

Justice Denied: The Criminal Law and the Ouster of the Courts

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Abstract – The character of contemporary criminal law is changing. This paper examines one aspect of that change: a type of criminal offence which, it is argued, effectively ousts the criminal courts. These ‘ouster offences’ are first distinguished from more conventional offences by virtue of their distinctive structure. The paper then argues that to create an ouster offence is to oust the criminal courts by depriving them of the ability to adjudicate on whatever wrongdoing the offence-creator takes to justify prosecuting potential defendants. The paper further argues that creating such an ouster is objectionable on a number of grounds. It deprives the courts of the ability to adjudicate independently, and undermines their ability to deliver procedural justice in both pure and imperfect form. While the ouster in question is by no means express, the paper argues that it is nonetheless of the first importance.

*What areas of government decision-making would be next to be removed from the scrutiny of the courts? What is the use of courts, if you cannot access them?*¹

Clause 11 of the Asylum and Immigration (Treatment of Claimants, etc) Bill 2004 created a storm of controversy when put forward by New Labour as the solution to mounting delays and increasing costs in the asylum and immigration system. Lord Woolf, in the lecture quoted above, was by no means alone in publicly lambasting the clause. Why such furore? Because Clause 11 attempted to comprehensively remove the ability of the courts to review the legality of decisions made by the Immigration Appeal Tribunal, a tribunal which, pursuant to the Bill, would become the only source of appeal in asylum

¹ Lord Woolf, ‘The Rule of Law and a Change in Constitution’ (Squire Centenary Lecture, Cambridge 2004) < <http://www.law.cam.ac.uk/faculty-resources/lecture-handouts/3> > accessed 30 June 2009.

and immigration matters.² Denying access to the courts to an entire class of litigants was, the critics claimed, beyond the pale. In the face of enormous criticism, the government backed down and amended Clause 11, denying constitutional lawyers everywhere the chance to see if the judges would, as Lord Woolf had once predicted, act without precedent and refuse to apply a piece of primary legislation.³ In the end, the courts retained jurisdiction, and the critics appeared victorious.

Crisis averted. But Lord Woolf's questions hung in the air. What would be the next class of decisions which the government sought to remove from the courts? When would the next ouster be brought forward, challenging the role of the judiciary? This paper argues that *sub silentio*, the government has already begun to achieve what it sought to achieve in the immigration context in the context of the criminal law. True, the result has not been achieved through the formal device of the ouster clause. The government has learnt that transparency courts criticism. But what has happened in substance is of the first importance. For the courts' role has been significantly undermined by new developments. I will argue that a whole range of offences have recently been created denying the courts scrutiny of the very behaviour which those offences exist to target, and commission of which is thought to justify convictions pursuant to each offence. The role of the courts has been cut down - limited to establishing the presence of that which, by the government's own lights, amounts simply to a collection of elements brought into law to help facilitate conviction of those who

² For discussion of the saga, see R Rawlings, 'Review, Revenge and Retreat' (2005) 68 MLR 378-410.

³ See H Woolf, 'Droit Public - English style' (1995) PL 56-71.

have engaged in the targeted behaviour. When it comes to that latter behaviour, the courts have no role to speak of. They have, in short, been ousted.

It will be my argument that this ouster cannot be reconciled with important values which should be respected by the criminal law, and which are central to the proper fulfilment of the judicial role. In particular it impairs both the pursuit of justice and judicial independence. If I am right, this is a matter of no little concern. It amounts in substance to the realisation of the threat Lord Woolf warned of in 2004.

1

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

Here is the first claim. Criminalisation – making something a criminal offence – marks out whatever is criminalised as something which, according to the law, must not be done.⁴ Nor is this marking out merely incidental. In fact, it helps criminal offences play their typical *ex ante* role: because criminalised behaviour is marked as something which must not be done, each offence guides potential offenders away from that behaviour, helping reduce its overall incidence.⁵ This is not the only effect worth noticing. Barring

⁴ This is an oft-made claim: see e.g. H.L.A. Hart, *The Concept of Law* (2nd edn OUP, Oxford 1994) 27; A Ashworth, 'Conceptions of Overcriminalisation' (2008) 5 Ohio State Journal of Criminal Law 407-425.

⁵ At this point, it may be objected that only that part of the offence to which there is no defence is marked out in the manner described. Those troubled by this point should read my discussion as referring only to those cases where no defence is available.

evidentiary difficulties, engaging in whatever is criminalised makes one's arrest, prosecution, trial and conviction legally legitimate. Criminal offences thus also have a typical role to play *ex post*: they provide grounds for official responses to offending behaviour, including censure, punishment and other forms of negative evaluation.⁶

This all raises the question of the criminal law's relationship to wrongfulness. Because a crime is behaviour marked out as that which a) must not be done, and b) renders one liable to conviction and punishment, many Anglo-American criminal law theorists hold that the law portrays criminal behaviour as wrongful.⁷ To put it another way, it is part of the significance of criminalisation – one of its *outputs*, if you like - that anything made a criminal offence is portrayed by the law as a breach of duty. To commit an offence is thus to commit what I will call an *output wrong*: it is to do something which, on account of its criminalisation, the law portrays as wrongful.

Nor is this the only interconnection between crime and the wrongful. As well as output wrongs, we can also identify what I will call *input wrongs*. An input wrong is a moral wrong commission of which is taken by the offence-creator to in some way justify creating a given offence.⁸ The offence-creator may think there good reason to *reduce* the

⁶ Of course, the offence's *ex post* role is actually more complex. The offence is likely to be only part of a larger decision-rule which officials use to guide their responses to offending behaviour. I cannot discuss this further here.

