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Innocence and Burdens of Proof in English Criminal Law

*Federico Picinali**

ABSTRACT: Since the Human Rights Act 1998, scholars and courts have dedicated considerable attention to the presumption of innocence. A major strand of the ensuing debate has focused on the scope of this safeguard. Many academics have argued in favour of according to the presumption a substantive – as opposed to a procedural – role. In other words, these scholars maintain that the presumption set in art. 6(2) ECHR should have some influence on the definition of criminality. Courts seem sympathetic to this approach, albeit not following it to the full extent. The paper, instead, defends a procedural understanding of the presumption of innocence, on the basis of interpretive arguments concerning art. 6(2) ECHR. Besides, it shows that adopting this conception does not entail lowering the protection of the individual before the substantive criminal law.

KEYWORDS: Presumption of innocence; burden of proof; criminal law; ECHR.

1. Introduction

During the last decade the presumption of innocence has been at the centre of a lively scholarly debate in England. The Human Rights Act 1998 transposed into English law art. 6(2) of the European Convention on Human Rights, stating that “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” The presumption has two facets. It advances the general demand that “the treatment of the defendant throughout the criminal process [...] be consistent, as far as possible, with his or her innocence. Used in this broad [...] sense, the presumption of innocence underpins the whole range of rules intended to ensure fairness to

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defendants.”¹ In addition, presuming the defendant innocent involves a particular requirement: it is a necessary condition for conviction that the State proves the defendant’s guilt. The paper is concerned only with the latter facet. References to the presumption of innocence throughout the work should be read as references to this specific aspect thereof.

Notably, the principle that it is for the State to prove the defendant’s guilt pre-existed the Human Rights Act, being famously described as the ‘golden thread’ of English criminal law in the first half of the twentieth century.² However, the Act has bestowed upon it – or, at the least, has reinforced its – constitutional status. Under sections 3(1) and 6(1) of the Act, courts are required to interpret the criminal law in a way that is compatible with the presumption. Provisions imposing upon the defendant the burden of proving certain exculpatory facts at trial are potential sources of incompatibility. A slew of decisions has tried to shed light on the criteria for determining when a reverse burden conflicts with the presumption and must, therefore, be read down to a mere

¹ A. Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford: Hart Publishing, 2010), at xxxviii. See also H. L. Ho, ‘The Presumption of Innocence as a Human Right’ in P. Roberts & J. Hunter (eds.), *Criminal Evidence and Human Rights* (Oxford: Hart Publishing, 2012), and P. Roberts, ‘Loss of Innocence in Common Law Presumptions’ (2013) *Criminal Law and Philosophy*, DOI 10.1007/s11572-013-9235-8, at 4-6. An argument that the presumption of innocence (more precisely, its moral grounds) has ramifications for sentencing is put forward in P. Tomlin, ‘Could the Presumption of Innocence Protect the Guilty?’ (2013) *Criminal Law and Philosophy*, DOI 10.1007/s11572-012-9193-6. For an argument in favour of extending the purview of the presumption to certain cases where the individual has not been charged of a criminal offence see L. Campbell, ‘Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence’ (2013) 76 *MLR* 681.

² *Woolmington v D.P.P.* [1935] AC 462; [1936] 25 Cr App R 72, at 95.

evidential onus, i.e., the burden to adduce sufficient evidence to raise an issue in court. As commentators have pointed out, it is difficult to find coherence in this case law.³

The apparently unsystematic response of the courts, together with the widespread understanding that the presumption of innocence rests at the core of the criminal trial, has stimulated a considerable array of scholarship. This literature endeavours to answer both a descriptive question – how do courts interpret the presumption? – and a normative question – how should courts interpret it? The latter side of the debate, especially, resembles in several respects a dispute that has been rumbling on in American scholarship over the last fifty years.

The paper attempts to make a normative contribution to the debate about the presumption of innocence, with reference to the ECHR system: it tries to determine how the presumption set in art. 6(2) ECHR is to be interpreted and enforced. Sections 4 and 5 counter the rather widespread claim that this safeguard should play a substantive role, that is, a role in defining criminal conduct. These Sections advance interpretive arguments indicating that the presumption enshrined in art. 6(2) ECHR is a procedural safeguard only. Furthermore, Section 6 shows that adopting this conception does not entail lowering the protection of the individual before the substantive criminal law. As a preliminary to this discussion, however, it is necessary briefly to identify and to summarise the different scholarly positions on the significance of the presumption. Notably, not all of these positions have been suggested as interpretations of art. 6(2) ECHR and most of them have been first elaborated with American law in mind. However, considering them all will provide a larger spectrum of interpretive possibilities for the legal provision we are interested in. In light of this taxonomy of

³ See, in particular, I. Dennis, *The Law of Evidence*, 4th edn (London: Sweet & Maxwell, 2010), Ch. 11 and D.

Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 *CLJ* 142.

scholarly theories, the paper will later classify the main approach taken by English courts, so as to render it more amenable to assessment and criticism. Sections 2 and 3 are devoted to these tasks.

2. The state of the art in the scholarship

David is charged with possessing an imitation firearm that is readily convertible into a firearm “so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger.” The offence is constructed by combining section 5(1)(a) of the Firearms Act 1968 with sections 1(1) and 1(2) of the Firearms Act 1982.

It is generally accepted that this offence does not require mens rea concerning the nature of the object possessed.⁴ However, section 1(5) of the 1982 Act states that “it shall be a defence for the accused to show that he did not know and had no reason to suspect that the imitation firearm was so constructed or adapted as to be readily convertible into a firearm.” This section evidently imposes on David the burden of proving a lack of both knowledge and recklessness on his part.⁵ Does the provision amount to a violation of the presumption of innocence? There is no agreement in the scholarship on how this question should be answered, the answer being a function of how the presumption of innocence is understood.⁶

⁴ See *R. v Williams* [2012] EWCA Crim 2162, para. 19.

⁵ Similar facts characterise *id.*

⁶ As the reader will notice, the following classification resembles, but is by no means equal to, the classification offered in Stumer, above n. 1, Ch. 3. In particular, Stumer’s conception of restrictive (or ‘narrow’, as he calls it) proceduralism is markedly different from that followed here, as it “almost

According to the *substantivist*, the presumption of innocence does not merely govern the proof of facts at trial; it also has implications for criminalisation.⁷ *The presumption is violated when a person is convicted of conduct that should not be subject to punishment, whether or not a reverse burden is involved.* As a result, a reverse burden on a particular fact is compatible with the presumption only if the prohibited behaviour, considered without (the negative of) that fact, would be deserving of punishment. Indeed, when a reverse burden is in place, the defendant may be convicted regardless of whether the fact subject to the reversal has occurred. It is therefore on the elements other than this fact that the substantivist focuses her attention.

Referring to the example above, a substantivist would claim that section 1(5) of the Firearms Act 1982 complies with art. 6(2) ECHR only if the mere possession⁸ of a readily convertible imitation firearm may be legitimately criminalised. She would also make a further claim: if, indeed, the mere possession of a readily convertible imitation firearm may not be legitimately criminalised, then the law would still run foul of the

inevitably morph[s] into full-blown substantive conceptions of the presumption of innocence” (Roberts, above n. 1 at 13).

⁷ See: R. J. Allen, ‘Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law – An Examination of the Limits of Legitimate Intervention’ (1977) 55 *Texas Law Review* 269; J. C. Jeffries & P. B. Stephan, ‘Defenses, Presumptions, and Burden of Proof in the Criminal Law’ (1979) 88 *Yale Law Journal* 1325; R. J. Allen, ‘Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices’ (1980) 94 *Harvard Law Review* 321; L. B. Schwartz, “‘Innocence’ – A Dialogue with Professor Sundby’ (1989) 41 *Hastings Law Journal* 154; R. A. Duff, ‘Strict Liability, Legal Presumptions, and the Presumption of Innocence’, in A. P. Simester (ed.), *Appraising Strict Liability* (Oxford: OUP, 2005), at 133-137.

⁸ To be sure, although not explicitly mentioned, it is assumed that the offence includes a mens rea requirement concerning the possession of *an* object.

presumption even in the absence of the evidentiary device prescribed in section 1(5). The substantive purview of the presumption of innocence is not limited to cases involving reverse burdens.

Under this reading, the presumption of innocence would confer upon the courts the power to scrutinise the legislator's criminalisation choices, possibly based on substantive principles that are entrenched in criminal law discourse, e.g., the voluntary act requirement, the fault principle, and the principle of proportionality between crime and punishment.⁹ By doing so, courts would safeguard innocence, where this concept is understood as the status of an individual who has not committed conduct deserving of punishment.

In contrast, according to the *proceduralist* the presumption of innocence only concerns the proof of facts at trial. In order to appreciate the proceduralist view it is necessary to clarify the concept of 'crime definition' – and the related concept of 'element of the crime'. The former phrase is used here simply to refer to the conjunction of the elements that constitute the crime, such that behaviour lacking any of these elements could not be deemed an instantiation of the crime itself. Consider a possible definition of theft as (1) the appropriation (2) of someone else's property (3) with intent to appropriate. Given this definition, (1)-(3) are the elements of the crime; the absence of coercion, instead, is not. Thus, the fact that the defendant was acting under coercion would not deny that her behaviour is an instance of theft, provided that elements (1)-(3) are present.

⁹ See, in particular, Jeffries & Stephan, above n. 7, at 1370-1379.

