*Ian Leader-Elliott**

A CRITICAL READING OF R A DUFF, *ANSWERING FOR CRIME*

Answering for Crime[1] is an essay in rational reconstruction of the substantive criminal law. It takes the presumption of innocence as the central guiding principle for the reconstructive project. The proposed reconstruction is based on principles drawn from the law of offences against the person, in particular, rape and murder. Professor Duff opposes tendencies to unprincipled legislative pragmatism with a normative theory that would require each criminal offence to proscribe an identifiable public wrong, before a citizen could be required to answer to a court for the offence. The normative theory turns on the distinction between the citizen's obligation *to* a court, when the prosecution must make out its case for conviction by establishing the commission of a public wrong, and the citizen's obligation to answer *for* an offence, by way of justification or excuse, once the public wrong has been established. Exceptions would be possible, but they would be infrequent and they would require justification consistent with the normative theory. This review questions the normative significance of the divide between offence and defence, and questions as well the adequacy of the foundations for the reconstruction. The criminal law is more varied and various in its sources, structure and principles of development than *Answering for Crime* allows.

INTRODUCTION

Professor Duff, who is a leading UK theorist in the philosophy of criminal law, proposes a normative theory of the criminal law that would bridge the divide between common law and statute. The presumption of innocence, which is given a broad, substantive reading, is central to the theory. Though he takes care to emphasise the preliminary and exploratory nature of the project, it is the magnitude of vision in his conception of a normative theory of the criminal law that is the important thing. *Answering for Crime* has the great virtue of taking the presumption of innocence seriously, as a fundamental principle of the criminal law. That central insight is challenging in its implications and it provides the foundations for the normative theory advanced by Duff.

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* Emeritus Fellow, University of Adelaide Law School. It would be remiss not to open with an expression of gratitude to the anonymous reviewer whose good advice enabled the removal of many faults and infelicities in the original version of this review.

1 R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) ('*Answering for Crime*').

I take issue, in this review, with the normative theory, and dispute the implications that Duff finds in the presumption of innocence. Though my disagreement with Duff's thesis is fundamental, I should also say that *Answering for Crime* is exemplary in the clarity of its analysis, innovative in its theoretical explorations, and comprehensive in its coverage of current scholarship in criminal theory.

The concluding chapter of the book provides a lucid resolution of the continuing debate over the distinction between defences that excuse and defences that justify criminal conduct.[2] Apart from that recommendation, the chapter on defences will not be a subject of discussion in this review.

It is necessary at the outset to say a little about the project of creating a normative theory of criminal law. In his opening outline of the project, Duff refers to the discovery and articulation of a set of general principles that will make the 'best sense' of the existing practices of the law.[3] The poised ambiguity of that expression captures, with concise precision, the problematic nature of the enterprise. There is inevitable tension between the sense in which the best account of the general principles is one that provides the most comprehensive understanding of existing realities, and the opposing sense in which the best account is the one that will provide decent guidelines for the continuing enterprise of the law. One might, that is to say, be concerned to make the best of a bad job in one's reconstruction. Duff proposes a normative theory of criminal liability that will be appropriate for citizens in a liberal democracy, 'whose common life is structured by such core liberal values as autonomy, freedom, privacy and pluralism, informed by a conception of each other as fellow citizens in the shared civil enterprise.'[4] The theory is presented as a rational reconstruction[5] of existing criminal law. There are, Duff contends, limiting principles immanent in the law which can be articulated after an exacting work of 'excavation and reconstruction'.[6]

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2 But see the critique in Peter Westen, 'Offences and Defences Again' (2008) 28 *Oxford Journal of Legal Studies* 563, 575–84.

3 *Answering for Crime* 4, 6.

4 Ibid 11.

5 Ibid 5–6. On 'rational reconstruction', see also R A Duff, 'Principle and Contradiction in the Criminal Law' in R A Duff (ed) *Philosophy and the Criminal Law* (1998). As a mode of proceeding, 'rational reconstruction' has continuing appeal. See, eg, H Fingarette, 'Diminished Mental Capacity as a Criminal Law Defence' (1974) 37 *Modern Law Review* 264 and the recent paper, C S Elliott and C de Than, 'The Case for Rational Reconstruction of Consent in Criminal Law' (2007) 70 *Modern Law Review* 225. George Fletcher extends the constructional metaphor in 'The Psychotic Aggressor — A Generation Later' (1993) 27 *Israel Law Review* 227, 229: 'The architecture of the law comes after the building is more or less built. … As the beams and boards are added to the barn, we notice that a certain structure lies implicit in what we have been doing. The task of the theorist is to explicate the plans that made the building possible.' Compare, however, A Norrie on the delusive nature of an 'internal' critique of the criminal law in *Punishment, Responsibility and Justice* (2000) 39–42.

6 *Answering for Crime* 5.

Reconstruction is meant to reveal an underlying structure of moral and political values that will provide criteria for principled assessment of the substantive criminal law and condemnation of its many aberrations. Most — if not all — of the aberrations to which Duff refers are legislative: terrorism laws that require defendants to prove an absence of any terrorist purpose are his stock example of legislative violation of principle.[7] He proposes a set of structural constraints on the creation and interpretation of criminal offences that should be observed, if legislators and courts are to maintain the respect that is owed to citizens of the polity, to visitors and sojourners, and to others who are subject to its laws.[8]

The theory is provisional in the sense that Duff accepts that there is no single or 'master principle' of limitation.[9] He is concerned, rather, to delineate areas where principled debate over the limits of the criminal law is necessary. There are few if any definitive answers in his discussion of these areas of controversy, though Duff shares with other theorists the conviction that there is far too much criminal law.[10] He concludes his discussion with a modest disclaimer:

> If the book succeeds at all, its success will therefore lie not in providing direct answers to the substantive questions about the scope and content of the criminal law, about the criteria of criminal responsibility and liability, about the definitions of offences and the conditions of defences, that properly exercise both theorists and practitioners. Its success will rather lie in suggesting new ways of understanding and approaching such questions — ways which should then enable us to work towards better, and better grounded, answers to them.[11]

Duff is well aware that there is a point at which a theory loses normative plausibility[12] if too much of our existing practice is discarded or distorted in the process of rational reconstruction. It is time for second thoughts about a normative theory if it 'would involve rejecting large swathes of our criminal law'.[13] Though Duff does not use the expression, the sort of theory wanted is one that has the virtue of 'normative resilience': one that it is capable of withstanding objections based on the inconsistent realities of existing practice. Much of what I will have to say in this critical reading of *Answering for Crime* is based on what I take to be an unnecessary constriction of the resources for Duff's reconstruction. There is a passing indication of this constriction at the outset of the book, when the reconstructive project is said to involve 'the excavation and reconstruction of norms

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7 Ibid 1–2, 250–1 and numerous intervening references.

8 References hereafter to 'citizens' include visitors and others who are entitled to the same respect for their rights as citizens.

9 *Answering for Crime* 138–40.

10 Ibid 145, citing Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2007). The literature on 'overcriminalisation' grows apace: see, eg, Markus Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (2002).

11 *Answering for Crime* 297–8.

12 Ibid 8.

13 Ibid 169.

that can be shown to be implicit in the system of law as it is applied by the courts'.[14] The absence of any mention of the legislature in this description of the project is significant.

When one considers the adequacy of the foundations for the project, there are grounds for serious reservations. The normative theory depends heavily on an extended consideration of the law relating to murder and rape, which are almost alone among serious offences in retaining strong connections with their common law origins. This seems a narrow base indeed for a theory that must encompass a very large range of crimes, almost all statutory and many with no common law precursors. Parliament is strangely absent from Duff's discussion, apart from the salutary examples of legislative excess that make regular appearances in the text. It is a surprising omission in a book that is presented as a preliminary survey for 'theorists and practitioners' who are concerned with the structure of criminal liability.[15] Legislators, whose creative powers are so much more extensive than those of the 'theorists and practitioners' to whom *Answering for Crime* appears to be addressed, would seem to be a particularly appropriate audience. Perhaps it is implicit in the reconstructive project that the normative theory is addressed to legislators: there is little point in the recurring criticism of UK terrorism legislation if that is not the case.[16] There is no attempt, however, to draw on principles immanent in statutory criminal law and legislative practice, or on the relationship between courts and legislature in the development of those principles.[17] Throughout, the stance adopted is oppositional. The attitude expressed towards the legislature is scornfully dismissive. In his discussion of strict responsibility and strict liability, Duff refers to the frequent legislative resort to the 'pragmatic [and] unprincipled' imposition of liability without fault.[18] Courts have not been immune to the attractions of these expedients, but his examples of unprincipled pragmatism are all of legislative excess.

The absence of any direct address to the legislature in *Answering for Crime* may be taken, perhaps, to reflect a mood of shared despair among UK theorists of the criminal law, who fear that it is a lost cause and beyond rescue.[19] John Gardner has given vent to the most recent and most naked expression of that despair.[20]

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14 Ibid 5.

15 Ibid 298.

16 Cf Husak, above n 10, 131: 'Thus I direct this theory of criminalisation to legislatures rather than to courts'. Compare *Answering for Crime* 145, citing Douglas Husak: '[W]e surely need to identify some more robust constraints on the proper scope of the criminal law than I have offered here.'

17 *Answering for Crime* 5–6.

18 Ibid 261.

19 A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225.

20 Despair is evident in John Gardner's review of Douglas Husak*'s Overcriminalization: The Limits of the Criminal Law* (2007) in *Notre Dame Philosophical Reviews* (2008) <http://ndpr.nd.edu/review.cfm?id=13805> at 7 March 2010: 'Personally I fall into the camp identified by Andrew Ashworth in the title of his article 'Is the Criminal Law a Lost Cause?'… Not that I no longer see issues of

Ten years ago, another of Gardner's essays (omitted from his recent anthology) provided a vision of the 'supervisory general part' of the criminal law — an immanent normative theory if you will — which is addressed to legislatures and courts alike.[21] There is a continuing sense of ambivalence throughout *Answering for Crime* on the question whether the reconstruction is meant to occupy that sphere of criminal theory and, perhaps, whether there is such a sphere of theory at all.[22]

The first part of these reflections, which is expository and critical, explores what I take to be ambiguities and inconsistencies in the normative theory. The second part argues that the normative theory rests on too narrow a base in its reliance on crimes of intentional attack, and fails to take sufficient account of the diversity of the criminal law: in particular, of 'crimes against the common good'. Since that term is unfamiliar, and used for want of a better, I should explain what I mean by it.

