *do* make it harder for people to express themselves freely, and *do* intrude in people's private lives. The *moral* interests in both expression and privacy - which the legal rights exist to protect - *are* thus set back by the criminal law. The necessity and proportionality of all this is questionable to say the least, but I cannot pursue this issue further here.

and every such norm, one's choices begin to become more like stabs in the dark: one *may* be engaging in criminal activities, but one cannot be sure. When the Rule of Law *is* upheld, things are different. One can discover (without undue difficulty) exactly what the law does and does not prohibit, and thus when one risks being prosecuted and when one does not. Accordingly, one can give shape to one's life possessed of one extra source of light: one can (without undue obstacle) work out which of one's options are of no interest to the criminal law.

We can sum up this discussion as follows: when the Rule of Law is upheld, it protects ordinary citizens against threats to their autonomy which the criminal law might otherwise pose. A world without such threats may well be a world with more autonomous lives. Even if not, it is a world in which, all other things being equal, there are fewer threats to autonomy.¹⁷⁴ This is the first reason to think there is a duty to uphold the Rule of Law, and thus to refrain from creating empowering offences. To do the opposite is to undermine the *legal protection* Hart identified and on which he placed such weight. What we have just seen is what this protection really amounts to: it protects not only the passive security of potential offenders but their personal autonomy too. It protects that autonomy from the attacks which could otherwise be launched against it by the criminal law.

Let us turn to a second reason to accept the legislative duty being defended here. We have seen that type-1 empowering offences extend the scope of the

¹⁷⁴ According to Joseph Raz, this makes the Rule of Law a *negative virtue*: one which 'does not cause good except through avoiding evil'. It is true that this is how the Rule of Law makes its contribution to personal autonomy: it eliminates the evil the criminal law might otherwise cause. But it seems too strong to claim, as Raz does, that this is 'no moral credit to the law'. We could have a criminal law in which empowerment predominated, the Rule of Law was regularly impaired and the threats to autonomy great. All other things being equal, this would be a morally reprehensible system. *Pace* Raz, it is a credit to the law whenever it avoids this scenario. For Raz's discussion, see Raz, *The Authority of Law* (n 106) 224.

criminal law. We have seen that type-2 empowering offences make it all the more likely that potential offenders will (unwittingly) fall within that scope. When such offences are created, officials have a legal power to arrest and prosecute people across a wider than previous domain, a domain which is highly likely to have more people fall within it. In English law, as we have seen, this domain apparently includes turning up at any place where one knows certain training is taking place (whatever one's reasons for doing so), and uttering various misleading statements from which one intends to gain.

Now it is the flip side of this that whenever people do act within the aforementioned domain, their *not* being arrested and prosecuted depends on officials letting them be: on their failing to exercise their legal power to arrest and prosecute for an offence. That we can act in various innocuous ways without the force of the criminal justice system crashing down upon us, thus depends, in the end, on law enforcement agents deigning to allow it.

On one view about freedom this predicament has immediate implications. On what is nowadays called the 'republican' view, the central worry about freedom is a worry about domination.¹⁷⁵ One is made less free on this view when others take or are granted the power to interfere at will with one's actions, even if those others are no more likely to interfere as a result. Those with such power are those who *dominate* one – those upon whose forbearance one's ability to act without interference ultimately depends.

¹⁷⁵ For a sophisticated version on which I draw in the text, see Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP, Oxford 1997). Whether this republican view is ultimately sound is a question I cannot tackle here.

We can apply such a view to empowering offences including those I just described. The republican claim here is that our freedom is reduced as offences make more and more people subject to powers of arrest. Why describe this as a reduction of freedom? Most straightforwardly, because of what one loses. When officials had no power of arrest, they might have thought there were all sorts of reasons to arrest one, but that was irrelevant if all one did was the innocuous.¹⁷⁶ One had an immunity from arrest if one stuck to such things - any attempt to arrest one would have been legally *ultra vires*. When officials do have the power to arrest for innocuous acts things are markedly different. One can only go about one's everyday life without being legitimately arrested if officials either fail to notice one or choose to allow one to carry on.

Some will maintain that the only real loss here lies in the considerations we already discussed in connection with autonomy – in the risk attached to one's actions by the power to arrest and prosecute, and the consequent effect on the shaping of one's life. Whether this objection is sound cannot be resolved here. But it is worth noting that defenders of the republican view have their answers. As Phillip Pettit has pointed out, there may well be something distinctively valuable in being immune to the unfettered power of others. One is then not a subordinate who has to rely on others looking the other way or deigning to permit one to act. One need not rely on currying favour with the powerful to ensure one won't spend time in a cell.¹⁷⁷ Even if the actual risk of interference is unchanged, there may well be something to be said for such a status. The problem of course is that one only *has*

¹⁷⁶ For brevity, I focus here on arrest. That prosecution and eventually conviction may well follow only strengthens the worry about freedom.

¹⁷⁷ Pettit (n 175) ch 3.

this status when officials lack the power to arrest one. And when the Rule of Law is not upheld and empowering offences exist, we are far less likely to have it – to have the status which, on the republican view, is the status which makes us free.

Now those with different views about freedom will not be convinced by this discussion, as I have merely invoked, without defending, a version of the republican view. But even those who take what is often called a negative view of freedom, should recognise further reasons to uphold the Rule of Law.¹⁷⁸ First, notice that as empowering offences result in more people becoming subject to powers of arrest, they increase the damage officials can do by *hijacking* offences, and using their powers of arrest to give effect to grudges or carry through vendettas. Those persons and groups police officers feel have offended them, or whom they happen to despise, are at much greater risk of being subjected to arrest when only the innocuous need be reasonably suspected, or when it is difficult to be sure one has not stumbled into crime. Nor, at least with type-1 offences, can one be confident that the interference with one's options will be short-lived: the despised may well find that things go much further than arrest, when quotidian activities are all there need be evidence of to charge or convict.

Finally, note that as well as the potential for *hijacking*, the potential for *mistakes* is also increased by violation of the Rule of Law.¹⁷⁹ Consider a case where the objective in creating an offence was to punish some wrong W. The worse the normative guidance offered by the offence-definition, the more offenders there will

¹⁷⁸ The classic account is Isaiah Berlin's: see Berlin, 'Two Concepts of Liberty' in H Hardy (ed), *Liberty* (OUP, Oxford 2002).

¹⁷⁹ The issue of mistakes at the court-room stage was discussed at length in Chapter 2, section 7 (text to n 72 – n 81).

be who have not committed W. While it is not these people whose arrest and prosecution the offence is supposed to produce, it remains the case that many such people are likely to end up being arrested and prosecuted. Why? Because as offence-definitions diverge ever more from W, officials need less and less evidence to justify acting on hunches and intuitions. After all, even when they lack much reason to think W has been committed, the power to arrest for the innocuous remains such that no rules are broken. The culture and mission of the police points them in the direction of using this newfound freedom. It is an important part of life as a policeman that one's goal is to help get wrongdoers off the street: there is thus internal pressure to make arrests and try to attain convictions. In such an environment, being given the power to arrest suspects *without* evidence of W is surely likely to result in the police making more guesses, more of which turn out to be mistaken. Nor is there much obstacle to arrest becoming conviction when the evidence required both at charge and at trial need say nothing about W either.¹⁸⁰ The mistakes which follow are the *casualties* of empowerment, legally legitimate though they are. Their existence gives us further grounds to uphold the Rule of Law.¹⁸¹

¹⁸⁰ This latter consideration is crucial to the question of whether prosecutors can be relied upon to filter out police mistakes. As William Stuntz has argued, the incentive to carefully sort cases so only those where D is guilty of W are brought to trial, is reduced when D is highly likely to be convicted regardless. The prosecutor is likely to win at limited cost, so need worry less about restricting cases to those which are strongest. See William Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 Michigan Law Review 505, 569-572.

¹⁸¹ The reasons in question are reasons generated by the value of (negative) *freedom*, because the plight of the casualties in question often consists in the following type of situation: in situations where the range of options available to them without interference is reduced, because detention or punishment is imposed upon them.

4. Conclusion

The previous section offered two arguments to the conclusion that offence-creators should uphold the Rule of Law: to the conclusion that their creations should comply with the demands of the ideal, and thus make available only those means which are Rule of Law-reliant. It may be said in response that this does not yet establish the existence of a legislative *duty*. But in the present case at least this is but a small further step. After all, duties are reasons which are both categorical and mandatory.¹⁸² Categorical reasons are reasons one has regardless of one's particular projects and goals. Mandatory reasons are comprised of reasons *for* a given action, and reasons *not to act for* (at least some of) the reasons which count against.

Now it is surely implausible to argue that law-makers' reasons to protect both personal autonomy and valuable freedom would no longer apply if those law-makers chose to pursue different priorities.¹⁸³ And it is at least plausible to think that those reasons not only *count in favour* of law-making which guarantees the aforementioned protection, but also *count against* law-makers opting to undermine that protection, merely because it costs less or makes the lives of officials easier. The reasons to protect autonomy and freedom, so the thought goes, are rationally protected from being outweighed by factors such as these. Mere cost and convenience are reasons for which law-makers should not act when the Rule of Law is at stake, precisely because they have a duty to uphold the ideal.

¹⁸² See John Gardner, 'The Wrongdoing that Gets Results' (2004) 18 *Philosophical Perspectives* 53, 58-59.

¹⁸³ In Chapter 6, I offer an account of why organs of states are bound to concern themselves with the lot of those subject to their jurisdiction on an *impartial* basis, an account which also explains why the state's reasons for action are often categorical.

If the argument is sound, it follows that creating an empowering offence will (barring justification) be a misuse of the power to criminalise. For as we saw in section 2, such offences not only violate the Rule of Law on account of their presentation and/or definition, they make available means of achieving objectives which exist precisely because of that violation. They increase the power of officials to achieve objectives by arresting and prosecuting suspects, relative to the power those officials would have had were the demands of the Rule of Law met. It was the argument of section 3 that to create such an offence is to breach a legislative duty. And as Chapter 1 established, to make available means of achieving objectives which one has a duty not to make available, is (barring justification) to misuse the power to criminalise.¹⁸⁴

A final point. It may well be pointed out that the issue of justification remains: that we are yet to see that no justification can be found for breaching the legislative duty. True enough, though as we just saw it follows from the fact that we are dealing with a *duty* that not just any reasons can serve to justify creating an empowering offence. It remains true that there may be *other* legislative duties by which law-makers are also bound, and which compete with the duty to uphold the Rule of Law.¹⁸⁵ Most prominent among these might be thought to be a duty to provide legal subjects with *security*, and I do not mean to ignore the relevance of this to my conclusions here. Instead, to ensure that the objection gets a proper hearing, I return to the justificatory potential of security in Chapter 7.¹⁸⁶

¹⁸⁴ Text to n 25 of ch 1.

¹⁸⁵ Or other reasons against which the case for upholding the Rule of Law is not protected, and which might thus outweigh that case in a given instance

¹⁸⁶ Text to n 459.

CHAPTER 4

COMING CLEAN ABOUT THE CRIMINAL LAW

The previous two chapters first analysed, and then evaluated, certain types of criminal offence. One type ousts the criminal courts and creates grave procedural injustice. Another type empowers officials in a manner which threatens the Rule of Law. Both types of offence, I have argued, are now represented in English law.¹⁸⁷ But we should not infer that this representation is a fact about which the state has come clean. Indeed it is the argument of the present chapter that the opposite has taken place.

This chapter addresses three doctrinal phenomena of which it finds evidence in English law, phenomena which exist (whenever else they exist) when ouster and empowering offences are created in a legal system.¹⁸⁸ First, the quiet extension of the criminal law so as to criminalise that which is by no means an obvious offence; second, the creation of offences the goal of which is not to guide potential offenders away from crime; third, the existence of offending behaviour which is not itself what grounds the state in commencing prosecutions, but constitutes a mere condition of the validity thereof.¹⁸⁹

¹⁸⁷ Examples of ouster offences were discussed in the text to n 52 – n 58 of ch 2. Examples of empowering offences were discussed in the text to n 135 – n 145 of ch 3.

¹⁸⁸ I do not actively argue that each offence discussed in this chapter is an empowering or an ouster offence. But the three phenomena which I will describe will be familiar to the reader as indicators that the offences discussed are tokens of the types examined in previous chapters.

¹⁸⁹ While this chapter is thus of a more doctrinal cast than the previous two, and spends a good deal of time discussing English criminal law doctrine, the lessons it draws for the power to criminalise are of general application.

The chapter argues that the state has not come clean about the existence of these phenomena. It argues that the officials and institutions of the state encourage the belief that the phenomena in question are no part of English law.¹⁹⁰ Thus they give people every reason to believe that the criminal law's scope extends only to well-publicised offences and common-sense criminal wrongs; that (one of) the goal(s) of every criminal offence is to guide potential offenders away from crime; and that the ground for arresting and prosecuting a defendant is always the commission of an offending act. In truth, I argue, there are a number of cases in which this picture is false. Those persuaded to believe its truth have been misled about English criminal law.

The chapter then argues that the state should come clean about the three phenomena discussed. Drawing on the work of Antony Duff, it argues that defendants are not the only answerable actors when it comes to the criminal law. It is contended that the *state* owes its people answers for the imposition of the criminal law: it owes them an account of what it takes to justify both creating and enforcing any given criminal offence. When the state misleads those people about the criminal law's scope, goals and enforcement, it fails to provide them with the answers they are owed.

The upshot of this argument for the thesis as a whole is as follows: the state has a duty to answer for the creation and enforcement of criminal offences. Offence-creators are officials of the state who are bound by this duty. When those officials

¹⁹⁰ In what follows I will sometimes talk simply of what is done by 'the state'. I should not be taken to be overlooking the difficulties involved in explaining how entities as complex as the state can be described as single agents. Suffice it to say here that if the state is to act at all, it must do so via the officials who act on its behalf and on behalf of its constituent institutions. For discussion, see John Gardner, 'Some Types of Law' in Douglas Edlin (ed), *Common Law Theory* (CUP, New York 2007).

define or present their creations in ways which will – if the legal system functions as normal – result in breach(es) of said duty, their use of the power to criminalise is a *misuse* of that power.¹⁹¹

Notice further that when the phenomena in question *are* a function of the creation of ouster and empowering offences, the means of achieving objectives which those offences introduce have *themselves* been introduced by *non-transparent means*: without the state coming clean about the phenomena which make the introduction possible. The argument here is thus an argument for *transparency*: the doctrinal phenomena which offence-creators bring into law when they oust or empower, are doctrinal phenomena they are duty-bound to expose to public view.¹⁹²

1. The Scope of the Criminal Law

My first topic is the criminal law's *scope*. For the purposes of this chapter, the scope of the criminal law is given by the amount of behaviour which is a criminal offence. It is true that some of this behaviour furnishes one with a *defence*, and thus, barring evidentiary difficulties, should not result in prosecutions or convictions. But we should not assume that mere criminalisation is therefore unimportant.¹⁹³ Once behaviour is criminalised, one can no longer engage in that behaviour without

¹⁹¹ Barring justification of the type discussed in Chapter 7. You may doubt that power is always misused if a breach of duty results from its exercise. What if this breach was down to the unforeseeable intervention of others? To avoid such objections I only claim that power is misused if the breach of duty is down to workings of the law of which offence-creators are well aware (and have done nothing to change).

¹⁹² One important implication of which is that type-2 empowering offences will not exist if offence-creators conform to the duty to answer. Such offences increase the power of officials on account of their (scope) being little-publicised. If offence-creators do their duty, no such offences will exist. For the definition of a type-2 empowering offence, see text to n 138 of ch 3.

¹⁹³ In this chapter criminalised behaviour is all behaviour which it is a criminal offence to commit.

worrying about justifying, excusing or otherwise finding a defence for doing so. If one cannot find a legally-recognised defence, one has nothing with which to stave off prosecution if the state decides to prosecute. Even if one *can* find a defence, one must still be able to prove it to be sure of staving off conviction. Prior to criminalisation, none of this was required. One's behaviour fell, mercifully, outside the scope of the criminal law.¹⁹⁴

My argument here is that the scope of English criminal law has been extended in various respects, with no adequate indication from the state that the extension has taken place.¹⁹⁵ Nor is the extension one which leaves ordinary life untouched. Various quotidian acts are now criminal offences, but this has not been adequately publicised to those at risk of offending. Furthermore, the actions of the state *encourage* the belief that behaviour which is now an offence is no offence at all. They encourage the belief that the criminal law's scope is narrower than it is in truth.

Consider three criminal offences of relatively recent vintage. Section 58(1) of the Terrorism Act 2000 makes it an offence to possess a document or record containing information likely to be useful to a person preparing an act of terrorism.¹⁹⁶ Section 38B of the 2000 Act makes it an offence to fail to disclose

¹⁹⁴ Of course, even *prior* to criminalisation one might have found oneself in the dock *despite* one's behaviour falling outside the criminal law's scope. But the fact that a mistake was then required shows how different one's situation then was: one had committed no offence, and thus ought to have needed no defence. Post-criminalisation, this is no longer the case.

¹⁹⁵ This is not to say that the criminal law's scope is now greater *overall* than at some previous time. This claim would require significant doctrinal and historical work, as well as the tools required to compare systems which each extend further than the other(s) in certain respects. My claim here is only that specific extensions in liability have taken place in the manner described. For discussion of the work needed to make claims of the former type, see Nicola Lacey, 'Historicising Criminalisation' (2009) 72 MLR 936.

¹⁹⁶ This example was also touched upon in Chapter 3 (text to n 143).

information to the police as soon as reasonably practicable, if one believes the information may be of material assistance in preventing an act of terrorism.¹⁹⁷ Section 45 of the Serious Crime Act 2007 makes it an offence to do anything capable of encouraging the commission of an offence, if one believes the offence will be committed and that one's act will encourage its commission.¹⁹⁸

It follows from these three offences that the curious reader who borrows books about explosives, the tenant who never informs the police of his flatmate's plan to graffiti anarchist slogans on the town hall, and the neighbour who suggests that the tenant tell no-one, may all have committed an offence. Could they reasonably be expected to *know* that the scope of the criminal law extends so widely? I think not. You may say that as with any criminal offence, these offences sit on the statute book and are accessible to the public as a result. But so do thousands of others, many regularly amended, contained within diverse pieces of legislation, addressing diverse areas of human life.¹⁹⁹ Those with lives to lead away from the law cannot be expected to keep up with all this by scouring the statute book

¹⁹⁷ The definition of 'act of terrorism' is extremely broad in English law. Under section 1 of the Terrorism Act 2000, acts of terrorism include, *inter alia*, all acts which are a) designed to influence the government, b) aim to promote a political, religious or ideological cause, and c) cause serious damage to property, or are designed to seriously disrupt an electronic system. Eco-protestors who aim to make a political point by daubing graffiti on a government building, thus commit terrorism if the damage to property is sufficiently serious.

¹⁹⁸ It is true that the offences created by section 45 of the 2007 Act, and section 58 of the 2000 Act, both make provision for defences of reasonable behaviour or excuse. But as I have already noted, it matters that even reasonable conduct has been made an offence: one must have one's defences ready whenever one so acts, and one had better be able to prove one's case to ensure one is not convicted.

¹⁹⁹ For instance, the Clean Neighbourhoods and Environment Act 2005 may not seem an obvious source of criminal offences which one might be inadvertently committing. But if one's local authority has designated one's area of residence an 'alarm notification area', one commits an offence under sections 71 and 72 of the Act if: a) one's residence has an audible alarm and one fails to designate a key-holder who can turn it off, or b) one designates said key-holder but fails to inform the local authority.

for potentially relevant offences. Something more is required to make the criminal law's scope reasonably knowable to them.²⁰⁰

You may reply that expert legal advice would allow one to discover the existence of my examples. But if one has no reason to believe that *ping* is an offence, one does not seek legal advice before one *ps*. You may further reply that there are obviously *wrongful* activities, which anyone can be expected to know are criminal offences, and other *specialist* activities, which anyone can be expected to know will be regulated by the criminal law. So there are. But the examples I have given here are not caught by such a reply.

Notice that all three examples *could* have been made reasonably knowable to those they make offenders.²⁰¹ Most obviously, this could have been achieved by actively bringing their existence and content to the attention of those who might commit them.²⁰² The offences could have been publicised via leaflets posted to homes, via notices in public libraries, via advertisements in newspapers or posted on the internet. The ambit of each could have been clarified thereby, in terminology

²⁰⁰ You may say we now have this 'something more' in the form of the Statute Law Database. But it is not clear that having to scour the database makes one's task that much easier. Offences remain buried in legislation which does not obviously address the criminal law; there are still thousands to search through, to which new additions are frequently made. Database or no database, to be sure one is not about to stumble into offending one faces a mammoth task. And this all assumes one actually knows that the database *exists* – alas, this is itself a little-publicised fact.

²⁰¹ For extended discussion of how this might be done, see Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it' (2011) 74 MLR 1, 20-24.

²⁰² Would attempting to bring thousands of offences to the attention of the public really help with knowledge of the law? Recall that many such offences regulate specialist activities and thus need only be brought to people's attention on point of engagement in those activities. Those which *do* cover non-specialist activities (and do not merely capture the obviously criminal) could be brought actively to public attention with far *less* danger of information overload. Were this done on a uniform basis the concern of this section would be significantly reduced.

which potential offenders understand.²⁰³ Alas, such publicity never came, leaving curious readers, knowing flatmates and nosey neighbours everywhere with no adequate indication that they may be committing offences. Such people fall within an increasingly *esoteric part* of English criminal law: a part comprised of liability created on the quiet and known only to the few, which nonetheless brings many within the scope of the criminal law.²⁰⁴

Now the existence of esoteric liability *itself* creates the appearance that the scope of the criminal law is narrower than it is. It is natural to assume that many of the activities thereby criminalised – hardly obvious wrongs – are not offences *at all* unless one is given reason to think the contrary. And this assumption is only further encouraged when offences are publicised *selectively* without the state coming clean about the selectivity. To see the point, think of the recent smoking ban introduced by the Health Act 2006.²⁰⁵ This new offence, which criminalised the daily activities of many, *was* widely publicised before it came into force. Such publicity naturally encourages the belief that *whenever* the criminal law expands into unusual terrain, such publicity will attend its expansion. It encourages us to believe, what with the

²⁰³ Which suggests yet another problem with ascertaining the scope of the criminal law: much of it is drafted in such technical terms that ordinary people are highly likely to make mistakes about the true scope of offences even if they discover them. For discussion, see JR Spencer, 'The Drafting of Criminal Legislation: Need It Be So Impenetrable?' (2008) 67 Cambridge Law Review 585.

²⁰⁴ Will the offences in question not become better known as the police enforce them over time? Certainly those prosecuted will become aware of the existence of the offence with which they are charged. But it is unclear that people generally will be much benefited thereby: most such enforcement action tends to occur quietly and get little attention. Of course, things may be different if enforcement becomes so widespread as to ensnare large swathes of the population. But this is no comfort to those from whom the law was kept quiet until *after* it was enforced against them. Bentham famously argued that to impart knowledge of the law in this way is to resort to *dog law*: instead of trying to obtain compliance by laying down rules in advance, one waits until an offence has been committed then punishes the offender. See Jeremy Bentham, *Truth versus Ashhurst* (T Moses, London 1823).

²⁰⁵ ss 2 and 7 of the Act make it an offence to smoke in certain 'smoke-free premises'.

lack of publicity, that much of the behaviour criminalised by my three examples remains outside the scope of the criminal law. Not so.

There is a second way in which we are encouraged to believe in a narrower criminal law: we are encouraged in that belief by state pretensions to observance of the Rule of Law. It is proudly proclaimed by government ministers, and even by legislation itself, that the Rule of Law is a sacrosanct constitutional principle in the United Kingdom.²⁰⁶ We cannot but be encouraged by such rhetoric to believe that the demands of this ideal will, at least in the main, be honoured. Yet even those with only a vague idea of what those demands amount to will appreciate their opposition to little-publicised laws which burden unsuspecting actors with the surprise commission of crime.²⁰⁷ If the Rule of Law *were* being upheld, such offences could not exist. We have already seen that they do. We have seen that the law is of wider scope than the noble rhetoric would have us believe.

I have argued that the state encourages the belief that the reach of English criminal law is narrower than it truly is. It encourages the belief that there is no esoteric criminal liability: that various everyday activities have not been criminalised on the quiet. What this section has shown is that such liability does

²⁰⁶ The Constitutional Reform Act 2005 s 1 declares that the Rule of Law is an ‘existing constitutional principle’ in the United Kingdom. In April 2004, Lord Falconer, then Secretary of State for Constitutional Affairs, asserted in Parliament that the Labour Government responsible for significantly expanding the criminal law, and for the specific offences mentioned, has ‘always strongly defended the rule of law and will continue to do so’: see HL Deb 27 April 2004, vol 660, col 687. A year earlier, the Prime Minister, in a speech to the US Congress, asserted that the Rule of Law is one of ‘the universal values of the human spirit’: see Tony Blair, ‘Speech to the US Congress’ (Washington, 17 July 2003) <http://news.bbc.co.uk/1/hi/uk_politics/3076253.stm> accessed 4 May 2010. Such rhetoric has by no means ceased since the formation of the Coalition government in 2010.

²⁰⁷ As John Gardner puts it, the Rule of Law requires that the law ‘must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans’. See John Gardner, ‘Introduction’ in HLA Hart, *Punishment and Responsibility* (2nd edn OUP, Oxford 2008) xxxvi. I discussed the compatibility of the Rule of Law with such esoteric liability in Chapter 3 (text to n 149).

exist. Borrowing the wrong books, failing to tell on one's housemates, encouraging such things in the belief they will occur - all may now bring one within the scope of the criminal law. We must have our defences ready when we do such things, and if we lack a defence only the forbearance of officials stands between us and prosecution. The state gives us every reason to think that this is not so: that the criminal law extends only to common-sense crimes and well-publicised offences. This, alas, is nothing more than a masquerade.

2. The Goals of the Criminal Offence

The second phenomenon to be addressed here concerns what each criminal offence is meant to achieve and how it is meant to achieve it. To see the point, ask yourself this: what did the state seek to achieve by criminalising murder and dangerous driving?²⁰⁸ Few would deny that part of the answer is to reduce the behaviour criminalised.²⁰⁹ Murder is an egregious wrong, and by making it a crime to commit that wrong, we aim to produce fewer murders. Dangerous driving risks serious harm, and the point of criminalising it is to produce less such driving and less such serious harm. What is important for present purposes is how these offences are to achieve their goals. They are to do so by eliciting a particular *response* from those who would otherwise offend. Such people are to respond to criminalisation by

²⁰⁸ In this section, references to the state are primarily references to those officials involved in the law-making process. As explained in the text to n 29 of ch 1, even if attributing intentions to the legislature as a whole is thought far-fetched, I maintain that the same is not true when it comes to the intentions of the team of governmental officials responsible for the Bill on which legislators vote, and which will often become law with no or limited amendment.

²⁰⁹ Perhaps a more precise characterisation would be that offences are created to reduce *only* that offending behaviour which furnishes no defence. For brevity's sake I omit this qualification from the text in what follows – the present and following sections should be read with this in mind.

avoiding criminalised behaviour. If they do, and all other things are equal, such behaviour will be reduced.

Why respond to crime by avoiding rather than embracing it? The threat of punishment provides one reason, of no little force. Commission of most (if not all) criminal offences renders one liable to criminal punishment, providing an obvious incentive to stay on the right side of the criminal law.²¹⁰ But as H.L.A. Hart famously insisted, the criminal law does not *only* seek to elicit the sought-after response via threats.²¹¹ There are also various trappings of crime which signal to potential offenders that criminalised behaviour *must not be done*. For those who wish to stay on the right side of the law, this is an additional reason not to offend: even if one can be sure to avoid detection, committing crime is presented by the criminal law as something one has a duty not to do.²¹²

Many of the trappings I just mentioned are obvious once one considers them. Criminalised behaviour is often declared to be an ‘offence’ by the very legislation which criminalises it.²¹³ Judges speak of what is ‘prohibited’ by the criminal law, and condemn proven offenders as ‘guilty’. Political and media discussion frequently

²¹⁰ The parenthetical reference is needed because there is dispute about whether the availability of punishment is a *necessary* feature of anything rightly called a criminal offence. For the view that it is, see Douglas Husak, ‘Why Criminal Law: A Question of Content?’ (2008) 2 Criminal Law and Philosophy 99.

²¹¹ See HLA Hart, *Punishment and Responsibility* (2nd edn OUP, Oxford 2008) 40-50. As I argued in the text to n 156 of ch 3, when the characteristically legal *modus operandi* is in effect, those threats play a supporting role, backing up the normative message sent by what are here called the trappings of crime.

²¹² For versions of this claim, see HLA Hart, *The Concept of Law* (2nd edn OUP, Oxford 1994) 27; Andrew Ashworth, ‘Conceptions of Overcriminalisation’ (2008) 5 Ohio State Journal of Criminal Law 407.

²¹³ This is the language used in both the Terrorism Act 2000 and Serious Crime Act 2007 both discussed above.

pre-supposes that criminalised conduct is to be avoided.²¹⁴ And the aforementioned fact that offenders are liable to *punishment* cannot but further imply that as far as the law is concerned, offenders should not so act. It is true, of course, that the message that crime should be avoided is not *explicit* in the wording of offences. But we must look beyond this to appreciate the entire message criminalisation sends. The message sent by the trappings of crime is that one ought to avoid the criminalised, and if this is taken on board by potential offenders – if they are guided away from offending – the reductive goals to which the criminal law traditionally aspires will be achieved.

My argument here is that there are criminal offences in respect of which the trappings of crime *mislead*. Unlike murder and dangerous driving, the goal of such offences is *not* to elicit a consistent non-offending response, nor to reduce the incidence of all they make a crime.²¹⁵ We have already encountered several such offences in previous chapters. Chapter 3 considered section 8 of the Terrorism Act 2006.²¹⁶ It argued that this section could not have been intended to stamp out much that it prohibits, including behaviour intended to *disrupt* rather than *support* the terrorist plots at which the offence-creator took aim. In Chapter 2, I considered sections 9 and 13 of the Sexual Offences Act 2003.²¹⁷ While the argument there focused on the effect of the offence-definition on the criminal trial, this effect was itself a result of the prohibition of behaviour considered innocuous by the offence's

²¹⁴ Debates about the criminalisation of drugs, for instance, often revolve around the argument that criminalisation 'sends a message' about drug-use. It is taken for granted that the message sent is that drugs should not be used.

²¹⁵ Such offences are thus not what Chapter 3 called guiding offences. To the extent that they increase the power of officials on account of this fact they count as empowering offences, but I do not pursue this line of thought here.

²¹⁶ See text to n 135 of ch 3.

²¹⁷ See text to n 57 of ch 2.

creators. Thus all sexual acts between teenagers are prohibited by sections 9 and 13, where at least one party is 15 or under, and is not reasonably believed to be 16. No matter that many such acts will be entirely consensual, involving actors well-known to each other and lacking coercion of any kind. Was the aim really that young people respond to this by making sure they do not offend? Not at all. As we saw above the CPS has been instructed to prosecute only where additional features are present.²¹⁸ This cannot but imply that the state will frequently be indifferent to (and may even welcome) the fact that youngsters continue to offend. The point for present purposes is that this tells us something important about what this offence was created to achieve: it was *not* created to produce non-offending responses from all who would otherwise commit it.

In fact the truth, as we saw in earlier chapters, is that both these offences were created with distinctive goals in mind. They were created to *facilitate* the conviction of a mere sub-set of offenders: those who not only meet the offence-definition but stray into (what is thought to be) the genuinely wrongful as well.²¹⁹ Thus it is manipulators of the young who are meant to be prosecuted; members and supporters of terrorist plots who are meant to be convicted. And while the road to conviction is indeed smoothed out in this sub-set of cases, the many *others* who technically commit these offences can (as far as the state is concerned) simply be left to get on with it.

²¹⁸ See n 58 of ch 2.

²¹⁹ A point stressed in Chapter 2 (text to n 50). The idea, then, is that prosecutors will exercise significant discretion in prosecuting. Douglas Husak has argued that this is itself problematic from the perspective of the Rule of Law, a concern only amplified when we realise that law-makers are *deliberately* delegating such discretion to petty officials. For discussion, see Douglas Husak, *Overcriminalization* (OUP, Oxford 2008) 26-32.

The key point here is that the shift of goal is *concealed* by the trappings of crime. Legislation continues to describe the criminalised behaviour as an *offence*, and anyone who commits it continues to be liable to imprisonment. Courts continue to convict those shown to have offended, and there is no announcement, in the media or otherwise, that the offences' goals are any different. All of this cannot but send the message that offending behaviour should be *avoided*: that training sites should be vacated and teenagers cease to experiment. What we have just seen of course is that this message will often mislead: that the true (facilitative) goals of these offences are masked by the trappings of crime.

It is worth noting that if Chapter 3 is correct this is a characteristically *legal* pretence. It is a pretence to the *modus operandi* which characterises the workings of the law.²²⁰ The argument there was that legal systems are systems of norms, and norms do their work (at least *qua* norms) when they do that work by guiding. It is true, of course, that some legal rules will only (exist to) guide the few – they will only (be there to) guide officials or the members of the ruling class. What certainly does *not* follow from this is that those rules have no relevance to others. The remainder are simply likely to encounter the law in a very different way. They will encounter it – perhaps most starkly – being wielded by officials against them: as a source of the power those officials are using (or threatening to use) to achieve their official objectives.