⁷ For just one endorsement, see A Duff, 'Theories of Criminal Law', *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/criminal-law/>> accessed 30 December 2009.

⁸ By 'offence-creator' I mean to refer to those responsible for crafting the offence-definition by deciding which elements to include and in what form. In most cases, this is principally the job of government officials and their agents. Legislators, on whose say-so the legal validity of the offence depends, play a subsidiary role, making such amendments to a pre-existing offence-definition as time and support permit.

incidence of a moral wrong, and think that creating a criminal offence will help achieve this. The offence-creator may think there good reason to *punish* a type of moral wrongdoer, and think that a criminal offence is required to do this. There are other justificatory possibilities, and we need not mention them all here. Nor can we yet say what the relationship should be between the input and output wrongs. We need only keep in mind that it is, in some sense, *because* of commission of the input wrong that the output wrong is created.

In this paper, I am solely concerned with criminal offences which are responses to input wrongs. There are no doubt many such cases. The paradigmatic offences (murder, rape, burglary, theft) are all plausibly thought of in this way. Why make murder a crime? Because to murder someone is to commit a moral wrong, because we want to see less of this type of wrong, and because creating the output wrong will help reduce its commission.⁹ By capturing (albeit roughly) the relevant input wrong with a corresponding output wrong we hope to both a) guide behaviour by marking out the prohibited conduct as wrongful, and b) provide a standard for evaluative responses such as conviction and punishment, which responses play their own part in putting people off output, and thus input, wrongdoing.¹⁰

⁹ As will be clear from my describing the input wrong as *murder*, an output wrong which captures this input wrong will be one which provides for the acquittal of justified or excused killers, normally by granting defences in such cases. This means that for my purposes an output wrong still captures the input wrong as long as the defendant is legally entitled to raise points nullifying input wrongdoing. In short, I am not concerned to attack reverse onus clauses in this essay.

¹⁰ Why is the input wrong captured only 'roughly'? Because the two roles the offence plays (guide and standard of evaluation) do not always wax and wane together. Not all salient evaluative dimensions can feature in the offence-definition if it is to be a serviceable guide for the man on the street, or for the various officials who need to make decisions about violation. A serviceable guide

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

2

In Section 1, I discussed a case where an output wrong was created to (roughly) capture an input wrong. After all, it is because of the latter that the former was created. In the cases with which I am concerned in this section, an offence-creator intends to *separate* the output wrong from the input wrong. Why? In order to facilitate the arrest and conviction of more suspected input wrongdoers. The idea is simple: the offence-creator creates an output wrong which merely captures some act A because it is thought that prohibiting A, rather than the input wrong, will make it easier to arrest and convict the aforementioned suspects. Once we see that this is the goal, we can see that much of the behaviour captured by the output wrong is never intended to play the dual role which, as we saw above, is typically played by criminal offences: it is never meant to serve as a guide to that which must not be done, nor as a ground for censure and punishment.¹¹ One can commit act A without doing anything which the offence-creator seeks to reduce or condemn.

As an example, let us assume an offence-creator adverts to the existence of an input wrong of ‘preparing terrorist attacks’. It is thought, let us imagine, that those who engage in such behaviour should be convicted and punished. But instead of trying to

must be relatively simple, while the evaluative complexities embedded in human behaviour are legion.

¹¹ One might argue that if offence-creators are to bring about this type of change in the purposes of criminal prohibition, they should make the change transparent and not conceal it within legislative language which implies business as usual. I will not pursue this objection here.

capture the input wrong with an output wrong, the offence-creator creates an output wrong of ‘possessing information or items useful to terrorists’, something we may well do every day, because this will make it easier to convict those suspected of preparing terrorist attacks.

It is worth noticing that the phenomenon I am focusing on is not as common as it may seem. Take an offence like carrying a knife in a public place. Is there not a separation of input wrong (creating an unjustified risk of stabbings) from output wrong (particular instances of possession) here too? That depends. In some cases the answer is no. An offence-creator may well take every act of public knife-carrying to be wrongful on account of the risk it creates of further wrongs. But the answer may also be yes if the offence-creator accepts that some knife-carriers create no real risk, and so do not act wrongly. Then the output wrong is deliberately over-inclusive relative to the input wrong. But this case remains distinct from the cases in which I am interested, such as the terrorist case discussed above. Why? Because in the knife-carrying case the aim of the offence-creator *remains* that all be guided away from the output wrong, and that those who fail to be so guided be censured and punished. Committing the output wrong is to be treated by the law as wrongful in all cases (even at the risk of catching some who do not act wrongly) and this is thought justified because of the effect this will have in reducing input wrongdoing.¹²

¹² Antony Duff has suggested that such an output wrong might also be justified on the grounds that all those who carry knives display the vice of *civic arrogance*: by assuming they can safely carry a knife, each knife-carrier ‘arrogantly claims the right to decide for himself on matters which he, like the rest of us, should not trust himself to decide’. Even if carriage is actually safe, such arrogant conduct is wrongful, and the appropriate object of punishment. Whether or not this argument is sound, it does not apply to the cases I am concerned with here. As the following