I have in mind offences that can be roughly located within the triangular space delineated by Peter Alldridge's category of crimes against markets,[23] crimes against institutional infrastructure,[24] and 'crimes against the realm' or polity.[25] The coining offences, to be discussed in the final section of this article, are sufficiently distant in time and sufficiently unfamiliar to provide illuminating examples of the category. Offences of trafficking in drugs and other forbidden commodities provide modern parallels.

Crimes against the common good can be catastrophic — crimes against person or property writ large — and their victims may number thousands. Catastrophic harms will not be discussed: the crimes against the common good with which I

philosophical interest or importance in the criminal law, but that I no longer imagine that any serious work I could do on the subject would have the slightest effect on the assorted knaves and fools who largely determine the shape of the criminal law in my country. Trying to stem the tide of fatuous law that emanates from our incontinent legislatures, at least in the US and the UK, is a luckless and thankless task.'

21 See John Gardner, 'On the General Part of the Criminal Law' in R A Duff (ed), *Philosophy and the Criminal Law* (1998) 205, 208.

22 Duff promises consideration of 'more robust constraints' on legislative excess in a future work: *Answering for Crime* 145–6.

23 Peter Alldridge, *Relocating Criminal Law* (2000) ch 6; Cf Stuart Green, *Lying, Cheating, and Stealing* (2007) on the moral foundations of 'white collar crime'.

24 Definitions of 'infrastructure' abound. For present purposes, the Australian Commonwealth Government definition of 'critical infrastructure' is sufficiently inclusive: 'those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would adversely impact on the social or economic well-being of the nation or affect Australia's ability to ensure national security': *About Critical Infrastructure*, Attorney-General's Department Critical Infrastructure Protection Branch <http://www.tisn.gov.au/www/tisn/tisn.nsf/Page/About_Critical_Infrastructure> at 7 March 2010.

25 The immediate reference is to the *Defence of the Realm Act 1914* (UK), for its broad inclusivity and for the remnant memory of the connection between treason and crimes against the polity.

am concerned have no immediate victims. The harm they cause is collective and incremental. This has consequences for the formulation of legislation defining crimes against the common good. Since the harm is incremental, the conduct that is punishable is typically conduct that is a symptom or sign of an activity which causes harm to the public at large, rather than harm or wrong to any particular individual.

I use this unfamiliar description, 'crimes against the common good', in the hope that it will provide a barrier against the ingrained tendency in current criminal law theory to divide the criminal law between 'truly criminal' offences on the one hand and 'regulatory' or 'welfare' offences on the other.[26] That division has the effect, if not the purpose, of relegating the so-called 'regulatory' or 'welfare' offences, all of which have long been statutory, to the periphery of the criminal law. There are ample warnings in the literature of the uncertain and confusing nature of that particular dichotomy; the distinction is probably, for all practical purposes, unsalvageable.[27] It persists, nevertheless, to obscure discussion.

Crimes against the common good cannot be characterised as minor offences; their penalties can be equivalent to the most serious of the offences against the person. Criminals who have committed these offences account for a very substantial proportion of prison populations. Though many impose strict or even absolute liability, this is not a defining or even prevalent characteristic. Many deploy the fault elements of intention, knowledge and belief with a precision and sophistication rarely, if ever, matched by the common law. They are not recent: their remote history is entwined with the common law and they are not characteristically concerned with *mala prohibita*. One primary function of this very large body of laws defining offences against the common good is the preservation of moral, social, economic and cultural values.[28] It is, of course, hardly a cause for surprise that this should have been, from the beginning, a central concern of the legislature.

There is another, minor, linguistic point to make before proceeding. There is potential for misunderstanding among Australian readers as a consequence of divergent UK and Australian usage of the concepts of 'criminal responsibility', 'strict liability' and 'absolute liability'. I have, so far as possible, adhered to Duff's

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26 Glanville Williams attributes the descriptive category of 'regulatory or public welfare' offences to US sources: 'To use these expressions is easier than to say exactly what they mean': Glanville Williams, *Criminal Law: The General Part* (2nd ed, 1961) 234–5. For instances of use, see William Wilson, *Central Issues in Criminal Law Theory* (2002) 26–31; Stephen Shute and A P Simester, 'On the General Part in Criminal Law' in Stephen Shute and A P Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002) 9–12.

27 See, eg, the careful dissection in Nicola Lacey, 'Legal Constructions of Crime' in M Maguire, R Morgan and R Reiner, *Oxford Handbook of Criminology* (4th ed, 2007) 179, 184–5; Andrew Ashworth, *Principles of Criminal Law* (4th ed, 2003) 51: 'The term "regulatory" should never be taken at face value when used to describe an offence.'.

28 Cf Stuart Green, above n 23, 'Regulatory Offences', ch 20.

usage throughout.[29] The differences, which have no significant bearing on the discussion, are noted below.[30]

I The Normative Theory

The theory will be discussed in more detail presently. For the moment, the barest outline is sufficient. Duff begins with the premise that moral blameworthiness for wrongdoing is a necessary though not a sufficient basis for denunciation, censure and criminal punishment. The moral wrongfulness of conduct may be inherent (*malum in se*) or it may be constituted by statute (*malum prohibitum*). I should add that the discussion of *mala prohibita* is particularly illuminating.[31] Offences have a public dimension in the sense that they amount to a wrong to the public at large, or a wrong to an individual that is an appropriate subject for public concern because it is a violation of the 'defining aims and values' of the polity.[32] These are necessary, though not sufficient, conditions: there are many reasons of prudence and policy why criminal sanctions should be a last resort. Since censure and punishment by the state are in issue, criminal liability requires proof of fault — whether that fault be intention, recklessness or negligence — unless some exceptional ground can be found for imposing liability without fault.

The most significant of the structural constraints that Duff proposes is a 'substantive' reading of the *Woolmington* principle that criminal liability must be proved beyond reasonable doubt.[33] This substantive reading is the most original and, I will argue, the most vulnerable element of the normative theory. The presumption of innocence provides the basis for a distinction that Duff takes

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29 See *Answering for Crime*, ch 10, 'Strict Liability and Strict Responsibility' where the terms are defined.

30 In the *Criminal Code 1995* (Cth), 'Chapter 2 — General Principles of Criminal Responsibility', a person is criminally 'responsible' for an offence only when the elements of the offence are proved and defences are disproved. Duff's usage is different, and is likely to cause confusion among Australian readers. In *Answering for Crime*, a person is said to be 'responsible' for the offence when the elements of the offence are proved; but that person does not become 'liable' for the offence until defences are disproved. Difficulties arising from these differences in usage are compounded when strict and absolute liability are discussed. In *Answering for Crime*, 'strict *responsibility*' is more or less equivalent to Australian 'strict *liability*', while Duff's category of 'strict *liability*' is more or less equivalent to Australian '*absolute* liability': see *Answering for Crime* ch 10. The expression 'strict liability' in Australian criminal jurisprudence refers to offences that do not require proof of fault for one or more physical elements of the offence but which do permit a defendant to rely on a defence of reasonable mistake of fact or unforeseeable intervening event. The defendant bears the evidential burden but not the persuasive burden. Liability for an offence is 'absolute' when reliance on the defence of reasonable mistake of fact is barred: see, eg, *Criminal Code 1995* (Cth) '6.1 Strict liability', '6.2 Absolute liability'; S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005) 189–94.

31 *Answering for Crime* 166–74.

32 Ibid 142.

33 See *Woolmington v Director of Public Prosecutions* [1935] AC 462 ('*Woolmington*').

to be fundamental, between the elements of the offence — the public wrong — and potential defences against liability for that wrong, whether of justification or excuse. This distinction between offence and exculpation is implicit in the title of the book. When the elements of an offence are in issue, the defendant must answer *to* the charge. It is only when it is apparent that the elements of the offence can be proved beyond reasonable doubt that the defendant must answer *for* it and present their excuse or justification, if any. There is a wrong or harm to the public that is 'presumptive' in the sense that it must be answered, if it can be answered at all, by a defence that justifies or excuses the offence.

This 'substantive' reading of the presumption of innocence is presented as the ground for restraint on the legislative imposition of strict or absolute liability. Though Duff allows the possibility of principled exceptions to the requirement of fault, it is assumed throughout that the exceptions will be rare.

It may be helpful at this point to provide a simple tabular outline of the structural elements of the normative theory. Much has been omitted; the outline is meant to do no more than illustrate the tipping point between the offence and the defence.

<table>
<tr><td>OFFENCE
(answering to the court)</td><td></td><td>DEFENCE[34]
(answering for the offence)</td></tr>
<tr><td>Malum in se</td><td rowspan="2">PRESUMPTIVE
(PUBLIC) WRONG</td><td>Justification</td></tr>
<tr><td>Malum prohibitum</td><td>Excuse</td></tr>
</table>

Duff allows a couple of extended applications, but no exceptions, it seems, to the principle that the elements of the offence must constitute a public wrong before it is permissible to require D to take up the evidential burden to excuse or justify.[35] Is the principle sustainable in the sense that it can play a coherent normative role within the existing body of the criminal law? It requires conduct that is a wrong in the sense that it is an appropriate subject for a criminal offence, and it must be conduct that requires criminal punishment unless it is justified or excused. Duff provides a concise formulation of the requirement that offence definitions should 'define presumptive wrongs':

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34 See *Answering for Crime*, ch 11, for Duff's lucid re-working of the differences between justification and excuse. He distinguishes justified action, where both foresight and hindsight concur in the judgment that D's action was the right or at least permissible thing to do, from 'warranted' action, which is an instance of imperfect justification. Action that is warranted is taken for a good and sufficient reason that hindsight shows to have been unnecessary. Conduct that is excused is neither justified nor warranted: D is excused from blame, however, because it would be unfair to have expected more of him or her in the circumstances.

35 Ibid 242. See, however, the dangling reference to the possibility that 'we could try to justify some [infringements of the presumption of innocence] as practically necessary'.