²²⁰ Text to n 119 of ch 3.

Chapter 3 argued that it is this latter type of encounter upon which some criminal offences rely.²²¹ What is crucial to see is that the trappings of crime obscure this reality. In combination, these trappings imply that criminal offences are set up to guide citizens: that each, in substance, is a rule to which legal subjects should conform. It follows that the state *presents* each offence as working in the characteristically legal way. The truth - that some are mere facilitation devices – is thereby concealed from view.

3. The Role of Criminal Offences in the Criminal Process

Let us turn to our third topic. To understand the argument here, consider the following questions. Why are individuals arrested, charged, tried and convicted? More precisely: what must one *do* to give the state grounds for taking such steps against one?²²²

You may say the answer is obvious. Such grounds exist when there is sufficient evidence that a *criminal offence* was committed, where what is sufficient varies depending on the stage of the criminal process reached. This answer seems so obvious because of the way that process presents itself. When one is told that one is being arrested, one is told it is *for* committing an offence. One is only ever charged with committing an offence, and one pleads to that offence in court. If one is tried, one's trial revolves exclusively around whatever offence is at issue: it is *this* which the prosecution advocate will try to prove; *this* against which one's advocate will

²²¹ Those which fail to provide decent guidance to legal subjects, and become effective (where they are effective at all) only via the exercise of powers of arrest and prosecution granted to legal officials. See text to n 159 of ch 3.

²²² By grounds, I mean the considerations taken by a given actor to suffice to justify their action.

defend one; *this* which judge and jury will consider in deciding whether to convict. If conviction does finally befall one, it is the offence one is convicted *of*. This cannot but imply that at each stage of the criminal process, the conduct which grounds one's having reached that stage is one's alleged offending behaviour. Why was one arrested? Why was one charged? Why did the state seek one's conviction at trial? When it comes to these questions and others like them, the self-presentation is unequivocal: it points us back, only and always, to the commission of the criminal offence.

Yet this thesis has already shown that this self-presentation sometimes misleads.²²³ that there are cases where the conduct which grounds prosecution is left out of the criminal process.²²⁴ It is true that criminologists have noticed that this is an implication of certain strategies of law-enforcement: that officials do sometimes use offence-commission as a pretext for arrests made on other grounds.²²⁵ What has not been denied is that in most such cases this is an aberrant use of offences: however common it may become, it is not the use for which those offences were created. My concern here is with cases where offending behaviour *itself* was never *supposed* to ground prosecutions: where the real grounds for prosecuting suspects were meant to lie elsewhere, and enforcement grounded by the offending behaviour

²²³ In Chapter 2, in which it was argued that the conduct which grounds prosecuting defendants and seeking their conviction is sometimes no part of the offence-definition, producing what was there called an ouster offence. The present discussion explores the way in which the creation of such offences – when combined with the ordinary operation of the criminal process – contributes to a misleading picture of the workings of the criminal law.

²²⁴ At least, at each stage prior to conviction. Those grounds may be relevant to sentencing, but their consideration at this stage will not save the convicted: it is likely to at best result in a degree of mitigation. For fuller consideration of this point, see n 62 of ch 2.

²²⁵ For a classic treatment, see Egon Bittner, 'The Police on Skid-Row: A Study of Peace-Keeping' (1967) 32 *American Sociological Review* 699.

alone would itself be the aberration.²²⁶ It follows that when certain offences *do* come to be enforced, the grounds for that enforcement will be (at least partially) excluded from the criminal process. Of course, that process will continue to present offending in a grounding role. The change which has taken place is thus concealed from public view.

This may sound to the reader like a remarkable set of claims. But we have already discussed offences which testify to their truth in English law. Consider again sections 9 and 13 of the Sexual Offences Act 2003. We have already seen the state accept that much of this behaviour is of no concern in itself. If this is right, it was never intended that offenders be prosecuted simply *because they offended*. It is only when an extra element is present – one entirely excluded from the offence-definition - that the criminal process is to spring into action. It is only when *manipulation* is thought to have occurred that arrests are to be made, and the other stages of the process to follow.²²⁷

The upshot is that when people are arrested pursuant to sections 9 and 13, what grounds their arrest in the eyes of the state is *not* their offending behaviour. Certainly, that an offence has been committed figures among the *conditions* of arrest: there must be a reasonable suspicion that the arrested person offended if arrest is to be legally legitimate. As far as the state is concerned however, this

²²⁶ It is important to see that here, as in section 2, I am talking primarily from the perspective of offence-creators. There will be cases where law-enforcement agents *are* told that offending is not itself taken to justify making arrests. But this need not always be so: *law-makers* may believe that only factors external to the offence-definition will justify arrests, while allowing *law-enforcers* to believe that offending is itself such a justification. Why create such a disjunct? Perhaps enforcement agents would be overly cautious if law-makers revealed their true view of the justificatory situation. Whatever the answer, my focus here is on the designs of law-makers first and foremost.

²²⁷ As it happens, this is a case where the truth *has* been communicated to law-enforcement agents: see n 58 of ch 2.

suspicion provides no positive *reason* for officials to arrest anyone. Grounds for arrest only exist when the conduct in question also amounts to the sexual manipulation of a minor. Furthermore, the same point can be made throughout the criminal process. Those suspects who are eventually charged are not charged with *manipulative* sexual activity. But it is evidence that they *were* manipulative which grounds their being charged in the first place. Defendants in court do not plead to a charge of manipulation, nor will a case be made to this effect. But the truth is that the state only hauls them into court because of evidence their actions were manipulative.²²⁸ If such evidence were lacking, the state would leave them well alone.

The key point here is that the wrongdoing which grounds each step in the criminal process is being *excluded* from that process. This exclusion cannot but encourage us to think that the excluded conduct is *irrelevant*, and that the true ground for each suspect's treatment is the offending behaviour put forward in that role. In fact, the evidence of this behaviour merely helps meet conditions of prosecutorial validity. It is only presented as if it were more than that – as if it were grounds for prosecution too.

Various further examples could be given of the point, but let us consider just one. Sections 12 and 13 of the Sexual Offences Act 2003 make it an offence for anyone under 18 to cause anyone they know to be under 16 to look at an image of a person engaging in sexual activity for the purposes of sexual gratification. As J.R. Spencer points out, this criminalises young boys looking at dirty magazines for the

²²⁸ The implications of such a move for the justice of the criminal trial were the focus of Chapter 2.

purposes of a sexual thrill. For Spencer, this is one of the many cases in which the 2003 Act criminalises behaviour ‘for which it would be scandalous’ if anyone were prosecuted.²²⁹ My point here is that such a scandal was surely never meant to occur: whatever the appearances to the contrary, offending alone was rarely if ever supposed to provide grounds for prosecution. Those who *were* meant to be prosecuted are those suspected of preying on the vulnerable for their own gratification. The criminal law masks this truth by presenting the suspicion that a given suspect offended as though it provides grounds for prosecution; the true grounds for the decision to prosecute actually lie elsewhere.²³⁰

Now you may object that my argument proves too much. Is it not true of innumerable offences that the state’s grounds for prosecuting defendants are excluded from the offence-definition? Is this in fact not *clearly* true of offences which criminalise speeding (the grounds being dangerous driving), or which criminalise the possession of drugs (the grounds being use or supply)? Not so. We should not make the mistake here of assuming that by grounds I mean *ultimate* grounds. That one drives in excess of the speed limit may well be what grounds one’s arrest, just as long as the view of the state is that each instance of speeding provides justification for arresting the speeder.²³¹ True, the *ultimate* ground for arresting speeders may be that speeding is generally dangerous. But that is beside

²²⁹ JR Spencer, ‘The Sexual Offences Act 2003: (2) Child and family offences’ (2004) Criminal Law Review 347.

²³⁰ Nor are examples necessarily confined to less familiar criminal offences: is it really the case that mere touching of items on display in a shop provides grounds for prosecution, if done dishonestly and with intention to permanently deprive? As a result of the decision in *Gomez* [1993] AC 442 (HL), such touching is theft in English law even if no further steps are taken. Yet further features are presumably required if prosecution is to be thought justified.

²³¹ This justification need not be thought to be decisive in all circumstances: there may be various reasons which defeat it, including lack of resources and the need to attend to more important matters.

the point as far as my argument here is concerned. What matters here is that in the cases I have discussed, the offending behaviour alone is *no ground at all* for initiating the criminal process. By the state's own lights it provides no good reason for that process to spring into action.

What follows for our purposes is that the state's actions are again misleading. The self-presentation of the criminal process suggests that in *every case* offending behaviour plays the same grounding role. What we have just seen is that its role is actually different in two different classes of case. In the first, exemplified by the speeding example, offending behaviour *does* give grounds for prosecution. But in the second, it is merely a validity condition, and provides no positive reason to prosecute.²³² If I am right, English law contains both classes of case. And it follows that in parts of that law, pretext is a matter of course. While offending behaviour is put forward by the state as giving grounds for prosecution, there are cases where it is actually thought to do nothing of the sort.

4. Coming Clean

In this section I argue that the state should come clean about the three phenomena discussed to this point.²³³ It should come clean about the *scope* of the criminal law, by adequately publicising criminal offences so their existence and contents are

²³² As will have become clear, the second and third phenomena discussed in this chapter are related. It is often *precisely because* the grounds for prosecution have been written out of the law that the offence which remains is not supposed to guide potential offenders. It is worth noting however that this need not always be so. One might still intend to guide people away from ϕ ing, *without* thinking that ϕ ing itself provides grounds for prosecution. And one might use the *criminal* law to prohibit ϕ ing precisely because the trappings of crime will send the message that one should not ϕ . This would be a case of the third phenomenon but not the second.

²³³ All other things being equal. I do not rule out the possibility that the duty argued for in this section might conflict with, and be defeated by, rival legislative (or executive) duties in certain cases. I consider the all-things-considered position only in Chapter 7.

reasonably knowable to potential offenders. It should come clean about what offences exist to *achieve*, by stripping the trappings of crime from offences which exist to facilitate, or publicising the fact that those trappings mislead. And it should come clean about its grounds for prosecuting suspects, by bringing those grounds back into each stage of the criminal process. I return to all this below. My primary goal however is to argue that whatever the mechanics of doing so, the state should come clean. There are various arguments one might make to this conclusion and this thesis has already considered one argument applicable to the first and second phenomena. Thus in Chapter 3 I argued that the Rule of Law demands decent *practical* guidance, something the criminal law fails to provide when offence-definitions are esoteric; and I argued that the ideal also demands decent *normative* guidance, something the criminal law fails to provide when the trappings of crime mislead.²³⁴ I further argued that these demands have important normative backing: that they protect the personal autonomy of legal subjects against the law, as well as securing them a measure of valuable freedom from it.²³⁵ Here I pursue a very different argument which applies to all three developments. I will call this *the argument from answerability*.

According to the argument from answerability, those upon whom a system of criminal law is imposed are owed *answers* for that imposition: an account of that which is taken to justify both the creation and enforcement of any given criminal offence.²³⁶ It is important to note that if this argument succeeds, the demands it

²³⁴ Text to n 147 – n 152 of ch 3.

²³⁵ Text to n 163 – n 181 of ch 3.

²³⁶ I assume here that the state *does* take itself to have justification for both these things, the argument being that it should present that putative justification to an audience identified below.

places on the state are both more modest and more exacting than they may appear. More modest in that the argument only demands an account of the state's *explanatory* reasons, without demanding that these also be *normative* reasons, let alone normative reasons which are *undefeated* by those which countervail. By a normative reason I mean a reason which bears on what one ought to do, whether or not one realises that it has any such bearing at all. By an explanatory reason I mean a reason *for which* one acts in a given instance. As John Gardner has explained, an explanatory reason is (at least ordinarily) a reason which is *taken* to be normative – after all, one acts for that reason – but it need not actually bear at all on what one ought to do, let alone provide rational support for what one does.²³⁷

The argument from answerability demands that the state offer certain *explanatory* reasons to a certain audience.²³⁸ Whether or not they actually provide normative support for its actions, the state must offer an account of its reasons for enforcing the criminal law, as well as its reasons for creating any given criminal offence. Whenever these reasons are taken to actually *justify* the state's activities (when, in other words, they are taken not only to be normative reasons, but to be *undefeated* normative reasons) it is an account of this putative justification which is owed by the state.²³⁹

²³⁷ See John Gardner, *Offences and Defences* (OUP, Oxford 2007) 91-92.

²³⁸ Which is not to say that we should be indifferent to whether the state's explanatory reasons are the normative reasons they are thought to be. While this is of evident importance, the demands it places on the state are not the focus here.

²³⁹ One takes oneself to have justification only if one believes that one's reasons for acting are undefeated in rational conflict with those which countervail. If one believes that one's reasons for acting are outweighed, cancelled or otherwise defeated by their opponents, one believes one's action to lack justification. I base these remarks on the account defended in Gardner (n 237) ch 5.

Now it follows that the state's actions may be justified in the very way they are taken to be, and that the state may still fail to do what is demanded of it by the argument from answerability. It will so fail when the state offers no account of its reasons for acting, or when it offers a misleading account of those reasons to those owed the account. This, then, is the sense in which the demands placed on the state are *exacting*. It is not enough to have justification for creating or enforcing laws. One must provide an account of that justification in order to do one's duty.²⁴⁰

I just mentioned that if the argument from answerability succeeds, the state must offer answers *to those to whom they are owed*. In fact, there are two groups owed answers for the imposition of the criminal law, and different things for which each group is owed them. I have already claimed that answers are owed for the criminal law's *enforcement*. It is part and parcel of that enforcement that arrests are made, charges brought, prosecutions embarked upon, convictions handed down, and sanctions handed out. The argument here is that those subjected to such steps are entitled to an account from the state: an account of *why* any such steps are taken against them.

Having said this, we should not ignore those who - be it through luck or judgment - never experience such a predicament. This group of law-subjects still have the criminal law imposed upon them, albeit in a different way. The point is not only that the criminal law imposes (or claims to impose) an obligation to contribute to its running costs, though this it does through the tax system. It is also that the

²⁴⁰ Isn't it an account of that which one *takes* to justify one's actions that is required? True, but as John Gardner has pointed out, if one has justification for one's actions, one *both* has an undefeated normative reason for acting *and* one acts for that reason, such that the undefeated normative reason is *also* an explanatory reason: Gardner (n 237) 91-92. It follows that where one has justification, an account of one's explanatory reasons cannot but be an account of the reasons which constitute one's justification.

criminal law imposes (or claims to impose) a much more general obligation: an obligation to refrain from doing anything which is a criminal offence.²⁴¹ Of course, one might not worry too much about either of these (claimed) obligations were they the toothless assertions of a powerless entity. But when each is backed up by the threat of coercively-imposed sanctions – a threat the state’s might makes anything but idle – the scope of the criminal law becomes of concern to law-subjects generally. The argument here is that those subjects are entitled to an account from the state, explaining why all it has criminalised has been brought within that scope.

So far I have merely outlined the shape of the argument from answerability. I am yet to give any reason to believe that answers of the kind discussed above are actually owed by the state. We can make progress here by considering the work of Antony Duff. For Duff, whether or not we must answer to others depends on our *prospective responsibilities*.²⁴² These are the responsibilities we have before we do anything untoward, given by the range of matters, in Duff’s words, ‘that it is up to us to attend to or take care of’.²⁴³ Now for Duff responsibility is multiply relational. We owe prospective responsibilities *to* particular people, and we are responsible to them *for* particular things.²⁴⁴ Teachers owe prospective responsibilities *to* their students *for* those students’ education. Doctors owe prospective responsibility *to* their patients *for* treating those patients effectively.

How are we to know if we are prospectively responsible to a given person for how we act in a given instance? We must work out whether that person’s

²⁴¹ At least where there is not also an available defence.

²⁴² See RA Duff, *Answering for Crime* (Hart Publishing, Oxford 2007) 30-36.

²⁴³ Duff (n 242) 30-31.

²⁴⁴ Duff (n 242) 22-30.

interests give us reasons to act (or to refrain from acting) in that particular instance.²⁴⁵ In many cases, Duff argues, this depends on the roles we occupy. It is because I am their doctor that my patients' interests in being treated give me reason to treat them effectively. Others do not have the reasons I have because they do not occupy the same role. Duff accepts, of course, there are other cases where roles are less important. We all have prospective responsibilities not to kill, or maim, or injure others. Why? Because whatever role we happen to occupy, the interests others have in these things not occurring give us reason not to so act.

Now according to Duff, it is our failure to fulfil our prospective responsibilities for which we are answerable in a given case.²⁴⁶ We are obliged to answer *for* this failure, *to* those to whom the responsibilities were owed. It follows that we are not uniformly answerable to everyone we meet: the doctor need not answer to a stranger on the street for his failures in treating a patient. Nor do we need to answer for all the effects of our actions: those effects of the doctor's conduct

²⁴⁵ While he is not explicit on the point, Duff's discussion of various examples suggests that the comments in the text reflect his views. For instance, when discussing the responsibility of neighbours he says that to deny one has a prospective responsibility to one's neighbour for playing loud music, or for living with one's gay partner, is 'to deny that the effects on them give me any reason to modify my conduct': Duff (n 242) 33. Clearly talk of reasons here is talk of what I above called *normative* reasons: reasons which actually bear on what one ought to do. In the pages which follow, references to reasons *simpliciter* are references to reasons of this kind.

²⁴⁶ Why think answers are appropriate here? Why can we not leave well alone when we fail to fulfil our prospective responsibilities? These are important questions to which I cannot do justice here. Perhaps part of the answer lies in the fact that by offering an account of *why* we acted as we did, we at least express *some* recognition that those whose interests gave rise to our responsibility have interests which matter. True, we failed to conform to the prospective responsibility those interests generated, but we still respond retrospectively to a different interest: an interest in receiving an explanation of why we did what we did. To refuse even to offer this much is to add insult to injury.

which give him no reason to act otherwise are effects for which the doctor need not answer to anyone.²⁴⁷

This all raises the question of the *state's* prospective responsibilities when it comes to the imposition of the criminal law. My argument here is that the state has prospective responsibilities both to refrain from *creating* criminal offences, and to refrain from *enforcing* the criminal law. This may sound wildly implausible because talk of responsibility sounds like talk of what the state should do all things considered. It may appear, in other words, that I am arguing for the criminal law's *abolition*. Not so. While it is true that the state must answer for doing that which it has a prospective responsibility not to do, it may have an excellent answer for doing so. We just saw that one has prospective responsibilities not to ϕ whenever the interests of others provide one with reason not to ϕ . But no-one said there could not also be reasons *in favour of* ϕ ing, nor that these reasons could not be strong. Such reasons may not only make ϕ ing permissible, they may even make it obligatory.

Now I think it plain that *enforcing* the criminal law involves the state in doing numerous things which the interests of others give it reason not to do.²⁴⁸ These include forcibly detaining, publicly censuring and coercively sanctioning people, some of whom will be rightly accused of offending, others of whom will not. It is no use denying that there are important interests at stake here. Those

²⁴⁷ Duff considers the case of a doctor who prescribes contraceptives to a girl of 15. Does the doctor need to answer for the likely effect of doing so, namely that the 15 year-old is now more likely to have unlawful sexual intercourse? Or does this likely effect simply give him no reason to modify his conduct: is his only prospective responsibility to give appropriate medical treatment? See Duff (n 242) 35-36.

²⁴⁸ We need not go as far as Douglas Husak, and claim that there is a *right* not to be so treated. Nor need we go as far as to say that enforcing the criminal law is always *wrong*. We need only claim that the state has *reason* not to enforce it as a function of the interests of its people. For Husak's argument that the first claim applies to criminal punishment, see Husak (n 219) 93-101.

detained, censured and sanctioned all have interests in these things not occurring: interests in being free from detention, and in not having their self-respect and future prospects damaged by criminal conviction. You may say that murderers and rapists actually have no such interests. But if they truly have *no* interest in such things as being detained or stripped of their money, it is unclear why we ever thought these appropriate criminal sanctions. Surely it is precisely because the opposite is true that those thought to have committed such grievous wrongs are treated in these ways.

Nor is it open to the state to claim that the effects of enforcing the criminal law are none of its concern. As many have pointed out, if the state exists to do anything, it is to act on behalf, and in service, of its people.²⁴⁹ It follows that the effects of state action on those people's interests are among the most important things to which the state must attend. The fact that enforcing the criminal law will so significantly set back so many such interests cannot but give the state reason to refrain.²⁵⁰ Remember, this is *not* to say that enforcement action cannot be justified: it may, in some cases, be obligatory. But if we accept (as we should) that such things *need* justification, we simultaneously accept that there is reason not to do them: we do not need to justify that which we have no reason not to do. Once we see that the aforementioned reasons are a function of the *interests* of those against whom the criminal law is enforced, it follows that the state owes prospective responsibilities to those it arrests, convicts and sanctions. It further follows that the state is *answerable* to those people for the enforcement of the criminal law.

²⁴⁹ Thus for John Locke it is of the essence of political power that the various rights the state possesses are to be exercised 'only for the public good': see John Locke, *Two Treatises of Government* (CUP, Cambridge 1988). For modern philosophical endorsement of similar views, see Duff (n 242) 49-50, and Gardner (n 237) 217.

²⁵⁰ Nor are these reasons of trifling weight. *Ceteris paribus*, it is highly plausible to think that the stronger the reasons not to ϕ , the more important one's responsibility to refrain, and the more important it becomes that one answers for ϕ ing.

What of the creation of criminal offences? Is there also a prospective responsibility not to criminalise? Here is one reason to think so. At least when dealing with the type of offence I have discussed in this chapter, there are clearly people with interests in the state not branding the offending behaviour as a breach of duty and imposing liability to punishment. The 17-year old who wishes to kiss his 15-year old girlfriend is but one obvious case. More generally, the chilling effect such offences may have (be it on private, experimental behaviour or on movement in public space) points to a wider public interest in a narrow(er) criminal law. As servant of the people, the state has prospective responsibilities not to set back this interest by extending the criminal law. This fortifies the responsibility adverted to at the beginning of this paragraph – and equally applicable to other actors – not to threaten people with coercion for doing the morally innocuous.²⁵¹

This is already enough to make my point. But note also that whatever the type of offence, it is a highly probable consequence of criminalisation that some of those suspected of offending will experience the criminal process. It is also likely that some of these suspects will not have offended at all. We saw a few paragraphs ago that we all have interests in not being arrested, convicted or sanctioned. We have a *particular* interest in not experiencing this when we have done nothing wrong. These interests give the state reason not to do anything which will lead to such experiences, including the creation of criminal offences. If this is right, the state has a prospective responsibility not to criminalise. Accordingly, it is answerable to its people when it does.

²⁵¹ It is a testament to the state's ability to persuade us of its legitimacy that we seem to forget this responsibility as soon as the state gets involved.

My argument has been that a state which creates criminal offences and enforces the criminal law owes an account of what it takes to justify so doing. It owes that account to its people generally, as well as to those against whom the law is enforced. Of course, states cannot always do things in the way we do them in everyday life. They cannot stand opposite us in a room and explain themselves as might a friend or acquaintance. But this only explains why the stylized proceedings of the courtroom, and the provision of explanations through the media, are of such importance. For these *are* manageable ways for states to answer where they are answerable: ways to provide people with the account they are owed of what is taken to justify their treatment by the state. When it shuts off these channels of communication, or sends out messages which mislead, the state fails to do its duty: it refuses to provide its people with the answers they are owed.

Let us return at long last to the three phenomena discussed in sections 1-3 of this chapter. I have just argued that the state owes an account of *why* it creates criminal offences. Yet we saw in section 2 that offences now exist to facilitate the conviction of wrongdoers, which are *presented* as if they exist to guide potential offenders away from offending. The trappings of crime continue to be attached to these offences, and nowhere is it made clear that those trappings now misrepresent the intentions of the state. To mislead people in this way about what offences exist to achieve is to deny those people a true account of why those offences were created.

A similar complaint can be made about the esoteric liability discussed in section 1. The state does not even publicise the *existence* of this liability, preferring instead to encourage the belief that it does not exist. I have argued that the state owes its people an *answer* for the criminalisation of behaviour. It thus owes those

people its justification for the entire scope of the criminal law. When the state conceals the law's true scope it escapes from doing its duty. By concealing the existence of liability created on the quiet, it conceals the need to answer for it. As long as that liability remains esoteric, no answers will be provided.

Lastly, consider section 3's argument about the nature of the criminal process. I argued there that this process presents offending behaviour as though it is always *grounding conduct* – as though it gives the state grounds for prosecuting people and seeking convictions. But I also argued that there are some cases in which this is nothing more than a fiction – where offending behaviour figures only among the *conditions* for prosecutorial validity, and the true grounds for the law's enforcement lie elsewhere.

To see the implications of this for the duty to answer, consider the criminal trial. When offending behaviour *does* provide the state's grounds for seeking defendants' conviction, the requirement that the state *prove* that behaviour at trial serves an important non-probative purpose: it ensures that the state must offer its *answer* for seeking a guilty verdict.²⁵² To put the point more fully: when the state has to put forward in court that which *grounds* its attempt to convict, it must give both court and defendant its explanatory reasons for the attempt. In doing so, the state gives the defendant an account of what it takes to justify its actions: it gives the defendant an *answer* for its enforcement of the criminal law. The key point here is that this need not occur in respect of the offences discussed in section 3: when the

²⁵² Of course, such proof also serves the important purpose of making it more likely that those convicted will have done whatever grounds their conviction. The importance for procedural justice of these grounds being in issue before the courts was discussed in Chapter 2 (text to n 72 – n 88).

state's grounds are no part of the offence to be proved at trial, the state need not give the answers it owes the defendant for the enforcement of the criminal law.

At this point it may be objected that I am seeking answers from the wrong party. For have Duff and others not convincingly argued that the point of the trial is to call *defendants* to answer for the alleged commission of crime?²⁵³ I do not deny the importance of such insights here. My aim is simply to show that we can also see things the other way around. Just as the defendant is pressured to answer for *himself* by the state's attempts to prove a crime against him, so the state is pressured to answer for *itself* by the very courtroom procedures which those attempts initiate. For it is part and parcel of those courtroom procedures that the defendant is entitled to *resist* the state's case: both by requiring the state to prove that case, and by seeking to disprove it once it is made. This, of course, requires provision of legally-recognised reasons for the defendant's conviction: an *account* of why the defendant should be convicted relative to the relevant offence-definition. If this is right, calling defendants to answer for crime opens the state up to its *own* call to answer: it must offer an account to the courts of why the defendant should be convicted in each case it brings.²⁵⁴

²⁵³ Why call defendants to answer for such things? Because they are answerable to the public for doing so. Crimes, Duff claims, are public wrongs, and to commit a public wrong is to launch an attack on the values of the political community. Such wrongs are wrongs *to* the public, as well as to their immediate victim, and offenders have prospective responsibilities to the public not to commit them. It follows, as we saw above, that offenders are *answerable* to the public when they commit a public wrong. The criminal trial is the means by which the answerable are called to answer by a state acting on its public's behalf. I cannot address the merits of Duff's wider views here. Suffice it to say that the claims in the text do not depend on their truth. For a sustained version of the argument as it applies to the criminal trial, see RA Duff, Lindsey Farmer, SE Marshall and Victor Tadros, *The Trial on Trial Vol. 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, Oxford 2007).

²⁵⁴ This is not to say that Duff et al are blind to this point. They note, for instance, that to recognise the need to try a defendant is to 'recognise the need both to explain to them why we are responding in this way, and to attend to their explanations and defence of what they did'. See *Duff et al* (n 253) 138.

Now I have already explained why we should call the state to answer for its enforcement of the criminal law. I have argued that the state is answerable *to* those it seeks to convict *for* that very attempt. A transparent criminal trial is one which forces the state to do its duty: it must give its grounds for seeking the defendant's conviction and respond to his objections. But when these grounds are excluded from offence-definitions the state wriggles out of its duty. It can put forward merely pretextual grounds at trial, and thus refuse answers to those it tries: it need not explain what it takes to justify convictions through the advocates it retains in court. Notice finally that because the same offence is put forward on the street and at the police station, the same point can be made throughout the criminal process. When offences of the type discussed in section 3 are being enforced, the state need no longer explain through police forces or prosecutors why it arrests and charges people either.

5. Conclusion

This chapter has discussed three phenomena of which it has found evidence in English law: the quiet extension of the criminal law so as to criminalise that which is by no means an obvious offence; the creation of criminal offences the goal of which is not to guide potential offenders away from offending; and the existence of offending behaviour which is not itself thought to justify arrest or prosecution. The argument came in two stages: first, it was argued that the state encourages the belief that the three phenomena I just mentioned are no part of English law; second, it was argued that the state should come clean because it is *answerable* for the criminal law.

I argued that when the state criminalises behaviour it owes an account of why it has done so. But when the true *goals* of criminalisation are concealed we are denied the state's reasons for criminalising; and when the very *existence* of liability is hidden from view we are denied those reasons also. I further argued that answers are owed for the criminal law's enforcement, answers the state has long provided via the criminal process. But when the true grounds for arrest and prosecution are excluded from that process, those against whom the law is enforced are denied the answers they are owed. To come clean here requires nothing short of substantive reform: offences must once again capture the state's grounds for prosecution, so those grounds are brought back into the criminal process. Only then – in court, on the street and at the police station – will the state consistently offer the answers it owes for the imposition of the criminal law.

CHAPTER 5

TRUST AND WHY STATES SHOULD DESERVE IT

In the present chapter, and the chapter immediately following, I attempt to broaden the range of resources at the disposal of the main argument of this thesis. That argument depends for its success on finding moral principles which together provide sufficient support for its (provisional) conclusion: that certain uses of the power to criminalise are misuses of that power. In Chapters 5 and 6, I go in search of further such principles. I develop accounts of two principles of political morality, which are less frequently encountered in political philosophy than those relied upon to this point.²⁵⁵ While these accounts ought to be of interest in their own right, there are pay-offs for the main argument of the thesis to which I return in Chapter 7, where the accounts are applied to further (mis)uses of the power to criminalise.

The present chapter begins by arguing for what will here be called the trust principle:

The Trust Principle: all other things being equal, the modern state ought to deserve the trust of its people.²⁵⁶

It also argues for what will here be called the *strong view* of that principle:

²⁵⁵ I take principles of political morality to be moral principles which apply (to whomever else they apply) to the actions of the officials and institutions of the state and other political entities.

²⁵⁶ By 'its people' here, I mean all those subject to the state's jurisdiction, not only those who are citizens of that state. I restrict myself to the *modern* state to avoid the objection that the character of the state has changed radically over time. I am not competent to engage in such historical debate and so set the matter aside here. When, as I sometimes do, I drop the qualifier 'modern', this should be read with the present note in mind.

The Strong View: the modern state's reasons to deserve the trust of its people are reasons of particular strength for the officials and institutions of the state.

The reference to strength in the above formulation is necessarily a vague one, but I mean it to carry two shades of meaning here. First, that the *Trust Principle* does not give rise to merely trivial or weak reasons, easily defeated by rivals. The *ceteris paribus* clause in the Trust Principle is not, in other words, a subtle indication that the demands of the principle can be departed from without real cost; it merely indicates that their defeat is not impossible. I attempt to vindicate this aspect of the strength claim in section 2 of the chapter. Second, that the case for the state to deserve trust is strong in relative terms: strong, that is, when compared with the case which can be made in respect of other entities. I do not claim that the state's reasons to be deserving of trust are *always* stronger than the reasons other entities have. But I do argue that on account of certain features of the modern state, the case will often be stronger than that which can be made for other, similar entities of comparable power and influence.²⁵⁷

My argument takes the following form. In section 1, I offer an account of what it is to trust, and what it is to be deserving of trust. In section 2, I discuss some features of the state which, I claim, give rise to (strong) moral reasons for the state to deserve the trust of its people. In section 3, I claim that even when compared with entities of comparable power and influence there is, in general, *particularly* strong

²⁵⁷ It is worth noting that I do not here attempt to provide a definition of the state. Rather I confine my discussion to certain (distinctive) features of states which bear on the arguments I make. Some of these features are conceptual necessities for anything rightly described as a state. But some are merely *general* features, possessed by most but not all instances of the genus. I do not apologise for discussing the latter set – such features are often of great moral importance and thus should not be overlooked, even by those unable to do the empirical work needed to verify the generality claim.

reason for the state to deserve trust. That this is so, I argue, is a distinctive and important feature of the morality of the modern state.

Some will immediately object that even these preliminary remarks show that I am confused, or at least that I misstate my concern. One extreme is occupied by self-styled ‘realists’ for whom politics stands outside morality, and is subject only to normative standards which derive from within the practice of politics itself.²⁵⁸ For these writers, the state is not subject to *moral* principles only *political* ones. The other extreme is occupied by those who deny that there is anything sufficiently distinctive about states to distinguish them from the might of the multi-national corporation or from gangsters who ‘protect’ the populace just as long as they pay up on time. For these writers there is nothing special about the state’s moral responsibilities, because states cannot be distinguished from other entities in morally important ways. If the argument of this chapter is successful both groups are mistaken. The objectors are wrong to think that the morality of the state is either as separate from, or as close to, the morality which attends other roles and the occupants thereof. That this is so should become clear as the argument unfolds.²⁵⁹

²⁵⁸ Bernard Williams claimed to adopt such a view, distinguishing himself from John Rawls and others whom he accused of wrongly applying independently-derived moral principles to politics. It is unclear whether Williams ultimately follows through on his claim. His ‘Basic Legitimation Demand’, which demands that governments be capable of justifying their actions to each person, is a moral requirement which appears to derive from outside the practice of politics itself, and apply to those within it. In fact, it resembles Rawls’ own ‘principle of liberal legitimacy’. For Williams’ account, see Bernard Williams, *In the Beginning Was the Deed* (Princeton University Press, Princeton 2005) ch 2. For Rawls’ principle, see John Rawls, *Political Liberalism* (expanded edn Columbia University Press, New York 2005) 137.