The cases with which I am concerned are different. Here, the output wrong is a mere facilitation device – a way to ease conviction of input wrongdoers. Committing the output wrong is *not* thought to justify censure or punishment, nor is the prohibited behaviour something from which the offence-creator intends that one refrain. There are two conceptual steps here. First, there is the separation of input and output wrong. Accordingly, committing the offence is not itself thought to involve doing something morally wrongful. Second, there is the offence-creator's purpose. In the cases I am concerned with, that purpose is not to *prevent* the output wrong because this will reduce input wrongdoing, nor to *punish* output wrongdoing as a way of achieving this. Rather, the purpose of separation is simply to *facilitate* conviction of suspected input wrongdoers. In short, whatever is captured by the offence is captured in order to facilitate conviction of those thought to have committed a separate wrong.¹³

Are there any *actual* examples of such a thing in contemporary systems of criminal law? Consider two cases from English criminal law. Section 1(2) of the Terrorism Act 2006 makes it an offence to, *inter alia*, make a statement which is likely to be understood by some of those to whom it is published as indirect encouragement to the

paragraphs explain, ouster offences do not capture conduct because the conduct is thought wrongful. In fact, the offence-creator may well want some of the captured conduct to continue. For Duff's discussion, see A Duff, 'Crime, Prohibition, and Punishment' (2002) *Journal of Applied Philosophy* 97-108.

¹³ Victor Tadros, fastening onto the fact that the intent of offence-creators is sometimes *not* that people refrain from the prohibited behaviour, calls such offences 'intentionally non-ideal'. Tadros' idea is that even in an ideal world, the offence-creator intends that people carry on acting in the prohibited manner. While I have gained much from Tadros' discussion, I think his terminology is somewhat unhelpful. The ideal/non-ideal contrast assumes a picture in which the ideal scenario is perfect compliance with the prohibition on its face. Yet the troubling aspect of these offences is precisely that this ideal for law-makers is *being challenged* – the ideal is now that offences serve as efficient facilitation devices, not as standards of behaviour. It is one of the many problems with this new ideal which I am interested in tackling here. For Tadros's treatment, see V Tadros, 'Crimes and Security' (2008) 71 MLR 940-970.

commission of acts of terrorism, being reckless as to whether such encouragement will take place. Indirect encouragement includes any statement which glorifies the commission or preparation (whether in the past, in the future or generally) of such acts and is a statement from which members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances.¹⁴

The offence is breathtakingly wide. It arguably catches everyone from outspoken Islamic clerics, to North Korean exiles who criticise their native regime, to those, like Cherie Blair, who express their ability to understand the actions of Palestinian suicide-bombers.¹⁵ Such an output wrong clearly does *not* aim at everyone it technically ensnares. Much of the expression captured is, by common consent, not the appropriate target of the criminal law. Indeed, in the lead up to the passage of the Act, the Home Secretary stressed the importance of the Director of Public Prosecutions consenting to any prosecution.¹⁶ The implication was that only genuine wrongdoers would be convicted. Who are these people? The targets of the offence, as the government made clear to the Joint Committee on Human Rights, are those who *incite violence*, whether generally or specifically.¹⁷ Incitement, in other words, is the input wrong. It is assumed that discretion will be exercised in order to ensure that only those committing *this* wrong

¹⁴ Terrorism Act 2006 s 1(3).

¹⁵ As alleged by several MPs: see G Hurst, 'Terror Bill rebels cut Labour's majority to one vote' *The Times* (London 3 November 2005) < <http://www.timesonline.co.uk/tol/news/uk/article585982.ece> > (accessed 9 October 2009).

¹⁶ C Clarke, 'Terrorism Bill, the Government's Approach' (Speech to the House of Commons on 5 December 2005) < <http://press.homeoffice.gov.uk/Speeches/speeches-archive/12-05-sp-terrorism-bill> > accessed 12 December 2008.

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

are convicted, while others technically caught by the offence go about their lives untouched. Why then the innocuous output wrong? Because by removing input wrongdoing from consideration by the courts, a major hurdle to the conviction of suspected inciters is removed.¹⁸ When so little need be proved, more suspects will surely end up where it is suspected that they belong.

Second, consider section 13 of the Sexual Offences Act 2003. This provides that a person below the age of 18 commits an offence if she would commit the offences created by sections 9 to 12 of the Act were she 18. Section 9 makes it an offence to sexually touch a person below the age of 16. As such, if there is any sexual conduct between two teenagers who are under 16, they both commit an offence. Clearly this offence was not aimed at prosecuting everyone it technically covers. Rather, the output wrong was created in order to ensure that it was possible to convict those who *manipulatively* engage in sexual conduct with young persons.¹⁹ The aim was to have the police pick these people out on the assumption that *they* would be the ones convicted. And the aim was to allow this to happen without the trouble of having a key element of the input wrong before the courts, namely the manipulation itself. This is a transparently facilitative move. It is to target suspected input wrongdoers with the creation of an output wrong designed to

¹⁸ It is worth noting that my objection here is not the standard one, namely that such broadly-drawn offences give petty officials excessive discretion to choose who to pursue, increasing their power to carry through vendettas against those they despise. This is a good objection. It is just not the objection I press here.

¹⁹ The government's command paper concedes these points when it states that 'it is recognized that much sexual activity involving children under the age of consent might be consensual and experimental and that, in such cases, the intervention of the criminal law may not be appropriate'. On the other hand the criminal law 'must make provision for an unlawful sexual activity charge to be brought where the sexual activity was consensual but was also clearly manipulative.' Secretary of State for the Home Department, 'Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences' (CM 5668, 2002) [52].

facilitate their conviction, and to do so by denying the courts the opportunity to consider the input wrong itself.