> they should define types of conduct that we normally have categorical and conclusive reason not just to avoid, but not even to consider as options, and define them in a way that identifies the wrong for which the defendant will be convicted if he cannot offer an exculpatory defence.[36]

I will pass over, for the moment, the implicit distinction between defences that exculpate and exceptions to liability, which constitute part of the definition of the offence. If the conduct is justified, the wrong is neutralised or defeated[37] and D is neither criminally liable nor morally blameworthy, though the elements of the offence have been established. If it is merely excused, there is a still a wrong, but D escapes criminal liability for that wrong because any reasonable person would have done the same thing.

The immanent principles that Duff discovers in the criminal law are derived, for the most part, from offences involving an intentional attack on persons or property. The structure of his normative theory is concentric.[38] Offences that require proof of an intentional attack on persons or property lie at the centre, while lesser offences of reckless and negligent criminality, most of which are statutory, are held in orbit by the gravitational pull of those central instances of intentional wrongdoing. It is a reconstruction without adequate empirical foundations. Murder and rape — atypical offences — are taken to be central and exemplary instances of wrongdoing. Statutory offences of dangerous driving, and offences involving sexual intercourse with children below the age of consent, provide Duff's examples of marginally acceptable legislative formulations of crime. The current UK terrorism offences are taken to represent the vices of unprincipled legislative pragmatism. The vast hinterland of statutory crime between murder and rape on the one hand and terrorism on the other is barely represented among Duff's sources for his normative theory. Consideration of that hinterland suggests that the criminal law is polycentric, rather than concentric: a loose federation rather than a unitary state. Three provinces are readily distinguishable of which only the first — crimes involving wrongdoing or harm to persons or their property — has a significant part to play in the reconstruction. Distinct from these are crimes of dishonesty, which have their own distinct principles and history of statutory development, and crimes against the 'common good', which have been the province of the legislature for many centuries. In these offences, harm to individuals or wrongdoing against individuals is neither the gist nor an element of the offence. That threefold categorisation is one of convenience and is not intended to be exhaustive.[39] One

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36 Ibid 223.

37 Duff prefers to say that there is still in such a case a 'wrong', but that it is a permissible wrong, or a wrong that it is right to do, in the circumstances: *Answering for Crime* 219, 264. The linguistic stress involved in this stipulation is indicative of the unresolved problem of finding a distinction between exceptions and exculpations. The issue is discussed in John Gardner, *Offences and Defences* (2007) 253–61.

38 *Answering for Crime* 143 ('minimum core').

39 Alternative divisions have been proposed: see, eg, George Fletcher, above n 5, 389, whose 'three patterns of liability' approach bears a family relationship to the approach taken in this review: 'The implication of there being at least three patterns of liability is that criminal law must be grasped as a polycentric body of ideas.

might, for example, distinguish crimes against humanity as a fourth province. One might also quarrel with the divisions. It is arguable that crimes of dishonesty have merged — or are in the process of merging — with crimes against the common good. These marginal uncertainties hardly matter, however, so long as the broad differences among these areas of criminality are apparent.

Legislative neglect accounts for the survival of the common law and obsolete statutory provisions in the definition of unlawful homicides, lesser offences against the person and rape. Until recently, legislatures have displayed intermittent interest, at best, in crimes against the person. In the UK, 25 years or more have passed without issue since the Law Commission proposed a comprehensive codification of the offences against the person to replace the *Offences Against the Person Act* of 1861. That Act was itself a compromise that fell well short of the aspirations of nineteenth-century reformers.[40] Until very recently, the UK statutes relating to sexual relations with children were in an indefensible state of disrepair.[41] By contrast, legislatures have long been active in the invention, extension and elaboration of crimes against the common good. This extensive body of law receives no more than a passing mention in *Answering for Crime***.** The latter part of this essay will present counterfeiting as a paradigm offence against the common good, and the coining statutes as exemplary instances of legislation against conduct that harms the common good. These offences are remarkable for their historical pedigree, technical sophistication and representative character. They were the precursors of the extensive body of modern statutory offences against institutional infrastructure and offences of trafficking in forbidden commodities. Failure to integrate this large body of statute law into the normative theory defeats Duff's claim that the normative theory is a reconstruction of norms implicit in existing law. The theory fails to take account of the characteristic conventions and techniques employed in the definition of crimes against the common good.

There is no single mode of thinking that accounts for all crimes'. 'The patterns are a guide to diverse modes of reasoning about existing offences, and they generate plausible arguments for creating new offences … ' Cf Peter Alldridge, above n 23, ch 6 proposing the 'criminal law of markets' as a unifying classification for offences ranging from drug trafficking to currency offences.

40 For some theorists, the passage of time appears to have converted that statutory consolidation of earlier statutory offences into something akin to a body of common law: see, eg, J Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14 *Oxford Journal of Legal Studies* 335; John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502. These complementary studies of the *Offences Against the Person Act 1861* (UK) can be taken as essays in rational reconstruction of statutory structures that are explicitly addressed to the legislature.

41 In *R v K* [2001] UKHL 41, prior to codification of the sexual offences in the *Sexual Offences Act 2003* (UK), Lord Millet referred to the 'persistent failure of Parliament to rationalise this branch of the law' and the 'grotesque' consequences that would ensue if the existing catalogue of offences were to be enforced with literal fidelity. Compare the convoluted legislative history of corresponding offences, no less grotesque in their potential applications, in the *Crimes Act 1900* (NSW), recounted by Heydon J in *CTM* v *The Queen* (2008) 236 CLR 440, 496–509.

First, however, it is necessary to consider the normative theory in more detail. Duff's elaboration and extension of the implications of the presumption of innocence is the most challenging and contentious element in *Answering for Crime*.

II From Procedural to Substantive Presumptions of Innocence

When the House of Lords affirmed the presumption of innocence in *Woolmington*, it distinguished between 'the web of the English Criminal Law',[42] where the golden thread runs through the weave, and 'statutory exceptions' which seem to be cut from a different fabric, where the golden thread does not run. That division, with its curious use of dignitary capitals, can be taken to mark a characteristic opposition between the courts and the legislature. For Duff, the significance of the House of Lords decision in *Woolmington* is still unfolding. Though there are moments of ambivalence, his reconstruction rejects the dichotomy between 'English Criminal Law' and 'statutory exceptions', and proposes an extension of the *Woolmington* principle to include the formulation of legislation. The presumption of innocence is given a 'substantive', rather than 'procedural' dimension. The procedural presumption is the familiar rule of interpretation that requires elements of an offence to be proved, and defences disproved, beyond reasonable doubt. It is unnecessary to say more of that. The substantive presumption, which is central to Duff's normative theory, is implicitly directed to the legislature. It has three areas of progressively wider application.

1. *The first substantive presumption — voluntary action and fault*: The 'innocence' that is presumed is innocence of what can be appropriately described as *criminal* conduct. Moral responsibility for harm is far more extensive than criminal responsibility, for we can be morally responsible for harms that are not our fault. An enquiry into moral responsibility can entail obligations of explanation, apology and reparation that play no part in the determination of guilt or the imposition of criminal punishment. When criminal conviction and punishment are in prospect, the presumption of innocence requires proof that the conduct was voluntary[43] and accompanied by fault — negligence at the least — with respect to each of the elements that constitute the offence. Legislation that imposes liability without proof of intentional, reckless or negligent wrongdoing is a trap for unwary innocents and violates Duff's proposed substantive presumption.[44]

2. *The second substantive presumption — 'offence' and exculpation*: The title of the book refers to the distinction, which Duff takes to be central, between answering *to* a charge that an offence has been committed and answering *for* that offence, when the prosecution has presented its case and the offence has been (provisionally) established. This marks a tipping point beyond which the defendant must take up the evidential burden and advance any defence

42 Ibid 7. The defence of insanity was, of course, a well established common law exception to the presumption.

43 *Answering for Crime* ch 5.

44 Ibid 230: the 'correspondence principle'.

that may be open. This allocation of the evidential burden is expressed by a distinction between 'criminal responsibility', when the elements of the offence are in issue, and 'criminal liability', when the elements are no longer in issue and the question is whether the commission of the offence can be justified or excused.[45] In Duff's analysis, a requirement that the defendant take up the evidential burden when exculpation is in issue is a significant derogation from the presumption of innocence. But derogation is reasonable — it is not unfair to expect the defendant to answer *for* the offence, once the elements have been provisionally established. Until then, however, the defendant has nothing to answer for. This analysis presupposes, of course, that a clear distinction can be drawn between exceptions *to* liability and exculpation *from* liability. Proof that exceptions have no application must be part of the prosecution case. Exceptions and exculpations can be differentiated in simple applications: the distinction has at least an intuitive appeal. Criminal liability for sexual intercourse with a child is subject to an exception, not an excuse or justification, when the defendant and the child are married. Marriage is neither a justification nor an excuse for consensual sexual intercourse with a child. It is, one might say, a licence or permit; it is an exception to the general prohibition. It may seem equally intuitive that the law of murder does not make an *exception* for those who kill in self-defence. There is no licence or permit to kill another; the fatal act must be justified or excused, as the case may be. The question whether such distinctions can be made when intuition runs out or when intuitions clash is contested. It is unnecessary to pursue the question here: it will be taken up later in discussion of the distinction between offences and defences.

3. *The third substantive presumption — the necessity for wrongdoing*: The third application of the substantive presumption of innocence has nothing to do with the burden of proving guilt. It is, rather, a presumption that the conduct of citizens, in all the rich variety of their lives, is innocent unless the legislature has good and sufficient reasons to characterise some particular instance of that conduct as a wrong that warrants the imposition of criminal responsibility.[46]

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45 Care is necessary as a consequence of differences between the terminology used in *Answering for Crime,* ch 10 and established usage in Commonwealth criminal law. The *Criminal Code* reverses Duff's terminology. In the *Criminal Code* D is not 'responsible' for an offence until the elements are established and defences disproved. I have adhered, so far as possible, to Duff's usage in this review.

46 There are points at which Duff seems to equivocate on the question whether this is perhaps an altogether too substantive reading of the presumption. See, eg, *Answering for Crime* 201, citing R A Duff, *Trials and Punishments* (1986) and, contra, V Tadros, 'Rethinking the Presumption of Innocence' (2007) 1 *Criminal Law and Philosophy* 193. Tadros proposes a continuum from a 'moral theory' of the presumption, that would shield citizens from conviction for conduct that *should not* be criminal, and a 'classical theory' that merely requires the defined elements of the offence to be proved and defences disproved. Despite the uncertainty expressed at some points in *Answering for Crime*, the discussion of strict responsibility (at 239–242) clearly envisages a broadly substantive or moral theory of the presumption. The fishing-boat example in the text, which supports the third substantive presumption, appears consistent with the argument and examples in *Answering for Crime*.