²⁵⁹ I do not actively argue against the realists or the non-specialists in what follows. Rather I put forward a view which, if correct, implies that they are mistaken. It is the plausibility of the picture I present that is thus the key to showing that both groups are incorrect, and not anything I expressly say about their views.

1. Trust and How to Deserve It

What does it mean to claim that the state should deserve the trust of its people? In straightforward terms it means this: if people do place their trust in the state, that state should have what it takes not to let them down or betray them.²⁶⁰ These are separate failings to which those who trust render themselves susceptible. One can be let down without being betrayed. One can be let down by failures of *competence* – by those one trusted failing to do what one trusted them to do, however hard they tried, and however noble their motives. Think of a plumber one trusts to repair one's pipes, but who, one later discovers, failed miserably to fix the leak. One is not betrayed here as long as the plumber did his best, and did not hold himself out as a plumber knowing he was useless at plumbing. But one is let down.²⁶¹

On the other hand, one's trust *is* betrayed by failures of *wholeheartedness* – by those one trusts failing to be adequately motivated to be or do whatever one trusts them to be or do, such that they fail one. This failure may be the result of the trustee's motives being weak, or of those motives being overwhelmed or corrupted by rivals.²⁶² To return to the plumber, he may make no effort, steal one's property,

²⁶⁰ Notice that I am not saying that people *ought to* trust the state. I am simply saying that the state ought to deserve trust, which trust may or may not be placed in it by its people. My position is thus consistent with the claim that it is preferable for people to be *distrusting* of the state, and, as Hume advised, to design their institutions on the assumption that they will be staffed by knaves rather than saints: see David Hume, 'Of the Independency of Parliament' in Eugene Miller (eds), *David Hume: Essays Moral, Political and Literary* (Liberty Classics, Indianapolis 1985) 42. I return to Hume's point in section 2 below (text to n 297).

²⁶¹ Notice that one is not let down at all if the plumber is entirely competent but the leak still cannot be fixed. This is because one expects nothing more from the plumber than a specific level of competence. I discuss the relevance of expectations to trust below.

²⁶² One can be more or less wholehearted about ϕ ing depending on how strongly one is motivated to ϕ , and how resistant one is to motives which point away from ϕ ing. At some point on the scale, it will be more accurate to describe one as merely half-hearted, but there are no bright lines here.

or fraudulently hold himself out as a plumber when he isn't one. In these cases, one's trust is *betrayed* because one trusted the plumber to work hard, respect one's property, and be truthful about his qualifications.²⁶³ His wilful failure on each score not only lets you down, it also betrays you.

Now this may all seem somewhat unmotivated, so let me defend my account. Any analysis of what it is to be deserving of trust must rely on an account of what it is to trust. There are a variety of accounts in the literature, and I will not endorse any in full despite having learnt much from several. On the view I endorse, trust has three basic elements. First, to trust A is to accept a measure of *vulnerability* to A's discretion in respect of something one cares about.²⁶⁴ If one cannot accept any vulnerability to A, or if one does but one then seeks to cut down A's discretion at every turn, this only shows one has not trusted A. Similarly, one has not trusted another until the vulnerability one accepts is in respect of something which matters to one. I may claim that I trust you to look after a bag I give you when I bump into you on the street, but if you discover I just wanted an excuse to get rid of the bag, you will rightly claim that I deceived you – I was not trusting you at all, just pretending in order to get rid of an unwanted item.²⁶⁵

Second, when one trusts A, one accepts the stated vulnerability on the basis that A *ought to be* both competent to look after, and wholehearted in looking after,

²⁶³ Of course, one only reasonably expects these things to a degree. I argue below that it is meeting such expectations which is required to avoid betrayal.

²⁶⁴ This element is drawn from the account given by Annette Baier: see Baier, 'Trust and Anti-Trust' (1986) 96 *Ethics* 231.

²⁶⁵ My account here might be said to be an account of what it is for A to *entrust* B with C, rather than what it is for A to trust B *simpliciter*. I focus initially on this triadic account for the following reason: we only know that A trusts B *simpliciter*, when we know that A is *willing* to entrust B with some range of Cs. We thus need to work out what is involved in the triadic notion, before we can make progress with the dyadic version.

that which one cares about. There is thus a *normative expectation* which is partly constitutive of trust.²⁶⁶ This helps distinguish trust from mere reliance on regularities. The much-cited case of the neighbours who relied on Kant's meticulous routine to tell the time is, to my mind, a case of reliance but not trust. The neighbours would not feel betrayed or let down if Kant decided to loosen up a little. Why? Because those neighbours did not believe that Kant *ought* to stick to his routine so that they could keep time. They just thought he *would* stick to it because he always had. There was, in other words, no normative expectation of Kant and thus no trust in him.²⁶⁷

In contrast, a group of neighbours might *trust* their long-serving postman to deliver their mail and not just rely on this. What distinguishes this from the Kant case? First, like Kant's neighbours, the group would accept a measure of vulnerability to the postman's not turning up – they would not try to ensure his attendance by threatening him or promising him money. This is not yet a case of trust. The neighbours might just be confident of the postman's predictability. They only come to *trust* the postman when they also have certain normative expectations – when they expect his attendance to be a function of his wholeheartedness (his being sufficiently motivated to deliver them their mail) and his competence (his being sufficiently proficient at mail delivery). When this is so, and unlike Kant's neighbours, our group are *let down* if the postman gets lost one morning and never

²⁶⁶ This is, of course, a matter of degree: one can expect more or less of those one trusts. But one must expect *something*, else one does not trust at all.

²⁶⁷ Karen Jones also draws attention to the role of normative expectations in the analysis of trust. However, our analyses come apart when it comes to the *content* of the requisite expectations. As discussed below, I think that those who trust expect both competence and wholeheartedness (which I further define in what follows). For Jones' discussion, see Karen Jones, 'Trust and Terror' in P DesAutles and MU Walker (eds), *Moral Psychology: Feminist Ethics and Social Theory* (Rowman & Littlefield, Oxford 2004).

arrives. Their trust is *betrayed* if he fails to show up one day because he chooses to have a pint at the pub instead of delivering the mail.²⁶⁸

Third and finally, one who trusts A accepts the aforementioned vulnerability with an attitude of *confidence* in A's wholeheartedness in caring for what is entrusted and in his competence to do so. Why is this attitude necessary? Because one may accept vulnerabilities to others without trusting them, even if one does have normative expectations of those others. I may set out down the high street on a Friday night fearing for my life, with little confidence that any of the drunken revellers I will meet will refrain from assaulting me. Perhaps I accept a degree of vulnerability to them because of the importance of meeting my own friends. I may believe that the revellers I meet have a *duty* not to harass me, so my normative expectations may be high. Still, I do not *trust* the revellers I meet on the street. To trust them, my attitude towards them must be one of confidence that they will refrain from harassing me. Only then is the final element of trust present.²⁶⁹

My account of trust draws on, but departs from, that of Annette Baier. While we agree on the first element, Baier claims that the mark of the trustor is reliance on the trustee's good will towards her.²⁷⁰ I doubt one needs this latter element. One can trust institutions to deliver without any view about the quality of their will. One need

²⁶⁸ On my account it is thus the existence of the normative expectations described in the text which makes sense of the distinctive disappointments to which the trustor is susceptible. I assume in the text that the neighbours' expectations are *reasonable*. If one has disproportionate expectations of B when making oneself vulnerable to B's discretion, one may believe that B has let one down if anything at all goes wrong. But as I claim at n 275 below, if B has done all it was reasonable to expect of him, one's belief would be mistaken.

²⁶⁹ Some would replace this third element with a requirement that the trustor positively *believe* the trustee to be wholehearted and competent. As mentioned below there are some reasons to doubt that this is required (text to n 273) but nothing in the argument that follows turns on the point. For doubts about the view endorsed in the text, see Pamela Hieronymi, 'The Reasons of Trust' (2008) 86 *Australasian Journal of Philosophy* 213.

²⁷⁰ Baier (n 264).

only accept vulnerability to their discretion, believing they should exhibit both competence and wholeheartedness in exercising that discretion and confident that they will. Take Oxfam. One may trust them to use one's donations wisely without worrying about their good will towards one at all. All one need do is surrender one's money to them, believing that they ought to use it for the charitable purposes they claim to further, and confident that they will do so.²⁷¹

My account is fairly distant from *predictive* accounts according to which to trust X is just to believe that X is reliable.²⁷² On such views one can trust a rope because one believes it will bear one's weight. And one trusts strangers as long as one believes that the external pressure one places on them to act in a particular way is great enough to make them reliable. I think this account doubly flawed. First, one only shows a *lack* of trust by trying to remove one's vulnerability to another and attain predictability through external pressure. Second, as Richard Holton has observed, we can trust others even if we do not positively *believe* they can be relied on.²⁷³ We can decide to trust a small child whose reliability we know is unproven (say, not to drop a prized golf trophy), or to trust others we have just met (say, to catch us as we fall backwards as part of a bonding exercise). To do so, on my account is simply to accept vulnerability to the trusted in respect of something we

²⁷¹ More precisely, one must believe that Oxfam *ought to be*, and be confident that they *will be*, both competent in, and wholehearted about, getting the donation to those who need it.

²⁷² Simon Blackburn endorses such a view: see Blackburn, 'Trust, Cooperation and Human Psychology' in V Braithwaite and M Levi (eds), *Trust and Governance* (Russell Sage, New York 1998).

²⁷³ Holton goes on to associate trust with adopting a stance in which the trusted person is taken to be a suitable object of reactive attitudes of betrayal. I agree that these attitudes are apt to a relationship of trust, but I think Holton's account is incomplete in failing to explain what is involved in adopting the stance and making betrayal apt. My answer is that betrayal is apt when one believes the entrusted person ought to have exhibited a degree of wholeheartedness in caring for the entrusted object, and discovers that they did not. See Richard Holton, 'Deciding to Trust, Coming to Believe' (1994) 72 *Australasian Journal of Philosophy* 63.

care about (our trophy, our physical safety) with the expectation that the trustee ought to be both competent (capable of holding on) and wholehearted (properly motivated to hold on), as well as an attitude of confidence that they will be.²⁷⁴

With this in mind, let us return to what is involved in being *deserving* of trust. I have already suggested that one deserves trust if one has what it takes not to let people down or betray them. We can now see how this analysis derives from the concept of trust itself. One deserves the trust of a given trustor if one is apt to live up to the normative expectations reasonably directed at one by that trustor.²⁷⁵ Thus one deserves A's trust in respect of a specific object which A cares about if one is sufficiently competent to care for it and sufficiently wholehearted about doing so, where what is sufficient depends on what A's normative expectations reasonably are. Those liable to *meet* these expectations are those who have what it takes not to betray A (for they are sufficiently wholehearted) or let A down (for they are sufficiently competent). It is these people, I claim, who deserve A's trust.²⁷⁶

Take two examples. On my analysis, I am deserving of my wife's trust only if I care strongly about being faithful to her, and if this motive is strongly resistant to corruption by rivals. Why strongly? Because my wife can reasonably demand that I

²⁷⁴ So a trustor cannot believe a trusted person will certainly *not* deliver – this would be incompatible with the attitude of confidence required for trust. There is thus a grain of truth in the predictive account. But it is no more than that. One need not positively believe that a trusted person is likely to deliver – one need only adopt an attitude of confidence in them, for whatever reason.

²⁷⁵ To put it another way, to be deserving of a trustor's trust is to be what the trustor reasonably expects you to be when accepting vulnerability to your discretion. I insert the reference to *reasonableness* here because it cannot be right to say that you do not deserve my trust with X just because I expect you to protect X against earthquakes, nuclear attacks, and all other possible contingencies. I may not *think* you deserve my trust. But if you are extremely competent and wholehearted, I can surely be wrong.

²⁷⁶ In truth, one can be more or less deserving depending on how frequently one is apt to live up to A's reasonable normative expectations. Those who never fail deserve A's trust unequivocally. Those who constantly fail (even if their failure luckily does no damage) are unequivocally undeserving.

am anything but half-hearted about my fidelity to her, and deserving her trust requires meeting that demand. Similarly, I am deserving of the trust of my banking clients only if I am competent at handling their money, and if I care about protecting their interests. I am not so deserving if I am reckless with their investments or have no head for numbers, even if it turns out that my clients somehow do well. Why? Because I do not have the wholeheartedness or competence required to live up to my clients' reasonable normative expectations, and thereby make myself deserving of their trust.

Now it is true, of course, that I might *fail* to meet the expectations of my wife or my clients, and yet never stray or lose them money. On the account presented here, this would not show that I deserve their trust. To deserve *that*, I must have what it takes to meet their expectations: it must be the wholeheartedness they (reasonably) expect from me which stops me betraying them; the competence they (reasonably) expect which stops me letting them down. If it one day became clear that it was mere luck which got me by (perhaps I was always open to a fling, but never had the chance) they could rightly accuse me of never having deserved their trust at all.

What if it is *greed* which motivates me to handle my clients' finances effectively, or *money* which prompts me to take good care of people's possessions while I do their plumbing? These are often strong and reliable motives, but do they show me to be deserving of trust? There are reasons to be sceptical. One can no doubt be *relied upon* when such motives are what moves one, just as long as the money keeps on coming, and one's desire for it remains. But it is arguable that the motives in question provide the wrong *kind* of motivation to make one deserving of

trust. Those moved by such motives look after that which is entrusted to them only because of certain extraneous motivational reinforcements – only because of the contingent attachment of personal gain to caring for the object of entrustment. Once the money runs out, or their paymaster looks the other way, their motives run out accordingly. To deserve trust requires more than this: my otherwise larcenous plumber does not become deserving of trust just because I am vigilant and pay him handsomely. We reasonably expect something more from those we trust.

What then distinguishes those who *do* deserve trust? Simply put: those who deserve trust are those who care about that which is entrusted for reasons *internal* to the entrustment – reasons inseparable from the fact that *this* object is being made vulnerable to *their* care. Such a person is moved by the very fact of the trustor's vulnerability, as well as by the valuable nature of the object entrusted. He is not moved to look after the object only if someone *adds* the prospect of his being paid or punished. If this is right, deserving trust is not only about having the competence and motivation required to avoid letting down or betraying people. The deserving are also those who care for the *right reasons*: husbands who care about breaking their wives' hearts, not just about getting caught; bankers motivated by the damage they may do to their clients' lives, not just by the size of their bonuses. In short, to meet the normative expectations of those who trust one, be it spouse or business client, requires nothing less than *wholeheartedness*: one must be moved by the right reasons if one is to be deserving of trust.²⁷⁷

²⁷⁷ I thus disagree with Russell Hardin when he claims that those who are worthy of trust are all those who can be relied on to treat our interests as their interests, something they may do simply because this is likely to promote their financial prospects or bolster their reputation: see Russell Hardin, *Trust* (Polity, Cambridge 2006) ch 2. On my account, these reasons are the wrong *kind* of reasons to make one deserving of trust.

It is worth noting as a final point here that the above picture makes space for much *variation* in one's deservingness. One may deserve trust in respect of X but not Y because one is wholehearted about caring for X but cannot bring oneself to take Y seriously, at least without inducement. Similarly, one may be occasionally half-hearted or only moderately competent, and thus be undeserving of trust in respect of what is of most importance to the trustor, and in respect of which their normative expectations are (reasonably) high, while remaining deserving of trust with less important matters. This seems to me a strength of the account proposed here. It makes sense of the variety of ways in which it often does and does not make sense to trust different people with various different objects of entrustment.

2. Why the State Should Be Deserving

Let us return to our central question. Why should we endorse the *Trust Principle*, and the *Strong View* of it in particular? Why, in other words, should we endorse the view that the modern state ought to deserve trust, *and* the view that the reasons for doing so are of particular strength? In this section I provide the bulk of my answer to these questions. I begin by observing that many people *depend* or are *dependent* upon the state for things which are of no little moral importance. In response to the suggestion that (even great) dependency may be uninvited and thus normatively inert, I argue that the aforementioned dependence is, in large part, brought about by the state itself. In response to the suggestion that this only shows that the state ought to be dependable, I make three further arguments. First, that wholeheartedness and competence from government will often be *necessary conditions* of dependability: however good our institutional design, such features will often be required to (further) reduce the risk of serious damage being done by the state. Second, that

some people are highly likely to develop normative expectations of the state, which expectations the state's self-presentation encourages and strengthens. These people are not only liable to being *harmed* by the state, they are also liable to being *betrayed* if the state's failure is down to half-heartedness, and *let down* if that failure is down to incompetence. The failures of a state which does not deserve trust will, in short, be all the worse (morally speaking), giving the state even stronger reason to be wholehearted and competent in what it does. Third, I rely on a much more general point about the virtues, namely that those virtues demand not only right action from actors, but also right action from those actors *for the right reasons*. They demand, in other words, not merely the *simulacra* of virtue but virtue itself. And this requires not mere dependability, but deservingness too.

If I am right all three arguments support the claim that we should endorse the *Trust Principle*: they show (I will claim) not only that it is reasonable for people to have normative expectations of the state, but also that the state ought to meet those expectations. On the account put forward here, this entails that the state ought to deserve their trust. Furthermore, the arguments support the *Strong View* of the *Trust Principle*: they suggest that the state's reasons to deserve trust are by no means trivial; that there are in fact strong moral reasons for the state not to betray its people, and for the state not to let down those people either.

a) Depending and Dependence

There is a distinction between choosing to depend on someone and being dependent. The person who does the former has a freedom to choose which the latter person lacks. We may wish to see ourselves as being in the former category in respect of

the state. But most of us are fooling ourselves. This is perhaps most obvious in cases of what I will call *provision-dependency*. When we leave the house in the morning, we depend on the state to have ensured the roads are safe to drive on. When we return home at night, we depend on the state to have ensured the streets are safe to walk. During the day, we create waste and depend on the state removing it. When we get ill, we depend on the state to have made sure the health service is competent to cure us and to have made sure it does not infect us with something else. When we have children, we depend on the state to ensure that the education system will educate them, and won't abuse them or neglect them either. In many of these cases (though by no means all) we are forced to depend on the state, and are thus dependent on it.²⁷⁸

Such examples immediately raise the issue of withdrawal. Perhaps some (the very wealthy, or the very remote) can withdraw from provision-dependency altogether, though this is hard to do. Think of the various areas where state provision has done the job well enough for long enough (traffic lights, refuse collection, drainage) to inhibit the development of alternative systems which would allow people to provide for themselves. Perhaps there are some for whom such alternatives *are* a possibility – we need not rule that out here. It remains true that most of us are dependent. And even those who are *not* dependent in certain respects often opt to depend nonetheless.²⁷⁹

²⁷⁸ Perhaps some governments do not provide some of the specific services discussed here, and people will then be unlikely to depend on them doing so. Still, anything recognisable as a modern government will provide goods and services in some morally important areas, and dependency of some form will likely result. That provision is *generally* made in the specific areas mentioned is also of much importance.

²⁷⁹ By choosing to use roads or send their children to state-run school even if they did not have to.

Notice next that our dependency on the state is by no means trivial. We often depend on others in the sense that we act in specific ways assuming that those others will act (or will have acted) in specific ways themselves. In the morning, I open the fridge assuming my housemate bought the milk I need to have my choice of breakfast. I depend on her to do this. But our dependency on the state cuts deeper. We depend on the state in the sense that we will suffer mightily if the state does not act as we (sometimes have to) assume it will. Those who use the National Health Service in the United Kingdom depend on that agency for health care on which their survival may hinge. Drivers depend on the traffic lights functioning to avoid life-threatening accidents. Many of our dependencies on the state might thus be described as *momentous* – they are of great importance to our lives and the lives of those around us. As we saw above they are also *pervasive*, infiltrating many areas of those lives. And they are temporally *indefinite*: there is no foreseeable time at which we will be free of them. It is a consequence of such features that many of the plans we make in shaping our lives – both short-term and long-term – are dependent on the continuing provision of what the state has to offer.

Before moving on we should not forget what I will call *omission-dependency*. Much of everyday life is carried out in a state of dependency on people omitting to do horrible things which they could easily do to those around them. This applies with full force to the state. We know states have police and armed forces at their disposal. We know they have powers of manipulation and indoctrination. We know they can choose to expel us or prohibit our activities. We are, in all these respects, vulnerable to states using their powers against us, and dependent on them not doing so. This is an important sense in which even purported withdrawers are ultimately unable to follow through. They may not be provision-dependent, but they

are certainly omission-dependent. They cannot avoid being vulnerable to the state unleashing the force of arms against them when it sees fit.

b) Creating Dependency

Now it is not just a brute fact that we depend and are dependent on the state in various important ways. It is also true that states *create* this dependency by acting and presenting themselves in certain ways. Judith Andre sums up the relevance of this when she observes that those who voluntarily bring about the dependencies of others have ‘deepened their resulting obligations’ compared with those on whom others simply depend or become dependent.²⁸⁰ We will deal later with the salience of this point for the *Trust Principle*. For now let us focus on the realities of the state.

The state encourages us to depend on it in both positive and negative ways. Positively, states often hold out the provision they make as available for, and designed for, the use of their people. Thus health services are held out as existing to provide the people with care they need. The roads are not private roads, they are *public* highways. Schools are set up to educate the children of those living in the state. Law-enforcement agencies are called police *services*, which (at least allegedly) exist to protect the public from harm. It is hard to imagine a state which did nothing of this sort – which claimed to provide *only* for itself, and charged people to use its *own* hospitals or roads in pursuance of a profit.²⁸¹ We might well think that this entity was not a state at all, but a private corporation selling goods and services to

²⁸⁰ Judith Andre, ‘Role Morality as a Complex Instance of Ordinary Morality’ (1991) 28 *American Philosophical Quarterly* 73.

²⁸¹ This is not to say the state cannot attach (financial) conditions to services. The point is that these conditions are not ultimately attached so the state can make a profit to take away *for itself*. That is the mark of a corporation, not a (modern) state.

consumers. Still, even if this is not right as a conceptual matter, something like the above picture is *generally* true of modern states as we know them.²⁸² And it is also true of these states that they present their provision *not* as something which gets in the way of their own more personal projects and ambitions, but rather as the very project they exist to pursue. While we may accept the existence of a partial perspective from which *we* unobjectionably prioritise our own lives (and those of our nearest and dearest), the self-presentation of the state stands opposed to *its* benefiting from any such perspective.²⁸³

Now both these truths cannot but encourage us both to *use* the provision which the state makes available, and to worry less about developing alternative means of providing for ourselves. After all, there is an entity which is apparently dedicated to the task.²⁸⁴ Note also that the encouragement in question is made all the more potent when the state (as states are wont to do) puts significant effort into persuading whoever will listen that the roads and schools it is providing are *good* roads and *good* schools. It is precisely once we start to use those roads and send our children to those schools – while simultaneously neglecting the production of viable

²⁸² It is also worth noting that modern states generally present themselves as *duty-bound* to tackle certain problems – insecurity, economic hardship, etc – and as doing all manner of things to tackle them. This again encourages us to depend - to go about our lives assuming the state is doing what it claims to be doing, often as a matter of duty. Again, this may not be a conceptual point. It is no less important for it.

²⁸³ Aside that is from the partiality states legitimately show their own people. I consider whether there are good reasons for the state to refrain from *further* partiality in the following chapter. The idea of a *partial perspective* is due to Thomas Nagel. Note that for Nagel institutions like the state are differently placed because they ‘don’t have their own lives to lead’. My claim here is that the modern state presents itself in accordance with this insight. See Thomas Nagel, *Equality and Partiality* (OUP, New York 1995) 59.

²⁸⁴ This is not to say that many people do not remain extremely sceptical about certain areas of state action. It is just to say that there are features of the state’s self-presentation which encourage (or force) them to depend upon it nonetheless. The result is that many who are sceptics about the capacity of the state still depend upon its provision in myriad ways.

alternatives – that we begin to depend, or become dependent, on the provision of the state.²⁸⁵

Negatively, states encourage (or even force) us to depend on them by actively making themselves the only game in town. This is part conceptual point, part generalisation. On the conceptual side, as Leslie Green and others have noticed, the state claims *overriding authority* for the laws it puts in place, which claim (and here is the generalisation) it has the capacity to make effective.²⁸⁶ There are two parts to this. First, states do not just go around coercing people, as might a street gang looking to silence rival sources of power. Nor do they just go around advising people on how to make up their own minds about what to do. Rather they get laws passed which announce that it is an *offence* to disobey the law. Legal officials – particularly judges, but also government officials – speak of *duties* to obey the law, and this is backed up by various forms of *condemnation* for breach. All this implies that states see people as bound to obey the law, whatever the law may be, and simply on account of the fact it is the law.²⁸⁷ In short, the state claims *authority* for the law.²⁸⁸ Nor is this claim one which can safely be ignored: for most states do have the capacity to give effect to their claim (and at least sometimes do so) – be it

²⁸⁵ A similar point could be made about the way that the state's self-presentation encourages us to acquiesce while states amass enormous financial and physical clout. We cannot but be made omission-dependent as a result.

²⁸⁶ See Leslie Green, *The Authority of the State* (Clarendon Press, Oxford 1988).

²⁸⁷ It will be noticed that the examples I just used to support this claim are examples characteristic of the criminal law. This reflects the focus of the thesis as a whole.

²⁸⁸ I cannot here deal with the controversies over both the nature of authority, and the type of claim the law makes. For discussion of both issues, see Joseph Raz, *Ethics in the Public Domain* (OUP, Oxford 1994) ch 10.

through police services, through court rooms or other mechanisms of enforcement.²⁸⁹

Second, states present the authority of law as *overriding*. Legal obligations are put forward as overriding both the commands of other loci of power and the demands of other normative systems when those systems conflict with the law. If a rival entity attempts to enforce its own state-style punishments in breach of the law (but in support, say, of religious norms), the state will continue to insist that this is an offence unless the law itself recognises an exception. If experts are (rightly) convinced that a government policy will be self-defeating and try to solve the problem with illegal acts, this will be no less a breach of the law for having wisdom on its side.²⁹⁰

For present purposes, the upshot of all this is as follows. We are *encouraged* to depend on the state by its claim to overriding authority, and we are often *forced* to depend on the state because, on account of its might, the state can effectively follow through on its refusal to suffer rivals. Why exactly do these features encourage or force dependency? Because if myself and my friends believe (rightly or wrongly) that we could do a better job than the state by digging up local roads during the night and resurfacing them, we are discouraged from doing so because we are told we will commit a legal *wrong*, and thus breach an overriding duty not to so act. If we persist, we know we may well be arrested and punished. Similarly, those who (somewhat

²⁸⁹ Of course, some governments' claims to authority are woefully ineffective, and nothing much is done to give effect to them. Think of so-called 'failed states' as an example. But this is the exception not the rule. Most governments have agencies which are capable of enforcing (and do at times enforce) the legal duties they claim exist. This is not to say such agencies are not a fall-back, and that people do not comply with the law most of the time. It is just to say that governments generally can (and at least sometimes do) give effect to their claims when people disobey.

²⁹⁰ Unless, to repeat, the law itself incorporates the demands of wisdom.

less drastically) advocate rival schemes to keep the lights on, or to make people safe, had better convince the state to change its course. If they do not, efforts to put their scheme into practice will be portrayed as wrongs regardless of their merits, and may ultimately lead them to the inside of a cell. The point is this: if rival schemes are prohibited, prevented or dismantled whenever states use the law to achieve their objectives, we (both ordinary folk and rival schemers) cannot but be encouraged, and even forced, to depend on the state scheme. And the resultant absence of alternatives means that our dependency is even more morally significant: there may be no alternatives around when the state's preferred option fails.

Now those on the right of the political spectrum may object that my entire discussion presupposes a host of nationalised areas of provision, rather than a privatised state in which we *actually* depend on private corporations to provide or omit. This is a mistake. The state cannot escape the allegation of encouraged or forced dependency that easily. For by its own lights, such provision only occurs *on the state's terms*. It only happens to the extent the state permits and for the period it permits. Outside that realm of permission, alternatives are still forbidden, and will still be prevented from developing.²⁹¹ As a result, we are still dependent on the particular structure of possibility the state allows whether more or less expansive. The minimal state thus does not escape the accusations I have made here. The argument, accordingly, holds firm.

²⁹¹ Remember: the state puts forward its authority as overriding. By its own lights, provision made by other entities is provision the (minimal) state allows. If it chose to forbid it, the state would, by those same lights, have the authority to do so.

c) Dependable or Deserving?

Let us see where we are. We are often dependent on states, or choose to depend on them. The dependencies in question are, as we have seen, momentous, pervasive and indefinite. And this shows just how *vulnerable* we are to the state failing to take care of things we care greatly about (our physical safety; the development and care of our children; the quality of our environment). It shows how vulnerable are the plans we make for our lives to the present and future acts of the state. This alone, it may be said, gives grounds for thinking that the state ought to deserve trust: it clearly matters a great deal that the state *deliver* for those who are so vulnerable.

In response it may be said that dependence alone does not (at least without more) have the normative effect I just attributed to it. It may be said that if I simply begin to depend on another for certain goods – without inducement, encouragement, or any prior relationship – I cannot reasonably expect that other to provide for me to any significant degree. Now whether or not this is true it is not the position of the state. For, as we have seen, the self-presentation of the state *encourages* its people's dependency. By presenting itself in the role of carer and protector, the state encourages people to depend on the provision it makes available in those roles.²⁹² By claiming there are overriding duties not to compete either with the state's own provision, or the range of possibilities it allows, the state necessarily encourages dependence on that provision or those possibilities. It follows that the state is in a very different position to the private individual I imagined imposing on above. If I had come to depend upon that individual because he put himself forward as my carer

²⁹² In what sense does the state put itself forward in these roles? By, as we saw above, putting itself forward as providing health and security services (among many others), which are available to, and *designed for*, the use of the people: text to n 281 above.

or protector, and claimed I had an overriding duty not to seek certain goods elsewhere (which duty he also presented himself as capable of backing up by force), he would, I submit, clearly have reason to deliver the goods in question. The harder it became for me to get those goods elsewhere, and the more important the goods in question, the stronger his reasons would accordingly become.²⁹³

If this is right, the objection pressed at the beginning of the last paragraph is refuted by the state's self-presentation. The people's dependence on the state is not only momentous, pervasive and indefinite; it is also dependence which has been actively encouraged by the state. And if the story I told in respect of dependence on private individuals is correct, these features of the state's relationship with its people *are* of normative effect: they give the state reasons of no little strength to deliver for its people.²⁹⁴ They give the state reasons of no little strength to deserve its people's trust.

Alas, this line of thought, while it appears to support both the *Trust Principle* and the *Strong View* of it, is faced with a further objection. For nothing I have said, it may be pointed out, shows that states should be anything more than *dependable*, where this is understood to mean merely predictable or reliable. Just as a good bridge need only be utterly dependable in order to do its job well, might it not be that a good state does all it should if people can depend on it in the crunch? If the roads are safe and people stay healthy why worry about anything more?

²⁹³ One reason it might become hard has already been explored in relation to the state: if one depends for long enough on another for certain goods, one may become less capable of providing them for oneself.

²⁹⁴ When we recall how difficult the state makes it to obtain (many important) goods in ways which lie outside the range of possibilities it permits, we see just how strong the state's reasons to deliver are.

Let us get clear about the focus of this objection. The objector accepts that it is important for the state to be dependable. But, it is said, we are yet to see an argument for the claim that the state should *deserve trust*. If my account to this point is correct, to deserve someone's trust is to meet the reasonable normative expectations they have of one in respect of some vulnerability. More precisely it is to be sufficiently wholehearted and sufficiently competent to meet the aforementioned expectations, such that one has what it takes not to let down or betray the (potential) trustor. Now I have already argued that people are vulnerable to the state as a result of the dependencies discussed in sub-section a). I have just argued that the state has strong reasons to ensure that the vulnerable do not come to harm. But to demonstrate that the state ought to deserve the trust of its people (and that its reasons to do so are strong), two further things must be shown. First, that the people *can* reasonably expect wholeheartedness and competence from the state. Second, that meeting these expectations *matters*, and matters *a great deal*.

Here is a first argument. I have already argued that the state has strong reasons to be dependable. But there remains a question about the *conditions* necessary to ensure such dependability, when we consider the nature of the activities commonly undertaken by states. The question raised is whether we can really expect a state to reliably deliver – or to deliver as reliably as it otherwise might – if its officials lack competence or are only half-hearted about their tasks. How, without *competence*, is the traffic system to eliminate (or at least minimise) disastrous accidents? How, without *wholeheartedness*, are people – be it the young, the old or the sick – to find not neglect but care and concern when they find themselves in state

institutions?²⁹⁵ Some will reply, in Humean vein, that all we actually need here is better institutional design: with the right checks, balances, incentives and sanctions we can ensure that even if government is staffed by knaves it will work well for those who depend on it.²⁹⁶ I have no quarrel here with Hume's normative claim, namely that a state designed to minimise the damage it can do if controlled by monsters is a state with much to recommend it.²⁹⁷ But this is not to accept that institutional design can make competence or wholeheartedness unimportant. Indeed, it is hard to imagine how any state could hem its officials and institutions in as completely as the reply under consideration imagines. There are, in other words, inevitably gaps where checks and balances are either lacking or can be evaded; where incentives are limited, and sanctions fail to bite; where, if the state is to reliably deliver, its officials must instead be wholehearted about their task.