3

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

This view is initially appealing, but it relies on a firm divide between defining legal rights and interfering with adjudication. In truth, to do the former is often to do the latter. For legal rights can be defined so as to detach the law on the books from that which is really taken to justify both the defendant's presence in court, and his potential

treatment as a criminal.²⁰ Adjudication then occurs only in the empty sense of examining legal rights which neither offence-creators nor law-enforcers take to justify initiating the criminal process and seeking its results. To take an extreme example, we could have a set of offences which captured a range of innocuous quotidian activities, where the legislative and executive branches intended these to work as smokescreens used to prosecute (and severely punish) robbers, murderers and rapists. The courts would never get to look at whether any defendant was a robber, murderer or rapist, even as they ‘adjudicated’ on whether the defendant had brushed his teeth.

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

²⁰ Really taken, that is, by those responsible for creating the offence and, in many cases, by those enforcing it on the streets. Of course, *judges* may well believe that committing an offence *itself* justifies their convicting the offender. This is a function of their role in the criminal justice system. But my primary concern, here and throughout, is with the mindset of the *creators* of offences, who, in the cases with which I am concerned, believe that only input wrongdoing (and *not* commission of the output wrong) justifies conviction. It is *their* decision to create offences of this type which I am concerned to attack, not the decision of judges to convict pursuant to them.

wrongdoing which grounds the convictions and punishments they deal out. The offences in question are *ouster offences*.²¹

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

Not so. We cling, as did many in 2004, to the value of courts adjudicating legal rights precisely because we see this as having moral value. Lord Woolf and others objected to Clause 11 because they thought there were good moral reasons to have the courts examine disputes over legal rights. These reasons are part of explaining why we care about the judiciary in the first place. What is important to notice is that these very same reasons support courts adjudicating in a way which is more than a mere smokescreen, even if the smokescreen is what the legal rights define. The courts must be able to look at the underlying dispute if they are to avoid being part of the smoke – they must not be denied the chance to adjudicate on whatever really explains the defendant's

²¹ One may reply that courts can consider input wrongdoing (or lack thereof) at the sentencing stage, such that the ouster I have discussed makes little difference. This reply is weak. First, to the extent that criminal conviction is *itself* of moral significance this consideration comes too late. Second, courts are still likely to impose sentences in cases where the output wrong *is* proved at trial, but where the input wrong could *not* have been proved had it been part of the offence. This could not have happened were the offence not an ouster. Third, and relatedly, many of the procedural protections which attend proof of the offence are absent at the sentencing stage. The value of these is not insignificant, and is discussed in greater detail below.

presence in court, and is really thought to justify his conviction.²² If they are so denied, many of the reasons for having courts look at our legal disputes at all are undermined. In the following sections, I describe some of these reasons, and defend the claim that the type of offence I have outlined is objectionable by their lights. I begin with reasons of justice.

4

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

Sometimes justice is used as a synonym for rightness. When used thus, the claim that something is unjust tells us little absent a fully worked out theory of right and wrong. But justice is also used in a narrower sense, to refer to a distinct virtue. This is the sense used by John Rawls when he says that ‘the concept of justice applies whenever there is an allotment of something rationally regarded as advantageous or disadvantageous’.²³ And it is what H.L.A Hart refers to when he writes that justice is ‘concerned with the adjustment of claims between a multiplicity of persons’.²⁴ Putting these two definitions together, we can see that justice is a matter of who is due what and why. As Rawls observes, justice is about allocating benefits and burdens (the ‘what’). As Hart observes, it is about allocation

²² Again, it is not the courts’ perspective, but that of offence-creators and law-enforcers in which I am interested when I talk of ‘real’ explanations and justifications. I will assume from now on that this point is clear.

²³ J Rawls, *A Theory of Justice* (rev edn OUP, Oxford 1999) 7.

²⁴ H.L.A. Hart, *Punishment and Responsibility* (2nd edn OUP, Oxford 2008) 21.

to and from persons (the ‘who’) based on what those people can properly claim as their due (the ‘why’). We do justice, then, when we allocate the right people the right things as determined by the right reasons.²⁵

Even when speaking of this specific virtue, as I will from now on, there is much complexity. Consider the relationship between justice and procedures. As Rawls noticed, a procedure may interact with what is just in a number of ways.²⁶ A procedure may make a just result *more likely* by increasing the probability of the right people getting the right things. A procedure may *ensure* a just result, by ensuring the right people get the right things. And a procedure may *constitute* a just result when following the procedure just is giving the right people the right thing for the right reasons. I will follow Rawls in calling these options imperfect, perfect and pure procedural justice.

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

²⁵ As well as Rawls and Hart, this account of justice draws inspiration from the account provided by John Gardner. See J Gardner, 'The Virtue of Justice and the Character of Law' (2000) 53 *Current Legal Problems* 1-30.

²⁶ *Rawls* (n 23) 73-8.

In other cases one does not look first to whether the right people have the right things to test the justice of an allocation. What comes first is the *why* - the reasons why the allocation was in fact produced by those who produced it. If decision-makers allocate by attending to and acting for the right reasons, the outcome is just, whatever that outcome may be. If decision-makers fail to do this, the outcome is unjust, even if that outcome is identical to what it would have been had they not so failed. In some such cases following a particular procedure just is to consider and act for the right reasons. Following the procedure entails doing justice.

With all this in mind, we are faced with a diversity of routes to *injustice*. One may give the wrong things to the right people. One may give the wrong people the right things. And in some cases, one may act unjustly simply by giving things to people absent consideration of and action for the right reasons. The more *imperfect* one's procedural justice the more likely one is to realise the first or second of these failings. The less *pure* one's procedural justice the more one instantiates the third failing by moving away from a procedure which, in the pure case, entails that one is giving the right people the right things for the right reasons.