> At the centre of the normative theory is the contention that the elements of the offence must constitute a punishable public wrong. Suppose, for example, that a legislature intent on protecting dwindling stocks of sea creatures against the depredations of commercial fishing were to impose criminal liability on the master of any fishing vessel found in a prohibited zone. This imaginary offence does not require proof of intention to fish or proof that fishing occurred. It does, however, require all the usual fault elements with respect to the position of the vessel. The statute accepts that involuntariness is an answer to the charge; the prosecution must prove intention to pass through a prohibited zone and the defences of necessity and duress are available, if there is evidence to support them. It even allows a defence of reasonable mistake of law about the designation of the zone. The legislation is inconsistent nonetheless with the substantive presumption of innocence because it requires the conviction of some who are not guilty of 'a presumptive wrong of the appropriate kind'.[47] Even if the legislature had been less severe, and had qualified the prohibition by allowing a defence of innocent passage without intention to fish, the statute would still breach the second substantive presumption. Innocent passage through the prohibited zone is not a wrong to which absence of intention to fish could plausibly count as a justification or an excuse. The prohibition catches innocents and predators alike and, accordingly, it violates the second, substantive presumption of innocence. Legislatures may, on occasion, make exceptions to the principle, but the exceptions require justification.

The central sections of *Answering for Crime* explore at length the meaning of the requirement of a public wrong. The wrong may be to an individual or group of individuals, or it may be a wrong against the common good, but it must be a wrong that is an appropriate and justifiable subject of criminal proceedings in a liberal democracy.[48] Though there is no explicit statement of the requirement, the offence must provide a 'representative' or 'fair label' for the offending conduct.[49] As an instance of representative labelling, Duff distinguishes between the offence of rape, as a particular kind of violation of sexual autonomy, and lesser sexual offences against young victims, whose consent provides the offender with no answer to the charge.[50]

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47 *Answering for Crime* 231.

48 Ibid 209: 'the offence definition must specify a type of conduct that constitutes what is at least presumptively a wrong for which the perpetrator can be called to answer to his fellow citizens — a presumptive wrong for which he can be held responsible by and to the polity.'

49 On fair labelling, see Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 88; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217.

50 *Answering for Crime 210*: 'a distinctive presumptive wrong, which can be plausibly argued to capture what we should understand by "rape", for which we should have to answer in a criminal court.' Cf the broader American understanding of the offence of rape in Peter Westen, 'Offences and Defences Again' (2008) 28 *Oxford Journal of Legal Studies* 563, 571–4. On labelling in offences of bribery, see *Answering for Crime* 249–50.

This elaboration of the implications that can be drawn from the presumption of innocence is meant to express a set of principled limits on the imposition of criminal responsibility for wrongdoing. Far more demanding processes of enquiry and attribution will be appropriate when moral wrongdoing is in issue and there is no question of criminal liability. The structure that Duff proposes can be illustrated with the aid of a simple thought experiment. Imagine a model citizen, who is well versed in their rights and obligations, and who is veiled by the presumption of innocence. This imaginary figure disputes at every available point the right of the polity to call him, or her, to account with a view to censure and criminal punishment for an instance of alleged criminal wrongdoing. The citizen is not answerable to the polity unless the wrongdoing in question is an appropriate subject for criminal proceedings leading to the possibility of state imposed punishment. Requirements of fault and manifest criminality bar the imposition of liability for criminal disposition or dangerous propensity. Innocent explanations for apparently criminal conduct, however unlikely, must be disproved by the prosecution. The citizen is free to maintain an uncooperative silence until each element of the offence is established. Until that point is reached, the citizen is not required to present any explanation, excuse or justification for their conduct. Apart from the minimal obligations of compliance with the conventions of the criminal trial, the citizen owes no duty of explanation, apology or reparation. No inference of guilt can be drawn from silence in response to prosecution evidence. Alternative forms of legal enquiry must be employed if we want a closer approximation to the processes for attributing moral blameworthiness for conduct or bad character.

The discussion that follows begins with a critical exposition of the normative theory and ends with an examination of the qualifications, compromises and inconsistencies that appear in the course of discussion as Duff moves to a consideration of a limited range of statutory offences. Of necessity, the analysis of his examples is fairly detailed. The point of the analysis is to discover what remains of the theory, after the qualifications and compromises are taken into account.

III Offences, Defences and the Idea of a 'Presumptive Wrong'

Duff's essay in rational reconstruction is based on the premise that normative theorizing is only possible 'within some human practice'.[51] The theory is presented as an account of the substantive meaning of the presumption of innocence as it is expressed in the procedural steps of a criminal trial. Yet the normative message appears to be implicitly addressed to a legislature. There is, in consequence, persistent tension between Duff's account of the temporal sequence of a criminal trial and his implicit references to the articulation of factors that will constitute criminal liability when a legislature devises a new offence or revises an existing offence. An offence expressed in legislative form is a decision tree, or an algorithm of possibilities. One of the purposes of codification is to ensure that the legislature, rather than a court, specifies the decision procedure at each point of juncture in the algorithm. The significance of *Answering for Crime* is its implicit claim to enunciate principles that will determine where those decision points will

[51] *Answering for Crime* 10.

be placed and how the issues should be resolved, in a way that is consistent with the presumption of innocence. The two-stage procedure of the criminal trial — prosecution case followed by defence — will reflect those principles: how could it not? But it is the principles that count; the procedure at trial is secondary and subservient, and provides no more than a rough approximation of the framework of the normative theory. In his review of *Answering for Crime*, Peter Westen[52] makes the point that Duff's sequential analysis of an enquiry into criminal guilt bears only a remote resemblance to the procedure of a criminal trial.[53] It is unnecessary to add to Westen's convincing criticism on this score. The brief account of Duff's sequential analysis of the trial process that follows takes a different path, and suggests that his analysis impedes understanding of the principles and lends quite unwarranted weight to the significance of the distinction between offences and defences.

There are four stages in Duff's analysis:

1. *Answering and refusing to answer*: The defendant in a criminal trial is required to answer the charge with a plea of guilty or not guilty, unless there is some bar to trial. In that case, the defendant is said to be *exempt* from criminal liability. Exemptions include the immunity enjoyed by diplomats; restrictions on double jeopardy; and bars to prosecution that would involve an abuse of process as, for example, in certain cases of entrapment. Children, and defendants who suffered from severe mental illness at the time of the alleged offence or at trial,[54] are said to be exempt, in this sense, from the obligation to answer to the court. In a problematic aside, of which I will have more to say later, Duff remarks that a person who is *authorised* to act in a particular way, as for example a parent who smacks their naughty child, is similarly exempt from criminal liability for that conduct.[55] The nature of the distinction between exculpations, on the one hand, and exemptions for conduct that is authorized or permissible, on the other, is an unresolved puzzle in *Answering for Crime*.

2. *Answering **to** the court*: If prosecution is not barred, the defendant does owe some minimal obligations of respect for the court, enforced by the law of contempt, when answering *to* the charge. There is, however, no obligation to co-operate with the prosecution, or even to plead to the charge. The prosecution will present evidence that the offence has been committed and the court will

52 P Westen, 'Offences and Defences Again' (2008) 28 *Oxford Journal of Legal Studies* 563.

53 Ibid 566–8.

54 *Answering for Crime* 285–6. So far as the obligation to answer *to* the court is concerned, Duff draws no distinction between mental illness or disability that impairs fitness to stand trial and mental illness or incapacity for moral agency at the time of the offence. The mentally incapacitated defendant is exempt from criminal trial in either case because proof of liability requires capacity for agency both at the time of the alleged offence and at the time of the trial. Alternative legal processes are, of course, available.

55 Ibid 180. Discussed at fn 71.

make a ruling on the question whether the defendant has a case to answer. There is, at this point in the sequence, a concept of critical importance in Duff's analysis of the process. In a just system of laws the 'offence' will amount to a 'presumptive wrong' against the polity — 'presumptive', because the prosecution's prima facie case can be defeated by an exculpatory defence. The concept of 'presumptive wrong' has an important role in the normative theory; it will be considered in more detail presently.

3. *Answering **for** an offence*: If the prosecution has a case, there is 'a Presumption of Guilt which it is for the defendant to defeat'.[56] Conviction can be avoided by advancing an exculpatory explanation — a justification or excuse — but the defendant now bears the burden of adducing evidence in support of any attempt at exculpation. Placing the evidential burden on the defendant means that 'she owes it to the court (and to the polity in whose name the court acts) either to admit her guilt, or to offer an [exculpatory] explanation of why she committed the offence.'[57]

4. *Conviction and sentence*: In the absence of an exculpation that will 'block the presumptive transition from responsibility to liability',[58] the defendant is guilty of the crime and will be sentenced accordingly.

The argument for the importance of the divide between the offence and its defences is expressed in language charged with moral and legal significance that is only apparent — that evaporates under closer scrutiny. As Peter Westen remarks, 'raising a reasonable doubt about defences is hardly the same thing as answering for having committed offences.'[59] The linguistic divide between 'offence' and 'defence' has the awkward consequence that the hero honoured with a bravery award by the state for a justifiable homicide has nonetheless committed the 'offence' of murder. That awkwardness may be accepted, on the ground that 'offence' is a convenient collective term for the defined set of elements that constitute the offence, and that 'offence' has a purely formal meaning in the criminal law. The same cannot be said so easily, however, of the other terminology of the normative theory. There is no 'Presumption of Guilt' when elements of the offence are established, either in the course of a criminal trial or in the legislative formulation of offences. There is, in Duff's discussion of presumptions, an unexpected and recurring ambiguity between the sense in which a 'presumption' is a warrant to *infer* A from B, and the common — though misleading — sense in which a 'presumption' means that A *entails* B. Proof of the elements of the offence provides no warrant at all for an inference that D cannot raise a defence to the charge. It is, of course, necessarily true that D is guilty if there is indeed no defence. But that conclusion is not a matter of inference; it is a conclusion determined by a rule in the legislative algorithm that allocates the evidential burden. The contention that D must 'answer for' the offence when the elements are established is equally ambiguous. It cannot mean that D is

56 *Answering for Crime* 223.