Nor, notice, can the need for competence be eliminated in this way: we may, by checking each institution, reduce the damage it can do, but we cannot thereby ensure (more positively) that it provides whatever goods it is depended upon to provide. Indeed, it is precisely the role of incentives to generate the competence required to ensure this. In short, however impressive our institutional designs they cannot do all the work. What's more, as long as there remain states which do not take Hume's advice, the existence of wholehearted and competent officials (and thus

²⁹⁵ You may suggest that wholeheartedness as I defined it is unnecessary here – that all that is needed is sufficient financial reward or reputational incentives. But there is (at least sometimes) likely to be little money or glory in helping the most downtrodden in society, despite these being perhaps the most dependent on government of all. This helps explain the importance not just of competence but also of *wholeheartedness* – of the state (and its officials) caring about the vulnerabilities of its people *in their own right*.

²⁹⁶ See David Hume, 'Of the Independency of Parliament' in Eugene Miller (eds), *David Hume: Essays Moral, Political and Literary* (Liberty Classics, Indianapolis 1985) 42.

²⁹⁷ I return to this point in the following chapter: text to n 359 of ch 6.

institutions) will remain imperative. Without them the dependability of the state will remain fragile at best.

What are the implications of this for the *Trust Principle* and the *Strong View* of it? First, that it is entirely reasonable for people to have normative expectations of the state: for them to believe that the state ought to be wholehearted and competent. After all, we just saw that both these attributes are required if the state is to reliably deliver for those it has encouraged to depend on it. Second, that meeting these expectations is something which the state has strong reason to do. As we have seen, the costs of failure here are likely to be great, and it is the state which encouraged the dependence that makes this the case. If this is right (and all other things are equal) the state ought to meet the reasonable normative expectations of its people. It follows that the *Trust Principle* is vindicated: as section 1 argued, to meet such expectations just is to be deserving of trust.²⁹⁸ If the reasons to do so are of particular strength, as I just suggested they are, it is the *Strong View* of that principle which we should adopt.²⁹⁹

Consider now a second argument. I have argued that the state encourages its people to depend or become dependent upon it. Notice now that the way that the state encourages this dependence is also likely to result in some people developing *normative expectations* of the state. Thus when the state presents itself as providing (and, sometimes, as duty-bound to provide) various goods for the sake of its people, and combines this with duties to support (and not to compete with) the provision it makes available, it can hardly be surprising that some develop expectations

²⁹⁸ Text to n 276.

²⁹⁹ Particular only in the first of the senses distinguished in the introduction to this chapter: in the sense that the reasons in question are not of trifling weight.

regarding what the state ought to be.³⁰⁰ Thus some will take the view that the medical system ought to be competently staffed and run. Others will believe that the police service ought to be wholehearted about protecting people: that its members should care about the fate of those who depend on them for protection.

The reader may ask what the relevance is of such expectations here. Simply put: that the state's failures, when they stem from incompetence or half-heartedness, will be all the worse morally speaking. Why? Because those who possess the expectations in questions, and also have a measure of confidence in the state, will be *betrayed* if the state fails them due to a lack of wholeheartedness; they will be *let down* if incompetence is the cause of the same. As section 1 showed, these are the disappointments to which the trusting are distinctively susceptible: the disappointments suffered when they are failed by those to whom they accept vulnerabilities, because of a failure of the trusted to live up to their normative expectations.³⁰¹ The point here is that there is an *extra* moral taint involved when one not only harms someone vulnerable to one's actions, but also, in doing so, betrays them or lets them down. My argument is that this is precisely what happens to states whose failures stem from incompetence or half-heartedness, because at least some of their people are likely to have the requisite normative expectations. If this is right, it is all the more crucial that the state have the qualities required to meet those expectations: both because it thereby avoids moral aggravation of its failures, and because, as the previous argument showed, it makes those failures less likely. Because to meet those expectations *just is* to be deserving of trust, the upshot is further support both for the *Trust Principle* and the *Strong View* thereof.

³⁰⁰ When writing of support, I have in mind such things as support through the tax system.

³⁰¹ Text to n 268.

My third argument begins by stepping back not only from the state but from the question of trust as well. It is an argument which begins with a general truth about reasons, namely that we not only have reason to do certain things (reasons to ϕ), but also to be *rightly responsive* to reason when doing them (when ϕ ing). To put the point another way: those who ϕ should be judged not only against the reasons for and against ϕ ing; they should also be judged against reasons for and against ‘ ϕ ing *for certain reasons*’.³⁰² Rational evaluation, in short, extends beyond *what* one did to *why* and *how* one did it. It is this which explains the familiar thought that visiting an ailing grandparent (thus doing what, let us assume, one should), remains morally defective if done to snatch a larger share of the prospective inheritance. And it is this which – to return to an earlier example – explains why the husband who remains faithful to his wife merely because he never has the opportunity to cheat, is morally inferior to what we might call the *wholehearted* husband, whose love for his wife means that cheating never crosses his mind. While the grasping grandchild and the opportunistic husband exhibit the *simulacra* of virtue, the real thing, these examples suggest, requires not just right action, but right action *for the right reasons* whatever they may be.

Now this claim about virtue applies with full force to deserving trust. As I argued in section 1, the person who deserves trust is the person who succeeds in looking after things entrusted to her, because she is wholehearted about looking after them, and competent to do so.³⁰³ To be wholehearted, I further argued, involves

³⁰² A point insisted on by Aristotle in his discussion of the virtues: see Aristotle, *Nicomachean Ethics* (Terence Irwin tr, 2nd edn, Hackett Publishing 1999) Book 2 Chs 4 and 6. For recent argument that the moral value of any action depends on the reasons for which it is performed, see Julia Markovitz, ‘Acting for the Right Reasons’ (2010) 119 *Philosophical Review* 201.

³⁰³ Text to n 276.

being moved by the right reasons. One must look after entrusted objects, not because one fears reprisal, or has been paid enough to make an effort – this would be to exhibit the mere *simulacra* of virtue – but because one cares about the trustor’s vulnerability in and of itself, and about the damage one would do to her if one failed.

If this is right, there are reasons to which the merely dependable do not conform, regardless of how dependable they are made by incentives or sanctions. And this lack of conformity, I have suggested, is the mark of their lack of virtue. Those who are wholehearted, on the other hand, are those who conform to such reasons. Accordingly they possess the virtue of deserving trust.³⁰⁴ Unless there are reasons to think that we should be indifferent to whether the state is virtuous or not, these reflections provide further support for the *Trust Principle*. The state ought to be deserving rather than just dependable, because it thereby conforms to the reasons it has to be ‘dependable for the right reasons’; because there is then at least one virtue possessed by the state.

I have offered three arguments to the conclusion that the state not only has strong reason to be dependable, but also has strong reason to be deserving of trust. If those arguments are correct, they support both the *Trust Principle*, and the *Strong View* thereof.

Before moving on, let us consider one final objection. I have made much of the state’s self-presentation, and relied on certain generalisations about this to argue that certain normative expectations are reasonable expectations to have of the state. It may now be objected that my claims were *too* general: that states will not

³⁰⁴ As long as they are also competent to look after whatever we entrust to them.

infrequently present themselves as the enemy of, or at least indifferent to, some of their people. It may further be said that this undermines the argument of this section. For just as I argued that the state's self-presentation as protector or carer makes certain expectations reasonable, can't it equally be argued that a more hostile self-presentation makes such expectations unreasonable?³⁰⁵

In reply: we should accept that it is generally true that actors have some control over how they can be expected to act. A teacher may announce that she will provide extra help after school if requested, even though doing so is beyond the call of duty. Having made her announcement, the teacher can reasonably be expected to show up and help, at least for as long as the offer is not rescinded. Alternatively, a teacher might make clear she will not mark her class's books every week, but only once a fortnight. Reasonable expectations will then shrink accordingly. Of course, this type of manoeuvre has its limits. Attempting to shrug off the need to turn up to class, or properly prepare for lessons, would *not* somehow make it unreasonable to expect her to do so.³⁰⁶

In the case of states my argument already implies that the first point is true: that the normative expectations we can reasonably have vary depending on how the state holds itself out. If the state holds itself out as doing much to solve some pressing social problem, we can reasonably expect it to do so competently and wholeheartedly. After all, as the state well knows, such pronouncements encourage us to depend upon the state living up to them, and it has been the burden of this

³⁰⁵ If it can my argument here would have the following implication: the more transparently heinous a state, the less reasonable it becomes to expect anything of it, and the easier it is for that state to deserve its people's trust.

³⁰⁶ Imagine a teacher attempting to use *this* as an excuse.

section to argue that this not only generates (strong) reasons to solve the problem dependably, but also for the state to do so in a manner deserving of trust.

In the contemporary political climate it is worth noting that this point has significant implications. Because of the immense amount of rhetoric and activity in which modern states engage, the demands we can reasonably make of such states will tend to expand over time. In light of their various pronouncements, states will create different reasonable expectations in different domains, demanding that they exhibit various levels of wholeheartedness and competence in respect of various tasks. To deserve trust – to meet these expectations – will then require doing much more than it would have if they had only kept quiet.

Now it is true, as my hypothetical objector noticed, that the point I have just made cuts both ways. Some states will do nothing to encourage the idea that they are motivated to help certain people or will actively make clear that they are hostile or indifferent. They may thereby try to cut down the entitlement of some to reasonably expect anything from the state. Now we need not deny that states are capable of *deflating* reasonable expectations as well as inflating them. Perhaps the state can, by announcing that it will leave the trains up to the private sector, or not worry too much this year about child obesity, thereby ensure that we can reasonably expect nothing more of it. Perhaps the state needs to have its priorities, and perhaps money is tight.

But there is reason to doubt that all such expectations can be made unreasonable for any group within the state. For as we saw above all states make a

certain structure of possibility available within the law.³⁰⁷ They claim that their people have overriding duties not to step outside those possibilities, and make clear that they have the capacity to back this up with force. The only escape available is to leave the state entirely, an escape which, as the state well knows, will rarely be without difficulty: many have no guarantee there will be another state willing to take them. However hostile the state's pronouncements may be, such considerations continue to support the view that it is reasonable for each to expect the state to be wholehearted: to care about the vulnerability it creates to the structure of possibility it makes available, and about the damage it can do if it fails to deliver. They also support the view that it continues to matter that the state live up to these expectations. They thus continue to support the *Trust Principle* and the *Strong View* thereof.

3. The State in Particular

Even if my argument is correct to this point, it has yet to address one issue which I raised at the beginning of this chapter. For while I have argued at length that the state's reasons to deserve trust are not reasons of trifling weight, I am yet to vindicate the claim that those reasons are *comparatively strong*: stronger, that is, than the reasons others have to be deserving of trust. After all, we can all see the importance of having friends, neighbours and colleagues who deserve our trust. For one thing, we often trust persons who fit each of these descriptions. If they do not deserve this trust, the harm done may be significant, and, what's worse, we may be let down or betrayed.

³⁰⁷ Text to n 291.

Now my interest here is not in comparing the state with friends, neighbours or colleagues. It is rather in comparing the state with entities of comparable power and influence. It is, however, worth briefly challenging what may seem a natural assumption, namely that it is *clearly* more important for our friends, neighbours or colleagues to deserve our trust, than for a large, impersonal entity like the state to do so. I have already argued that many of us are *dependent* on the state – to have no choice but to depend on it as we go about planning our lives. As we saw, this is partly a function of the way the state’s self-presentation inhibits the development of alternatives: we are forced to depend because the state makes itself the only game in town. Our dependence on the state is, as we also saw, pervasive and indefinite. This contrasts starkly with many of our relationships with friends, colleagues or neighbours. Many such dependencies exist for just so long as we want them to, before we break free of them, or choose to create new ones. Many are restricted to narrow domains, exist alongside one another, and are of little consequence to the rest of our lives. We can plan out our future in a manner which is relatively independent of our friends or our neighbours. But such plans cannot avoid depending on the state continuing to provide for us – on the streets being safe to walk and the roads safe to drive.

Such thoughts may threaten to drive the argument beyond even the *Strong View* of the *Trust Principle*, towards an argument that deserving trust has a certain *priority* for the state – that it comes high on the list when the moral priorities for the state are sorted out. This will naturally be controversial, and I do not insist on it here. Suffice it to say that I do not think it should be ruled out. John Rawls, of course, famously claimed *justice* as the ‘first virtue of social institutions’, insisting that laws and institutions lacking in justice should, whatever their other merits, be

reformed or abolished.³⁰⁸ The argument for Rawls' claim has, I think, never been clear.³⁰⁹ Perhaps if we took up a position outside the state – if we stood in a hypothetical original position – our priority would indeed be allocating things correctly.³¹⁰ At least when we got into the thick of things we would have a just share available to us with which to live. I prefer to reserve judgment even on this. The problem with this argument is that we have been given no *reason* to occupy such a position when deciding which virtues have moral priority for the state. We have such reasons only when we have *already* decided we care most about justice and want to know exactly what it is that justice demands.

While I cannot discuss the point fully here, it is surely plausible that the position we should be most interested in when discussing the state's moral priorities is precisely that of those who *are* in the thick of it: those trying to get on with their lives while the state does what it does. Only when we see what it is like to be in *this* position, it might be said, do we find out what the modern state is really like to live under, information we need to work out what its moral priorities should be. And from this position, one of the first things to notice about the state is that it creates a momentous, pervasive and indefinite dependency *of* the people *upon* itself. Myriad services are offered to (and for) the people, all the while inhibiting the development of apparently unnecessary alternatives. Laws present an overriding duty to remain

³⁰⁸ John Rawls, *A Theory of Justice* (rev edn OUP, Oxford 1999) 3.

³⁰⁹ One explanation for the lack of a clear argument is provided by GA Cohen, who points out that the task Rawls sets his hypothetical contractors is in one sense all-consuming: it is the task of choosing optimal rules of regulation, taking account of all the virtues (and possible vices) one might wish the state to realise. If this is what is involved in choosing principles of justice it is only natural to think it has priority over any other task. But for persuasive doubts about the conflation of rules of regulation and principles of justice, see GA Cohen, *Rescuing Justice and Equality* (Harvard University Press, London 2008) ch 7.

³¹⁰ As Chapter 2 argued, justice is an allocative ideal. Principles of justice regulate the allocation of benefits and burdens between persons. See text to n 66 of ch 2.

within the possibilities offered by the state, while the force of arms lurks ready to back up this claim to authority.³¹¹

Once we see the state in this light, it is at least arguable that one of the priorities for the state should be deserving its people's *trust*. The state should, as it goes about creating such an enormous dependency upon itself, ensure it is sufficiently competent and wholehearted to *deliver* for its people, and to avoid *letting down* or *betraying* those who come to trust it. As I already said I do not insist that these considerations suffice to establish any kind of priority relation. But whether or not the argument just gestured at could eventually succeed, it does serve one purpose of more immediate relevance: it further cements the thought that the *Strong View* of the *Trust Principle* is the right one.

Let us return to the argument. I began this sub-section by claiming that it was especially important that the state be deserving of trust. We all know that the modern state is made up of institutions of enormous power and influence. Let us therefore turn to consider two comparators of comparable size and strength.

First, compare the state with a multi-national corporation such as Microsoft. We *are* dependent on Microsoft as consumers of its software. If it fails, we may lose much-needed information as well as amenities which we prize. We also depend on Microsoft products not harming us by stealing details from us, or exploding in our

³¹¹ It is true that Rawlsian contractors could build the importance of this into their choice of rules of regulation, assuming the veil of ignorance is specified so as to allow them access to necessary information. But the more weight those contractors given to issues of trust, *as compared with issues of allocation*, the more doubt is cast on the claim that justice has moral priority. After all, as Chapter 2 argued, questions of justice *just are* questions of how to allocate benefits and burdens between people (text to n 66 of ch 2). The more weight is given to essentially non-allocative questions (like which rules are required to make the state deserving of trust?) the more we call into question the moral priority of justice.

faces. There is a commonality with the state here – we are vulnerable to such corporations, both as consumers of their products, and as people who interact with others who are *themselves* vulnerable to such products. Damage to them may itself be – or may lead to – damage to us.

Still, there are at least two differences worth noting. First, our *dependency* on Microsoft is of lesser moral significance. We are not vulnerable to Microsoft in anywhere near as many spheres, nor in as many spheres of as much moral importance. Individually, we can escape from dependency on Microsoft by not having a computer, or not using it much. We escape when we go places and do things which don't involve computers. Collectively, we can escape Microsoft by interacting in ways which do not depend on computers – by talking on the telephone, or communicating face-to-face. This is far harder to do with the state – we need roads to go places; we need public order to live life outside (or, for that matter, inside) our walls.

Second, and in partial explanation of the difference in dependency, Microsoft does not *monopolise* as states often do. In the world of computers, there is always Apple. But there may be no-one else available to maintain the roads or keep the streets safe. As we have seen, this is often a function of statal claims to overriding authority: if there is a rival to the state, it is in the nature of states to claim authority to prevent their activities (and then do so).³¹² If the state then fails there may well be nowhere else to turn. Of course, this is not always true: states can allow others to

³¹² Now it is true that Microsoft also claims authority in the sense that one has a duty not to do certain things with its products just on account of Microsoft's say so. But this is authority Microsoft derives from the law, and which can thus be taken away by the law. This only suggests a further reason why governments in particular should be deserving of trust: they have the authority to regulate the derivative authority which corporations like Microsoft wield via law.

provide alternatives to statal provision. And this may appear to give us much the same choice we have with computers: should we take the state-run train or the private-train? In fact this equivalence is an illusion. The private-train only runs *because the state allows it, and on the state's own terms*. We are dependent on the state for the very existence of the private train. We are not dependent on Microsoft allowing us to switch to Apple.

Second, compare the state with a gangster-run protection racket. Let's imagine these gangsters beat people up on a regular basis, but do so less regularly if you pay them enough. Perhaps they can also get you better quality housing or better water if you pay, and perhaps the gang cuts off the water if you don't. As gangsters, they make clear that they act in their own interests – they make a profit out of protection, and that is why they are in the business.

Now, there is no doubt that we are *dependent* on these gangsters for our personal safety, and perhaps also for the quality of our life more generally. They also *create* this dependency by establishing the protection racket. These are good reasons for them to be deserving of trust – we want to be able to trust them not to beat us up if we pay. And this suggests something of general importance: there are ordinarily good reasons for *anyone* on whom we must depend in important respects to be deserving of trust. If they are not, we need something *other* than competence or wholeheartedness to ensure that in areas of dependency we are not left out in the cold or positively harmed. As I already argued in section 2(c) such things may be hard to find.³¹³

³¹³ Text to n 295.

Does this create equivalence between state and gangster? Not so. There are *extra* reasons why states should be deserving of trust. As we have seen, states tend to present themselves in a particular way. They hold out their provision as being *for* the people; they claim to be tackling people's problems through policy documents, speeches and manifestos; often, they claim to be *duty-bound* to tackle such problems, and to do so with competence and wholeheartedness. Such self-presentation inevitably induces *expectations* among the governed ('surely my information will be safe') and makes *dependence* upon the state all the more likely ('surely the ambulance will arrive soon'). In short, it raises the stakes of one's lacking competence and wholeheartedness all the higher. It makes it all the more urgent that the state deserve trust.

To present oneself as a gangster is to present oneself very differently – as motivated largely by one's own profit margin and as willing to use lethal means to maximise it. One who complains that the gangsters ought to have been more wholehearted is likely to face the following reply: they're gangsters, what do you expect? There is something to this: we have not been led to *expect* anything more from these gangsters than that they behave as gangsters. They have not encouraged us to *depend* on them by holding themselves out as anything other than ruthless maximisers of self-interest. The stakes have thus not been raised by self-presentation – we are unlikely to be shocked if the gangsters are anything but wholehearted about our well-being.

Let us be clear here: we have already seen that there are good reasons for gangsters to deserve trust irrespective of their self-presentation. The point here is just that we do not have the *extra* reasons for them to be deserving of trust which we

do have in respect of those who hold themselves out as servants of the people, and induce us to depend upon this being so. If this is correct, states are burdened by stronger reasons to be deserving of trust than others. And this is one reason why it is better to be governed than ‘protected’ by gangsters: on account of their self-presentation, even the most oppressive states have stronger reasons not to let people down or betray them than do the most wicked of gangsters.

4. Conclusion

This chapter has defended the *Trust Principle* and the *Strong View* of that principle. It first argued that people depend and are dependent upon the state in ways which are momentous, pervasive and temporally indefinite. It argued that many of us cannot but plan our lives in dependency upon the state. It further argued that this dependency, far from being an accident, is the *creation* of the state itself, and that this disables the state from claiming that popular dependency is normatively inert. Why does it follow that the state should be anything more than dependable? First, because wholeheartedness and competence will often be pre-conditions of dependability. Second, because the state’s self-presentation will often encourage its people to trust it, such that a state which is half-hearted or incompetent will not only harm people but also betray them or let them down. Third, because virtue – rather than the mere *simulacra* thereof – demands nothing less of an entity like the state.

If these arguments are correct, we rightly expect wholeheartedness and competence from the state, and the state’s reasons to *meet* those expectations are by no means trivial. If the previous section is correct, the reasons just mentioned are even stronger for the state than for super-corporations and powerful gangsters. It is

particularly important that the state live up to our reasonable normative expectations, in both of the senses distinguished at the outset. And as section 1 demonstrated, to live up to these normative expectations just is for the state to be deserving of our trust.

CHAPTER 6

FOR ‘US’ BUT NOT FOR ‘THEM’: THE PROBLEM WITH PARTISAN GOVERNMENT

This chapter continues the search for moral principles which can be put to use in support of the central argument of this thesis: that certain uses of the power to criminalise are misuses of that power. The chapter defends a single principle called the *Anti-Partisan Principle*. That principle is applied to (mis)uses of the power to criminalise in Chapter 7.

The Anti-Partisan Principle: governments should not behave as political partisans in their relations with the governed.

Political Partisans: political partisans are political entities which behave as if they are agents of some and not others within a given political arena.

It should immediately be clear that I am not concerned here with how governments should relate to those outside their jurisdiction.³¹⁴ I am not, in other words, concerned with how much each government owes to the rest of the world.³¹⁵ Rather, my focus is on governmental relations *with the governed*: with those subject to the jurisdiction of the state which the government in question governs. This, in short, is the political arena of sole relevance here.

³¹⁴ More precisely, those outside the jurisdiction of whatever state the government in question is the government *of*. I thus limit my discussion to the governments of states.

³¹⁵ For insightful discussion of this issue, see Samuel Scheffler, *Boundaries and Allegiances* (OUP, Oxford 2001) ch 3.

Now it remains to be seen what politically partisan behaviour *is* within this arena – what exactly it is for governments to behave as though they are agents of (only) some of the governed. Explaining this will be the task of section 1 below. Suffice it to say here that the *Anti-Partisan Principle* rules out a certain kind of divisive government: government which is out for *us* but not *them* where both are groups of the governed.³¹⁶ Thus it rules out government which focuses its energies on promoting the agenda of indigenous persons or the propertied classes, while making little effort to promote the agenda of the rest.³¹⁷ And it rules this out even if the former are the government’s supporters, and even if the members of government are their kin. It requires instead a government which is in some sense out for all: a government which is non-partisan in its relations with the governed.³¹⁸

It is a further task to show that we have good reason to favour non-partisan government and adhere to what I have called the *Anti-Partisan Principle*. Demonstrating that such reasons exist is the task of section 3. Notice however one immediate complicating factor, namely the unobjectionable nature of much behaviour which *is* obviously partisan when we change either the arena or the actor which is the focus of our attention. As an example of the first change, think of government prioritising the agenda of the governed over that of the rest of the world. As an example of the second, think of friends who prioritise the agenda of their friends, while doing little to promote the agenda of those to whom they are

³¹⁶ *A fortiori*, it also rules out government which is out for ‘us’ and *against* ‘them’.

³¹⁷ As explained below (text to n 319), to promote the agenda of a group is to take steps to bring it about that the members get what they (can reasonably be expected to) want.

³¹⁸ Of course, there will often be conflicting claims to the government’s attention, and some distributional principle(s) will be needed to resolve the conflict. But government does not stop being for me just because it diverts scarce resources to those with greater needs than mine. As long as my needs are given due weight, the government is still seeking to promote my agenda and is still out for me in the relevant sense. I discuss all this in greater detail below (text to n 324).

strangers; or corporations which prioritise the agenda of their shareholders, while doing little to promote the agenda of shareholders of rival corporations. Notice that such behaviour appears to *remain* unobjectionable, even if the latter group is clearly worse off, and even if its agenda is much easier to promote.

No doubt there are limits to how far this prioritisation can permissibly go. Even corporations probably owe something to strangers, particularly those in dire straits. But whatever the limits they do not amount to a bar on partisan behaviour. A charity does not behave objectionably because it only seeks to help old age pensioners, while ignoring sick children, even if the latter is the more urgent problem. Friends need not toss a coin when deciding whether to help a friend or a stranger move house. Rather, the examples I have given show that individuals and collectives are often permitted, and sometimes obliged, to focus on promoting some agendas to the relative exclusion of others, even though many of the latter are more urgent, and can be more effectively promoted.

This leaves advocates of the *Anti-Partisan Principle* with the following question: why think *governmental* partisanship objectionable, and why only when it fails to stop at the jurisdictional edge? Why think governments lack permission to prioritise the agenda of their friends or their backers alone? Why, indeed, think they are not obligated to do so? In what follows I offer answers to these questions. In doing so, I should not be taken to be implicitly claiming that government is the only entity which should avoid partisan behaviour. In section 4, I acknowledge that other such entities exist. But I argue that even when the partisan behaviour of other actors *is* objectionable, it is rarely as objectionable as politically partisan government, on

account of certain special features which governments possess. Section 5 concludes the chapter by summarising my argument.

1. Political Partisanship

The *Anti-Partisan Principle* demands that governments not behave as political partisans in their relations with the governed. In this section I clarify the nature of this demand. I have already made clear that a government is politically partisan when it behaves as if it is the *agent* of a select group of the governed.³¹⁹ This agency relation obtains, as I conceive of it, when three conditions are met. First, the government seeks to promote the *agenda* of the select group. A group's agenda includes the various things that group can reasonably be taken to want, such as better economic prospects, increased security or fair treatment from others.

Second, the government does *not* take up the agenda of those outside the select group, either at all or to anything like the same extent. As we shall shortly see, to be partisan may well be to ignore these people's preferences, and may even involve setting back their interests when this is to the advantage of the select group. It is to act with a measure of *disregard* for those one leaves on the outside.

Third, government is only partisan if the difference in the treatment of those within and without the select group cannot be justified by what I will call *impartial reasons*. By impartial reasons I mean to refer to all those reasons government has prior to, or abstracting from, any particular ties to particular groups of the

³¹⁹ A 'select group' is a group comprised of only some (and not all) of the governed.

governed.³²⁰ Of course, many of the reasons governments have *will* be generated by the uniform tie between government and governed. But this tie applies identically to each member of the governed, and the reasons it generates are thus impartial reasons within the political arena at issue here.³²¹ You may ask what *other* reasons a government could possibly (claim to) have. But as individuals, we often *do* have reasons – which I will call *partial reasons* – to promote the agenda of particular people (our friends) or particular groups (our local community) because of particular ties we have to these people and groups.³²² We frequently have such reasons as a result of our having chosen to form relationships with others, even though there was no special reason to choose *these* others before the relationship was formed.³²³ Why think people have the ability to create reasons in such a way? Because the space to do so – to create ties of the sort just mentioned – is of such obvious value to people's lives, both on account of the value of the connections formed, and the value of being able to form them.

It is worth noting that the contrast I have drawn here is not the straightforward contrast between reasons which count in favour of promoting the agenda *of some*, and reasons which count in favour of promoting the agenda *of all*.

³²⁰ So I do not mean that such reasons have to be neutral between different conceptions of the good, or (if this is different) reasons which holders of any reasonable conception of the good could endorse. To insist on neutrality would be a *further* restriction, ruling out various perfectionist reasons which I do not seek to rule out here. For a variety of perspectives on the neutralist/perfectionist divide, see George Klosko and Steven Wall (eds), *Perfectionism and Neutrality: Essays in Liberal Political Theory* (Rowman and Littlefield, Oxford 2003).

³²¹ Were we considering the relationship between government *and the world at large* the impartiality of such reasons would be called into question.

³²² Not just any tie will do: whether a tie gives us partial reasons (and what reasons it gives us) depends on the nature and value of the relationship in question. For interesting discussion of this point, see Niko Kolodny, 'Which Relationships Justify Partiality? The Case of Parents and Children' (2010) 38 *Philosophy and Public Affairs* 173.

³²³ Of course, there were *some* reasons to promote the agenda of one's friend before he or she became one's friend. The point is that one has *extra* reasons on account of the choice one made to form the friendship.

Rather, to distinguish the two types of reason correctly, we must look not to *whose* agenda they count in favour of promoting but to the *grounds* on which they count. Impartial reasons may well count in favour of helping particular groups, most obviously when goods are scarce. Think of special assistance from government for the impoverished or for children. Because the poor have more urgent needs the impartial reason to meet people's needs points one towards helping the poor first and foremost.³²⁴ Why is the reason just mentioned an *impartial* reason? Because we need postulate no special relationship between ourselves and the neediest in order to account for its force. We thus need point to no partial reason to justify such assistance.

The politically partisan government governs in a manner which cannot be explained by impartial reasons. When the applicable impartial reasons point in favour of acts which serve A rather than B, the politically partisan government jumps to the service of B rather than A. It thus governs as if it has *partial* reasons and *partial* responsibilities of the type described two paragraphs ago: as if it has ties to some and not others among the governed which give it cause to promote their agenda, but need do nothing of the sort for the rest of the governed to whom it (apparently) has no such responsibilities.³²⁵

³²⁴ That reason is, on other words, of diminishing strength: the more completely a person's needs are met, the weaker the reason to act in ways which help to meet them. As Joseph Raz puts it, such reasons have a 'built-in weight discounting-measure': see Joseph Raz, *The Morality of Freedom* (OUP, Oxford 1986) 236-237. The crucial point here is that such reasons are not partial reasons – they apply in their diminishing way irrespective of any special relationship one has to those in need.

³²⁵ To repeat: by *partial* here I do not mean incomplete. I mean to refer to reasons and responsibilities which people routinely have on account of their relationship with certain persons or groups, such as the responsibilities which are part and parcel of genuine friendship. My concern is with governments which behave as if they owe responsibilities of this partial type to only some of those they govern.

It is government of this type which I mean to describe when I write of politically partisan government.³²⁶ Such a government behaves as if it is the *agent* of a select group of the governed because it behaves as though it has peculiarly *partial* responsibilities to that group: responsibilities to promote their agenda whatever the impartial situation may be; responsibilities not owed to those whose only claim is to be one among the governed.

As the discussion to this point suggests, it is part and parcel of political partisanship that a *divide* is created between ‘us’ and ‘them’, insiders and outsiders. Those for whom the government acts as partisan are *insiders*: ‘we’ receive more from government even when our claims are no stronger impartially. We are treated as though we have a special tie to those in power which others simply lack. Those on the other side of the government’s partisanship are treated as *outsiders*: ‘they’ receive less even though there is no impartial reason to justify their neglect. They are treated as if they are owed less by government than those on the inside. It is the defensibility of governments creating such a divide in which I am interested here.

2. Examples

Before I seek to vindicate the *Anti-Partisan Principle*, let me provide some (more or less hypothetical) cases in which governments do appear to act in a politically partisan manner. I say ‘appear’, as partisan governments need not admit to acting as

³²⁶ One might worry that only one course of action will be justified by impartial reasons, making the demands on non-partisan government overly rigorous. This worry is often baseless. There are many (at least partly) incomparable impartial reasons, and many (at least partly) incomparable ways to conform to them. Governments can also do more good in some areas than others, giving them extra reason to focus on areas they would otherwise have less reason to worry about. All of this means that many courses of action will often be impartially justified, even if many others are ruled out. For general discussion of incomparability, see Raz (n 324) ch 13.

partisans. My examples are supposed to be cases where the inference to the best explanation is one of partisanship, rather than examples where governments openly admit to it.³²⁷ But a note of caution is in order: one can only identify political partisanship when one has an idea of the impartial reasons governments have in any given case. Why? Because it is only when impartial reasons do not explain the pushing of one group's agenda that government adopts the agential stance in which partisanship consists. This means that those who endorse rival political ideologies will have different views on many examples. Pushing the agenda of the very poor may be acceptable to a socialist but partisan to a libertarian. Maintaining a capitalist economy may appear partisan to a socialist but acceptable to a libertarian.³²⁸ This is not at all worrisome. Our project is not to argue for the best political ideology. It is only to show that whatever the ideology, governments should not behave as political partisans.

Here are the promised examples. First, consider two non-rival cases. By 'non-rival' I mean to refer to cases where governmental provision for its select group does not of itself involve taking away from those left on the outside.