One final point. Injustices can be more or less grave. Sometimes this gravity is internal to the concept of justice. Thus gravity may vary with the 'what': it is a graver injustice to give severe burdens to the wrong people than to give trifling ones. But gravity may also vary with moral factors external to the concept of justice as I have defined it. The injustice may be all the greater if the wrong burdens are imposed intentionally rather than negligently, actively rather than by omission, deliberately rather than

spontaneously.²⁷ We can see this internal/external distinction at work again if we consider reasons and procedures. In cases with an element of pure procedural justice, what is just can vary internally with the distance from the right reasons or the right procedures. It is a graver injustice for an interviewer to refuse someone a job because of their race (an irrelevant consideration) than it is to refuse them because the interviewer overemphasises the importance of teamwork (a relevant consideration). It is more of an injustice for a judge to dismiss a claim in court without considering the claimant's case than it is to do so having considered the claim perfunctorily. Yet the injustice may also vary with external factors. The race/teamwork example gets some of its power from the assumption that while the interviewer may have been *unaware* of his bias towards teamwork, such that he was at worst negligent in overemphasising it, he must have known of his racial bias when he acted.

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

...at this point, the court cannot but face up to the question of who is to bear the costs of the alleged breach and in what proportion, and on what grounds, etc. It is now a situation in which there are no winners without

²⁷ I say 'may' because this is clearly not the place to add to the forest of literature discussing the doctrine of double effect and the act/omission distinction.

losers, no gains without losses, and questions about how to allocate these gains and losses cannot but arise.²⁸

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

5

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

First, the *Imperfect Procedural Justice Thesis*. According to this thesis, creating an ouster offence is likely to lead to the conviction of more who are innocent of input wrongdoing. As input wrongdoing is what is thought to justify the said convictions, there

²⁸ Gardner (n 25) 18-19.

are, by the offence-creator's own lights, likely to be more unjustified, and so unjust, convictions.

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

6

John Rawls wrote that the criminal trial is a form of imperfect procedural justice.²⁹ What did he mean by this? He meant that the processes of the courts during a trial are a way of making it more probable that the right people get the right things by the lights of the right reasons. In the case of a single trial this may be cashed out as follows. The right person is whoever committed the offence. The right things are the burdens of conviction and punishment. And the right reason, at least superficially, is the very guilt which I just mentioned. The criminal trial is a procedure which strives imperfectly to realise the perfectly just set of outcomes in which everyone convicted is indeed guilty of an offence.

We can agree with Rawls that some parts of the criminal trial are indeed oriented towards ensuring that the guilty are convicted. I say 'some' because there are no doubt significant elements of the trial which are aimed at other (sometimes conflicting) values,

²⁹ Rawls (n 23) 74-5.

some of which will be discussed in this section and the next.³⁰ But anything recognisable as a criminal trial will have as a central justifying aim the pursuit of accuracy, where an outcome is accurate if it convicts those who are in truth guilty, and acquits those who are in truth innocent. With perfect accuracy, Rawls assumes, comes perfect justice.

We should be wary however of succumbing to the view that the justice of the criminal trial varies only with those factors which promote accuracy *relative to the elements of the offence*. For an output wrong may be such that even if it is accurately proved in court, it remains an open question whether that which is actually taken by the offence-creator to justify conviction and punishment (here, the input wrong) is present. As we have seen, an offence may prohibit what the offence-creator believes is utterly innocuous, intending to ensnare and punish serious input wrongdoers, and there will then be little justice in convicting everyone against whom the elements of the offence are proved. Indeed, perfect accuracy relative to the requirements of the offence would be no indication of perfect justice.³¹ Only ensuring accuracy relative to the presence of serious wrongdoing would ensure that the right people (those guilty of that wrongdoing) got the right things (the burdens of conviction and punishment), making the outcome more perfect by the lights of justice.

³⁰ For discussion of some of these other values, see M Damaska, 'Truth in Adjudication' (1998) 49 *Hastings Law Journal* 289-308.

³¹ Hart seems to disagree when he writes of one prosecuted under controversial laws that 'if he has broken such laws 'voluntarily' (to use Professor Hall's expression), which in practice means that he was not in any of the excusing conditions, the requirements of *justice* are surely satisfied'. See *Hart* (n 24) at 37. Here Hart suggests that voluntary violation of a rule suffices to make criminal punishment just, whatever the rule may be. This cannot be right. To inflict criminal punishment pursuant to a rule prohibiting what was evidently innocuous conduct would be a paradigmatic *injustice* – it would be to impose harsh burdens on people who did nothing to justify such an imposition and would thus give the wrong people, the wrong things for the wrong reasons.

What is important for our purposes is that the creator of an ouster offence underwrites what is, by its own lights, a greater likely rate of unjust outcomes. How does the offence-creator do this? By ensuring that the input wrong which it takes to justify conviction is excluded from judicial consideration. By the offence-creator's own lights, justice demands that only those who are guilty of that wrongdoing be convicted, for it is input wrongdoing which grounds creation of the offence, and conviction of defendants pursuant to it. Yet ouster offences *deprive* the courts of the opportunity to adjudicate on the very issue of input wrongdoing. The courts can do little to ensure that those who are convicted are actually input wrongdoers because significant elements of the input wrong are excluded from judicial consideration. Unless there is some fluke by which everyone who is convicted is indeed guilty of the input wrong (even though this is not adjudicated upon by the courts) the offence-creator's actions seem destined to make the courts a much less perfect example of procedural justice. This is so even where, as it has been throughout this paragraph, a just outcome is defined relative to the offence-creator's own views. More people who are not guilty of the input wrong will (by the offence-creator's own lights unjustly) end up being convicted.³²

Now the advocate of ouster offences may accept the claim that ousting the courts is likely to increase the conviction rate among those who did not commit an input wrong. But he may respond by claiming that *not* ousting the courts is likely to lead to the acquittal of many who *did* commit an input wrong. After all, the standard of proof in the

³² To repeat: I do not claim that the courts are at fault here, or make any claims about how they should act. My argument is directed to the designers and creators of ouster offences. I claim that they should not create such offences because this makes the justice handed out by the criminal courts increasingly imperfect *by the creators' own lights*.