57 Ibid 207.

58 Ibid 223.

59 P Westen, above n 51, 563.

'answerable' in the sense that D is presumptively punishable, for D is presumptively innocent. Nor does D 'owe' any legal obligation, when criminal liability is in issue, to answer the charge by providing an account of the reasons, exculpatory or otherwise, for committing the offence. There is undoubtedly a *moral* obligation to provide an explanation in such a case but the presumption of innocence, allied with the defendant's right to silence, has the precise purpose of blocking any transition from that moral obligation to a legal obligation.

If the prosecution's presentation of a case to answer did indeed raise a presumption of guilt, that would amount to a significant qualification of the *Woolmington* principle. The consequences are less dramatic. There is a useful and deflationary comparison that can be made between the structure of Duff's normative theory and the general provisions of Chapter 2 of the Commonwealth *Criminal Code*, in which the same distinction is drawn between offence and defence: criminal responsibility and criminal liability.[60]

In 'Chapter 2 — General Principles of Criminal Responsibility', the physical and fault elements that comprise the offence are distinguished from any 'exception, exemption, excuse, qualification or justification provided by the law' that will answer the charge. Ignoring their diversity for the moment, this collection of potential bars to conviction can be called 'defences', though that expression is not used in Chapter 2. In the absence of specific provision to the contrary, the prosecution bears the legal burden of proof on all issues. As in Duff's normative theory, the distinction between an element and a defence is determined by the allocation of the evidential burden. That is the sole formal basis for the distinction: if the legislature imposes the evidential and legal burden of proving a factor on the prosecution, that factor is an element of the offence. If the defendant must bear the evidential burden or, exceptionally, both evidential and legal burdens, that factor is a defence.

The distinction has three formal consequences. First, physical elements of the offence require proof of a corresponding fault element of intention or recklessness,[61] unless specific provision is made for another fault element or for liability without fault. There is, however, no corresponding requirement of fault with respect to defences, in the absence of specific provision. So, for example, if absence of consent is an element of an offence and there is no reference to fault with respect to that element, the prosecution bears the legal and evidential burden of proving

60 Cf the structural provisions of the *Criminal Code* '3.1 Elements', '4.1 Physical elements' and '5.1 Fault elements', in which the 'offence' is complete on proof of its elements. Absence of a defence is not an element of offences. Compare the Model Penal Code, in which absence of a defence is a 'material element' of offences — see Model Penal Code '1.13 General Definitions', ss (9(c) & (d), ss 10. Discussed, M Dubber, *Criminal Law: Model Penal Code* (2002) 190–2. As mentioned earlier (see fn 30) Duff's usage of 'responsibility' and 'liability' is reversed in the *Criminal Code*.

61 *Criminal Code* '5.6 Offences that do not specify fault elements' requires intention for conduct and recklessness with respect to circumstances and results.

recklessness with respect to that element.[62] If, on the other hand, consent is characterised as a defence, a mistake on that score — no matter how reasonable — is no answer to the charge in the absence of specific legislative provision. That difference between offences and defences in the incidence of fault requirements reflects the probable state of common law.[63] The second formal consequence is the familiar rule that the defendant has no case to answer unless the prosecution carries the evidential burden on each element of the offence. The set of elements that constitute the offence must be proved in their entirety and, in principle, none can be withheld from the jury. The third is the equally familiar rule that the court must determine whether the evidence advanced in support of a defence is sufficient in law for the consideration of the jury and must withhold the defence if the evidence is not sufficient.

There is no specific rule in Chapter 2 of the *Criminal Code* to guide Parliament or a court when it determines whether a factor bearing on guilt is an element or a defence.[64] It is arguable that there are implicit normative criteria in Chapter 2 that should guide the legislature in allocating the evidential burden.[65] It could also be argued, however, that there are few if any implied limits and that the extreme formal simplicity of the general principles in Chapter 2 is meant to ensure that the legislature can deploy the evidential burden as it considers appropriate for reasons of convenience or policy.[66] It is at this point that Duff would propose the normative constraint that the elements of the offence must constitute a 'presumptive wrong'. The requirement that the 'offence' should amount to a presumptive wrong would guide or control the legislature in its allocation of the evidential burden. Considered in that light, Duff's normative limit would be one of the principles located in Gardner's 'supervisory general part' of the criminal law, which is exterior to the

62 In the *Criminal Code*, recklessness requires proof of awareness of physical elements; 'practical indifference' is not enough: '5.4 Recklessness'.

63 See, for example, G Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233, 239–43, who is critical of the rule.

64 The persuasive burden always rests on the prosecution, in the absence of express provision to the contrary: *Criminal Code* '13.4 Legal burden of proof — defence'. In the absence of express provision, allocation of the evidential burden depends on whether the court characterises a factor bearing on guilt as an element or as an 'exception, exemption, excuse, qualification or justification': *Criminal Code* '13.3 Evidential burden of proof — defence'.

65 The *Criminal Code* provisions '5.6 Offences that do not specify fault elements', '6.1 Strict liability' and '6.2 Absolute liability' could be taken as an implicit endorsement of the correspondence principle.

66 In reality, normative limits of some stringency are stated in Commonwealth drafting instructions that supplement the *Criminal Code* provisions. The instructions limit reversal of the evidential or legal burden and require explicit textual indication if the defendant is to bear the evidential or legal burden of proof. See: *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers,* December 2007, '4.6 Defences and Evidentiary Presumptions'. <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers> at 7 March 2010.

statutory provisions of the *Criminal Code*, and addressed to legislatures and courts alike.[67]

Of course there must be *some* principle or set of principles that will guide the legislature when it determines the essential elements of an offence: we are not trapped in a legal system imagined by Franz Kafka, where the elements of the offence cannot be ascertained. The question, however, is whether the principle that the essential elements of the offence must amount to a public wrong provides a coherent guide to a legislature; and, if so, whether that requirement should be the only acceptable ground for shifting the evidential burden to the defendant. Perhaps there are other, less demanding criteria that would be acceptable in a liberal democratic state.

There are at least three grounds for doubting that the normative theory can be sustained as a significant and principled limit on legislative excess. The first is that the distinction between offences and defences lacks the normative significance that Duff claims for it. He appears to concede as much in his discussion of the fault element in the offence of rape. The second point is perhaps related. There is a recurrent ambiguity, mentioned earlier, between two senses of the term 'presumption': a presumption that warrants an inference from facts, and a presumption that embodies a stipulative rule. When discussing the requirement that the 'offence' amount to a presumptive wrong, there is a slide between these inconsistent senses of 'presumption'. The third ground for doubt is the surprising latitude that Duff allows for the attenuation of the requirement for proof of fault — a requirement that is supposed to be essential to the constitution of a 'public wrong' — by resort to qualifying doctrines of constructive fault. These points of criticism are related to a more serious underlying problem. The discovery and development of a principled set of legislative limits or constraints requires careful consideration of the history and conventions of legislative practice over a broad and representative range of statutory criminal offences. There is a lacuna in the normative theory that is particularly apparent in Duff's all-too-brief consideration of legislation creating 'hybrid offences' and offences against the common good. These offences will be considered in the final section of this review.

1. *The normative insignificance of the distinction between offences and defences:* Once the notions of presumptive guilt and an obligation to answer the prosecution case are stripped away, the formal consequences of placing an evidential burden on the defendant do not appear to be of great normative significance. It would be different, of course, if there really was a Presumption of Guilt; but there is not. Whether the factor in question is an element or a defence, the jury will be directed on the law relating to that factor. It is true that defences can be withheld from the jury for want of supporting evidence, but defendants are not immune from adverse judicial comment on their evidence when elements are in issue. It is certainly arguable that it is an important function of the criminal trial to encourage defendants — to a point approaching

67 See J Gardner, above n 21, 205, 208.

compulsion — to provide an account of their conduct.[68] But that function bears no direct or necessary relationship to the allocation of the evidentiary burden. If the object of the criminal trial is to induce an account of the reasons for conduct, that inducement is present whether fault elements or defences are in issue or not. An allegation of intention may be defeated by an account of the Defendant's reasons for that conduct: as, for example, where the Defendant testifies that an impugned transaction was not intended to defraud creditors but to preserve remaining assets from ruin. Allegations of recklessness, negligence or dishonesty can be rebutted in the same way, by an alternative account of the Defendant's reasons for action. If an element of the offence is in issue, the trial judge will be required to instruct the jury on the legal effect and relevance of those reasons to proof of the offence. If a defence is in issue, the same kind of instruction will be necessary, unless the defendant's account is quite beyond the pale and the defence is withheld from the jury. In his discussion of the offence of rape, Duff appears to concede the point. The UK *Sexual Offences Act* 2003 requires, as the threshold fault requirement for the offence of rape, proof of absence of a reasonable belief that V consented to the act of sexual penetration.[69] Duff is prepared to countenance the argument, however, that the fault element could be characterised instead as a defence of reasonable mistake of fact.[70] Though rape is a very serious offence, the normative theory does not require proof of fault for the 'presumptive wrong'. It can be reconstructed as an offence of strict responsibility. I have no quarrel with that conclusion: it does suggest, however, that the normative significance of the distinction between an element of an offence and a corresponding defence is small. The same absence of normative significance in the allocation of the evidential burden is apparent in the considerable number of offences that make criminal liability depend on breach of a standard of reasonable conduct.[71] Dishonesty is an obvious case in

68 J Gardner, *Offences and Defences* (2007) 190–1.

69 *Sexual Offences Act* 2003 (UK) s 1(1)(b). New South Wales law is similar, though it achieves that effect by a quite unnecessary redefinition of 'knowledge' to include cases where D did not know that V had not consented: D is taken to 'know' that V did not consented if D had 'no reasonable grounds for believing' that V did consent: *Crimes Act* 1900 (NSW) s 61HA(3)(c).

70 *Answering for Crime* 224, 247–8.