Natural Disaster: a tsunami devastates a city on the coast of the government's territory, leaving many city-dwellers in desperate need of food, water, shelter and security. The government's response is woefully inadequate: it comes too late and provides too little. Resources and logistics are not the problem. There

³²⁷ Does any government actually *believe* it is acting as a partisan – as the agent of some but not others? I think many will be at least dimly aware that they are being partisan in certain cases. In the examples given below, it seems hard to avoid such awareness. Perhaps some avoid it via a sort of wilful blindness, be it of an empirical or normative flavour. This type of self-deception is little better than self-conscious partisanship.

³²⁸ My own sympathies will thus become clear when I discuss specific cases. Those with different views can think up examples of their own.

simply seems to be little commitment to alleviating the plight of the city-dwellers. Over the course of the surrounding years, disasters take place in other areas. They are uniformly met with urgency and efficacy by governmental authorities.

City Projects: inner city areas within a government's territory receive almost no public investment. Drains overflow. Refuse piles up. Schools are overcrowded. The police are nowhere to be seen. Many other (generally more affluent, suburban) areas receive extensive public investment. New schools are built. Policemen provide a visible presence on the streets. Rubbish collection is prompt, and drainage efficient. The disparity is not the result of resource constraints or the failure of previous attempts to invest in the inner city areas. There simply appears to be little interest in so investing.

In both these cases, the most plausible explanation of events seems to be that the government is acting as a political partisan. Why so? First, the agenda of select groups is promoted by government. Some communities *are* helped in circumstances of disaster, and some *do* receive the public investment they can be reasonably assumed to want. Second, the agenda of other groups fares badly in comparison. Much less is done for those harmed by the tsunami in *Natural Disaster*, and for the inner city-dwellers in *City Projects*, than for other similarly-situated groups among the governed. Third, this difference cannot be justified from an impartial perspective. The impartial reasons to assist the victims of the tsunami are just as strong as the reasons to assist other disaster victims. The impartial reasons to provide for the inner-city dwellers are surely stronger than the reasons to provide for those in the suburbs. Yet in each case one group receive much less. The very fact of this disparity, coupled with its disastrous effects, suggests that the government

acknowledges little *responsibility* to promote the agenda of the disaster victims and inner-city dwellers. If these groups attempted to call the government to account for its failings, it is hard to see what answer the government could give them. For the truth seems to be that the government sees its responsibilities as *partial* ones – owed to some whose agenda it has reason to promote, but not to those outsiders whose agenda it can safely disregard, despite their case for assistance being (at least) as impartially strong as that of the insider group. If this is right, such a government behaves as if it is the agent of its insiders, and this makes its governance politically partisan.

Second, consider three rival cases. By ‘rival’ I mean to refer to cases where making governmental provision for a select group involves taking away from, or otherwise burdening, those on the outside.

Immigrants: some people within the state are increasingly hostile to immigrants. Accordingly, the government places extremely strict conditions on provision of social security benefits to first-generation immigrants, and introduces new legislation which gives preference in allocating scarce goods (social housing, public sector jobs, etc) to those born in the state in question. The government states that this helps fulfil its duty to preserve the indigenous population.

Yobs: due to increasing anxiety among older people about the anti-social behaviour of the young, a government introduces new offences which make it a crime for persons under 18 to do anything which is ‘capable of alarming others’. Although much of this behaviour is innocuous, the crime carries a heavy penalty. The government states that this helps fulfil its duty to make people feel safe.

Victims: due to increasingly vengeful complaints from victims of crime, the government significantly increases the penalties available for various offences, hoping to satisfy these victims' desire for revenge. This increases the suffering of offenders who now have to serve much longer in prison. It does little to reduce crime. The government states that this helps fulfil its duty to the victims of crime.

In these cases, there is again a strong case that the government is acting as a political partisan. In all three cases, the government clearly promotes the agenda of a select group, be it those hostile to immigrants and young people, or vengeful victims of crime. Its actions seek to fulfil their desires and promote their interests. And its claims about duty imply that it acknowledges a *responsibility* to these people – it has to answer to them for its failure to meet their concerns, and seeks to do so with its new policies.

But what of the groups set back by these policies? In *Immigrants*, the character of the government's actions certainly does *not* serve to promote the agenda of immigrants. Rather, the life prospects of many are likely to be significantly set back. While I cannot argue the point here, there are surely insufficient impartial reasons to justify this attack on a section of the governed, even if it does serve to please a hostile indigenous group.³²⁹ This suggests that the government takes its responsibilities to be *partial*. It appears to take itself to owe little when it comes to

³²⁹ One may well be able to think of *some* impartial reasons: perhaps the resulting support for the government will prevent an even worse government coming to power later, thus staving off great injustice later on. Could this justify *Immigrants*? I am sceptical. First, there are all kinds of uncertainties involved in such predictions, which make the consequential calculation sketchy at best. All we do know is that injustice is being inflicted *now*. Second, it is unclear that the active infliction of injustice can be justified by consequential gains of this kind. If the duty not to inflict injustice is agent-relative, the state cannot justify violating it just because things will be better later. For the suggestion that there is such a duty, see John Gardner, *Offences and Defences* (OUP, Oxford 2007) 216-221. For discussion of a number of challenges faced in calculating the consequences, see James Griffin, *On Human Rights* (OUP, Oxford 2008) 71-72.

the agenda of the immigrant population. But it appears to acknowledge strong reason to please a hostile indigenous population, implying once again that the government sees itself as the agent of this latter group.

A similar story can be told in *Yobs* and *Victims*. In the first, young people are burdened with potential criminal liability for enormous swathes of innocuous conduct. In the second, offenders are burdened with sentences out of all proportion to their crimes. Clearly the agenda of *these* groups is not thereby promoted. And it is hard to see how impartial reasons could justify their being subjected to such injustice, however many demands are sated and however many people feel safer. If this is right, the government again acts as if it has partial responsibilities. It acknowledges little responsibility to offenders or the young – it does not deliver justice *for them* after all. But it acts as if it has strong reasons to please vengeful victims and fearful adults. When the impartial normative picture is so radically at odds with what takes place, the best explanation can only be that the government is acting as a political partisan: as the agent of a select group, to the detriment of the rest of the governed.

It is worth noticing that governmental rhetoric can play a variety of roles in instances of political partisanship. Such rhetoric may serve to implicitly *concede* that the government is a partisan actor. This is by no means politically suicidal. Governments may paint the claimed outsider group as evil or undeserving, and win support for their actions in the process. Campaigns against the ‘corrosive impact’ of immigration tend to be an example of this. By portraying a group as harmful and unwelcome, the government legitimates its outsider status in the eyes of the

populace. People may then support partisan behaviour because they see nothing wrong with leaving out the outsiders.

Alternatively, a government may rely on all of its audience locating itself within the insider group, such that no-one listening has anything to fear and all have something to gain. The government may say it is out to help the ‘squeezed middle’ during a recession, and that it will do so by cutting down welfare payments. The disastrous damage this will do to poorer sections of society can hardly be impartially justified by the benefits to the already financially secure. So the best explanation is a *partisan* one: the government is pushing the middle’s agenda, to the exclusion of others, because it apparently conceives of itself as having partial responsibilities to the former group. Why is this not opposed? Because most of the population (and almost all those listening) see themselves as part of the middle, and, with self-interest in mind, support partisanship of this sort.

Of course, governments will not always take this route. Sometimes they will try to *conceal* partisan behaviour by claiming that a policy is actually backed by impartial reasons. Thus it might be said that only the very lazy are being badly affected by benefit cuts and that such people do not deserve benefits in the first place. Sometimes this will be a rather shrivelled fig-leaf which the facts easily falsify. In such cases, the only inference may well be that political partisanship is at hand.

One final point. Someone may object that my discussion proves too much, and that any governmental action which burdens some or benefits others can be conceived as falling foul of my objection to partisan behaviour. Not so. As to

benefits, that the government puts money into schools does not show that it does not acknowledge responsibility to, or seek to further the agenda of, older people. There can simply be no valid inference of this type until we have looked at the type of provision made for such people, what if anything is being taken away from them, and the impartial reasons which support various different courses of action.

As to burdens, that some are punished by the law does *not* show that the government is a partisan of the law-abiding. If offences capture genuine wrongs, if procedures are just and punishments humane, there is nothing partial about punishing people. There are many impartial reasons to punish wrongdoers – reducing the incidence of wrongdoing, giving people what they deserve, even protecting offenders from the mob.³³⁰ In and of itself, such punishment does nothing to suggest that the government is acting in disregard of the agenda of offenders. In fact, that justice and humanity *are* observed only sends the opposite message.

Now of course, the government does not let offenders off, and on some views this would be doing what is best for them. But we never said government had to do what is best for each person *whatever the consequences for others*. It simply must not behave in a partisan fashion. When interests conflict, one may attend purely to impartial reasons while nonetheless having to set back some to further the weightier or more numerous interests of others. There is nothing about *this* to which I have objected here.³³¹

³³⁰ In each case, the status of the relevant factor as a reason for action is independent of any special relationship between government and any given section of the populace. These reasons are thus not partial reasons in my sense.

³³¹ Thus in the rival cases discussed above, the objection is *not* that some people's interests are set back. It is that their interests are not given the weight which they impartially should be when compared with the weight given to those of others. It is this which implies that the

3. Against Partisanship

In this section I seek to vindicate the *Anti-Partisan Principle*, by arguing that governments should not behave as political partisans in their relations with the governed.³³² Now we should immediately notice one restriction on the form that argument can plausibly take: it cannot plausibly take the form of a universal rejection of partisan behaviour. For as the introduction brought out we can all see that such behaviour is no bad thing for various actors in various contexts. Thus friends promote the agenda of other friends and acknowledge partial responsibilities to do so. They do not so act, or acknowledge the same responsibility to so act, towards strangers. In fact, acknowledging such responsibilities is a plausible candidate for a necessary feature of friendship. If one puts one's friend on a par with strangers, one is no friend at all. This does not make friendship a bad thing. It may well be partly constitutive of its value, a value of obvious significance in human life.

Many associations and organisations are in much the same boat. It is a valuable feature of many such bodies that they promote the agenda of their members (and, in some cases, select classes of non-members – think of the Women's Institute or Amnesty International) as well as acknowledging partial responsibilities to do just that. This is true of everything from charities to trade unions. Even if their partisan nature is not always of value, it is often unobjectionable.³³³ Companies are in this

government is partisan – that it takes itself to have partial responsibilities to promote the agenda of the former group alone.

³³² As in the previous chapter, my discussion here will invoke a number of general features of government, possessed by most but not all instances of the genus. Again, my doing so is a function of a simple conviction: that political philosophy should not restrict itself to conceptual necessities, but should also engage with significant features of the actual political world.

³³³ Should we really object that most charities don't seek to promote the agenda of all needy, or the neediest, groups of people? Surely there is nothing wrong with having a charity which focuses on lung disease, even if there are worse afflictions in the world.

boat too – they act to maximise the profit of their shareholders, to whom they have partial responsibilities in this regard. Whatever position one takes on the social responsibilities of corporations, there can be nothing which is in principle objectionable here either.³³⁴

One may doubt that the actors I mentioned in the above paragraph regularly act as partisans. But one need only reflect for a moment to see that they do. Such actors will not push the agenda of their opponents, or accept responsibilities to do so. They may even act in ways which *set back* the interests of those opponents if and when doing so is beneficial to those for whom they act. Think of corporations which try to squeeze out competitors by cutting prices (so much for the competitors), or environmental groups who campaign against produce being shipped from abroad (so much for the shippers and producers overseas). This is not an unhealthy way for associations and corporations to behave, at least within certain limits.³³⁵ Much of civic, social and economic life revolves around it.

If this is right, there is little wrong with partisan behaviour in many spheres of life. To put the point in the language used in section 1, there is rational space for various actors to be partisan in various contexts: space for unobjectionably choosing to promote particular agendas and to disregard others, even though the impartial

³³⁴ Of course, and as the text suggests, we might well wish that major corporations attended a little more to applicable impartial reasons rather than focusing exclusively on the bottom line. But the suggestion that they should not be partisan *at all* is hard to accept.

³³⁵ One should not get carried away. Anti-abortion groups who kill doctors for giving abortions have forgotten the basic injunctions of morality. Those who bankrupt rival businesses knowing this will leave all the employees in poverty may also have gone too far. In short, the force of one's ordinary moral responsibilities remains in place, and limits the partiality one can exhibit in positively promoting the agenda of those for whom one acts. Nothing I have said here is supposed to deny this fact.

reasons for promotion are uniformly applicable.³³⁶ These partisan choices are by no means trivial. They are constitutive of attachments which give meaning to our lives (friendships, memberships, projects); they give rise to and maintain groups which offer us many much-needed goods (unions, teams, charities, businesses). It is hard, quite frankly, to imagine things being otherwise.³³⁷

It follows that various unobjectionably partisan entities will operate within any given jurisdiction. The question for us is why we should think government so differently placed. Why cannot the government decide to act as the agent of victims, and to disregard offenders? Why can it not acknowledge that impartial reasons apply to the situation (the victims have been wronged and have suffered) but give *special* weight to the agenda of victims on account of partial responsibilities it takes itself to owe victims alone? Shorn of the example, the point is this: I have claimed that partisanship is a vice of governments, something in which they ought not to engage. But what reasons can be given to believe this? Why think partisan behaviour is anything but a virtue for governments if it often is a virtue for individuals, associations and corporations?

³³⁶ Text to n 323 for the initial version of this point.

³³⁷ Of course, there is much dispute about what ultimately grounds our having the space to form such attachments. Suffice it to say that the existence of such space is by no means out of bounds even for hard-line utilitarians: our forming such attachments may be the best way to create the most happiness for the most people. Whether the utilitarian view adequately captures the true nature of many attachments cannot be discussed here. For debate, see Scheffler (n 315); Peter Singer, 'Outsiders: our obligations to those beyond our borders' in Chatterjee (ed), *The Ethics of Assistance* (CUP, Cambridge 2004); Kolodny (n 322); Sarah Stroud, 'Permissible Partiality, Projects and Plural Agency' in J Cottingham and B Feltham (eds), *Partiality and Impartiality* (OUP, Oxford 2010).

a) Alternatives

Here is one part of the answer. That partiality is unobjectionably exhibited by friends, associations and corporations is in part a function of the existence of desirable *alternatives* available to those left on the outside. My choosing to strike up a friendship with Bill but not Bob does not mean that Bob, who is a friend of neither of us, suddenly has little chance of making friends. His chances are relatively unchanged, and we can safely assume that he will find friends somewhere at least if he has anything about him which makes him friendship material. Similarly, that our association only represents the interests of, or opens its membership up to, women does not mean that men have no opportunities to join associations, or that there are no associations which represent their interests. We can go to Fathers For Justice even if we cannot join the Women's Institute. And if there is no Men's Institute and we think this is a problem we can set it up.³³⁸

Things are not so simple with governments. If governments act as if they are peculiarly responsible only to some, alternatives can be hard to come by. Why? Because governments frequently act by designing and pushing through *laws*. And as we saw in Chapter 5, officials of the state claim *overriding authority* for the laws that result, which claims can – as the governed well know – generally be made effective.³³⁹ By the lights of the state, one is *bound* to obey the law, whatever the

³³⁸ This is not to say that the criteria for admission to various associations and organisations are beyond scrutiny. Refusing to admit people on bases which are patently discriminatory *is* objectionable, especially when the benefits of insider status are significant. The point in the text is perfectly consistent with this. It is simply that there clearly are many bases on which one can unobjectionably set up partisan associations and organisations, and that this is unobjectionable partly because of the availability of alternatives.

³³⁹ See text to n 286 of ch 5. For argument that the claim to overriding authority is critical to distinguishing states from other entities, see Leslie Green, *The Authority of the State* (Clarendon Press, Oxford 1988).

law may be, and simply on account of its being the law. If one disobeys, or threatens to, the state possesses a variety of tools – from preventive policing to judicially-imposed sanctions – with which it can bring one into line. And one’s legal duties are both presented and enforced as *overriding* – as continuing to bind in the face of the conflicting commands of other loci of power, as well as the conflicting demands of other normative systems.³⁴⁰

The point for present purposes is that this cannot but hinder our finding alternatives outside the law. We can do little to seek justice elsewhere for wrongs done to us by others. The law claims that alternative punishments handed out by alternative courts are crimes,³⁴¹ and there are ready means of punishing those who seek to hand them out. Similarly, we cannot compulsorily tax local citizens to build parks and pavements if the government will not – the law claims that this is also a crime, and punishments await those who seek to compel payment. Rival schemes to keep the lights on cannot be put into place if they conflict with the government scheme. Nor can we institute a better traffic system, unless of course we can persuade the government to change the law.³⁴²

In short, many alternative sources of provision are closed off to us because governments claim overriding authority for the law and back up their claim. The most direct consequence of this is that we are prevented from setting up our own systems to deliver justice or fund public goods. An important indirect consequence

³⁴⁰ Unless of course the law incorporates the relevant normative system on its own terms.

³⁴¹ Commission of which, as the previous paragraph showed, is presented as a breach of an overriding duty.

³⁴² This remains true however much better that traffic system really is: remember, the law presents its authority as overriding the imperatives of morality, prudence and any other set of norms one cares to identify.

is that there is unlikely to be an alternative *around* if the government fails – people are unlikely to have developed the capacity to keep things running when the government has always done so to the exclusion of all others.³⁴³ Nor, of course, can we use *another* set of laws to regulate our lives. Try pointing to such norms to justify or excuse breaking the laws of the government. One will be arrested and convicted all the same.

These remarks imply that there are two features of government which are relevant to the existence of alternatives, and which comprise what I will call the ‘anti-alternatives’ feature of government. First, each government is, under ordinary circumstances, *the* government of a particular territorial jurisdiction. Its writ runs over the entire jurisdiction, and that of no other government does so. Hence my above remark that no other set of laws will help one – one is stuck with the government one has, and there is no alternative. Second, many of the laws designed and pushed through by government are claimed to override, and enforced as if they override, other proposals in the relevant domain, however wise those proposals may be and however morally sound. The result, as we saw, is that developed alternatives are likely to be scarce, while those which do exist in breach of the law are liable to being dismantled.

Now this may not be a problem if government provides justice for all and promotes genuine public goods. But if the government acts as though it is the partisan of a sub-group – as though it is out for ‘us’ but not ‘them’ – the consequences of the anti-alternatives feature are likely to be pernicious. Those

³⁴³ How would we cope if the government announced today that all the traffic lights were out of action, and that it was not offering an alternative?

denied justice because this is thought to serve insiders may have nowhere else to turn. Those whose communities are neglected are unlikely to be able to rely solely on philanthropy and get little from the public purse.³⁴⁴ No-one else is likely to be around to keep the lights on. As these examples show, there is much of moral moment at stake here and there may be nowhere else to get it. So if governments are doing justice for the rich but not the poor, building pavements and parks in the suburbs but not the city, those who are left out may fall far and fall hard.

This begins to help us distinguish governmental partisanship from the other types of partisanship mentioned above. These latter types are less pernicious because those left out have available alternatives. But it is in the nature of government to *deny* people alternatives by prohibiting those alternatives and preventing them from doing what they wish to do. Of course, sometimes governments do attempt to foster competition among rival providers: privatization of public services is only the most obvious example. But this is always something governments do on *their own terms*, and to which they set the limits.³⁴⁵ When these limits, or the privatization itself, are *themselves* pieces of partisanship, it is little comfort to hear that such government-licensed alternatives exist. Those left on the outside are hardly better off as a result.

³⁴⁴ Which points to another important point: even if governments do not expressly prohibit alternatives, their provision of a system which they make clear is designed for public use (eg taxation) tends to inhibit others from setting up alternatives (e.g. an organised system of voluntary contributions). After all, if the government is doing it, surely we can all get on with our own lives? In short, there is a division of labour which modern government tends to create, and which becomes pernicious where partisanship arises.

³⁴⁵ After all, government has (by its own lights) overriding authority to prevent these alternatives if it chooses to exercise it. This point was also made in Chapter 5 (text to n 291).

b) Evasion

This is only half the picture. Governments do not just prevent many alternatives. They also compulsorily impose their authority on all those within their territory, subjecting each to alleged duties to obey, and enforcing breach of those duties through the enforcement mechanisms of the law. There are two points here. One need not *opt-in* – one is compulsorily subjected to governmental authority from the moment one enters the territory (by birth or by travel) without needing to do anything more. And one cannot *opt-out* of these duties without leaving altogether, something one can only do if there is another state willing to take one. These features comprise what I will call the ‘anti-evasion’ feature of government: it is made extremely difficult to evade the duties imposed by government through law.

Needless to say, no exception is made for those of the governed whom partisan governments disregard. To return to earlier examples, suspects may be denied justice by a government waging a war on crime in the name of victims, but they cannot *for that reason* opt-out of the duty to take the punishment, and they will be tracked down and made to suffer punishment if they try to escape. Immigrants may receive no assistance from government while others are preferred for jobs and housing. But they cannot refrain from paying the taxes which fund this partisanship as a result. To refuse payment is a crime, and the money will be taken by force if necessary.

The contrast with associations and friendships is stark. Unless I choose to join up, I am not subjected to duties imposed by associations which (by their own admission) neither promote my agenda nor acknowledge responsibilities to do so. So

I need not worry too much about such associations acknowledging special responsibilities to their members even if I am disqualified from joining.³⁴⁶ And if I can and do join, but the duties imposed are unwelcome, I can usually leave without uprooting my life. Similarly, I am subject to no special obligations on account of the friendships which others form, so I need not worry too much about other people treating *their* friends with special concern. Government is different. If *government* sees itself as especially responsible only to some of its subjects, the outsiders are nonetheless bound by the duties it imposes through law. As part of the governed, they cannot decide whether to opt-in, for they are bound automatically. And it may be exceedingly difficult to opt-out – one must leave the jurisdiction entirely, with all of the costs that can entail.³⁴⁷

Let us recap. Our task is to explain why governments should not be politically partisan. Why should government not treat some of the governed as *outsiders*: persons whose agenda it need not promote, and to whom it has little responsibility? I have begun to answer by pointing to two features of government which I have called the ‘anti-alternatives’ and ‘anti-evasion’ features.³⁴⁸ In short,

³⁴⁶ As mentioned at n 338 above, there is certainly a worry if the said associations disqualify persons from joining on discriminatory grounds. But this only shows that there is a general worry about discrimination, not that all partisan associations are objectionable because they leave people out. In reply, it may be argued that I am overlooking the influence which any partial association can have *through government* to the disadvantage of outsiders. But the difference is important. First, these associations cannot themselves impose legal duties, but must (at least ordinarily) get government on side to do so. Second, the possibility of alternatives allows us to exert pressure in the opposite direction.

³⁴⁷ Hume was perhaps the first to point out that this is no trivial matter, a point overlooked by those, like Locke, who assumed that not uprooting one’s entire life and all one has ever known could somehow amount to tacit consent to the authority of government. See David Hume, ‘Of the Original Contract’, in Eugene Miller (ed), *David Hume: Essays Moral, Political And Literary* (Liberty Classics, Indianapolis 1985).

³⁴⁸ In a related discussion Thomas Nagel points to the ‘special involvement of the will that is inseparable from membership in a political society’ to explain why demands of distributive justice which do not apply elsewhere, are applicable to the state in its relations with the governed. According to Nagel this involvement is (in part) a consequence of the fact that state action is taken in the name of its people and aspires to command their acceptance: see

governments deny those they treat as outsiders alternative sources of provision, while continuing to impose duties upon them, and while making those duties and their enforcement extremely difficult to avoid.³⁴⁹

Before continuing, it is worth noticing that the worry about governments stems in particular from the normative situation which governments create *through the law*. First, legal norms impose duties on the governed evasion of which is extremely difficult. Many are bound from birth and would experience great hardship if they sought to escape. The duties imposed by friendship, association and corporation are entered freely, and can usually be escaped easily enough if one is being ignored or attacked. Second, the legal norms which governments create tend to prevent alternatives by overriding, or inhibiting the growth of, conflicting ways of doing things. In contrast, each friendship, association or corporation leaves room for many more, and need not even attempt to override the claims of other instances of the same, or any other, genus.

Let us return to the argument. Our next task is to explain in greater detail why the two features of government I have mentioned make it *objectionable* for government to be politically partisan. My answer is that the features in question give

Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113. Is this a third feature needed to explain why the state should avoid the partisan? I doubt it. A state which makes clear that it is indifferent to the plight of some of its members cannot be said to thereby free itself from the need to act impartially, despite the fact that it (transparently) makes no effort to command acceptance, or to act in the name of (all) its people. *Pace* Nagel, oppression is no less unjust simply because the oppressors are open about what they are.

³⁴⁹ It is worth noting that other actors often thought to be obliged to refrain from partisanship create a similar normative environment. Parents and teachers of children are both often reprimanded if they show signs of having a favourite child, and of promoting the agenda of these favourites to the exclusion of others. Our analysis suggests an explanation: both parents and teachers claim authority over children, and routinely make it effective. This authority is made difficult to evade, and alternatives are prevented. If I am right, these are just the features which also make partisan behaviour objectionable in the governmental sphere.

partisanship of this kind morally pernicious consequences, and help make its constituent actions morally wrongful. I have already hinted at both these points when discussing examples. The task of the following paragraphs is to develop the point.

c) The Case Against Partisanship

Start with alternatives. It is clear that the ‘anti-alternatives’ feature is liable to cause important interests of some to go unmet when their government is the partisan of others. As we have seen, governments claim authority to set up, and effectively set up, schemes of provision in all manner of important areas of everyday life. There are traffic lights to keep the roads safe; rubbish trucks to take away the litter; courts to deliver justice; police to keep the streets safe. In many such areas, no rival schemes are permitted. In others, nothing else has had the chance to develop. If the government schemes are partisan, outsiders may have nothing to fall back on. They not only lose much of value. They are also likely to suffer a significant reduction in their well-being. They will be unable to find justice when they are denied it by the courts. They will be unable to access important communal goods – be it housing, safe streets, ambulances which turn up – goods on which, as Chapter 5 showed, they will often come to depend.³⁵⁰

Now consider evasion. The ‘anti-evasion’ feature will lead to outsiders being *wronged* by political partisanship. After all, escape may be extremely difficult, and alleged duties will be imposed and enforced which make the government’s partisanship a reality. Many such duties are not intrinsically objectionable: there is

³⁵⁰ Text to n 278 of ch 5.

nothing necessarily wrong with criminal punishment or taxation. But outsiders are at risk of suffering disproportionate punishment *just because* this (allegedly) promotes the agenda of insiders, and *despite* the fact that no impartial reason can justify this result. Similarly, outsiders are at risk of having to pay for governmental provision which serves *only* those for whom the government acts as agent, when all the impartial reasons point in the opposite direction. In both cases it is difficult to see how this allocation of duty is anything but unjust. While many more examples could be given, the point, I hope, is clear: because governmental acts so often resist evasion, those on the wrong end of their partisan imposition will often have cause for complaint.

Now it may be said that the type of objection I just made is not special to political *partisanship* as opposed to various other forms of political malfeasance. And it is of course true that the fact that partisan government action is sometimes intrinsically wrongful (it is unjust), or has pernicious consequences (it leaves people without housing or water) doesn't tell us a great deal about what distinguishes it from *other* political aberrations. Drawing such distinctions, however, was not the point of my discussion. The point was to help explain why political partisanship on the part of government is so much more troubling than the partisan behaviour of various other actors. Nor does my case against political partisanship rest here. As I will now argue, such partisanship is peculiarly objectionable for an additional reason: because it deals out a particular *insult* to those left on the outside.³⁵¹

³⁵¹ This is not to say that anyone will *feel* insulted, though, for reasons given below, it is highly likely that those who have their eyes opened to governmental partisanship *will* feel insulted by it. It is rather to suppose that governmental partisanship is insulting to outsiders as a matter of fact. This is so even if the government has spun or concealed things sufficiently to insulate itself against negative reactions of the relevant kind.

Why is this so? It is so because those treated as outsiders are still subjected by the government which so treats them to alleged – and effectively enforced – duties of various sorts.³⁵² As a result, *they* apparently have obligations to obey the government's laws, even while *government* behaves as if it owes them nothing much at all. Most importantly, this failure of reciprocity is no accident. In the cases with which we are concerned, the government *deliberately* does little for the outsiders. After all, they are outsiders, and there are insiders to serve. All the while, the government continues to claim authority over these outsiders, and continues to punish them if they have the temerity to rebel: to act as if the government's refusal to behave as though they are owed much of anything, could ever serve to imperil the authority it claims.

The implications of all this are threefold. First, the legitimacy of governmental authority over outsiders is imperilled. Doing as government demands and submitting to the authority of laws and policies crafted in *disregard* of one's plight can rarely (if ever) provide one with any kind of service. To the extent that legitimate authority *depends* on the service provided, a partisan government has questionable authority over those it so disregards.³⁵³

Second, notice that as far as the government is concerned, its authority over outsiders *survives* its (intentional) failure to promote their agenda, and its apparent refusal to acknowledge any responsibility to do so. It continues to claim to impose

³⁵² To repeat: the contrast drawn here between insiders and outsiders is not a contrast between those within and without the jurisdiction. Rather it is a contrast between those for whom the government does and does not appear to act as agent.

³⁵³ At least to the extent of its disregard. While I cannot defend the view here, the idea that the legitimacy of an authority hinges on the service it provides continues to seem to me to be eminently plausible. For perhaps the most sophisticated development of the idea, see Raz (n 324) 23-105. For searching criticism, see Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal' (2010) 120 *Ethics* 257.

duties on them and continues to punish them if they disobey. That this occurs can only suggest that in the government's view the outsiders in question simply *don't matter much* – after all, no service is required in order *for them* to be morally obligated. To be treated as of such insignificance – as one who can be legitimately ordered around even as one is disregarded – is an insult in its own right. And we can see the point just as well another way. A partisan government deliberately denies its outsiders access to alternatives, while knowingly failing to itself promote their agenda, and implicitly denying a responsibility to do more. If their lives were of much import, the government would surely be morally obliged to either buck up its ideas or allow access to alternatives. The fact that it does neither – knowingly leaving them on the outside – implies that in its view, these people matter little. My claim here is that they are insulted accordingly.

While the above point focuses on how outsiders are treated in *absolute terms*, my final point focuses on their treatment *relative to others*. Remember that the laws imposed by partisan government are designed to promote the agenda of those who *do matter* – the privileged insider class which the government treats as principal to its agent. Pursuant to such laws those *outside* that class will be subjected to various legal duties in service of insiders. This is so even though the applicable impartial reasons favour action which serves *outsiders* in addition or instead. And this suggests that in the government's eyes, those outside the privileged class are nothing more than second-class citizens – persons who can legitimately be bossed around for the sake of those on the inside. While their own agenda is of little consequence, such outsiders are available to be burdened when this will promote the agenda of the privileged class. By relegating people to this second-class status partisan government adds a second wave of insult to its governmental behaviour.

Not only do some matter little. They are also acceptably imposed upon for the sake of those who matter more.³⁵⁴

d) The Case for Non-Partisan Government

This is the heart of the case against political partisanship in government. However it is worth noticing a further argument against partisan government behaviour. This argument derives not from the *downside* of such partisanship, but from the *upside* of government eschewing partisanship and conforming to applicable impartial reasons. In summary, the argument is this: when governments do a good job of conforming to impartial reasons they provide a reliable *backstop* that a partisan government would not (or would not reliably) provide. Such backstopping is of great value for reasons discussed below, such that the impartiality which produces it is a political virtue.³⁵⁵ Because political partisanship is liable to deprive some of valuable backstopping, we have a further reason for governments not to be political partisans.

To see how the argument goes, consider the following: why do we need a backstop, and what needs backstopping? The answer is that we need a backstop because of the cracks left by the many forms of valuable partiality exhibited by individuals and by groups in their private and social affairs. We are members of families, friendships, marriages, unions, places of work, clubs and teams. These

³⁵⁴ Again, my claim is *not* that there are never impartial reasons which count in favour of helping some groups and not others: see the text to n 324 for the initial version of this point. It is rather that partisan governments treat some people as though they just matter more to government. Even when impartial reasons point towards acting for outsiders either in addition or instead, such a government will still favour its insiders. It is this which gives rise to the conclusion drawn in the text.

³⁵⁵ The suggestion that impartiality is such a virtue has been explored at length by Brian Barry, in the context of his development of a theory of distributive justice. See Brian Barry, *Justice as Impartiality* (OUP, Oxford 1995). I discuss some contrasts between Barry's view of the virtue and mine, when discussing the virtue of justice in Chapter 7 (text to 443).

memberships are a source of innumerable goods which we often take for granted, and, as we saw above, such memberships are often partisan.³⁵⁶ The worry here is that all of these groups can malfunction or disappear often through no fault of one's own. When this happens one *may* be able to rely on other partial actors who make it their business to help people in precisely one's situation. But one may not be so lucky. There may be little hope of getting help from the various other partial agents at work in the vicinity, who have their own families, marriages, unions, clubs and teams. In short, one may fall through the cracks left between the many partisan connections being made and unmade around one, leaving one in dire straits if no-one steps in.