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

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

In the absence of empirical evidence, I cannot pursue this response here. Rather let us assume for a moment that both ousting and not ousting will produce roughly the same number of mistakes. The objection can still be answered by considering the *gravity* of the relevant mistakes. Increasing the number of wrongful convictions is a grave injustice on both the internal and external dimensions isolated previously. Internally, to inflict the 'what' on the wrong person is to impose particularly grave burdens on that person. Criminal punishment has the potential to retard the personal autonomy, self-respect and reputation of the victim. Imprisonment is only the most obvious case: pursuit of one's goals is interrupted if not destroyed entirely; one has to cope with the stigma of

authoritative condemnation; and one's family, friends, and all one will come to know in an official capacity will be aware of the conviction and all its overtones.

Externally, the injustice of wrongful conviction has increased moral salience lent to it by another virtue, namely the virtue of humanity. There is particular inhumanity in the active, intentional and considered infliction of the burdens described above. For some this is so in every case of punishment. For others it is only so if the individual is innocent. We need not arbitrate between those views here, for both sides agree that it is inhumane to inflict such burdens on the innocent in this way, and this is the scenario under discussion here. Such inhumanity can only increase the gravity of the injustice involved.³³

What then of mistaken acquittals? Some would doubt that what happens here can be described as an injustice at all. Who, these writers ask, is the supposed injustice an injustice *to*? For them, injustice inheres in the violation of rights, and this creates the difficulty of locating a right-holder who has a right that the guilty party be punished.³⁴ Perhaps there is such a right-holder. Perhaps the victim has such a right, though we should be wary of assuming this just because the victim might think it so. Perhaps the populace as a collective has the relevant right. Needless to say the issue cannot be

³³ Is criminal punishment, even of the innocent, always inhumane? Does it, in other words, always amount to the (intentional) infliction of suffering on those who have done nothing to deserve it? Perhaps not – small fines or minimal community sentences may not cause any suffering at all. But we should not be too sanguine about this. Even fines can cause great strain if one has difficulty paying, or finds oneself unable to pay, leading to a likely prison term. Furthermore, the after-effects of any conviction may be painful, be it socially, professionally or psychologically. For discussion of the virtue of humanity, see *Gardner* (n 25).

³⁴ Mill held a view of this type. See JS Mill, *Utilitarianism* (Parker, Son and Bourn, London 1863), ch 5.

resolved here. But notice that if this view of justice is correct, it places a substantial hurdle in the path of the objection. For it must first be shown that someone has the right to have others punished, only after which there is any injustice at all in mistaken acquittal. Not only that, but it is much more plausible to think that there *is* a rights-violation in the case of mistaken conviction (a violation of the innocent person's right not to be subjected to the burdensome treatment described above), and a significant one at that.³⁵ As such, there is on this view a plausible injustice involved in mistaken conviction, and an uphill battle to find any injustice at all in mistaken acquittal.

We need not press here the merits of this view of justice. The allocative view I endorsed above does not entail (though it need not deny) that one must find a rights-violation to find an injustice. On the basic definition, it is enough to find benefits and burdens which have been wrongly allocated. The mistakenly acquitted *is* the right person to bear the burdens of conviction and punishment, yet he never does. So we can accept that there is an injustice. But even here, the gravity of the injustice pales in comparison with that involved in mistaken conviction. Yes, the acquitted enjoys benefits he should not have had. Yes, the victim and/or those close to him may be tormented by the absence of justice, whether this manifests itself as anger, frustration, grief, fear or regret. In some cases torment ruins lives. But it is primarily the crime itself, not the injustice of the perpetrator being free, which is responsible for such cases. What is crucial is the following: on the internal dimension of gravity, no burden of comparable significance to that imposed on the innocent convict is imposed on anyone by a mistaken acquittal. Nor,

³⁵ For an argument that there is such a right, see D Husak, *Overcriminalization* (OUP, Oxford 2008) 93-101.

on the external dimension, is there comparable inhumanity involved. A mistake is made, but it is one which leaves one too many people without grave burdens, and to the extent that it does itself torment the victim and those close to him, torment is an unintended by-product of the decision, not the very purpose of what was done.

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

7

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

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

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

I think we should often take a different view. Consider the loved ones of the murderer's victim. They might view the imposition of the relevant burden as only part of what justice demands. They could intelligibly claim that justice was not done (or not done fully) because they never got their day in court. They never got to see that the burdens which the murderer deserved (and we can assume *arguendo* that being struck by lightning was at least what he deserved) were imposed for the right reasons. They never got to see those reasons declared publicly and given the authoritative imprint of the law. And they never got the chance to see the defendant account for himself and for his actions.³⁶

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

³⁶ For an extended treatment of the idea that an 'account' is given by a defendant in a criminal trial, see Duff, Farmer, Marshall and Tadros, *The Trial on Trial Vol. 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, Oxford 2007). Of course if the defendant pleads guilty, the account provided by the defendant will be minimal. However it is far from unintelligible to claim that this minimum is still a requirement of justice - that the defendant should still have to publicly accept blame and receive authoritative condemnation and punishment from the law.