71 There is a more serious underlying conceptual problem in Duff's requirement that the offence amount to a 'presumptive wrong' that can only be discharged by a justification or excuse. That requirement appears to have no application when conduct is simply *permissible*. There is no wrong to be justified or excused in such a case. The issue is masked in *Answering for Crime* (at 180) by the distinction drawn between *authorised* conduct, for which D claims an 'exemption' from the obligation to answer to a court, and *justified* conduct, when D must answer for a presumptive wrong. The example provided in the text of *authorised* conduct is the parent's plea of 'lawful chastisement' as an answer to a charge of assault on their child. There appears to be an implicit assumption that parental authorisation will be apparent from the outset: that is unlikely, however, when a parent is prosecuted. The limits of authority or permissibility are very likely to be in issue, as in the New South Wales case where a father appealed against his conviction for assault and false imprisonment after he grounded his rebellious daughter and cut her hair as chastisement for keeping bad company and having late nights: *R v DMC* (2002)

point. Though it is obviously a fault element in theft and related offences, UK law[72] and Australian common law[73] do not require a direction on dishonesty unless there is evidence that might cast doubt on the question whether the defendant's conduct was dishonest. In practice, honesty of purpose is treated as a defence and the defendant bears the evidential burden. Similar considerations apply to absence of consent, authorisation or reasonably permissible conduct as elements in offences that involve allegations of assault or causing physical harm. In practice, the defendant bears the evidential burden, even though an element of the offence is nominally in issue.[74]

2. *Presumptive wrongs and presumptive presumptive wrongs*: In his discussion of rape, Duff considers the case of a defendant who sexually penetrates a sleeping woman. Consent and mistaken belief in consent are potentially in issue in such a case. (He would allow a consent given in advance, for penetration that will occur during sleep, to bar conviction for rape in such a case.[75]) In these circumstances however, he contends that to obtain a conviction, the prosecution need do no more than prove that that V was asleep when penetration occurred. Consent is now characterised as a defence, and D bears the evidential burden. Once again, I do not wish to quarrel with that conclusion.[76] The question is one of consistency with the normative theory which requires the prosecution to establish a wrong, rather than an inference of wrongdoing, before D must

137 A Crim R 246. It is unconvincing to say that the case will go to the jury on the question whether the father is exempt from the requirement that he must answer to the court. Nor is it convincing to analyse the case in terms of justification or excuse for his conduct. The question is whether the chastisement was within the uncertain limits of acceptable or permissible parental conduct. If so, there is no wrong to be justified.

72 *R v Roberts* (1985) 84 Cr App R 117. On the doctrine of 'obvious dishonesty', when a direction to the jury is unnecessary, see A Halpin, *Definition in the Criminal Law* (2004) 156–62.

73 *Peters v The Queen* (1998) 192 CLR 493.

74 The *Criminal Code* provides a convenient example in its definition of 'harm', which is an element of various offences in 'Part 7.8 — Causing harm to, and impersonation and obstruction of, Commonwealth public officials'. The definition of harm in '146.1 — Definitions' excludes 'force or impact that is within the limits of what is reasonably acceptable as incidental to … social interaction; or … life in the community.'

75 *Answering for Crime* 247: 'it could be done with the person's consent, in a way that respects the person's autonomy'.

76 The law prevailing in some Australian states and territories may be a good deal more severe. The definition of 'consent' *Model Criminal Code*, 'Chapter 6 — Sexual Offences Against the Person' has been adopted in a number of Australian jurisdictions (Report, May 1999, Australian Government, Attorney General's Department <http://www.ag.gov.au/www/agd/agd.nsf/Page/Model_criminal_code> at 7 March 2010. If it is taken literally, the definition means that there can be no prior consent to sexual intercourse that occurs when the person is asleep or unconscious: '5.2.3 Consent'. Mistaken belief in consent would not avail the defendant, if the victim was known to have been asleep or unconscious at the time penetration occurred, for that would be a mistake of law.

answer for the offence. The problem here is that the 'presumptive wrong' — intercourse without consent — is inferred, not established. The basis for the inference that there was no consent is not explained, though it is said to be 'strong.'[77] That is very likely true, but the same can be said of any case of rape prosecuted in the criminal courts: current practice suggests that the Director of Public Prosecutions is unlikely to proceed unless the inference is very 'strong' indeed that V did not consent to intercourse. The presumption of innocence is meant to protect the defendant against *that* inference. Duff argues that the defendant should take particular care before proceeding to ensure that V has consented. That may be conceded; it has nothing to do, however, with the question whether the prosecution has established that V did not consent to intercourse. The presumptive wrong principle has undergone mutation in this reconstruction of the law of rape. It is no longer necessary for the prosecution to establish absence of consent before D is required to answer for the offence: wrongdoing that is merely apparent is sufficient to cast the evidential burden on D. This variation of the normative theory is very familiar in criminal legislation. It is no different in principle from the rule that the prosecution need not prove, as part of its case against a drug trafficker, knowledge that his suitcase contained a secret compartment with a cache of heroin.

3. *Skating on thin ice towards strict liability for constructive wrongs*: Though fault is normally required for a presumptive wrong, the normative theory is extended to include the common law principle of 'constructive liability' which allows the fault element for offence A to be established by proof of the fault element for offence B.[78] To avoid confusion arising from Duff's distinction between 'responsibility' and 'liability', I will call the principle 'constructive fault', rather than 'constructive liability'. The discussion of constructive fault is of particular interest because, at this point, Duff comes close to a consideration of legislation dealing with crimes against the common good. The offences that are taken to exemplify the constructive fault principle are drawn from the recently reformed UK offences of consensual intercourse with children.[79] The discussion appears to involve a substantial retreat from the apparent rigour of the normative theory. Duff oscillates between two versions of the constructive fault principle, one restrictive and the other expansive, and eventually adopts the expansive version to permit the imposition of strict, or in Australian terms, 'absolute' liability. The expansive and restrictive versions of the constructive fault principle can be illustrated by reference to the familiar rules defining common law murder:

   a. *Restrictive*: The fault element for Offence A (causing grievous bodily harm with intent to cause grievous bodily harm) is sufficient for Offence B (murder by recklessness) because they are equally blameworthy forms of fault. No distinction is to be drawn between recklessness as to death and intention to cause grievous bodily harm because both exhibit ' "practical indifference"

77 *Answering for Crime* 247.

78 Ibid 253–5.

79 *Sexual Offences Act* 2003 (UK) ss 6, 9.

as to whether [the] victim lived or died…'[80] They are equivalent in moral blameworthiness.

b. *Expansive*: The fault element for Offence A (robbery) is sufficient for Offence B (murder by recklessness) even though their fault elements are not equally blameworthy. A person who embarks on robbery is at peril of conviction for murder if something goes wrong with the planned robbery and an accidental death results.

Duff adopts the expansive version of the principle in his discussion of the offences of unlawful sexual intercourse with children. The more serious of these offences imposes a maximum penalty of life imprisonment for sexual penetration of a child who is less than 13 years of age.[81] The less serious offence imposes a maximum penalty of 14 years imprisonment for sexual penetration of a child who is less than 16 years of age. Liability for this offence requires proof that D did not believe V to be 16 or older.[82] One might expect Duff to argue that the more serious offence requires proof of fault with specific reference to the victim's age. He does not: the fault element for the lesser offence — absence of reasonable belief that V is 16 or more — is sufficient for conviction of the more serious offence committed against a child of 12 or less. Like the robber in the felony murder example, D takes the risk that the offence may turn out to be far more serious than he had reason to expect. Duff's 'thin ice' principle, which does not require proof of another offence, is essentially the same in its inculpative effects. Suppose Parliament took the unlikely step of repealing the offences of consensual intercourse with children between the ages of 13 and 16 years. The remaining offence of intercourse with a child of less than 13 might still retain the requirement of proof that D did not reasonably believe V to be 16 or more. That would ensure that D had fair warning of the peril that apparently lawful intercourse with V might turn out to be a very serious criminal offence.[83] Once again, these extended applications of the normative theory are familiar in legislation: an importer of some specified quantity of a forbidden drug is taken to be a trafficker without proof of intention to sell.

The discussion of offences of consensual intercourse with children is particularly interesting because these offences have only a tenuous relationship with the

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80 *Answering for Crime* 254. In this instance, as in his discussion of the drug dealer whose customer dies of an overdose (256–7), Duff insists that liability is *formally* strict, but *substantively* consistent with the presumption of innocence (254): 'the formally strict liability involved in the doctrine of implied malice is not substantively strict: what must be proved (an intended serious attack) also proves the necessary fault as to death'.

81 *Sexual Offences Act* 2003 (UK) s 6: The offender's beliefs about the age of the child, whether reasonable or unreasonable, are irrelevant to criminal liability.

82 Ibid, s 9. The discussion above follows Professor Duff in disregarding s 9(1)(c)(ii), which eliminates the requirement of a fault element when V is less than 13 years of age.

83 *Answering for Crime* 257–60.

intentional attacks and reckless endangerments that provided the basis for the normative theory. These offences are described as 'hybrid', because the prohibited conduct will include a proportion of cases involving wrongful harm to a victim (*'malum in se'*) and a proportion, perhaps large, where there is neither harm nor risk of harm to the victim (*'malum prohibitum'*).[84] Douglas Husak asks of these offences, 'how can punishment be justified within a theory of criminalisation that includes the wrongfulness constraint?'[85] Duff replies that these over-inclusive hybrid offences are justified because citizens have a 'civic duty to accept this modest burden'[86] on their choice of sexual partners. If most of us are, on the whole, better off with a clear but over-inclusive rule to follow, offenders wrong their fellow citizens by breaching their duty to observe the rule. The same can be said of those offences that do not designate a class of potential victims but simply punish conduct that represents a harm to the common good: 'breaches of them are therefore breaches … of our civic responsibilities, which merit (often mild) condemnation as wrongs.'[87]

We have travelled a long way, it seems, from the formal simplicities of the normative theory which provides no guidance here. The acceptability of these hybrid offences and offences against the common good appears to depend on an assessment of the policy reasons for a generalised statutory rule; the projected benefits to the polity of compliance with its provisions; the significance of the sacrifices involved in compliance; the degree of derogation from the presumption of innocence; and the magnitude of the penalty for breach, among other considerations. There is no guiding principle here, only the familiar balancing of policy with requirements of fair notice and the like.

The preceding outline of the qualifications, inconsistencies and compromises in the application of the normative theory may seem of marginal significance, occurring in what theorists often dismiss as the 'regulatory' part of the criminal law. That is not the case, however. It is time to make good the assertion that the criminal law is polycentric, rather than centred on crimes of intentional attack.