*The proceduralist maintains that the presumption of innocence is violated when a person is convicted notwithstanding that an element of the crime is not proved.*¹⁰ Whether the conduct, with or without this element, is deserving of punishment is irrelevant to determining whether the presumption has been breached. The choice of criminalisation is a given and cannot be called into question by the presumption. The proceduralist, therefore, understands the ‘innocence’ protected by this safeguard as the status of an individual who has not realised one or more elements of whatever the lawmaker defines as a crime – with the important specification below concerning a spurious strain of proceduralism. Thus, innocence and its reverse, guilt, are construed exclusively by reference to the alleged crime definition.¹¹ To put it in logical terms, there is a bi-directional implication between the concept of ‘guilt’ and that of ‘crime definition’: someone is guilty if, and only if, her behaviour instantiates the elements of what the lawmaker defines as a crime.

Proceduralism contends that only reverse burdens regarding the negative of an element of the crime conflict with the presumption of innocence. As mentioned above, the phrase ‘element of the crime’ is used to refer to the constituents of the crime definition. Importantly, the identity of these constituents is the subject of disagreement among the proceduralists. *Restrictive proceduralists* claim that a fact qualifies as an

¹⁰ See: S. E. Sundby, ‘The Reasonable Doubt Rule and the Meaning of Innocence’ (1989) 40 *Hastings Law Journal* 457; S. E. Sundby, ‘The Virtues of a Procedural View of Innocence – A response to Professor Schwartz’ (1989) 41 *Hastings Law Journal* 161; P. Roberts, ‘The Presumption of Innocence Brought Home? *Kebilene* Deconstructed’ (2002) 118 *LQR* 41; P. Roberts, ‘Drug Dealing and the Presumption of Innocence: The Human Rights Act (Almost) Bites’ (2002) 6 *E&P* 17; P. Roberts & A. Zuckerman, *Criminal Evidence*, 2nd edn (Oxford: OUP, 2010), at 282-290.

¹¹ However, see the important specification below regarding expansive proceduralism.

element of the crime if it is regarded as such by the lawmaker¹² – where the expression ‘lawmaker’ refers to Parliament, but possibly also to the courts, whose creative role is hard to deny.¹³ Thus, section 1(5) of the Firearms Act 1982 is apparently in accord with art. 6(2) ECHR: the absence of knowledge and recklessness does not negate any element of the strict-liability offence of possessing a readily convertible imitation firearm.

Expansive proceduralists, instead, adopt a different criterion for the identification of the elements of the crime: any fact upon which the law relies for the determination of punishment is an element of the crime.¹⁴ As a result, this strain of proceduralism assigns to the presumption of innocence a scope that is potentially broader than that assigned to it by restrictive proceduralists. In fact, section 1(5) of the Firearms Act 1982 violates the presumption thus understood. The absence of knowledge and recklessness is relevant to the determination of punishment and must, therefore, be disproved by the prosecution before David may legitimately be convicted.

¹² See Roberts, ‘The Presumption of Innocence Brought Home?’, above n. 10, in particular, at 67-71 and Roberts, ‘Drug Dealing and the Presumption of Innocence’, above n. 10, in particular, at 22-25. The US Supreme Court decision in *Patterson v New York* ((1977) 432 U. S. 197) seems to endorse this approach. For a different reading of this decision see R. J. Allen, ‘The Restoration of *In Re Winship*: a Comment on Burdens of Persuasion in Criminal cases after *Patterson v. New York*’ (1977) 76 *Michigan Law Review* 30.

¹³ See Roberts, above n. 1 at 15-18. On the role of courts as lawmakers see the recent reflections in N. Duxbury, *Elements of Legislation* (Cambridge: Cambridge University Press, 2013), in particular, at 3-20.

¹⁴ See Sundby, ‘The Reasonable Doubt Rule’, above n. 10 and Sundby, ‘The Virtues of a Procedural View of Innocence’, above n. 10. Cf. B. D. Underwood, ‘The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases’ (1977) 86 *Yale Law Journal* 1299, at 1338-1347. The US Supreme Court decision in *Mullaney v Wilbur* ((1975) 421 U. S. 684) endorses this approach. According to some authors, even sentencing factors (at least those capable of altering the statutory minimum and the statutory maximum) should be treated as elements of the crime.

'Expansive proceduralism' may be something of a misnomer. The supporter of this approach is making, in the end, a substantive claim: every fact that is relevant to the determination of punishment is an element of the crime definition and is, therefore, constitutive of guilt. Under restrictive proceduralism the scope of the presumption of innocence is determined based on a formalistic criterion that completely defers to the lawmaker's criminalisation choices.¹⁵ The presumption applies only to those facts that are regarded by the lawmaker as elements of the crime. The expansivist, instead, does not accord the same deference: although the lawmaker is left free to decide what conditions are relevant to punishment, once she has made this choice she is not equally free to restrict the ambit of the crime definition so as to include only some such conditions.¹⁶ In other words, if A, B, and C are considered relevant to punishment, the lawmaker cannot define guilt as depending on A and B only, so as to place the burden of proving $\neg C$ on the defendant. The expansive proceduralist understands A, B, and C equally: all are constituents of criminality. Thus, they all are subject to the presumption of innocence.