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

Nor is this the only complaint. Our hypothetical defendant was never called to answer for himself and his actions at the bar of the court. He was spared the pressure we all face when we do wrong (be it breaking one's friend's vase, or being hateful to others) to explain oneself as a rational agent, be it by denying, clarifying or accepting the charges made against one. As others have put it, to call the defendant to account in this way is one way of taking his wrongdoing seriously – of setting up the public sphere so that important facets of our everyday moral lives are not lost to institutional bureaucracy.³⁷

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

³⁷ Duff *et al* (n 36).

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

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

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

proven guilty in court.³⁸ Such labels have a special salience out in the world because of the courts' reputation as doers of justice. The defendant is labelled a criminal in general terms, but is also labelled in various more specific ways, some more general than others. He may be a sex offender, and he may be a rapist or a child molester. If the latter, he may be despicable enough to warrant community service or 5 years in jail. Each element has important repercussions. Such information is known to the defendant, to those he knows, and to those he will come to know.

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

If these latter labels reflect reality, offences may mask the truth. Offenders can be labelled sex offenders regardless of what has been proved against them. To maintain such smokescreens – to pretend that the labels handed out are the product of the processes of the courts - is to perpetuate another injustice. For even if the burdens are accurately

³⁸ The idea that criminal conviction 'labels' offenders has become a popular one since being brought into mainstream criminal law theory by Andrew Ashworth. For a recent statement see Ashworth, *Principles of Criminal Law* (6th ed OUP, Oxford 2009) 78-80. For Ashworth, to advocate fair labeling is to advocate offence-definitions which appropriately reflect the wrongdoing of the offender. As the text indicates my concern is related but distinct.

imposed, the labels which come with them have a salience justified only if the courts have indeed determined that they are warranted. The grounds of these labels make essential reference to the wrongdoing with which the offender is branded *having been in issue in court*. Where this is not so, those grounds are absent. It is an injustice to impose the label nonetheless.

Let us return to ouster offences. These offences impose the burdens of conviction and punishment without the input wrongdoing thought to justify that conviction and punishment having ever been in issue before a court. It is a defining feature of these offences that the output wrong - on which the courts do adjudicate - is separated from the input wrong, and constituted by elements designed to facilitate convictions. As such, many of the considerations mentioned above as constituents of a just outcome are necessarily absent. There can be no account given, publicly or otherwise, by the defendant for his alleged input wrongdoing. There can be no authoritative finding that the defendant committed that wrong. There cannot even be a case put forward by the prosecution that the defendant committed the wrong, as this is simply irrelevant to the case. All this is to severely undercut the element of pure procedural justice in the criminal trial. And on top of this there is the injustice which arises when the defendant is convicted and labelled pursuant to merely *suspected* input wrongdoing and not in accordance with the behaviour proved before the court. As I have argued, this is an injustice because the grounds of such labels make ineliminable reference to the courts having determined that the defendant is the wrongdoer his labels imply he is. This never occurred. Accordingly, ouster offences create pure procedural injustice as well.

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

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

I am interested in judicial independence as an ideal. Any plausible view of the judicial role will claim that the judiciary should be independent in some way. Following

Pamela Karlan, we can say that any plausible view will take a position on both the negative and positive aspects of judicial independence – the freedom *from* and the freedom *to*.³⁹ If the judiciary are to be anything more than an extension of the other branches of government, they must have freedom *from* being made the instrument of those branches. And this freedom from is valuable because it gives them the freedom *to* adjudicate in a way that, as we have seen, contributes to doing justice.

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

Recall first that ouster offences do not merely capture an input wrong, leaving it to the judges to decide who is guilty of committing it. Rather, offence-creators create an output wrong designed to facilitate the conviction of more of those they suspect of input wrongdoing. But notice what this does to the role of the courts. The courts are substantially disabled from *standing against* those executive bodies whose mission is to facilitate the conviction of suspects by tracking them down and getting them to trial, because the courts can no longer demand proof of executive suspicion. No longer, then, are the courts a significant counterweight to police and prosecutors whose goals are, at least in part, to put suspects where they are thought to belong. Of course, the courts remain *self-consciously* adjudicative as they always were – demanding proof before a

³⁹ P Karlan, 'Two Concepts of Judicial Independence' (1999) 72 Southern California Law Review 535-558.

suspect can be convicted. But the reality of their adjudication is that it operates within parameters set to facilitate conviction of suspects without proof of that of which they are suspected. The courts' freedom from becoming part of the facilitative process is thus undermined.

The last paragraph moved quickly, so let me explain. Prior to ouster offences, the courts' function was clear. Courts cared not whether the defendant was a suspect. They demanded *proof* of his guilt before any conclusions could be made, and thus stood in the way of those seeking to have the suspect put away on the basis of suspicions. As Viscount Sankey LC put it in one of the most beguiling passages in English legal history, '[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt'.⁴⁰ If this cannot be done, the suspect is not to be convicted.