IV Crimes Against the Common Good

The coining offences which I will use for the purpose of illustration are paradigmatic.[88] Offences of collective, incremental harm to infrastructure typically

84 Ibid 169: 'offences specifying rules that imperfectly capture standards which define genuine *mala in se*, the commission of which will therefore often, but not always, involve the commission of the relevant *malum in se*.' The term 'hybrid' seems to have been coined by Douglas Husak, above n 10, 106. See also V Tadros, 'Rethinking the Presumption of Innocence' (2007) 1 *Criminal Law and Philosophy* 193.

85 Douglas Husak, above n 10, 107.

86 *Answering for Crime* 172.

87 Ibid 173–4.

88 An indicative selection of coining cases can be found at Proceedings of the Old Bailey, 1674–1913: <http://www.oldbaileyonline.org/static/Crimes.jsp#offences againstking> at 7 March 2010. Historical accounts of the coiners can be found in

involve consensual transactions that do little or no immediate harm to identifiable victims; it is the aggregative effect of these transactions that constitutes the harm to the common good. The activities of the English counterfeiters from Elizabethan times through the 18th and early 19th centuries threatened the established infrastructure of commercial negotiation, exchange and agreement. The pattern of offences enacted in the coining statutes was to be repeated in modern legislation against trafficking in forbidden commodities — whether they be drugs, forbidden varieties of pornography, or the proceeds of crime.

Counterfeiting silver coin was punished with extreme severity.[89] The offences included clipping, modification and diminution of coin, as well as the fabrication of coins from base metal. The last three women burned at the stake in England, in the late 18th century, were burned not for killing their husbands, masters or mistresses, but for counterfeiting, which was high treason, not petty. Blackstone records that men suffered a modified penalty for treason when convicted of counterfeiting: they were hanged and drawn, but not quartered.[90] The counterfeiting offences were paralleled by lesser offences against the royal prerogative of using false weights and measures.[91] The essential ground of liability in offences of counterfeiting and the use of false weights and measures was not the loss suffered by individual victims of fraud. These offences against the royal prerogative came well before the development of the statutory offences of obtaining by false pretences. It was their deleterious effect on commerce, and on public trust in the measures of value and quantity, which justified the imposition of criminal and quasi-criminal liability. The royal prerogative stood proxy for the common good.

Two factors combined to encourage widespread counterfeiting and localised, popular acceptance of the activities of the counterfeiters during the seventeenth, eighteenth and early nineteenth centuries. During most of this period, there was a

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the following sources, among others: John Styles, ' "Our traitorous money makers": the Yorkshire coiners and the law, 1760–83' in J Brewer and J Styles (eds), *An Ungovernable People* (edited 1980) 172; Alan Macfarlane and Sarah Harrison, *The Justice and the Mare's Ale* (1981) 'Ch 3 Clippers and Coiners', 61–78; Malcolm Gaskill, *Crime and Mentalities in Early Modern England* (2000), 'Part II: Coining', 123–99; Carl Wennerlind, 'The Death Penalty as Monetary Policy: The Practice and Punishment of Monetary Crime, 1690–1830' (2004) 36 *History of Political Economy* 131; George Selgin, *Good Money: Birmingham Buttonmakers, the Royal Mint, and the Beginnings of Modern Coinage,* 1775–1821 (2008).

89 The counterfeiting offences relating to copper coin were of a lesser order of criminality. Parallels might be drawn with modern legislation distinguishing between offences of trafficking in cannabis and the more serious offences of trafficking in heroin and the like.

90 William Blackstone, *Commentaries on the Laws of England*, Book 4, Ch 6, Avalon Project, Yale Law School <http://avalon.law.yale.edu/subject_menus/blackstone.asp> at 7 March 2010.

91 See J O'Keefe, *The Law of Weights and Measures* (1966) 'Introduction: Outline of History and Nature of Weights and Measures Administration' for an account of the history of statutory penalties, forfeitures and compensation payments exacted from offenders who used false weights and measures.

significant shortage of genuine silver coin because the Royal Mint was unwilling to compete with the counterfeiters. As a consequence, their industry in supplying counterfeit coin satisfied the needs of commerce.[92] Fraud was an occasional rather than a necessary element of transactions involving counterfeit coin. Second, the manufacture of counterfeit coin that could pass as genuine, and modification or diminution of genuine coin, required no esoteric knowledge or highly specialised equipment. Though there were major producers who traded in bulk lots of counterfeit coin, the Old Bailey reports contain hundreds of accounts of minor players — many of them women — for whom the manufacture of counterfeit coin was a cottage industry.

The counterfeiters adapted their techniques with each advance in the technology of the Royal Mint. It was the practical impossibility of eliminating manufacture and trafficking in counterfeit coin that compelled the continual parliamentary extension, elaboration and refinement of the coining statutes. As in the case of modern drug trafficking legislation, there is no paradox at all in the fact that the legislation was extraordinary in the severity of its penalties, in its sophistication, and in its failure to eradicate the illicit trade in counterfeit coin. Successive waves of legislative activity produced the patchwork of counterfeiting statutes which were finally assembled in the statutory consolidation of 1832.[93] That consolidation was superseded by the more comprehensive consolidation of coinage offences in 1861.[94] When the offences were assembled and consolidated, the design and pattern of the patchwork became apparent. It was, in Markus Dubber's terms, a system shaped by the contours of enforcement policy to match what he would describe as the 'police power model'.[95] Contrary to his suggestion, however, the model is very far from being a modern development: most of the modern techniques of prohibition were deployed in the coining statutes from the end of the seventeenth century. The same striking parallels are apparent in the techniques of enforcement of the coining laws, which made extensive use of undercover agents. Parliament was not solely responsible for innovations in the coining statutes. Instances of judicial law making and parliamentary responses to judicial initiatives are entwined in the history of the coining legislation. Courts had greater mobility of response than Parliament and developed supplementary forms of inchoate liability that were subsequently adopted in legislation.[96]

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92 See the canonical study by Sir Albert Feavearyear, *The Pound Sterling: A History of English Money* (2nd ed 1963) 121–2: During the mid to late seventeenth century, counterfeiting 'served only to add to the circulation the quantity needed to meet the increasing demands of trade.' See also 211–2 on the condition of the silver coinage in the late eighteenth and early nineteenth century, which resulted in similar reliance on counterfeits and tokens.

93 2 William, c34.

94 24 & 25 Victoria, CXCIX, *An Act to Consolidate and Amend the Statute Law of the United Kingdom Against Offences Relating to the Coin*, c99.

95 'The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process' in RA Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005) 91–118.

96 See the important case of *R v Sutton* (1737) and its legislative aftermath. The case is variously reported: 95 ER 240, (Cas T Hard 371); 93 ER 1040, (2 Strange 1074); East

The fact that counterfeiting and the use of false weights and measures were, quite literally, conceived as crimes of disloyalty or breach of allegiance has familiar modern parallels in the justification advanced for offences concerned with the degradation of moral rather than monetary values.[97] That was the rhetorical form adopted by Lord Devlin in his famous debate with HLA Hart: that some forms of sexual immorality are akin to treason, and that the state is justified in punishing individuals whose conduct might encourage a general debasement of moral standards. In this cosmogony of evil-doers the traitor and the 'vice monger' are equivalent figures.[98] It hardly matters whether the vice monger traffics in sex, drugs or counterfeit coin; the subject matter of the vice monger's trade reflects the anxieties of their era. The arguments that support penal legislation are essentially the same; their animating concern is that trafficking in the forbidden commodity involves an intolerable degradation of public standards of acceptable conduct.

Legislative prohibitions directed to the suppression or control of incremental collective harms take quite a different form from those that deal with the familiar offences of intentional attack on persons or property. Harm to the common good will not be specified as an element of the offence; nor will the fault elements required for proof of guilt make reference to that harm. As Blackstone pointed out, the counterfeiter did not *intend* treason.[99] The contribution made by any particular transaction to a collective harm is almost always negligible, and few of those who participate in the activity will pause to consider the aggregative effects of their conduct. Lord Devlin made essentially the same point in his remark that the activities of the vice monger, like those of the traitorous spy, may do no more than 'dent the structure of a strong society — [b]ut that is not the way in which treachery is considered.'[100] So far as the offender's guilt is concerned, it is irrelevant that the particular instance of offending makes a negligible contribution or no contribution at all to the collective harm.

The absence of any requirement of a link in terms of causation, intention, recklessness or negligence, between the offender's conduct and the harm against which the law is directed, has structural consequences in legislation against collective harms. Penalties for breach are not geared, by any retributive calculus, to a harm or wrong suffered by some particular individual; nor are they geared to the contribution (usually quite negligible) that the individual offender makes to a collective harm. Instead, the penalties are primarily deterrent and determined by

Pleas of the Crown, Vol 1, 172.

97 Cf AP Simester and A von Hirsch, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269, 285 on 'apparently harmless wrongs' that set back 'the interest we all have in the effective existence of a property law regime. The regime itself serves our well-being by providing a reliable means by which we can seek to improve our own lives through the voluntary acquisition, use and exchange of resources.' The authors' recourse to the metaphor of a 'regime' can be taken as a reflection of the idea that the offences in question are a breach of allegiance or loyalty to the common-wealth.