An impartial government is an invaluable backstop for those who find themselves in such a predicament. Such a government will promote the agenda of the needy or the vulnerable, regardless of who is needy or vulnerable at a particular point in time.³⁵⁷ In contrast, a partisan government is one which leaves some people out, and if those outsiders have no-one else – if they have slipped through the cracks of what we might call 'private partiality' – they may be left well and truly out in the cold. The backstopping feature – the ready provision of governmental goods to those who slip through the cracks – thus amounts to an important service, one which a partisan government would not uniformly provide. In fact, the service is doubly important. For it also helps strengthen the moral case *for* private partiality itself, the great value of which we have already repeatedly encountered. How so? By ensuring

³⁵⁶ Text to n 335.

³⁵⁷ I assume governments have strong impartial reasons to do such things, but my claims do not depend on it. An impartial libertarian government which merely protects libertarian rights still provides a backstop of sorts: it guarantees one's rights if one wishes to invoke them, regardless of who one is. It remains true that this is a thinner backstop than that provided by a government which offers a fully-fledged welfare state on an impartial basis. I focus on examples closer to the latter type in what follows.

that the negative consequences of such partiality are minimised: that those who miss out cannot fall too far.

Here is another way to see the point. Anyone with friends and family, or who is a member of a club or association, knows how valuable certain forms of partiality are, and I have sought at no stage to suggest otherwise. We have seen that such forms of partiality do not have the ‘anti-alternatives’ feature which provides part of the case against governmental partisanship.³⁵⁸ However, some people *will* still find themselves without families to look after them, without unions to put their employers straight, without work or charitable giving which allows them to meet their needs. Such people have slipped through the cracks – they lack the forms of partial support on which most of us rely.

A partisan government (one which only pushes the agenda of the well-to-do, or of big business over the little guy) may do nothing for these people. They may be its outsiders. But an impartial state is liable to help cushion the fall: to attend to reasons derived solely from its tie to each of the governed – reasons to care for the vulnerable or meet urgent needs, irrespective of *who* it is that is vulnerable or needy. This helps explain the value of political impartiality – the case for its place among the political virtues. But it also helps make the case against political partisanship. For such partisanship robs the governed of a much-needed backstop. And in taking this away, a partisan government not only leaves people out in the cold. As I explained two paragraphs ago, it also weakens the moral case for our each pursuing

³⁵⁸ This is even true of family, at least for most adults. One can expand one’s family, or form relationships which serve as functional equivalents, thus finding different ways to access the goods in question. This is often not an option when governmental provision falls through: governments regularly prevent precisely such moves, or allow them only on their own terms.

that measure of private partiality which is of such value to us all, by making the consequences of that partiality all the more pernicious for the unfortunate.

I have made much of the damage which might be done by governmental partiality, but we should notice that governments often have internal resources they can use to limit that damage. For in truth, modern government is far from monolithic. Any modern government is made up of numerous institutions, all comprised of their own moving parts, and many of which are capable of frustrating the designs of others. Efficiency fiends are liable to see in this a gross failing of modernity: the inability of modern bureaucracy to work effectively when confronted with the rapid development and increasing complexity of modern society. One gets local government hindering central government; the courts getting in the way of the executive; the environment ministry clashing with the transport ministry; petty officials refusing to transmit the latest initiative to schools, police and hospitals. If only, say the efficiency fiends, everyone could get on the same page. Government would be able to do so much more.

Once we see the threat of political partisanship, we have a cautionary tale for those who propound such views. For the capacity of government to frustrate itself will, on this picture, often be a blessing: it ensures that partisan forces within government can be contained, just as long as other, countervailing forces exist in the right place at the right time. It ensures, for instance, that the partiality of a few on high cannot easily transmit itself through government without meeting resistance. It is true, of course, that a price may well be paid in efficiency, and this price may be high when committed, able and impartial politicians are on hand with ideas aplenty. But the price may well be worth paying to prevent toxic partiality from spreading

through government at less propitious moments.³⁵⁹ If I am right, we may be better off with a governmental structure which lends itself *less* to the rapid percolation of everything put forward, and *more* to limited, interstitial changes, each of which must prove itself repeatedly to proliferate. Such a structure may be exactly what is required when the stakes are so high – and partisanship such a risk – whatever efficiency fiends have to say about it. To the extent that modern states are indeed less than monolithic, we may at least say this for them: they may well have the resources to contain the worst of the politically partisan.³⁶⁰

Now an objector may claim that the discussion of the last two sub-sections only helps to show that my entire discussion has begged the question. They may say that one cannot establish the pernicious nature of political partisanship without considering whether there are good reasons *in favour* of partisan government, as well as the reasons *against* which I have discussed. These reasons would either prevent partisan actions from being wrongful, or justify any wrongs which are committed. That such reasons exist is precisely what the political partisan implicitly claims. By assuming that such reasons do not exist I simply beg the question.

Not so fast. The question we are answering is whether, in light of the many contexts in which the partisan is eminently valuable, there are good reasons for those occupying government to eschew it. My argument has been that on account of

³⁵⁹ The idea that state power should be dispersed among various different agencies, and that this guards against the damaging misuse of power, is of course an idea with a venerable history. The point here is simply that this applies within, as well as across, the various branches of government. For a classic account, see Charles de Montesquieu, *The Spirit of the Laws* (CUP, Cambridge 1989) Book 9.

³⁶⁰ I phrase this conclusion hesitantly for a reason: such a system creates its own potential for partisanship, most obviously by giving those at different points on the institutional ladder power to frustrate others in partisan-inspired ways. The worries about partisanship are, for this reason alone, of no little urgency even in less than monolithic states.

particular features of government, governmental partisanship *is* objectionable in a way that individual, associational, or corporate partisanship is not. The governmental type is peculiarly liable to harm, wrong and insult people, and this explains why governments do not have the space for partisan behaviour from which individuals, associations and corporations benefit. The point for present purposes is that this is all true even if there *are* reasons for government to be partisan.³⁶¹ One is still prevented from accessing alternative means which would allow one to flourish. One still has the burdens of an insider imposed on one without any of the compensating benefits. That all this attends political partisanship is what puts governments in a special position, and makes their partisanship of particular concern. It is this latter conclusion which I have sought to establish here.

4. Government in Particular

The previous sections offered my defence of the *Anti-Partisan Principle*. That defence invoked various features of government not shared by other actors. But I have yet to compare government to actors which rival it in power or ambition. To make the case that the avoidance of partisanship has special salience for governments, the following paragraphs compare government with two such comparators.

³⁶¹ What might those reasons be? It might be claimed that some people will identify with a partisan government, or with its partisan actions, and that this is of intrinsic or instrumental value. As to the former, identification with institutions or actions which are morally pernicious is surely anything but intrinsically valuable and should rather be regretted. So if I am right and political partisanship *is* morally pernicious there is no intrinsic value here. As to instrumental value, it may be said that partisanship, and identification with it, is politically necessary to keep otherwise just governments in power, or to maintain support for otherwise valuable institutions. In reply: 1) if, as considered at n 329 above, government has agent-relative duties not to (intentionally) wrong or insult people, it cannot point to the instrumental benefits in question to justify its actions; 2) even if there are no such duties, the justice of the government and value of the institutions is anyway undercut each time they are used in a partisan manner, weakening what is anyway an unpredictable instrumental case.

Let us begin, as we did in Chapter 5, with a corporation such as Microsoft. Is there something objectionable about Microsoft promoting the particular agenda of its consumers or its shareholders? I think not. First, there are alternatives to Microsoft. If one needs software, but one's needs are ignored at Microsoft, there is Apple and there is Linux. Second, the very fact that one can survive *without* a computer is of relevance. By choosing to step away from Microsoft, one can avoid the duties it imposes. Consumers have a duty not to give Microsoft products free of charge to their friends. But I can opt not to subject myself to this duty by not buying Microsoft. I simply do not have this easy option with government.

Notice that these differences continue to apply even if Microsoft decides to sell products only to those born within the government's territory – if, in other words, its criteria for consumption become morally dubious. It remains the case that a government acting as the partisan of that same group is differently placed. Microsoft doesn't impose duties on those who choose (and people can freely choose) to avoid its products. In contrast, governments won't leave you alone if you avoid the roads. You probably can't. But even if you do, you still owe government taxes. Nor should we forget that there is always Apple.

Nonetheless, there are ways in which Microsoft could become more like government. Does this refute my claim that government is specially placed in respect of partisan behaviour? Not so. First, when we reflect on the ways in which Microsoft might become more governmental, we only see that this makes partisanship by Microsoft more objectionable. Second, there is *still* more reason for government to refrain from partisanship than there is for mighty corporations, even those which come to resemble government in certain respects. Both these points

support, rather than refute, my claim that it is especially pressing that *governments* avoid partisan acts.

Take a hypothetical corporation, which I will call Supersoft. Supersoft might become a monopoly, and we might come to live in a world in which all depend on computers – say for communication (the telephone is long forgotten) and for food (all the shops, let's say, have switched to the internet). We are, as a result, all dependent on Supersoft. Now let us assume that Supersoft is a partisan actor. It produces products for, and provides post-consumption services to, certain groups only – either indigenous persons, or citizens whose image coheres with its super products. It seems to me that Supersoft's partisanship is more objectionable than Microsoft's. Why? Because some people who (*ex hypothesi*) desperately need Supersoft's wares won't have them, and they have no alternatives. It is now less defensible to leave people out.

Still, Supersoft is not government. On the story told above, Supersoft is not *forbidding* alternative sources of computer software as the government forbids alternative punishments. Supersoft has simply become the only option for whatever reason. That government actively forbids alternatives *increases* the strength of the government's reasons not to leave some on the outside looking in. So let us change the example again. Let us say that Supersoft works tirelessly to crush all competitors, using intimidation and force where necessary. This again seems to increase the force of the reasons not to leave some out. Supersoft has *deliberately* created dependency upon its services, and so owes more to those whom that dependency harms.

There is still a difference. I may choose to try and survive without Supersoft, and without interacting with those who use Supersoft products. Supersoft will then accept that if I do this, its authority over its products is irrelevant to me – it will seek to impose no duties upon me. Governments do not accept that those who eschew their provision escape the reach of the law. Even those who live remote lives are bound by duties to pay taxes and refrain from crime. We cannot so easily sever our connection with the duties imposed by government as we can with the duties imposed by Supersoft. So let us change the example one more time. Imagine it is now legally compulsory to purchase Supersoft's wares, and that we need them for the reasons given above (food, communication). But imagine the services needed to install necessary updates are only available to those with the desired image. In this scenario we have duties to pay Supersoft which we cannot opt out of, and to which we do not choose to opt in. Alternatives are prevented. Aren't we now on a par with government? Isn't partisan behaviour equally obnoxious here?

Not so. The entire Supersoft edifice depends on government in a way in which the governmental edifice does not depend on Supersoft. Supersoft can be disbanded by law. It can be made optional to purchase their software, and alternatives can be funded by government. Government can stop it selling only to certain agents. In short, the government *allows* Supersoft to be partisan, and *amplifies* the effect of its partisanship by making consumption legally compulsory. So government must bear some of the responsibility for what Supersoft does, whereas Supersoft bears no responsibility for what government does. This is an important asymmetry. There is governmental partisanship *involved in* Supersoft's

being allowed to act as a partisan.³⁶² This is true of every other objectionably partisan organisation within the jurisdiction. This gives governments extra reasons not to be partisan: if *they* are not, it is harder for anyone *else* to be.

This discussion is not a mere exercise in academic speculation. It shows us that governments rarely sit on a par even with corporations of enormous power when partisan behaviour is at issue. Nor do they sit on a par with corporations which become more like governments in various respects, at least as long as they do not become governments themselves.³⁶³ There may be good reasons for corporations of the type I have described not to be partisan. There are stronger reasons for governments to refrain from the same.

So much for corporations. Let us now compare government with the gangster-run protection racket introduced in Chapter 5. Do the gangsters also have reasons not to be partisan? I will argue that while many of the reasons not to be partisan do apply to such protection rackets, extra reasons exist for government to refrain from being the same.

³⁶² It might be suggested that this overlooks extremely weak governments, which cannot be said to *allow* corporations to monopolise provision, but simply lack the power to stop them doing so. Imagine a corporation with complete control over the water supply to a remote area. It might cut off all alternative supplies and leave no realistic chance of moving elsewhere. It is true that in such a case the asymmetry mentioned in the text is lacking. Where such a governmental vacuum exists, the partisanship of those who fill it may be just as troublesome as that of a government, albeit across what is likely to be a fairly narrow domain. Even here though, we should not overlook the fact that unlike corporations, governments make certain claims to authority which make their partisanship of particular concern. I discuss this further in the text that follows.

³⁶³ What if the government is the mere puppet of a corporation, which is the real engine behind partisan laws and policies? I think such a situation only confirms the importance of government. Why is the corporation bothering to act through government instead of using its own power to act as partisan? Because government does regulate, and can effectively regulate, so many enormously consequential domains. Its partisanship (whether in the service of corporations or of others) is thus of the greatest importance, something our puppeteer of a corporation knows only too well.

First, a government may well provide some *alternative* to the racket, and other rackets may do so too. If one racket is only offering protection to the Italians, the government may still provide rival services. And one may be able to pay another racket to keep one's lights on. If this is so, the 'anti-alternatives' features is not present. But this is evidently contingent, so imagine one all-powerful protection racket which destroys its rivals, and a feeble government which can do nothing for those who don't pay up. There are thus no alternatives. Nor can one evade handing over one's money. One will be tracked down and beaten up if one tries. So in this respect, the racket is more like a government than Microsoft or early versions of Supersoft – there are no alternatives, and the gangsters do not let one try to escape by severing one's connection with them.

So wherein lies the difference? One important difference lies in the racket's *claims* or lack thereof. The racket does not claim authority over the populace. It just says that if you don't pay, you'll suffer. Governments do claim authority. And they claim it over those treated as outsiders as much as insiders. Yet this claim to authority is manifestly dubious in respect of those treated as outsiders. The government acts as the servant of the *insiders*, but pays little attention to its *outsiders* (or actively attacks them) while all the while claiming to impose duties on them and backing this up with force. As I claimed earlier, a government which treats groups of the governed this way must forfeit (at least part of) its authority over those groups. True enough, if we were dealing with second-class citizens available for the use of a privileged group, authority might be thought to survive such shabby treatment. But this only shows how much of an *insult* it is to maintain a claim to authority while treating some as members of an outsider group. The upshot here is this: the claims which are distinctive of government provide *extra reasons* for

governments not to be politically partisan. People are especially insulted by *governmental* partisan behaviour: by the claim that they have moral duties to obey those who treat them so poorly.

We should also notice a general point about modern governments. Many such governments claim that they acknowledge both a duty to act for, and responsibilities to, *all* of the governed. They do so in speeches, policy documents, interviews and manifestos. This encourages those citizens to *expect* that government will live up to this claim, and, in many cases, to *depend* on this occurring.³⁶⁴ They may bring claims to court, or wait patiently for an ambulance. They might have done otherwise but for the governmental rhetoric under discussion. Yet outsiders who do this may well find their legal claim goes nowhere, or that the ambulance never arrives. This provides yet another reason for government to avoid treating some as outsiders. Such people will be disappointed when they discover the claim with which this paragraph began to be mere pretense. Many of them will be harmed when they depend on its truth. Gangsters, at least, make no such claims.³⁶⁵ If this is right, governments again have particular reasons not to be partisan, reasons which do not apply in equal measure to gangster-run protection rackets.

5. Conclusion

This chapter has sought to vindicate the *Anti-Partisan Principle*. If its claims are sound, government should not be political partisans when it comes to their relations

³⁶⁴ These expectations and dependencies were the focus of Chapter 5.

³⁶⁵ Though they may claim that anyone who pays will be immune from violence only to beat some up anyway. There is still a difference: on account of their being (and presenting themselves as) gangsters, people are much less likely to give their claims to trustworthiness much weight. They are generally more likely to do so when the claims are those of governments, who characteristically do present themselves as trustworthy entities.

with the governed. They should refrain from leaving out some of the governed and governing for *us* but not for *them*. While others operating within the jurisdiction – individuals, associations and corporations, for example – can often be unobjectionably partisan, there are features of government which mean that it is differently placed. If I am right, even all-powerful gangsters, or super-corporations, rarely have the reasons which governments have. The case against *governmental* partisanship is particularly strong.

My argument has not been that this is a mysterious political responsibility derived only from within the practice of politics.³⁶⁶ Rather it has been that once we attend to the claims of governments and the legal norms they create and enforce, we see that there are significant *moral* reasons why governments should not be political partisans. Governments who create outsiders hit those outsiders particularly hard. They deny them alternatives. They impose duties which can only be escaped with great difficulty. My argument was that people are harmed and wronged by such partisanship: left without needed goods which they cannot get elsewhere; insulted when they are subjected to alleged moral duties, while the benefits of their subjection redound to a privileged insider class. Instead, I argued, government should be *non-partisan*: it should provide the valuable back-stop which helps justify our private partiality, and which ensures that those who fall through the cracks do not fall too far.

If this is right, those in government have special reasons to avoid *qua* government the partisanship which is very often a virtue in many other spheres of

³⁶⁶ The argument, then, is not that of a so-called realist, for whom government is not subject to moral responsibilities derived from outside the practice of politics itself. For one such realist argument, see Bernard Williams, *In the Beginning Was the Deed* (Princeton University Press, Princeton 2005).

life. No doubt it is difficult to avoid the mistake of allowing valuable partiality to seep insidiously into the life of government. But no-one said good government would be easy. It has been the argument of this paper that avoiding political partisanship is one important challenge which those who form governments take on, and must meet.

CHAPTER 7

CRIMINALISATION, PREJUDGMENT AND THE MISUSE OF POWER

1. Introduction

The course of the last two chapters moved the thesis away from the topic of criminalisation, and offered a defence of two principles applicable to governance in all its forms. In the course of the present chapter, we turn back to criminalisation: to the form of governance with which this thesis is principally concerned.³⁶⁷ When discussing criminalisation in previous chapters, I evaluated the impact of certain types of offence on the role of the courts and the powers of law-enforcement agents.³⁶⁸ My criticism invoked moral principles of particular application to these domains, such as principles of procedural justice and the Rule of Law, without further expanding the evaluative horizons of the discussion. The focus of the present chapter is somewhat different. It investigates the underlying logic of the moves made by offence-creators when they create offences with the features discussed in Chapters 2 and 3.³⁶⁹ It then argues that those who govern by making such moves not

³⁶⁷ In describing criminalisation as a form of governance, I do not mean to suggest that only legislatures or executive organs have the power to criminalise. Judges also have influence, either over the shape or the very existence of criminal offences. To the extent that they do, they too have powers of governance – powers to impose legal duties on the populace, which duties will be followed up by enforcement agents, and will, eventually, lead to criminal cases appearing back in court.

³⁶⁸ See Chapter 2 and Chapter 3 respectively.

³⁶⁹ More precisely: when they create offences with the features discussed in Chapter 2, which offences are also tokens of the type of offence discussed in Chapter 3. For clarification of the relationship between ouster and empowering offences, see n 132 of ch 3. While ouster offences *do* always empower in the sense described in Chapter 3, the reverse is not true. There are empowering offences which do not oust the courts – including those I called type-2 empowering offences (see text to n 138 of ch 3 for a definition). These latter offences are not the focus here.

only create procedural injustice and violate the Rule of Law; they also bring their governance into conflict with the principles discussed in Chapters 5 and 6. In the process, the insights gained in the preceding two chapters are brought to bear on the topic with which this thesis began: the use and misuse of the power to add to the criminal law.

The chapter is structured as follows. I begin by reiterating two points already made in Chapter 2: first, that certain uses of the power to criminalise are designed to increase the *conviction rate* for particular classes of wrongdoer; second, that in some such cases the very *shape* of the resulting offences – the elements of which they are comprised – is a function of this perceived need to secure more such convictions. Of course, convicting more wrongdoers may be a laudable goal.³⁷⁰ But the argument here is that to pursue such prosecutorial targets via alterations in the *substantive* law is pernicious for reasons which this thesis has yet to fully explore. In short, if one wishes to convict more rapists or more terrorists, watering down the definition of rape and terrorism is precisely the wrong way to do it. For in doing so one cannot but work on the basis that the classes *suspected* of terrorism will be the classes *guilty of it*.³⁷¹ And in creating an offence which ensures that this statistical assumption will not be tested, offence-creators cannot help *prejudging* those suspect classes: after all, the path to their conviction has been pre-emptively smoothed out, in advance of

³⁷⁰ I leave open whether it is. This seems to me to depend a great deal on matters such as the nature of the wrong, how burdensome conviction and any punishment will be, and whether future wrongs are more or less likely as a consequence. For similarly pluralistic thoughts about criminal punishment, see John Gardner, *Offences and Defences* (OUP, Oxford 2007) 213-216.

³⁷¹ Or, at least, that those classes will substantially overlap. As the context suggests, one who is ‘guilty’ as I use the term here is not someone who has been found to have committed an offence in law, but someone who has in fact committed a (moral) wrong.

(and without) any court accepting that the suspicion in question is anything more than that.³⁷²

In the second half of the chapter, I attempt to explain what is wrong with governing through offences of the type just described – through what I will here call *prejudicial offences*.³⁷³ I argue first that when such offences are created, a judgment about the guilt of the suspect classes is made *en masse*, and insulated from individualised consideration in the courts. The golden thread of the criminal law thus begins to run out. I argue second that a state which governs through prejudicial offences shows itself to be *pro tanto* undeserving of trust. I conclude by arguing that to create such offences is politically partisan.

In making these latter arguments I am led to make a number of connections between the principles defended in Chapters 5 and 6, and two more familiar virtues discussed in Chapters 2 and 3, namely the virtue of justice and the virtue of legality.³⁷⁴ I argue that observing the Rule of Law is critical to the state deserving popular trust, and that prejudicial offences eat away at the Rule of Law and therefore at the state's deservingness. I further argue that the demand that government not be politically partisan is *itself* a demand of justice. If I am right that prejudicial criminalisation is politically partisan, it is also unjust.

³⁷² Clearly my use of the term 'suspect classes' is not the use to which that term is put in US constitutional law. By 'suspect classes' I simply mean 'the classes of people suspected by officials of certain wrongs'. As in Chapter 3, when I use the word 'wrong' *simpliciter* in this chapter, I mean to refer to moral wrongs not (mere) legal wrongs.

³⁷³ As these introductory remarks imply, ouster offences and (some) type-1 empowering offences are tokens of this type of offence. My criticisms of the creation of prejudicial offences must thus be added to those already amassed in respect of these tokens. Because these criticisms do not apply to other empowering offences (including the 'type-2' variety), the justificatory bar is not as high for the latter offences. It remains to be shown that it can be cleared.

³⁷⁴ As in Chapter 3, I use the terms 'virtue of legality' and 'Rule of Law' interchangeably.

The connections drawn here are important in helping to explain why the principles discussed in Chapters 5 and 6 are rarely mentioned in discussions of political morality. My claim is that the principles I have defended often *do* play their part in such discussions, but do so in the guise of certain requirements of legality and justice. We worry endlessly about the virtue of legality *partly because* its observance contributes to the state's deserving trust. We worry endlessly about the requirements of justice *partly because* these include the requirement that government not be politically partisan. Understanding the principles discussed in Chapters 5 and 6, I thus suggest, helps us better understand those virtues with which we are already familiar.

A final point. If the argument of this chapter succeeds we have yet another set of means by which offence-creators should not achieve their objectives – specifically the objective of bringing about the conviction, and punishment, of certain types of wrongdoer. They should not do so by pre-judging the suspect classes, and creating offences which build that pre-judgment into the fabric of the criminal law. As I have repeatedly noted, whether this ultimately *misuses* the power to criminalise depends on whether such moves can be justified. This chapter thus considers one oft-mentioned justification, which I will call *the argument from security*. The conclusion here is that this argument will rarely succeed, and that the creation of prejudicial offences will (barring better arguments) often be a misuse of the power to criminalise.

2. Criminalisation and Prejudgment

a) Preliminaries

Why create a criminal offence? No doubt the answer varies enormously, and no doubt many answers could be given in respect of any single offence. This section re-examines one set of reasons first introduced in Chapter 2.³⁷⁵ Before proceeding to this examination, it is worth conceding that it will often be difficult to provide *evidence* of offence-creators' reasons for action. True, those responsible for crafting a given offence will occasionally make those reasons explicit, be it in command papers, in press releases or otherwise.³⁷⁶ Often however one is left to draw inferences based on the shape of an offence, as well as the purposes it could plausibly be thought to serve. There is nothing objectionable about such inferences, as long as we recognise that this is what they are. We should not withdraw from scrutinising the reasoning of those who govern us just because they choose – as Chapter 4 showed they may well choose – to keep that reasoning firmly under wraps.

The reasoning which is the focus of this section can be set out in two steps: first, a problem is identified by an offence-creator; second, a particular solution is adopted. The problem is the (suspected) existence of a class who either are now, or will later be, guilty of wrongdoing taken to warrant criminal conviction, combined with the belief that these persons have not been, and will not be, convicted in large enough numbers. The offence-creator's *prosecutorial target* – the rate of convictions

³⁷⁵ Text to n 46 of ch 2.

³⁷⁶ Examples of this were encountered in Chapter 2 (text to n 52 – n 58). The assumption that such reasons can sensibly be said to exist was defended in Chapter 1 (text to n 28).

which should obtain among this class of wrongdoers – will, if the offence-creator is right, fail to be met.

While many options present themselves, the offence-creators' chosen solution is to change the *substantive* criminal law – it is to create or modify a criminal offence which, it is believed, will increase the conviction rate among the class of wrongdoer in question. Now it may be that no existing offence captured the relevant wrongdoing, that this explains the lack of convictions, and that a new offence is thus being created to achieve just this. I will not address such cases here. There is nothing in itself objectionable about such a move, without which the criminal law could scarcely have come to exist.

Instead, consider those cases where the offence-definition which is created is *watered down* relative to the wrong in respect of which prosecutorial targets are not being met. In the cases in which I am interested, it is this watering down which is the mechanism designed to increase the conviction rate among the relevant class. By a *watered down* offence-definition, I mean to refer to one from which elements of the relevant wrong have been removed. Perhaps the wrong in respect of which more convictions are sought is 'distributing harmful substances'. Rather than prohibiting this, the offence-creator prohibits 'taking harmful substances out of their original packaging', because many people doing the former are also thought to do the latter. Clearly, the offence-definition bears little resemblance to the wrong. But this is no accident: watering down the prohibition will make it much easier to convict distributors because little need be proved against them.³⁷⁷ While many non-

³⁷⁷ And because more distributors are likely to plead guilty when they see that they have little chance of securing an acquittal at trial.

distributors will also become offenders as a result, the conviction rate for distributors will increase as long as it is distributors whom law-enforcement agents bring to court. That such an increase obtain is precisely what is thought to justify the watering down.

I have already acknowledged that we encountered this reasoning in Chapter 2, and it may thus be asked why I have set it out at length here. My response is that as well as being subject to the objections discussed previously, such criminalisation harbours a further (fatal) flaw: it prejudges those classes who are *suspected* of certain wrongs, by setting up the criminal law on the assumption that they can safely be assumed to be *guilty* of those wrongs. It is, in this sense, *prejudicial* criminalisation. It is the task of the following paragraphs to defend this claim.

To understand my argument here, the key question is this: why think that watering down an offence-definition – by writing elements of wrongdoing *out* of that definition – will increase the conviction rate *for the wrongdoing with which one started*?³⁷⁸ How will one know that defendants who wind up in court are guilty of that wrongdoing if it is no part of the relevant offence, such that no evidence of it need ever be provided in order to convict?

The answer is that one will think one's watered down creation capable of increasing the conviction rate if one makes a single central assumption: if one creates one's offence having already made up one's mind that the class of persons *suspected* of wrongdoing by police and prosecutors, and against whom some watered down offence *can* be proved, is, or substantially overlaps with, the class of

³⁷⁸ Where to increase the conviction rate is to convict more wrongdoers than one would if one did not water down.

persons *guilty* of that wrongdoing.³⁷⁹ To put it another way: one will believe that watering down helps meet one's prosecutorial target only if one acts on the assumption that the *suspect* classes are, or will generally be, the *guilty* classes.³⁸⁰ If one assumes *this*, one can water down one's offence-definition without concern. Sure, the result is that in court, where only the watered down offence is at issue, there need be no *proof* that the defendant is actually one of the wrongdoers at which one is taking aim, rather than a casualty of definitional watering down.³⁸¹ But if we can safely assume that suspects are wrongdoers we needn't worry: convicting the former is tantamount to convicting the latter.³⁸²

Now it may be doubted that those who water down *must* act on the basis that suspected wrongdoers can safely be assumed to be actual wrongdoers. But if we take the initial goal as read (namely, increasing the conviction rate among those who have committed a given wrong) this is a conclusion which is hard to avoid.³⁸³ It is

³⁷⁹ In what follows I sometimes drop the 'overlap' qualification. I do not mean to thereby suggest that offence-creators who water down are assuming that *every* suspect will be a genuine wrongdoer. What they must be assuming – at least leaving aside the kind of scenario discussed at n 383 below – is that a significant number of the class of suspects will be rightly suspected. This kind of statistical assumption is what I mean to capture by attributing to offence-creators the belief that the suspect classes are also the guilty classes.

³⁸⁰ To repeat: by guilty here I mean guilty only in the (extra-legal) sense of having committed a moral wrong.

³⁸¹ I discussed the likelihood of such casualties existing in section 7 of Chapter 2 (text to n 72 – n 81).

³⁸² While I focus in what follows on contested trials, a similar point can be made in respect of guilty pleas. To revert to our earlier example: why think that when D pleads guilty to repackaging, one has thereby attained the conviction of a distributor? Might D not simply be accepting that he did indeed repackage? One will think otherwise only if one is willing to assume that suspects are wrongdoers – if convicting the former is taken to be tantamount to convicting the latter.

³⁸³ Here is one possibility: offence-creators may simply *not care* about the likelihood of the convicted being wrongdoers in truth. They may simply be confident that their watered down offence will result in (almost) everyone who engages in the prohibited behaviour being convicted, some of whom will surely be the wrongdoers they are after. I assume for the purposes of this chapter that we are *not* dealing with a case of such gross legislative indifference – that offence-creators and law-makers continue to aim at convicting all and only those guilty of doing wrong.

only *if* prosecutorial suspicions can be assumed to be accurate that proving one's watered down offence (and *not* the wrongdoing of which defendants are suspected) amounts to increasing the conviction rate among the wrongdoers one is seeking to convict. If those suspicions are inaccurate, then, to return to our earlier example, prohibiting the innocuous act of repackaging substances gets one nowhere in convicting distributors. Only if it is safe to assume that those *suspected* of distribution (and who can be shown to have repackaged) will also be distributors in truth, does convicting pursuant to the repackaging offence increase the conviction rate for distribution.

What, you may ask, is the problem with all this? Here is an initial explanation. When the assumption that the suspect classes will be the guilty classes leads to the watering down of the criminal law, the suspect classes are, in effect, being *pre-judged*. How so? Consider the following three observations. First, notice that whether the suspect classes are wrongdoers or not is no longer something determined in any court. After all, the offence with which defendants are charged necessarily omits elements of their alleged wrongdoing, such that those elements will be no part of any criminal trial.³⁸⁴ Whether each suspected wrongdoer is an actual wrongdoer is thus no longer something which can be scrutinised case by case, individual by individual. Such individualised consideration is characteristic of the proceedings of the criminal courts – each defendant is judged separately, his case considered on its particular merits. But this kind of attention is no longer being given to the question of whether the suspect classes are guilty of the wrongdoing of

³⁸⁴ This latter claim was defended at length in Chapter 2. Note one key assumption, namely that judges do not simply have discretion to read elements at will into an offence-definition. That this discretion not exist is itself a core demand of the Rule of Law, which helps bolster the ability of offence-definitions to provide (decent) guidance to officials and ordinary citizens.

which they are suspected, which wrongdoing justifies convicting them in the offence-creators' eyes.³⁸⁵ The locus of judgment upon this wrong thus shifts *forward* away from the courts, who can only adjudicate on the watered down offence.³⁸⁶

Second, notice that the assumption that the suspect classes *are* wrongdoers has already been built into the criminal law at the offence-creation stage. This may sound fantastical. But consider what we have already seen: it is only *because* offence-creators are willing to make assumptions about the suspect classes *en masse* that it makes sense to water down offence-definitions in the first place. Only *if* offence-creators have already made up their mind that suspected wrongdoers (against whom a watered down offence can be proved) will also be those who have actually committed wrongs, can watering down sensibly be thought to increase the conviction rate for the latter class. The upshot of this observation is crucial. We saw above that the courts are no longer making a judgment as to whether suspected wrongdoers are actual wrongdoers. What we have just seen is that this judgment is instead being made *by offence-creators*, who create watered down offences on the basis that whoever the suspects turn out to be they can safely be assumed to be guilty. The locus of judgment upon wrongdoing thus shifts from the courtroom to the offence-creating arena, and the individualised judgments of the courts are replaced with the generalised pre-judgments of offence-creators.³⁸⁷

³⁸⁵ I am not, then, concerned with those offences with the following feature: that while commission might not have been wrongful prior to or independently of the law, it is now thought to justify conviction of defendants. Such examples were set aside in the text to n 48 of ch 2 and are set aside here.

³⁸⁶ A point made at greater length in the text to n 62 of ch 2.