Ouster offences do not change this in self-conscious terms. Courts are still adjudicating on whether the output wrong took place at the defendant's hands. If this cannot be proved, the suspect is acquitted. But we must again look to substance not form. The only reason the output wrong exists at all is as yet another mechanism aimed at facilitating conviction of suspects: of suspected manipulators and suspected inciters of violence. The offence-creator did not care whether that wrongdoing could be proved – it deliberately prevented the courts from requiring this. Instead, it decided to do what it could to facilitate conviction of suspects without such a requirement. And in doing so it made the courts part of the facilitation, by limiting them to asking whether the defendant

⁴⁰ *Woolmington v The Director of Public Prosecutions* [1935] AC 462 (HL) at 481.

committed an offence which was only created in the first place *because it helps facilitate conviction of more defendants*. The courts are no longer free *to* challenge suspicion because they are not free *from* the bodies seeking to facilitate conviction on the basis of that suspicion. The courts' freedom from the other branches (the condition of their freedom to) is undermined.

9

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

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

moral map of the crime by using the input wrong to inform and develop the output wrong.⁴¹

The pay-offs here can be seen by recalling the dual role of criminal offences. They serve as guides to action and standards for evaluation. Where an input wrong is used to develop a closely corresponding output wrong, the output wrong is likely to track moral concepts and moral beliefs which are part of the public culture of the society in question. This helps ensure the law is an adequate guide to permissible conduct, furthering the Rule of Law.⁴² Similarly, where the courts have developed a moral map of the crime they can develop the output wrong in a manner which makes its evaluative role morally defensible – those condemned for committing the output wrong are, or are more likely to be, moral wrongdoers.

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

The problem arises when a gap is deliberately created between the input and output wrongs – where much of the latter has no relationship to the former, and is not

⁴¹ J Gardner, *Offences and Defences* (OUP, Oxford 2007) 225.

⁴² On the connection between the Rule of Law and guidance, see J Raz, ‘The Rule of Law and its Virtue’ in *The Authority of Law* (OUP, Oxford 1977).

thought to be something people should be guided away *from*, or negatively evaluated *for*. Then the judiciary are at up the creek without a paddle. For they have little or no compass to help develop the output wrong. It was not, after all, *supposed* to correspond to the input wrong, so this is no guidance if Parliamentary intent is to be respected.⁴³ In truth, the output wrong is a facilitation device masquerading as the ordinary guidance-giving, evaluation-producing criminal offence. How to develop the masquerade may not be clear, and is highly unlikely to result in a reliable guide to behaviour, or a defensible standard for condemnation. That the courts will nonetheless have to convict and punish anyone brought before them who has committed the output wrong only helps chip away at their moral authority.

Consider a second problem created by the attack on freedom from, and consequent lack of freedom to. This is the damage done to the valuable role of the courts in subjecting the exercise of government power to critical scrutiny, and in holding the government accountable for what it seeks to do through the criminal law. It is crucial to see that when ouster offences prevail, the actions of law-enforcement and prosecutors are insulated from scrutiny. If police and prosecutors are tracking down input wrongdoers ('arrest and prosecute those suspected of terrorism') but the output wrong they are utilising defines some lesser act ('it is an offence to express support for rebellious figures') the court process is constrained by the latter and cannot scrutinise power exercised under the former. Thus the defendant cannot attack the police's lack of

⁴³ This provides one doctrinal reason why judges cannot, or at least will not, take what may appear to be an easy way out of the ouster offence problem and just read elements of the input wrong into the output wrong. It is, in many such cases, the clear legislative intent that this not be done.

evidence that he is a terrorist, for this is not the relevant offence. The judge can rarely put the prosecution under fire for its decision to bring a weak case to court, because the offence requirements only demand proof of some lesser activity, not the terrorist activity the prosecution is really all about. And it becomes harder for any jury to exercise its discretion to pour scorn on the state's attempt to convict by rejecting its case – after all, the requirements of proof have been deliberately reduced.

This is not all. The actions of police and prosecutors may well merit deeper systemic scrutiny relative to the norms which they are following. But as these norms have been deliberately divorced from the offence-definition under which defendants are pursued in court, the offence-creator has removed the said actions from accountability through the courts. Practices of discrimination or partiality which might have been exposed by judicial broadsides are insulated. The public scrutiny which might follow this exposure of dubious practices is less likely to ever see the light of day. This is a dark reality for open government. It further tells against the existence of ouster offences.

10

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

Lord Woolf was particularly worried about ouster clauses - those clauses which deny the court the opportunity to adjudicate on disputes about legal rights. He was right to be. Among other things, adjudication by the courts in such matters is needed to do justice, hold the government to account, and develop the law. But if these are some of the reasons to worry about ouster clauses, they are equally reasons to worry about what I have called ouster offences. These offences oust judicial consideration of the wrongdoing thought by offence-creators to justify conviction pursuant to the offence. If this wrong is excluded from judicial consideration the value of the judicial function is undermined in much the same way as it is by an ouster clause. Justice cannot be done. Scrutiny cannot be brought to bear. The law is harder to develop in a principled manner.

An objector may claim that I have been too hard on the creators of ouster offences. Might facilitating the conviction of input wrongdoers not sometimes serve to protect vulnerable people? Might not the separation between input and output wrongs sometimes be small, and might not our procedural justice calculations come out differently? Might there, in other words, be ouster offences which produce few extra mistaken convictions, while producing many fewer mistaken acquittals?

Perhaps so, though I have given my reasons to doubt that an argument from procedural justice will often succeed. Whether such benefits really ensue from any given ouster offence, and whether they justify creating such an offence, are not questions I can address here. What this paper has sought to do, in light of the evident popularity of ouster offences with offence-creators, is to lay out the case against such offences. I believe that

the justificatory bar has been set high. It is for the defenders of any given ouster offence to show that the bar can be cleared.