98 Patrick Devlin, *The Enforcement of Morals* (1965) 13–14, 112–3.

99 Above n 90.

100 Above n 98, 112.

the perceived magnitude of the collective harm and the incentives for individuals to participate in the forbidden activity. The severity of the penalties for counterfeiting in the seventeenth, eighteenth and nineteenth centuries, like current penalties for trafficking in drugs or child pornography, were a reflection of concern about the consequences of widespread and endemic levels of participation in the illicit market.[101]

Legislation against trafficking — whether in drugs, sexual commodities or counterfeit coin — is aimed at conduct, not results. The difference between completed and 'preparatory' crimes ceases to be significant: as a consequence, the role of the law of attempt in these areas of statutory criminal law is increasingly uncertain.[102] Nor is there any requirement of causal proximity between conduct and the collective harm that sustains the statutory prohibitions. As a consequence, statutory prohibitions are addressed to conduct that is a sign or symptom of the offender's participation in the illicit market. These offences take the form of evidential presumptions of wrongdoing, crystallised in statute law. Crimes of manufacture, import and possession of incriminating things have long played this role. From the seventeenth century, the counterfeiting statutes based liability on possession of incriminating implements or raw materials; the common law appears to have done so even earlier. Mere possession is harmless. Criminal responsibility was based on a legislative presumption that the thing possessed would be put to harmful use. A round-robin pattern of reciprocal responses among Parliament, counterfeiters, the Mint and the courts, as each reacted to the others' latest initiatives, led to an increasing elaboration of the coining statutes. The offences took the form of a structured set of derogations from the presumption of innocence. In the terminology of Duff's normative theory, the defendant had something to answer *for* because he chose to engage in conduct that the legislature had declared to be symptomatic of participation in an enterprise that harmed the common good. The particular offence committed by the offender may have been discovered, or it may have been engineered by police or undercover agents in order to provide a symptomatic display of the offender's participation in the illicit trade. Undercover

101 George Fletcher discusses the question of punishment for treachery in *Loyalty: An Essay on the Morality of Relationships* (1993) 43: 'Just punishment requires a sense of proportion, which in turn requires sensitivity to the injury inflicted. … In the context of betrayal, the gears of this basic principle of justice, the *lex talionis*, fail to engage the problem. The theory of punishment does not mesh with the crime when there is no tangible harm … '

102 On the problematic role of the law of attempts in modern statutory law, see P Glazebrook, 'Should we Have a Law of Attempted Crime?' (1969) 85 *Law Quarterly Review* 28. Wholesale elimination of attempt liability, proposed by Glazebrook, is unlikely. But the preparatory offences, which long preceded the development of the law of attempt, supersede its limitations in the growth areas of modern criminal legislation, essentially for the reasons advanced by Glazebrook. See, for example, the numerous provisions in 'Chapter 10 — National Infrastructure' of the *Criminal Code* which preclude liability for attempt when offences are preparatory in form: 'Part 10.6 — Telecommunications services'; 'Part 10.7 Computer offences'; '10.8 — Financial information offences'. See also B McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance* (2009).

agents of the Royal Mint played that role in the enforcement of counterfeiting law in the late eighteenth and early nineteenth centuries, and it is standard practice in the enforcement of modern offences against the common good. The 'public wrong' is attenuated in these cases; there is only the simulacrum of a public wrong, for the conduct that constitutes the offence and the process of gathering evidence of its commission merge in the process of enforcement.

The legislative techniques employed by Parliament in the coining laws that culminated in the 1861 consolidation[103] are familiar. They could be superimposed without incongruity on the drug trafficking provisions of the Commonwealth *Criminal Code*, Part 9.1 — *Serious Drug Offences*. Possession of tools, raw materials, or product becomes a criminal offence. Proof of ulterior intention is required if the thing is innocuous, but not if the thing itself manifests the criminal intention of the possessor. Offences are graded in seriousness by reference to the quantity of product involved.

Offences against the common good, epitomised in the coining offences and their modern counterparts, occupy a broad tract of the criminal law, lying as they do between murder, rape and other offences against the person, which retain their common law roots, and the terrorism offences that provide Duff's recurring instances of unprincipled legislative pragmatism. This brief exploration of that territory should provide an indication at least of what has been neglected in Duff's essay in reconstruction.

Conclusion

The real subject of *Answering for Crime* is not the distinction between offences and defences that gives the book its title. Though the distinction is certainly important, it does not carry the normative significance that Duff requires for his normative reconstruction. Over a large range of applications, the incidence of the evidentiary burden is simply not that important. The real subject of the normative theory is the presumption of innocence, in its 'substantive' sense, which transcends the *Woolmington* divide between the 'Criminal Law' and 'statutory exceptions'.

It is worth emphasising again the magnitude of the undertaking implied in the normative theory. It is not a theory of statutory interpretation limited in its application to those areas of uncertainty where the legislature fails to make its intentions sufficiently clear.[104] Those areas of uncertainty are, in any event, diminishing with the development of rules and conventions for encoding and

103 24 & 25 Victoria, CXCIX, *An Act to Consolidate and Amend the Statute Law of the United Kingdom Against Offences Relating to the Coin*.

104 See, eg, Chief Justice James Spigelman, 'The Common Law Bill of Rights' (Speech delivered at the 2008 McPherson Series:, Statutory Interpretation and Human Rights, Brisbane, 10 March 2008); Chief Justice James Spigelman, 'The Application of Quasi Constitutional Laws' (Speech delivered at the 2008 McPherson Series: Statutory Interpretation and Human Rights, Brisbane, 11 March 2008); Chief Justice James Spigelman 'Legitimate and Spurious Interpretation' (Speech delivered at the 2008

decoding criminal legislation. Nor is the normative theory expressed with the necessary limitations that will constrain a court which is bound, in the end, to give effect to legislative intentions.[105] Though Duff is occasionally ambivalent on the point, and displays persistent distaste for legislatures, the theory seems clearly to occupy a place in John Gardner's 'supervisory general part' of the criminal law, which is addressed to legislatures and courts alike.[106] Stated in its most uncompromising form, it is proposed that criminal punishment can only be justified for conduct, proved beyond reasonable doubt, which amounts to a public wrong against individuals or the polity. Everything depends, of course, on what is to count as a 'public wrong'. In the offences of intentional attack there can be no doubt on that score. Violation of the individual victim is a violation of fundamental values of the polity. When Duff came to consider offences that do not require proof of any harm or wrong to individuals, however, the constraints of the normative theory were loosened. Uncompromising adherence to the requirement of a completed wrong, with its necessary complement of fault, would 'involve rejecting large swathes of our criminal law'.[107] The compromises have been outlined in the preceding discussion. The constructive fault and 'thin ice' principles permit conviction of defendants without proof of fault with respect to the elements of the offence, and without the saving grace of a defence of reasonable mistake of fact. In Duff's terminology, these are offences where the normative theory would permit 'strict liability'. More significant than the compromises, however, was his concession that the 'public wrong' might be located in the fact of disobedience alone, when liability is based on breach of a legislation that promulgates a general rule to secure the common good. These are the so-called 'hybrid offences' and offences of *malum prohibitum*. In *Answering for Crime* it seems to have been assumed that there is a central core of the criminal law and that these compromises and qualifications occur far from that central core, in areas

McPherson Series: Statutory Interpretation and Human Rights, Brisbane, 12 March 2008).

105 Cf V Tadros, above n 45, 213, who argues that the presumption of innocence is inviolable and that UK statutes can be challenged before the European Court of Human Rights if the presumption is breached. He concludes: defendants should not be convicted 'where it has not been proved beyond reasonable doubt *that they were the intended targets of such criminal offences*' (emphasis added). In Australia, a reverse onus defence of absence of intention to traffic in cannabis was unsuccessfully challenged, on constitutional grounds, in *R v Granger* (2004) 88 SASR 453. The Court left open the possibility that such a challenge might succeed if Parliament were to enact an irrational rule of presumptive guilt. Short of irrationality, however, there is little likelihood of such a challenge succeeding. Doyle CJ concludes (470): 'It should … be remembered that it is for Parliament to create offences and to define their elements. Many offences of strict liability have been created. It must also be within the power of Parliament to create offences that have no, or a limited mental element. Bearing that in mind, one must be cautious before holding that creating a presumption in aid of proof of the mental element of an offence is beyond power. Parliament might achieve much the same result, or a more stringent one, by redefining the elements of the offence in question to remove the mental element.'

106 See J Gardner, 'On the General Part of the Criminal Law' in RA Duff (ed), *Philosophy and the Criminal Law* (1998) 205, 208.

107 *Answering for Crime* 169.

of specialized or regulatory legislation, where penalties are comparatively lenient or borne by corporate defendants.[108] The preceding account of crimes against the common good shows that assumption to be unwarranted. Crimes against the common good, with their origins in the law of disloyalty and breach of allegiance, are no less representative of the criminal law than crimes against individuals. If normative plausibility requires some degree of fidelity to sources, reconstruction cannot be restricted to the discovery of norms that are 'implicit in the system of law as it is applied by the courts'.[109] The legislature has always displayed its primary interest in the crimes against the common good.

If one turns to the practice of legislation, one can ask: when (if ever) is it fair and reasonable, or consistent with principle, for members of a liberal, democratic polity to take the sign of criminal wrongdoing for the substance? Let us suppose that the sign is sufficiently cogent; that fault elements must be proved; that the offender will have fair warning; that defences will be recognised; and that any other legislative constraints one might devise will be observed. It is not impossible to imagine the development of a principled pragmatism that will justify legislation that takes the form of calculated derogations from the presumption of innocence. That presumption is not, after all, a moral principle: when moral culpability is in issue, we can be morally obliged to participate in the enquiry into wrongdoing. The presumption of innocence is necessary because the criminal process is not an enquiry into moral blameworthiness. In contrast, the process of enforcement of the criminal law is violent and frequently corrupt. The presumption of innocence is one of a number of restraints on the violence and potential corruption of the process.[110] It is, however, far from absolute in its demands. The possibility of a principled pragmatism is, after all, immanent in Duff's resort to the metaphor of skating on thin ice, and in his resort to the doctrine of constructive fault. In *Answering for Crime*, these forms of presumptive guilt play a marginal, dubious and speculative role. A more comprehensive view of the criminal law will show, however, that derogations from the presumption of innocence have a long established place in legislation dealing with crimes against the common good — many of which are punishable with penalties equivalent to those exacted for the major offences against the person. A principled pragmatism would require the thin ice metaphor to be unpacked and the ambiguities of constructive fault resolved. The realities of existing legislative practice, in which guilt may be presumptive and the sign of criminality may be taken for the substance, suggests the need for a more extended and articulate law of defences, that will enable a defendant to establish that the sign was delusive.

In the end, everything depends on how we on how we shall balance our civic duty with our rights as members of the polity, when the stakes are a good deal higher than they are when Lee must decide whether to engage in sexual intercourse with

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108 See, eg, *Answering for Crime* 172–4 on 'mala prohibita' and 243–6 on the liability of the factory owner for breach of health and safety legislation.

109 Ibid 5.

110 Stephen's 'extremely rough engine [which] must be worked with great caution'. See JF Stephen, *Liberty, Equality, Fraternity* (1967) 140.

young Leslie, who may be a good deal younger than appearances suggest. Nothing I have said is meant as an answer to Duff's characterisation of terrorism legislation as *un*principled pragmatism. One may doubt, however, that members of a liberal democratic polity will be convinced that contemplation of the law of murder and rape will provide grounds for radical reform of existing legislative excesses, or intelligent resistance to excesses yet to be invented, in that particular province of the criminal law.