³⁸⁷ This may well sound overstated. But consider that the offence-definition on which courts do adjudicate, is one which exists in the form it does precisely because this form is thought likely to help increase the conviction rate. That *this* must be proved in court is scant

Third and finally, notice that the offence-creator's pre-judgment is *insulated* by the watering down of its creation: it is protected from the challenges the suspect classes might otherwise bring in court. It follows that the pre-judgment has been built into the criminal *process* as well. To see this we need only recall that because the criminal trial is confined to proving the watered down offence, no amount of arguing that the defendant is no wrongdoer will avail him. As a result, the offence-creator's pre-judgment is the only judgment on wrongdoing there is.³⁸⁸ It is all but unchallengeable prior to conviction.

In combination, these three points support the following conclusion: whoever the suspect classes are – be they concentrated in particular social or ethnic groups, or drawn from society more broadly – they are pre-judged by those who water down the criminal law in order to meet their prosecutorial targets. Rather than having courts judge whether conviction is justified, offence-creators decide in advance that the suspect classes will be classes of wrongdoers. They shape the criminal law accordingly, and do not allow their judgment to be challenged.³⁸⁹

In the context of this thesis as a whole, the point to notice is this: once we see this type of prejudicial reasoning at work in the offence-creating process, much that

consolation to the suspect classes, and can only be explained by the kind of pre-judgment I outline in the text.

³⁸⁸ Of course, there remains the judgment that X is a suspect in the first place, but the point here is that once X becomes part of the suspect classes, no further judgment is made (pre-conviction) on whether the suspicion in question is anything more than that. Why not? Because offence-creators already decided that suspects could safely be assumed to be guilty of the wrong which justifies convicting them. The reply that this wrong *can* be considered at the sentencing stage was considered (and rejected) at n 62 of ch 2.

³⁸⁹ Nor does the objection only hold in respect of those who plead not guilty. The very fact that D cannot challenge the assumption that he is a distributor creates an obvious incentive to plead guilty to repackaging. Can we take such a plea to reliably indicate that D is guilty of distribution? Surely not. Unless, of course, we think we already know D is a distributor, such that our having pressured D into pleading guilty *to a different act entirely* can simply be ignored when deciding whether the conviction rate for distribution has gone up. It is precisely this kind of pre-judgment I am concerned to attack here.

we discussed in previous chapters falls regrettably into place. In Chapter 3, we discussed offences which increase the power of law-enforcement agents by removing various obstacles to successful prosecution. In Chapter 2, we discussed offences which effectively stop the courts getting in the way. Here, we make further sense of these moves from the perspective of offence-creators. For we see that they are but the natural moves to make in respect of those about whom one has already made up one's mind.³⁹⁰

b) The Golden Thread

One important upshot of the argument to this point is the following. As is well known, in *Woolmington v The Director of Public Prosecutions*,³⁹¹ Viscount Sankey LC famously claimed that a 'golden thread' runs through English criminal law, providing that at any criminal trial it is 'the duty of the prosecution to prove the prisoner's guilt'.³⁹² Where this duty is concerned 'no attempt to whittle it down can be entertained'.³⁹³ Reginald Woolmington was tried for the murder of his wife. Swift J claimed at trial that once it had been shown that the victim died at the defendant's hands, it was for the defendant to 'show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime'.³⁹⁴ This whittling down of the duty was rejected. The defendant was not already to be labelled a criminal in advance of proof of his guilt. Woolmington's

³⁹⁰ This section should not be read as claiming that officials are aware of the underlying logic I have described. I am not, in other words, claiming that officials are *consciously* pre-judging the suspect classes, merely that such a pre-judgment – whether or not consciously made – is the only thing which makes sense of their creative acts.

³⁹¹ [1935] AC 462 (HL).

³⁹² *Woolmington* (n 391) 481.

³⁹³ *Woolmington* (n 391) 482.

³⁹⁴ *Woolmington* (n 391) 473 (emphasis added).

guilt consisted in his having brought about the death of his wife ‘with a malicious intention’.³⁹⁵ It was this guilt which the prosecution faced the burden of proving in each and every case, *before* the law would treat the defendant as a criminal.

There has been much debate over what the duty in *Woolmington* requires where the burden of proof is concerned. This debate *presupposes* a collection of offence elements, and asks where the burden of proving the elements of that offence should lie. Does every element of the offence have to be proved by the prosecution? Can an evidential burden lie on the defendant? Can the defendant bear a legal burden, requiring proof by the defendant on the balance of probabilities?³⁹⁶ I will not enter into this debate here.³⁹⁷

Instead, my concern is with a prior question: with the particular collection of elements which is to make up the offence-definition in the first place, and with *Woolmington*’s implications (if any) for the moral evaluation of decisions about which elements to include.³⁹⁸ We have seen that to create a prejudicial offence is to create an offence-definition which will increase the conviction rate among suspected wrongdoers because it *omits* elements of the wrong in question from the offence-definition. We just saw that as a result, no court will determine whether the

³⁹⁵ *Woolmington* (n 391) 481.

³⁹⁶ For discussion of some of these issues, see Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 *International Journal of Evidence and Proof* 241.

³⁹⁷ The idea that *Woolmington* might have substantive implications extending beyond its implications for the allocation of burdens of proof, is an idea which has been considered by a number of authors. For a discussion from which I have gained much, see Victor Tadros and Stephen Tierney, ‘The Presumption of Innocence and the Human Rights Act’ (2004) 67 *MLR* 402.

³⁹⁸ As is made clear in the text which follows, the primary concern is thus not with what any given court should decide, and thus not with how the judicial duty outlined in *Woolmington* should be developed. Rather it is with the lessons of *Woolmington* for the morality of offence-creation. The thought is that *Woolmington* hints at an important point about how offences should (not) be shaped by their creators, a point which I attempt to unpack in what follows.

defendant actually *is* one of the wrongdoers whom the offence exists to convict. This is despite it being *that* wrongdoing (rather than satisfaction of the offence-definition *per se*) which is taken by the offence-creator to *justify* the defendant's presence, and any potential conviction.³⁹⁹ The upshot is that those *suspected* of wrongdoing will end up being convicted *because* of that suspicion, *without* the suspicion's veracity ever coming up in any court.

What does any of this have to do with *Woolmington*? Recall that in canonical form, the duty identified by Viscount Sankey is a duty to 'prove the guilt of the prisoner'. Imagine we are the offence-creator. We decree that at trial for our watered down offence, the prosecution still has to prove each of its elements. However, the reason we created the offence was to convict those we thought guilty of *wrongdoing*. By watering down we *excluded* that wrongdoing from the composition of the offence-definition, having been content to assume suspects would be guilty of it, just as long as the watered down offence could be proved against them. It follows that the wrongdoing of each suspect brought to trial will not be in issue before the courts, and *will not be proved by the prosecution*. It is certainly true that the prosecution will prove that the defendant did *something*, and this may make it more likely that the defendant is a wrongdoer, or it may be entirely unrelated. But the crucial point is that the guilt taken to justify the existence of the offence, and all the convictions under it, is irrelevant at trial - no evidence of it need ever be adduced in order to convict.

³⁹⁹ The defendant would not be in court just for doing whatever the watered down offence prohibits.

We have repeatedly seen that the *intention* of offence-creators who water down is to increase the conviction rate among those guilty of wrongdoing. But rather than this being a function of prosecutors proving the guilt of each suspected wrongdoer individually, it is now a function of offence-creators having pre-judged the suspect classes *en masse*.⁴⁰⁰ Having removed case-by-case consideration of wrongdoing from the courts, those who water down can only sincerely claim to have met their prosecutorial target if the suspect classes can safely be lumped together as wrongdoers in truth. That *Woolmington* stands against this, insisting that the prosecution prove the guilt taken to justify each defendant's conviction, illuminates a much-overlooked part of the value of the golden thread. Rather than standing only against reverse onus clauses which shift the burden of proof onto defendants, it also stands against the creation of offences of the following kind: those which take judgments about that which justifies conviction away from the individualised attention of the courts. It stands firmly against the phenomenon I have discussed here: against the generalised, class-based prejudgment of offence-creators coming to replace the individualised, case-by-case judgment of criminal courts.⁴⁰¹

Now it might be said that I have not so much expanded on *Woolmington* as abandoned it. It might be said first that *Woolmington* concerns only 'formal' proof of guilt: all that is required is that the elements of the offence be proved by the

⁴⁰⁰ As in the previous section, my focus here is on cases where the defendant contests the case against him. We have already come across an independent worry about prejudicial offences, namely that the opportunity to contest that case in the first place is eroded in substance by such offences: see n 88 of ch 2. For broader discussion of the effect the substantive law may have on the opportunity to plead not guilty, see Douglas Husak, *Overcriminalization* (OUP, Oxford 2008) 22-24.

⁴⁰¹ Which, to repeat, is not to say that the *courts* should interpret *Woolmington* as in conflict with prejudicial offences, nor to say that any court has done so to date. Rather the point is that the concern which lies behind the judicial duty – a concern with law-makers freeing the state from the need to prove those elements which justify it in convicting – is a concern equally applicable to prejudicial offences.

prosecution, whatever they may be. It might be said second that even if this hurdle can be surmounted, Viscount Sankey LC made clear that the duty he identified can be derogated from by statute and so has no implications for *legislative* criminalisation. Both objections should be rejected. The second overlooks the fact that the role of a judge gives him or her good reasons to defer to the will of elected legislators. This constrains the extension judges can give to duties they recognise as binding. Those without such a role have no such reasons and are free to extend genuine duties as far as the concerns of such duties take them. This brings us back to the first objection. Do the concerns of the *Woolmington* duty only extend to proof of ‘formal’ guilt? No doubt such proof is of great value in many cases. But in those cases where the legislature waters down the elements of an offence, separating them from the wrongdoing which justifies conviction, the value of the ‘formal’ duty can be vanishingly small. In the cases under consideration, the defendant cannot even shift the burden of proving the justifying wrong onto the prosecution. Whether he is guilty of *that* is simply irrelevant. It would be odd indeed if Viscount Sankey LC’s golden thread were to say nothing about such cases – cases where the demand that each and every defendant be proved guilty has been evidently sidestepped, by those who long since made up their minds about the guilt of the suspect classes.⁴⁰²

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As Tadros and Tierney point out, if the commission of elements A, B and C justifies convicting defendants, the creation of an offence-definition containing all three elements is a predictable response. No-one would doubt that a *Woolmington*-inspired concern is raised if the legal burden of proving C is placed on the defendant. When we are concerned with the moral duties of offence-creators, it is surely a mistake to conclude that the objection suddenly disappears if C is written out of the offence-definition entirely. See Tadros and Tierney (n 397).

3. Prejudgment and Trust

The previous section began to explain the worrisome nature of prejudicial criminalisation. In this section, I argue that a state which criminalises in this way is *pro tanto* undeserving of trust. Such criminalisation makes the criminal law something to *fear* rather than something to *depend on*: something which deprives people of security even as they strive to conform to the law, rather than something which provides them with security when they do so.⁴⁰³ Accordingly, I argue, a state which creates and maintains such a system of law does not, at least *pro tanto*, deserve the trust of its people.

There are three steps to the argument. First, I identify two types of security – that offered by the virtue of legality, and that offered by *Woolmington's* golden thread – which are crucial to the state deserving the trust of its people. Second, I argue that both forms of security are shattered by prejudicial criminalisation, which makes the criminal law a threat to security which is rightly feared. Third, I argue that it follows from steps one and two that a state which criminalises in a prejudicial manner is one which is *pro tanto* undeserving of trust: it is a state which takes away security crucial to that deservingness. It is worth noting that in making this argument we draw our first connection between the different moral principles discussed in this thesis. If I am right, it is part of the moral importance of upholding the virtue of legality that it helps make the state deserving of its people's trust.

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More precisely: something which, whatever its contribution to increasing security, also deprives legal subjects of a form of security which the law would otherwise have provided, and which deprives those subjects of security *not* because they wilfully break the law or negligently ignore its proscriptions, but in spite of their sincere efforts to discover its requirements and conform.

a) Legality and Trust

It was a theme of Chapter 5 that dependence on the state is, for most or all, a pervasive feature of life. People depend for safe streets, secure possessions, a clean environment and a functioning traffic system. In all these cases and more, states use the *law* to achieve what they are depended on to achieve. More specifically, they use the criminal law. Thus there are offences relating to violence, to property, to pollution and to driving. Part of the goal of these offences is to *reduce* violence, theft, pollution and traffic accidents, and thus deliver the goods mentioned at the start of this paragraph. In short, we depend on the state using the criminal law and criminal justice system to attain various reductive goals, and on it thereby providing us with many valuable forms of security – that of our person, our possessions, our environment and much more besides.

Once we see this dependency for what it is, we should also see that it necessarily brings another along with it. For it is not only true that we depend on criminal laws for the types of security just mentioned. It is also the case that those to whom each criminal offence potentially *applies* cannot but also depend on the security provided by the virtue of *legality*.⁴⁰⁴ Why so? Because *without* legality, potential offenders cannot plan out their lives secure in the knowledge that they are not committing offences and thereby rendering themselves liable to arrest and

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Because one can instantiate the ideal of legality to varying degrees, one may ask what degree of instantiation I claim to be relevant in this section. Here it is worth drawing on an observation made by Lon Fuller, who claimed that perfect instantiation of the ideal, if even possible, is a matter of aspiration not of duty. What *is* needed is some threshold level of observance of the ideal, without which legal subjects have no real security against the law. I take compliance with the ideal to amount to reaching this threshold level of observance, and do not concern myself with hitting the heights of aspiration here. See Lon Fuller, *The Morality of Law* (rev edn Yale University Press, New Haven 1969) 5-15.

prosecution.⁴⁰⁵ They do not have the (practical) guidance upon which such security depends.⁴⁰⁶ It follows that it is only *with* legality that legal subjects have not only the various forms of security which *individual* criminal laws provide, but also much-needed security against stumbling unwittingly into crime, and making themselves susceptible to the various damaging consequences of criminality.

Once we see this, we can also see that the dependency of potential offenders on legality is a form of master-dependency – a dependency which results from any attempt to achieve governmental goals through the criminal law. This no doubt sounds like an overstatement. But we just saw that for any criminal offence, those to whom the offence potentially applies are dependent on that offence not failing by the lights of legality, and depriving them of security against criminal liability. Such failure, when it does occur, leaves potential offenders unable (at least without undue difficulty) to use the law as a reliable guide to the boundaries of the legally permissible. It thus leaves them liable to being *ambushed* by the criminal law – with all the consequences this entails – as they go about making plans, and trying to live their lives.

Let us unpack this a little. The above mention of the security provided by the observance of legality should come as no surprise. As Chapter 3 briefly argued, upholding legality offers the populace a measure of security from the state because two facts then obtain.⁴⁰⁷ First, the law is a reliable practical guide – people can find out what the law requires of them (the epistemic desideratum) and ensure that they do just that (the practical desideratum). Second, the government does not break (or

⁴⁰⁵ At least not without undue difficulty – see text to n 110 of ch 3.

⁴⁰⁶ For the connection between the Rule of Law and guidance see text to n 106 – n 117 of ch 3.

⁴⁰⁷ Text to n 163 of ch 3.

place itself beyond) the law such that legal norms fail to restrict it. Rather the state governs through, and not outside, the powers granted by law.⁴⁰⁸ The upshot of these two facts is the following. Because of the practical desideratum and the restriction law places on the state, there are certain domains in which the state disables itself from interfering with one's plans – where one has a degree of *independence* from state and government. Because of the epistemic desideratum, one can find out what these domains are and *secure* one's independence from the state by remaining within them.⁴⁰⁹ This secures the plans one makes within those domains, as well as the way of life which those plans constitute, against state-sponsored interference. This security – securing the shaping of one's life against law and state – is of value in all but the most heinously restrictive of legal systems.⁴¹⁰

If what I have said so far is correct, we are *dependent* on offence-creators choosing to create offences which are conducive to legality being maintained: to our being offered reliable guidance by the norms of the criminal law. One may say that my use of 'we' is misleading. Only potential offenders, one may say, are so dependent. But if we think we fall outside this group, we are fooling ourselves. We cannot realistically avoid being potential offenders without leaving the jurisdiction altogether. We almost all drive, and need to know how to do so legally. We all buy and possess things, and need to know what we cannot buy and possess if we are to

⁴⁰⁸ Of course, there will be mistakes. But to the extent that the ideal of legality is observed, there will be relatively few, and there will be no *deliberate* governmental violation of, or self-exclusion from, the law.

⁴⁰⁹ The idea of domains of independence is drawn from the work of Nigel Simmonds. I differ somewhat from Simmonds in that I locate the value of such domains less in the existence of independence itself, and more in the consequent ability of persons to securely shape their lives within the relevant domains. For Simmonds' treatment, see NE Simmonds, *Law as a Moral Idea* (OUP, Oxford 2007). For my own discussion, see text to n 166 – n 174 of ch 3.

⁴¹⁰ This qualification is needed because security from laws which regulate almost every minute detail of life is hardly worth having. I set aside such systems here.

avoid crime. We all create waste, and need to know how we can legally dispose of it. If the virtue of legality is not observed, *our* lives are liable to ambush, because *we* are liable to arrest, prosecution, conviction and punishment, which liability it is unduly difficult to discover and/or avoid. In short, we lack the security which comes from the observance of the Rule of Law.

Now it follows from all this that we have reason to worry greatly about the behaviour of whoever possesses the power to criminalise. If offence-creators either lack the competence to create laws which observe legality, or are not wholehearted about doing so, the security against crime upon which we all depend is likely to be jeopardised.⁴¹¹ And because this is so, we have strong reason to expect offence-creators to *be* wholehearted and competent – we are extremely *vulnerable* to failures of legality which may otherwise result, and which expose even those reasonably diligent about the law to the risk of its ambush.

It is worth noting that if the argument of Chapter 3 is correct, criminal offences which *do* fail by legality's lights are by no means lacking in English law.⁴¹² This cannot but imply that offence-creators in at least this system are far from competent and wholehearted about legality.⁴¹³ They have, after all, repeatedly failed to uphold the ideal. Barring justification, it follows that they *do not* live up to the normative expectations we reasonably have of them in this context. And as Chapter 5 showed us, this only reveals one thing: that in the criminal law context those

⁴¹¹ You may doubt that wholeheartedness is required, but for an argument that gaps in the kind of mechanism which could substitute are always likely to be found, see text to n 297 of ch 5.

⁴¹² Text to n 135 and n 141 of ch 3.

⁴¹³ Though the implication may be blocked if there is adequate *justification* for these failures of legality. I consider possible justification in section 4(b) of this chapter.

responsible for offence-creation are either letting us down, or still worse, betraying us. Either way, they do not deserve our trust.⁴¹⁴

There is a sceptical claim worth dealing with before we move on. The sceptic may claim that wholeheartedness and competence are all very well in this context. He may concede that such qualities can produce norms which are designed to guide the governed, instantiating such desiderata as clarity, stability, intelligibility and public availability. But, so the sceptic may claim, the political realities of modern society make all this largely beside the point. The sheer volume of criminal law, the pace of its change, and the variety of areas it covers, all make it highly unlikely that private individuals can know the details of the criminal law and work out how to avoid it. Nor is it realistic to claim that people can get the advice of lawyers so as to secure themselves that way. When the criminal law is at issue such advice invariably comes too late.

The sceptic thus presses the claim that we are doomed to depend on the state for something it cannot provide. But this is too quick. There are several ways to minimise the looming problem of futility. One is to criminalise in a manner which seeks coherence between what we might call the *legal culture* and the *public culture*. I take the public culture to be partly constituted by a set of widely shared beliefs about what is wrongful, and about what warrants the criminal sanction.⁴¹⁵ No doubt these beliefs will be imprecise, and no doubt there are conflicting views, at least at the margins. Nonetheless, there is likely to be some consensus on both a set of core

⁴¹⁴ For the connection between normative expectations and deserving trust, see text to n 276 of ch 5.

⁴¹⁵ This conjunction is necessary once we recognise that in most societies beliefs about wrongfulness do not always translate into beliefs about the appropriateness of criminalisation – lying and adultery are the classic cases.

wrongs which are the legitimate business of the criminal law, and a wide range of behaviour which is not the business of the criminal law at all. To the extent that the legal culture – in this case the prohibitions of the criminal law – attains a measure of coherence with the part of the public culture I just described, the worry about insecurity is lessened. People have the notice they need to avoid crime because the public culture sets the boundaries beyond which the criminal law's writ does not run.

Now the picture is of course not so simple. First, the public culture will be marred by indeterminacy on issues where the criminal law requires an answer. There will most likely be no answer to be found on whether one commits a sexual wrong (which is the business of the criminal law) if one has an honest but unreasonable belief concerning the age or consent of another. There will likely be no answer to be found on where the line is between boisterous antics in a town centre and a public order offence. In other words, while there may be a core wrong in many cases – one which the public culture reliably identifies – there will always be instances at the margins where the law simply has to set the boundaries. And in these cases guidance will be lacking if one relies on the public culture alone.⁴¹⁶

Second, the public culture may contain regrettable omissions which the criminal law should, morally speaking, include within its bounds. Domestic violence or child abuse may be widely seen as private affairs of no concern to the law. But unless we endorse an austere relativism, we will likely agree that there is an overwhelming case for criminalisation whatever the perversities of the public culture. Furthermore, the criminal law is likely to be a valuable tool in *furthering* the

⁴¹⁶ Such guidance may also be lacking in circumstances of great diversity, in which moral disagreement, as well as disagreement on the proper purview of the criminal law, may threaten to reduce the part of the public culture I am discussing to vanishing point.

educative effort to mark this conduct out as unacceptable. So we have a compelling case for criminalisation in such cases. But once we criminalise, the guidance of the public culture will again be lacking, leaving the Rule of Law apparently in limbo once more.

This seems to raise the futility scenario all over again. But in both cases there is an answer. To deliver on the Rule of Law, the state must move beyond mere ‘promulgation’ or ‘public availability’ as the relevant desideratum in the context of criminalisation.⁴¹⁷ The contents of the criminal law must rather be actively *publicised*, be it via adverts in newspapers, on television or on the internet; via leaflets posted through people’s doors; or via yet other means which bring the contents of the criminal law *to* people, rather than relying on them going out and finding those contents themselves.⁴¹⁸ This alone, it seems, can guarantee people security against criminal laws the boundaries of which are otherwise destined to remain inaccessible to them. In fact, such publicity allows the criminal law to both offer people security against the law itself, *and* play the educative role hinted at above, by marking out behaviour as unacceptable in the face of a public culture which needs dragging into the light. Such a criminal law would be much more deserving of trust than the one imagined a paragraph ago. Not only could it be depended on to obtain valuable objectives, including improving the lot of those abused behind closed doors; it could also be depended on to offer people security against itself.

⁴¹⁷ I already made remarks to this effect in Chapter 4 in relation to the duty to answer (text to n 202). Here the point is applied to the realisation of the Rule of Law.

⁴¹⁸ Helpful suggestions on how this might be done can be found in Andrew Ashworth, ‘Ignorance of the Criminal Law, and Duties to Avoid it’ (2011) 74 *Modern Law Review* 1, 20-24.

A final point. In the previous section I discussed the golden thread: the demand that the prosecution prove the guilt of the prisoner at every criminal trial. Here, we should note that though the sources of its value are many, one source of the thread's value is its contribution to security, specifically the security which the legal process offers to criminal defendants. By demanding that the prosecution *prove* that the defendant is indeed the guilty party he is accused of being, the golden thread gives defendants the guarantee that they cannot be convicted without a compelling case being made against them on the very issue of said guilt.⁴¹⁹ They are *secured* against being convicted when proof of that guilt is lacking.⁴²⁰ There is an obvious parallel here with the rest of this section. For here we have another way in which one part of the law – here the legal process – secures people against another – here the efforts of legal officials to enforce the law in court against those suspected of crime. While the golden thread runs the length of the law, those efforts cannot succeed without the proof the thread demands. Whenever that thread runs out, the security offered to legal subjects is undermined.

b) Legality and Prejudgment

Let us move onto the next part of the argument. Why is the security provided by the virtue of legality, and that provided by the legal process, undermined by the creation of prejudicial offences? Let us begin with the first type of security. We already saw that when a prejudicial offence is created, the offence-definition is watered down

⁴¹⁹ You may say this is only true if the burden of proof is with the prosecution, but this, of course, is one of the things the golden thread demands.

⁴²⁰ At least if they plead not guilty. But notice that the golden thread may also make such pleas more likely, at least when there is any merit to them. Why so? Because when the thread is not snapped D is secured in a further sense: secured against being pressured into pleading guilty by a watered down offence-definition, which as everyone can see gives D little chance of securing an acquittal.

relative to the wrongdoing for which the offence-creator seeks to obtain convictions. What is important for present purposes is that this watering down tends to extend the scope of the criminal law in unpredictable ways, a point adverted to in different ways in Chapters 3 and 4. To stick for a moment with the example used earlier in this chapter, when the aim is to bring about the conviction of more distributors of the harmful, watering down leads to the prohibition of any act of repackaging. Unless one becomes aware of the existence of the prohibition, one has little reason to believe that this would be a criminal offence.

Now it was a lesson of Chapter 3 that while such moves may increase the power of officials, they create poor *normative* guides for legal subjects:⁴²¹ the offences which result will surely make it easier to convict wrongdoers, but will do so at the cost of telling potential offenders little about what they ought to do.⁴²² It was a further lesson of Chapter 3 that those who set out to facilitate convictions in this way have ready incentives to extend the criminal law's scope *yet further* – after all there are fewer obstacles to conviction the more innocuous and more widely-committed the offending behaviour.⁴²³ Finally it was a lesson of Chapter 4 that at least in contemporary English criminal law, the creation of such offences is highly likely to ambush legal subjects with liability of which they are (defensibly) unaware.⁴²⁴ Why so? Because keeping up with all that is prohibited in such systems is extremely difficult, when many thousands of offences exist and few are widely publicised. When offences prohibit the innocuous, they will by no means cohere

⁴²¹ Text to n 148 of ch 3.

⁴²² What they ought to do, that is, by the lights of those who create criminal offences.

⁴²³ Text to n 160 of ch 3.

⁴²⁴ Text to n 199 of ch 4. If Douglas Husak's work is anything to go by, the same point can be made about US criminal law as well. See Husak (n 400) ch 1.

with the public culture's conception of criminal behaviour.⁴²⁵ Nor is the problem purely epistemic: the more innocuous offence-definitions become, the more onerous it becomes to avoid offending even if one discovers it. The result is that prejudicial offences will offer scant practical guidance to those at risk of offending, because they make it unduly difficult for potential offenders to comply with the law.

The effect of such developments on security should by now be obvious. When offences are hard to avoid ('don't possess dangerous items') and when their content is by no means obvious ('don't take photographs of the police'), securing one's plans against criminality is extremely difficult. I do not deny that it is *possible* to nullify the ambush by devoting oneself to learning the law, and to scrupulously avoiding every innocuous act it prohibits. But it would be a cruel joke for the state to insist that this was a civic obligation – that legal subjects are duty-bound to scour the law-books for prohibitions it refuses to publicise, and to avoid innocuous acts which are part of those subjects' everyday lives.⁴²⁶ One is surely entitled to remain both ignorant and less scrupulous, while pursuing a more fulfilling existence than that. The problem of course is that once one does just this, the prospect of ambush rears its ugly head again.

It may be replied that many of us need not worry about any of this – that we will not be among the classes prosecuted pursuant to such offences, which classes are, after all, only meant to comprise those who have committed genuine moral

⁴²⁵ The first response to the sceptic considered in the previous sub-section is therefore unavailable.

⁴²⁶ The argument that the *state* is duty-bound to ensure that attaining knowledge of the law is not so onerous, and that the state's failure in this regard may undercut the wrongfulness of offending, has been recently pursued by Andrew Ashworth. See Ashworth (n 418) 19-20.

wrongs.⁴²⁷ Alas, such optimism is naïve at best. First, as we saw in Chapter 3, more capacious offence-definitions are likely to lead to more mistakes being made at each stage of the criminal process: after all, little need be established to obtain a conviction, and law-enforcement agents are under great pressure to put suspected wrongdoers where it is thought they belong.⁴²⁸ Second, such increased breadth gives greater latitude to officials to carry through grudges against those they despise without their doing anything which is legally *ultra vires*.⁴²⁹ Third, one may still commit a wrong *in the offence-creator's eyes* without having had any indication that one was doing so. After all, there is no guarantee that such wrongs will feature anywhere in the watered down criminal law, nor cohere with any part of the public culture (assuming there is a single such culture to cohere with in the first place). As a result, even those who strive officiously to avoid wrongdoing are at risk of becoming members of the suspect classes. And we have seen that once one does, one's security against criminal liability is negligible. When prejudicial offences violate legality's most elementary demands, the substantive law offers scant protection to the suspect classes.

Faced with this development, one might be forgiven for turning to the courts for help. If one has been arrested and prosecuted for wrongdoing which one never committed, one might think one could at least demand that the wrongdoing be *proved* in court if one is to be convicted.⁴³⁰ But we have already seen that such

⁴²⁷ Remember: it is upping the conviction rate for such wrongs which justifies creating prejudicial offences.

⁴²⁸ Text to n 178 of ch 3.

⁴²⁹ Text to n 179 of ch 3.

⁴³⁰ One might also hope to be able to rely on a defence of reasonable ignorance of law. But at least in English criminal law, such a defence does not exist. For discussion, see Ashworth (n 418).

hopes will be dashed. For the form of security offered by the golden thread all but disappears when prejudicial offences are the offences in question. As I argued in section 2 of this chapter, the prosecution's duty to prove the guilt of the prisoner may remain in form, but it is deprived of substance when offences are watered down to meet prosecutorial targets.⁴³¹ For such offences not only deprive defendants of the chance to insist that the wrongdoing which justifies their presence in court be *proved*, they also make that wrongdoing irrelevant at trial, such that it cannot even be *considered* by judge and jury as a relevant factor pre-conviction. What the prosecutor *will* have to prove is the watered down offence. But remember this: that offence was only brought into law in the first place in order to try and raise the relevant conviction rate. The security provided by the need to prove *this* can be of very little comfort indeed. Having become a suspect – one of the prejudged – one's prospects are dim indeed.

c) Prejudgment and Trust

Our conclusion should now be clear. A government which creates prejudicial offences is one which drastically undermines the security we have against the criminal law. If one is unlucky enough to become a suspect one has little to secure oneself against this snowballing into arrest, prosecution, conviction and punishment. One can have little confidence that one is not, whatever one's impression, an offender. Lacking guidance from the substantive law, one has little security against having stumbled into crime. And if one wants to assert one's innocence of wrongdoing in court, one is often wasting one's time. When only the watered down need be proved, the criminal process offers little security against conviction.

⁴³¹ Text to n 391 above.

It is no overstatement to say that when one's security is undermined in this manner, the criminal law becomes something for legal subjects to *fear* – a new threat to the planning of one's life which may creep up and ambush one with devastating consequences. One's best hope may well be never to become a suspect. But one has little security against that. And once one does come under suspicion, the absence of security offered by the substantive law is compounded by the absence of security offered by the criminal process.

Now a state which attacks the security of its populace in this way is a state which deprives its populace of security on which, as subsection (a) made clear, they are greatly dependent. The security provided by legality, and by the golden thread is, I argued, of significant value to the planning of people's lives. A state which takes this away cannot be depended on for security against its own officials and its own laws. *Ceteris paribus*, it cannot but be lacking in wholeheartedness and competence where these two forms of security are concerned.⁴³² Yet the form of security in question is a form of security which legal subjects rightly expect the state to provide, such is the threat to their lives which the failure to provide it brings. The examples given in this thesis suggest that consecutive governments in the United Kingdom have failed to live up to these normative expectations. It follows that they are (at least *pro tanto*) undeserving of our trust.⁴³³

⁴³² One may not be able to infer this from the creation of a single prejudicial offence. But the inference is strong when such offences begin to spread through a legal system, something which, as Chapters 3 and 4 suggested, is now the case in English criminal law. As n 413 makes clear, this remains only an inference until the question of possible justification has been addressed.

⁴³³ It may be objected that if depriving us of security in this way is justified (perhaps by improving security overall), our government still deserves our trust. I agree in principle. But I argue in section 4(b) below that no such justification is plausible.

4. Political Partisanship and Prejudgment

The previous section analysed the relationship between prejudicial offences and trust. In this section I draw on the argument of Chapter 6, and defend the claim that the creation of prejudicial offences is politically partisan. I begin by arguing that the *Anti-Partisan Principle* is a principle of *justice*, and distinguish my argument for this conclusion from a related argument given by Brian Barry in his book *Justice as Impartiality*.⁴³⁴ I then argue that, despite appearances, creating a prejudicial offence is a politically partisan move. If I am right that political partisan government is unjust, the move just mentioned is also an instance of injustice.

a) Partisanship as Injustice

We saw in Chapter 2 that in a just situation the right people get the right things.⁴³⁵ People, we might say, get whatever is their due. But how are we to know what is ‘right’ when this word is used as I used it a couple of sentences ago? How do we know, in other words, that *these* things should go to *these* people? Here, the straightforward answer is the correct one: we can only know what justice demands once we know the *right reasons* – the considerations which justify *these* goods being allocated in *this* way between *these* people in *this* context. Should governments distribute social goods on the basis of desert, or need, or entitlement? Should universities admit students on the basis of academic potential alone, or can they give extra weight to an applicant’s disadvantaged background or the generous donations of his parents? Debates about such matters *just are* debates about the right and

⁴³⁴ Brian Barry, *Justice as Impartiality* (OUP, Oxford 1995).

⁴³⁵ Text to n 66 of ch 2.

wrong reasons for allocating the goods in question. They are classic debates about what justice requires in a given case.

Such debates tell us something important about the concept of justice. They tell us that to determine whether justice is being done, we must specify the rational horizons appropriate to the case at hand: we must identify the right reasons, and discount all others. In some cases if we are to do justice ourselves we must *narrow down* our rational horizons. We must identify and act for the right reasons, and only for those reasons.⁴³⁶ This may be hard to do. Some reasons may be relevant to certain types of decisions, but not to others. They may be relevant in some contexts and not others. We may struggle to know whether *this* decision, in *this* context, calls for this form of narrowing or that one. But if we are to do justice, this is our challenge. We must find the rational horizons appropriate to the allocation of the goods at hand in the decisional context which presents itself.

The above paragraphs derive the idea of narrowing down one's rational horizons from the very concept of justice, specifically from the idea that it demands allocation for the right reasons. But the idea was given its most well-known expression by John Rawls in his book *A Theory of Justice* without any such derivation.⁴³⁷ My discussion to this point suggests that the intuitive power of Rawls' famous original position is partly derived from the concept of justice itself. For by putting people behind a veil of ignorance Rawls gives effect to the idea that doing justice – or choosing principles of justice – requires some narrowing down of one's

⁴³⁶ As noted in Chapter 2 (text to n 68) we should not forget that there are some cases where all that matters is that the right people get the right things, and where the decision-maker need not himself advert to any particular reasons. Those checking whether justice was done in such a case *will* still need to find out which reasons make a given distribution right.

⁴³⁷ John Rawls, *A Theory of Justice* (rev edn OUP, Oxford 1999) esp 10-19.

rational horizons: it requires that we screen out some things which *do* provide us with reasons in other decisional contexts and when other goods are at hand.

Of course, Rawls himself did not seek to rely on the concept of justice in support of his famous device, and this no doubt has much to do with the fact that it provides no support for Rawls' own specific form of narrowing, which, after more than three decades, remains highly controversial. Behind the Rawlsian veil of ignorance, one knows nothing of, *inter alia*, one's social class, natural ability or conception of the good.⁴³⁸ One thus cannot treat these as reasons to choose particular principles of justice. Many who disagree with Rawls disagree on precisely this point – they think some of the *right* reasons have been screened out, and that the decision being made in the original position is thus made incorrectly.⁴³⁹ We need not take a position in this debate. Rawls' work nonetheless demonstrates the massive influence of the idea that decisions about justice require some narrowing of one's rational horizons. His ideas continue to dominate much thought about justice in political philosophy.⁴⁴⁰

Nor is distributive justice the only site on which the narrowing idea is prominent. In Chapter 2, my focus was on the justice handed out by *courts* when they decide contentious cases. As I said there, we need not assume court decisions

⁴³⁸ Rawls (n 437) 15-17.

⁴³⁹ This is a key part of some communitarian criticism of Rawls, even though the criticism is often framed as turning on the conception of the person employed. What is really being objected to, it seems to me, is the exclusion of the particular loyalties and commitments of the decision-makers as relevant considerations when principles of justice are being determined. For one such critique, see Michael Sandel, *Liberalism and the Limits of Justice* (CUP, Cambridge 1982).

⁴⁴⁰ So much so that major contributions by the field's leading lights continue to be self-consciously conceived as developments of, or responses to, Rawls' ideas: see eg Martha Nussbaum, *Frontiers of Justice* (Harvard University Press, London 2006); GA Cohen, *Rescuing Justice and Equality* (Harvard University Press, London 2008).

are invariably or even commonly just. But we should notice that their decisions cannot but take the *form* of justice: they cannot but be *allocative* decisions which determine whether the claimant is to win at the defendant's expense, or, in the criminal context, whether the defendant is to lose and be convicted. This gives us reason to hold courts up to the demands of justice: to the demand that they produce just rather than unjust allocations at least all other things being equal.

Of course, this demand is largely empty without knowing more about what justice demands of courts, and we certainly cannot determine that here. But notice a fairly uncontroversial idea, commonly associated with the activities of courts and judges, namely that whatever else justice is, it is in some sense *blind*. In some ways this sounds highly unappealing. Courts need to attend to all of the relevant facts, not be blind to them. They need to be alert to shenanigans by lawyers or their clients which obscure evaluation of those facts. They need to be alert to the relevant legal standards: to the details of the crime or tort of which the defendant stands accused, as well as the relevant rules of procedure and evidence. But notice the stress on 'relevant' here. Judges should have their eyes open when relevant issues are at stake. What they should be *blind* to is the irrelevant. They should narrow their rational horizons so that only certain facts (both legal and extra-legal) are taken to matter. Facts like the defendant's wealth, or his being the son of the judge are, barring special circumstances, irrelevant to judicial decision-making, even though they might be relevant in other contexts and when making other types of decision.⁴⁴¹ If this is right, the demand that justice be blind is, like the Rawlsian veil of ignorance, the demand for a particular narrowing down of rational horizons. It is a demand that

⁴⁴¹ Fatherhood might be highly relevant if the judge's son is one of two people who need help paying off their mortgage, only one of whom the judge can afford to lend money.

certain facts which might be reasons in other contexts and when tackling other types of decision, be screened out of consideration when judges decide cases in court. It is a demand that only the *right reasons* be used to decide who is to get what from the legal process.

What does any of this have to do with political partisanship? It has much to do with it. Recall from Chapter 6 that a politically partisan government is one which acts as if it is the agent of a select group of the governed. This agency relation is satisfied when governmental behaviour cannot be explained by what I called *impartial reasons* (reasons government has prior to, or abstracting from, any particular ties to particular groups of the governed) but is instead best explained by government taking itself to have *partial responsibilities* (responsibilities derived from (perceived) ties to only some of those it governs).⁴⁴² The demand for non-partisan government – the demand of the *Anti-Partisan Principle* – is thus a demand for government which acts for, and only for, impartial reasons. It follows that the objection to political partisanship is an objection from the rational horizons of government. It is an objection to governments *failing* to narrow their horizons sufficiently to screen out partiality which ought to be screened out. In short, it is an argument about what *justice* demands of government. It is an argument that whenever they impose burdens on the governed or grant them benefits, governments should do so only for the *right reasons* – reasons they have as agent of *all* the governed, not just as agent of *some*.

The idea that justice is connected to impartiality is not new. As is well known, Brian Barry developed a theory of justice which he called ‘justice as

⁴⁴² Text to n 320.

impartiality' in a book of the same name.⁴⁴³ But Barry's argument is very different from mine. Early on in his work, Barry draws an important distinction between first-order impartiality and second-order impartiality.⁴⁴⁴ He rejects the idea of first-order impartiality, conceived as the demand that we be impartial in deciding on the right course of action. He points out that there are various moral contexts in which such impartiality is no demand of morality: we can choose to save a loved one instead of a stranger, even if the needs of both are equal, and need not toss a coin.⁴⁴⁵ We can do so on the basis of the special tie we have to our loved ones. Barry instead endorses what he calls second-order impartiality: the demand that we be impartial not in deciding on how to act, but in deciding on the rules and principles of justice we endorse. He takes Thomas Scanlon's contractualist apparatus to be one way (though not the only way) of attaining second-order impartiality. That apparatus is, he says, impartial in the relevant sense, because it demands that our principles be such that no-one motivated to find principles acceptable to others could reasonably reject them. It thus gives every person a veto power of equal weight.⁴⁴⁶

My argument is very different. I am not concerned with the second-order question of how to design principles for society. I *am* concerned with how government should go about deciding how to act, specifically with the *reasons* for which governments may permissibly act. My argument thus operates at what Barry calls the first-order level. Have I not then failed to see what Barry takes to be

⁴⁴³ Barry (n 434).

⁴⁴⁴ Barry (n 434) ch 8.

⁴⁴⁵ Barry (n 434) 13-19.

⁴⁴⁶ It is a further controversial question whether this leads to governmental neutrality between conceptions of the good. That Scanlonian impartiality leads to neutrality is a separate claim made by Barry but of no relevance to the discussion here. For Scanlon's apparatus, see Thomas Scanlon, *What We Owe to Each Other* (Harvard University Press, London 1998).

obvious? Have I not failed to see that partiality of various types is morally desirable, if not morally imperative, at this level? I have not. In fact, I have acknowledged throughout that this is so for friends, parents, team-mates and others.⁴⁴⁷ My contention is that *contra* Barry, there *is* a first-order impartiality which should be sought, but that this impartiality is of limited scope: it does not apply to all actors, and it does not apply in all arenas. Rather, it applies to the actions of *governments* within the limits of the political arena set by the jurisdiction of the state. I thus say nothing about governmental impartiality between all the peoples of the world. I do not claim that the UK government should be impartial between those it governs in the UK and the people of Brazil. And I certainly do not insist on impartiality on the part of private individuals, as if mothers should be impartial between their babies and those of others. I insist only on *governmental* impartiality between *members of the governed*.

My argument for such impartiality draws on special features of government to which Barry does not advert. It draws on what I have called the anti-alternatives and anti-evasion features of government, and on the government's role as a valuable backstop for those who might otherwise be left out in the cold. These features of government, I argued, provide strong reason for governments to be impartial, at least in the specific sense given to the word in Chapter 6.⁴⁴⁸ And this specific sense of the word is not unimportant. My argument is not for political neutrality as opposed to perfectionism, nor for moral universalism as opposed to nationalism or communitarianism. The argument is simply that government should not act as if it is the agent of particular people or groups, to the disregard of others whom it continues

⁴⁴⁷ See eg text to n 333 of ch 6.

⁴⁴⁸ Text to n 320 of ch 6.

to govern. The impartiality which results, at Barry's first-order level, is the demand of justice I have defended. No more and no less.

b) Partisanship and Prejudgment

Let us return to prejudicial offences. As the examples discussed in Chapters 2 and 3 illustrate, such offences certainly do not *appear* to be partisan on first sight.⁴⁴⁹ On the face of it, they simply prohibit behaviour whoever commits it, just like most other criminal offences. Thus certain actions (teenage sexual activity, attendance at terrorist training) or utterances (glorification of rebels, self-serving deception) are made criminal, with punishments attached. What we saw in section 2 of this chapter is that appearances can be misleading: that the true aims of these offences sit beneath the watered down surface. Such offences are only ever supposed to bring about the conviction of *some* of those who offend – those who have committed certain moral wrongs – on the assumption that this occurs if a larger proportion of suspected wrongdoers is convicted. Because this assumption is taken to justify watering down the offence-definition, it is not an assumption suspects can challenge in the criminal courts.

Now this immediately shows that prejudicial offences create a *divide* between different groups of the populace: between the *suspect classes* – comprised of presumed wrongdoers whom the law is shaped to convict – and the *privileged classes* – comprised of the remainder who are to benefit from these very convictions. I have already argued at length that the former are pre-judged by offence-creators as

⁴⁴⁹ See eg text to n 135 and n 141 of ch 3.

a class.⁴⁵⁰ An assumption that the suspect classes are guilty classes not only explains the *substance* of the offence which will be used to pursue the former, it also results in their facing a very different criminal *process*: in their being denied the individualised judgment of the courts in respect of the very suspicions taken to warrant their conviction.

The privileged classes, on the other hand, are situated very differently. They are those thought to constitute the law-abiding majority – those *not* suspected of the wrongdoing at which a prejudicial offence takes aim, be it manipulation of the young, incitement to violence, or participation in a terrorist plot. They are not presumed to be wrongdoers, and offences are not created with their conviction in mind. It is of course true that no member of the privileged classes has any guarantee that they will not one day become a member of the suspect classes. As soon as one is suspected of wrongdoing at which a prejudicial offence takes aim, one switches from the former to the latter. But such fluidity of membership does not show that there is no divide here. The treatment of the suspect classes is categorically different to that of the remainder of the population. Only these suspect classes are prejudged as a class. Only they are dealt with on a footing of failure. Only for them is the golden thread nowhere to be seen.⁴⁵¹

Now the idea of a divide between groups of the governed returns us to the topic of political partisanship. As I explained in Chapter 6, politically partisan behaviour is behaviour which promotes the agenda of some, and disregards that of

⁴⁵⁰ Text to n 384 above.

⁴⁵¹ The same cannot be said of those suspected of other, non-prejudicial, criminal offences. When one is suspected of this latter type of offence, one remains entitled to a judicial process which will determine whether the suspicion in question is well-founded. No assumptions thus need be made by offence-creators about whether any given suspect will be a guilty party. Whether guilty parties exist at all is for the judiciary to determine.

others, without impartial justification. An insider group is treated as principal to the government's agent, at the expense of a group of outsiders, to whom the government appears to acknowledge little or no responsibility.

In the case of prejudicial offences, we appear to have precisely such a situation. There are the suspect classes, and there are the privileged classes. The former are apparently owed little. They are not owed consideration of the wrongdoing taken to justify their conviction case-by-case, defendant-by-defendant, in the criminal courts. As we saw in section 2(b) of this chapter, the golden thread thus runs out.⁴⁵² Nor is this a point of meagre importance: it deprives defendants of procedural justice in both imperfect and pure form (so argued Chapter 2);⁴⁵³ it deprives them of the form of security guaranteed by *Woolmington v. DPP* (so argued section 3 of this chapter).⁴⁵⁴

If the agenda of the suspect classes is therefore disregarded, the advertised pay-off is that the agenda of the *privileged* is promoted by prejudicial criminalisation. How so? In the following two ways. First, the demand that more wrongdoers get what they *deserve* is supposedly met. Remember that watering down was justified in the first place on the basis that it would increase the conviction rate. Second, the demand for more *security* is supposedly met. When wrongdoers and potential wrongdoers are convicted in greater numbers, the streets, it is said, will be safer to walk. We have just seen that the mechanism used to achieve this runs roughshod over the suspect classes. But those who so criminalise claim that the agenda of the privileged classes is thereby promoted.

⁴⁵² Text to n 391.

⁴⁵³ Text to n 72 – n 88.

⁴⁵⁴ Text to n 430.

Now it may be objected that it remains to be shown that there is political partisanship here. For by my own lights, government is only partisan if it *lacks* impartial justification for its actions, and divides insiders from outsiders in a manner which implies that it sees itself as the *agent* of the former group. The objector may thus press the following: I must establish that prejudicial criminalisation *is not* impartially justified if I am to show that it is politically partisan.⁴⁵⁵ I am yet to do anything of the sort.

The objector is correct. Impartial justification must indeed be lacking if my argument is to succeed. But what could that justification *be*? No doubt there is something superficially appealing about any mechanism which has as its goal the conviction of wrongdoers. No doubt attaining such convictions is one thing the criminal law exists to do. But we must look hard at the mechanism being used to achieve this goal. Where prejudicial criminalisation is concerned, that mechanism is the watering down of the substantive law in an attempt to increase the conviction rate for classes of wrongdoer. This may initially sound unproblematic. But we have seen that appearances can be deceptive. We have seen that offence-creators who water down to achieve their prosecutorial targets are ensuring that suspected wrongdoing is never given individualised consideration in court; we have seen that it is being assumed instead that the suspect classes can be pre-judged as wrongdoers *en masse*. We have seen that it is a consequence of embracing this mechanism that the virtue of legality is imperilled, enabling officials to ambush suspects with liability that comes as a distinctly unpleasant surprise.⁴⁵⁶ We have seen that another

⁴⁵⁵ The objection may also be put to my claims about deserving trust: if prejudicial criminalisation is justified, isn't it no mark at all against governmental deservingness? My answer to the objector envisioned in the text is an answer to this objection too.

⁴⁵⁶ Text to n 421 above.

consequence is that suspects are deprived of the benefits of the golden thread, including the forms of procedural justice discussed in Chapter 2. When so much is at stake, the case in favour must be extremely weighty indeed if we are not to conclude that offence-creators just don't care much about the suspect classes – if we are not to assume that they are in fact acting as vicarious agents of the privileged.

We already saw in Chapter 2 that prejudicial criminalisation can hardly be justified with invocations of *desert*.⁴⁵⁷ Unless law-enforcement agents have suddenly developed supernatural powers of detection (in, it would appear, the case of some wrongdoers and not others), we still need courts to examine allegations of wrongdoing if we are to work out who deserves what. It is all very well offence-creators deciding in advance that convicting the class of suspects will be as reliable as convicting those found guilty by the forensic, individualised proceedings of the courts. But as Chapter 2 suggested, this is so much self-deception. To embrace such logic is only to make accuracy (here conceived as giving the deserving what they deserve) much *less* likely, and make the quality of our procedural justice far more imperfect. Furthermore, the logic in question makes it all the more likely that the criminal process will result in conviction of the *undeserving* rather than acquittal of the deserving. As Chapter 2 argued, this is to bring about much *graver* injustice than would otherwise occur.⁴⁵⁸

Could prejudicial criminalisation be justified as a source of *security*? Earlier chapters repeatedly put off consideration of arguments from security, and it is now time to confront those arguments head on. One advantage of considering the

⁴⁵⁷ Text to n 88 of ch 2.

⁴⁵⁸ Text to n 78 – n 81 of ch 2.

argument here is brought out by section 3 of this chapter. For as that section made clear, one thing to notice about prejudicial offences is that their creation *deprives* legal subjects of valuable security against the criminal justice system itself. In fact, it deprives those subjects of security in two forms. First, it deprives them of the security guaranteed by the Rule of Law, an argument also made in Chapter 3.⁴⁵⁹ Second, it deprives those who do become suspects of the security offered by the golden thread: the risk of unjustified conviction is increased when guilt need not be proved. The insecurity which results in each case may not sound like much, but it is by no means trivial: when criminal conviction and criminal punishment are the outcomes in question, our freedom, reputation, self-respect and future prospects are all at stake.⁴⁶⁰

Now it is true, of course, that there may be compensating *benefits* in security:⁴⁶¹ enforcement agents may well be able to use prejudicial offences to convict and lock away more dangerous people, assuming of course that those they *believe* to be dangerous really are.⁴⁶² But even if such security-benefits did outweigh

⁴⁵⁹ Text to n 163 of ch 3.

⁴⁶⁰ It is worth noting that those empowering offences which are not also prejudicial offences cannot be critiqued using the second of these arguments from security. The procedural security in question is not undermined by what I called a type-2 empowering offence, but the substantive security discussed in the text certainly is. Any security-based justification of such offences must confront this point.

⁴⁶¹ Samuel Buell has argued that this is especially so in cases where the wrongdoers targeted by offence-creators are adept at altering their behaviour to avoid offending. He argues that writing some elements of wrongdoing out of the law may be the only way to ensure that evasive acts remain criminalised, and to effectively deter those who would otherwise commit the targeted wrong. See Samuel Buell, 'The Upside of Overbreadth' (2008) 83 New York University Law Review 1491.

⁴⁶² On the subject of beliefs, I assume here that the security taken to do the justificatory work by my imagined objector is not mere *subjective* security – that is, the condition of feeling free from threat (however free from those threats one actually is). I assume that the production of such feelings unaccompanied by any increase in *objective* security – that is, any reduction of the *actual* threat posed to the populace – cannot serve to justify violating the various principles which oppose the creation of prejudicial offences. For the objective/subjective distinction, see Lucia Zedner, 'The Concept of Security: An Agenda for Comparative Analysis' (2003) 23 Legal Studies 153, 154-156

the security-costs, we have seen throughout this thesis that security is not all that matters. Because prejudicial criminalisation snaps the golden thread, it imperils procedural justice, judicial independence and the principled development of the law. So argued Chapter 2 and section 2(b) of this chapter. Because it brings the criminal law into tension with demands of the Rule of Law, such criminalisation fails to protect the freedom and autonomy of legal subjects against the law. So argued Chapter 3 and section 3 of this chapter. When the pernicious nature of such developments is kept under wraps, the state breaches its duty to answer to its people, and reduces their ability to scrutinise the power of the executive. So argued Chapter 4 and section 9 of Chapter 2.⁴⁶³

This smorgasbord of competing values already places a significant hurdle in the path of the security justification.⁴⁶⁴ And we should not overlook the significance of *how* the values implicated here are engaged with by a government which criminalises prejudicially. For prejudicial offences are *imposed* on suspects through the institutions of the state, the *intention* being to water down so as to facilitate convictions. The pernicious impact on both justice and legality is part and parcel of such a move – if such effects did not occur, nothing would be facilitated. Now there is a clear contrast here with the insecurity faced as a result of a *refusal* to so

⁴⁶³ Notice again that not all the offences I have discussed have all of these points in their favour. But they all have at least some, and the security justification must compete with those they do have in support.

⁴⁶⁴ Many of these values are left out of account by those, like Samuel Buell, for whom the problems created by this kind of offence are ‘of largely academic interest’ unless a) defendants are convicted who have not committed the targeted wrong, or b) people are deterred from committing acts which all agree are innocuous. My own view is that we should be rather less casual about the following additional problems (among various others): c) the pernicious effect of prejudicial offences on the procedural justice of *every* criminal trial undertaken pursuant to such offences; d) the threat prejudicial offences pose to the ideal of the Rule of Law, and thus to the protection the law provides to personal autonomy; e) the damage such offences do to the transparency of any legal system of which they are a part. Compare Buell (n 461) 1554.

criminalise: if such insecurity exists at all it is down to the actions of *others*, which is at most a foreseen (and regretted) consequence of one's refusal to act. Now this will of course matter little to those who reject the moral relevance of different modes of engagement with value. But if the moral topography is more diverse than advocates of the so-called doctrine of negative responsibility admit, then the distinctions just drawn can only increase government's reasons not to create such offences.⁴⁶⁵ The significance of the state's engagement with value is thus yet another nail in the coffin of the security argument.

If this is correct, we remain without justification for the creation of prejudicial offences. Such offences appear justified only if we seriously inflate the importance of the security of some within our rational horizons, while depressing the importance of the agenda of others and the values which serve their interests. They seem justified if, in other words, we conceive of ourselves as the *agent* of the privileged classes, and worry much less about the suspect classes. Such rational manipulation no doubt serves the self-interest of many elected politicians: they are naturally desperate to please those with political influence, apparently to the extent that they are willing to sacrifice those who lack it – suspected sex offenders, suspected terrorists, suspected yobs among others. Nor are self-interested motives the only explanation. Some in government may well believe that they simply owe more to their supporters and their kin, whatever the relative strength of the (impartial) claims of those inside and outside such groups. Either way, the problem should now be obvious. To criminalise as the agent of some, to the disregard of others, is politically partisan. It is to act in a manner which cannot be justified by

⁴⁶⁵ On negative responsibility, see Bernard Williams, 'A critique of utilitarianism' in Bernard Williams and JJC Smart (eds), *Utilitarianism For and Against* (CUP, Cambridge 1973) 95.

impartial reasons. And as this chapter has shown there is a more familiar way to put the objection: because the offence-creators in question fail to conform to right reason in allocating the benefits and burdens of criminalisation, they act unjustly whenever they create a prejudicial offence.

5. Conclusion

This chapter has argued against the creation of prejudicial offences. If the argument is correct we have identified another set of means by which offence-creators should not achieve their objectives. They should not, when their objective is the conviction of classes of wrongdoer, attempt to achieve that objective by prejudging the classes suspected of that wrong, and allowing that pre-judgment to determine the definition of the resulting offence. When they do and the aforementioned wrongdoing is followed up, the offence-creators' pre-judgment becomes the only judgment there is.

If I am right to criminalise in this way is to misuse one's power to add offences to the criminal law. To so act is subject to a range of objections encountered in earlier chapters, because all ouster offences and some empowering offences are tokens of this type of offence. But to create such offences is also subject to further objections from the two principles introduced in Chapters 5 and 6. Thus prejudicial offences not only violate the Rule of Law, they thereby imperil the state's claim to deserve the trust of its people. And such offences not only create procedural injustice, their creation is also unjust in a deeper sense – in the sense that it constitutes a failure of government to avoid becoming a partisan actor; a failure to remain the agent of all and not only of some. When, as I argued will often be the

case, such creative acts cannot be justified, offence-creators misuse their power to add to the criminal law.

CHAPTER 8

CONCLUSION

This thesis has argued that a number of uses of the power to criminalise are misuses of that power. The argument is a contribution to a growing body of scholarship on criminalisation, which seeks to identify how the aforementioned power can acceptably be used. Yet the argument I have offered is not the kind of argument offered by many writers in the field. It is not, in other words, an instance of what we might call the *standard approach* to this topic. On that approach one begins by identifying a feature (or several features) common to all criminal offences, such as the creation of liability to criminal punishment (the feature identified by Douglas Husak), or the imposition of limits on liberty (the feature identified by Joel Feinberg).⁴⁶⁶ One further claims that because of the feature(s) identified, the creation of a criminal offence always demands special justification. And one finally claims that this justification can only be found if a preferred (set of) master-principle(s) is conformed to, such as Douglas Husak's list of seven constraints on criminalisation, or Joel Feinberg's shorter list of liberty-limiting principles.⁴⁶⁷ Set out more formally, the argument presented by those who adopt this approach thus runs as follows:

P1: All criminal offences share at least one universal feature (UF);

⁴⁶⁶ See Douglas Husak, 'Why Criminal Law: A Question of Content?' (2008) 2 *Criminal Law and Philosophy* 99; Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (OUP, Oxford 1984) 3-10.

⁴⁶⁷ Husak's list is found in chs 2 and 3 of Douglas Husak, *Overcriminalization* (OUP, Oxford 2008). Feinberg accepts two liberty-limiting principles: the harm principle and the offence principle, while leaving open that some 'free-floating evils' may also justify criminalisation. See Feinberg (n 467); Joel Feinberg, *The Moral Limits of the Criminal Law: Offence to Others* (OUP, New York 1988); Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (OUP, New York 1990) 330-331.

- P2: Because of UF creating a criminal offence requires special justification;
- P3: This justification is only found if certain master-principles are conformed to;
- C: The creation of criminal offences which violate any master-principle is unjustified.

Without seeking to cast doubt on the importance of the standard approach, this thesis has pursued a different – and complementary – approach to the criminalisation question. It has focused not on *universal* features but on features *particular* to some offences and not others, which features it has used to identify different *types* of criminal offence. And it has evaluated those types not by reference to one (set of) master-principle(s), which allegedly impose absolute limits on the criminal law, but by reference to an open-ended list of principles of political morality, each of which fills in only part of the justificatory picture, and does so in respect of only some types of criminal offence.

This approach is thus doubly piecemeal when compared with the standard approach. It moves from offence-type to offence-type in building up a picture of how the power to criminalise can acceptably be used, and adds layer of principle to layer of principle in building up an evaluation of each use of that power. It follows, of course, that the answers provided on this approach are always *provisional* – further principles may always be found to justify the creation of a given offence. But if we are to develop a more complete picture of the morality of criminalisation – one which does not rely on master-principles alone – it is such provisional judgments we must be willing to make. Set out more formally, my argument has thus been as follows:

P1: Some criminal offences share particular features which make them tokens of a type;

P2: There are principles of political morality which count against the creation of the tokens of some of these types;

P3: The creation of such offences thus demands special justification, such that further principles of political morality must be found to do the justificatory work;

C: If such principles cannot be found, the creation of the offences in question lacks justification.

Now the form of this argument leaves open which types of offence one is to focus on, and this thesis has focused on types which *themselves* share a common feature. It has focused on types of offence which use distinctive *means* to achieve their creators' objectives, and which do so as a function of the way they are defined or presented. As Chapter 1 put it, the piecemeal approach has thus been applied to answering *the means question*.

The means question: what means are, and what means are not, permissible means by which criminal offences can (be set up to) achieve their creators' objectives?⁴⁶⁸

It has been the burden of the preceding chapters to provide part of the answer to this question. Only *part* of the answer because not every set of candidate means has been (or could have been) discussed. What has been provided is an argument of the

⁴⁶⁸ The bracketed reference to what offence-creators *seek* to do is bracketed because only some of the means considered are means which offence-creators *intend* to adopt or make available.

following piecemeal kind: an argument that some types of offence bring into law distinctive means of achieving objectives, and that to create tokens of some of these types is to misuse the power to criminalise.⁴⁶⁹

The argument began with what Chapter 2 called ouster offences – offences which facilitate the conviction of suspected wrongdoers, by denying the criminal courts scrutiny of the wrongdoing taken to justify their conviction. I argued that when criminal convictions are obtained by such means, the independence of the judiciary is undermined, and the procedural justice handed out by the courts made less pure and more imperfect. I further argued that such moves impair the principled development of the law, and the ability of the courts to scrutinise the executive.

Chapter 3 broadened the focus of the argument, and addressed offences which increase the power of law-enforcement agents in virtue of features which *decrease* their ability to guide legal subjects. Some of these empowering offences are also ouster offences: one way to increase the power of law-enforcement agents is to ensure that the courts cannot demand proof of whatever is taken to justify conviction. Because the offence-definition required to bring this about will often prohibit what all believe to be innocuous, it is a poor *normative* guide for subjects of the law. This is not to say that all empowering offences increase power in this way: some do so by ambushing unsuspecting offenders with liability, ensuring that their arrest and prosecution is legally legitimate if and when it happens to serve official objectives. These offences, I contended, are poor *practical* guides. There are yet further ways in which the power-increasing story can play out. Whatever the story,

⁴⁶⁹ Where the power to criminalise is misused whenever employing or making available the means in question cannot be justified.

my argument was two-fold: first that such offences violate demands of the Rule of Law; second, that they make available means of achieving objectives – the exercise of power officials only have *because of the violation just mentioned* – which offence-creators are duty-bound not to make available. I defended this duty by reference to the importance of upholding the Rule of Law.

Chapter 4 addressed three doctrinal phenomena present in a legal system (whenever else they are present) when ouster and empowering offences are created in that system. It argued that when (as in English law) these phenomena are kept under wraps, the state breaches its duty to answer to its people, by misleading those people about the criminal law's scope, goals and enforcement. The creation of ouster and empowering offences is thus often subject to a *further* objection, namely that the means of achieving objectives which those offences introduce have *themselves* been introduced by *non-transparent means*: without the state coming clean about the phenomena which make the introduction possible. In the case of some empowering offences this is necessarily so: some such offences would no longer empower in the relevant sense if the state came clean about their creation. In other cases misrepresentation remains highly likely: if the criminal process continues to operate in the way it usually does, such offences will continue to mislead defendants about the grounds for their treatment, and they will continue to mislead the wider populace about the goals of the criminal law. In both cases, I argued, the state is duty-bound to come clean.

On the piecemeal approach to criminalisation adopted in this thesis, it remains the case that criminalisation condemned by a number of principles could still be justified by further such principles. Chapters 5 and 6 thus sought further

principles to add to the equation. Chapter 5 defended what I called the *Trust Principle* and the *Strong View* of that principle. It argued, in other words, that the modern state ought to deserve the trust of its people, and that the reasons for the state to deserve that trust are reasons of particular strength. Chapter 6 defended what I called the *Anti-Partisan Principle*. It argued, in other words, that governments should not be political partisans – they should not act as if they are agents of some of the governed and not of others.

Chapter 7 applied the arguments of Chapters 5 and 6 to what were there called prejudicial offences. It argued that the creation of these offences harbours a particularly pernicious logic: that they can only be thought to serve their creators' objectives if a statistical assumption is made, which assumption the creation of the offence places beyond legal challenge. That assumption, I argued, is that the class *suspected* of certain wrongs by law enforcement agents will also be (or substantially overlap with) the class *guilty* of those very wrongs.⁴⁷⁰ Once we see that this assumption is required to make sense of the creation of such offences *and* that the assumption can be challenged in no court, we also see that the aforementioned class has – in effect – been pre-judged by offence-creators. Ouster offences and some empowering offences are examples of this type of offence, and understanding the prejudicial logic of their creation helps understand why these offences exist.

My argument against the creation of prejudicial offences came in several stages. I argued first that such offences are in tension with the golden thread identified in *Woolmington v. DPP*.⁴⁷¹ I argued second that on account of their

⁴⁷⁰ Where to be guilty of a wrong is simply to have committed it in truth.

⁴⁷¹ [1935] AC 462 (HL).

violation of demands of the Rule of Law, the creation of such offences eats away at the state's claim to deserve popular trust. And I argued third that their creation is politically partisan, and that political partisanship is itself unjust.

Each of the arguments made in the course of the preceding chapters sought to support a simple thesis: that to create the types of offence in question is to misuse the power to criminalise. In accordance with the piecemeal approach adopted, it was recognised throughout that this thesis is a provisional one: that rival principles may show that some creative acts are not misuses after all. Not all such principles can be anticipated, but the thesis was strengthened at several points by consideration of the weaknesses inherent in certain rival arguments: in arguments from *desert* which purport to justify creating ouster offences, and in arguments from *security* which purport to justify each use of the power to criminalise considered in these pages. I do not claim to have shown that these arguments can never succeed. But the chances of their doing so are clearly lower in cases where the arguments of Chapters 2, 3, 4 and 7 all apply – in cases where an offence ousts, empowers *and* prejudices without the state coming clean. They are higher when, for instance, an offence only empowers. In the spirit of the piecemeal approach, I do not rule out justificatory success on the part of security advocates and others. I simply insist that all potential defenders of the types of offence criticised here show that the justificatory bar is in fact cleared in a given case. If I am right, such a showing is very much required in contemporary English criminal law. It has been the business of this thesis to demonstrate that wherever such a showing is required, the bar which must be cleared is a bar which is set high.

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