It appears, therefore, that expansive proceduralism partially interferes with the substantive process of criminalisation. It is the focus on punishment that provides for an instruction on what must be part of the crime definition.¹⁷ Indeed, this self-declared

¹⁵ Of course, there are substantive constraints on such choices, which will be discussed in the last Section. As will be shown, these constraints are utterly independent of the presumption of innocence.

¹⁶ See Sundby, 'The Reasonable Doubt Rule', above n. 10, at 467.

¹⁷ Under restrictive proceduralism, instead, it is the label 'freely' attached to a certain fact by the lawmaker that determines whether such fact is an element of the crime. Of course, this labelling choice is not properly free. See the last Section.

procedural approach incorporates a “holistic”¹⁸ theory of substantive criminal law according to which the norms of criminal responsibility are ‘comprehensive rules’, encompassing all “the necessary and sufficient substantive conditions for the justified use of criminal sanctions.”¹⁹ For the purposes of defining the constitutive elements of the crime – the expansivist says – it is not possible to draw a meaningful distinction between these conditions: they are all part of the crime definition. As a result of embracing this substantive holistic theory, the expansivist accords to the presumption of innocence a much broader scope than the restrictivist does.

Another influential normative approach to the presumption of innocence is the *purpose theory*. According to this theory, the presumption of innocence is violated when a person is convicted for conduct that is not the real target of the lawmaker.²⁰ Consider an example. The lawmaker’s purpose is to punish ‘the carrying of a bladed article in a public place with the intention to harm somebody’ – after all, it could be argued that it makes little sense to punish those who carry knives harbouring no intention to use them in order to do harm. However, the offence is drafted without making reference to the ulterior intent. Now, if a person carries a bladed article in a public space, but has no ulterior intent, she is innocent under the purpose theory: her conviction would violate the presumption of innocence. This would hold true even if the law were to place on the

¹⁸ Sundby, ‘The Reasonable Doubt Rule’, above n. 10, at 465.

¹⁹ G. P. Fletcher, ‘Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases’ (1968) 77 *Yale Law Journal* 880, at 892.

²⁰ See V. Tadros & S. Tierney, ‘The Presumption of Innocence and the Human Rights Act’ (2004) 67 *MLR* 402 and V. Tadros, ‘Rethinking the Presumption of Innocence’ (2007) 1 *Criminal Law and Philosophy* 193. This theory has been recently developed in V. Tadros, ‘The Ideal of the Presumption of Innocence’ (2013) *Criminal Law and Philosophy*, DOI 10.1007/s11572-013-9253-6, in particular, at 9-11, 13-16.

defendant the burden of proving the absence of the ulterior intent.²¹ Under the purpose theory, indeed, a reverse burden is incompatible with the presumption of innocence if the occurrence of the particular fact that the defendant is required to prove would make the conduct fall outside the lawmaker's target. This is because, due to the reverse burden, the defendant may be legitimately convicted even if that fact has occurred and her conduct is not, therefore, that which the lawmaker intends to punish. Thus – to go back to David's case – section 1(5) of the Firearms Act 1982 would conflict with the presumption if the lawmaker intended to punish the *knowing* or *reckless* possession of a readily convertible imitation firearm. In fact, the criminal law would misfire if it were to punish the defendant notwithstanding her lack both of knowledge and of recklessness.

It is evident that this approach is inherently substantive, in that it interferes with the choice of criminalisation. This is true whether the lawmaker's purpose is reconstructed in descriptive terms – what conduct did the lawmaker actually intend to target? – or in normative terms – what conduct should the lawmaker have intended to target?²² Regardless of which of the two avenues is followed, the purpose theory forbids the creation of a gap between the offence as it is drafted and the offence as it appears through the lawmaker's sights. The lawmaker is not free to define offences in broader terms than those reflecting her purpose.

3. The state of the art in the courts

²¹ Cf. *R. v Matthews* [2004] QB 690; [2003] 2 Cr App R 19.

²² Cf. Stumer, above n. 1, at 78-80. The normative reading conflates the purpose approach and the substantivist approach.

After providing an essential taxonomy of the main normative theories developed in the scholarship, it is time to consider how the approach of the courts may be classified. As was noted in the Introduction, finding coherence in the way in which courts have understood and applied the presumption of innocence is no easy task, to say the least. In what follows there is no pretence to accommodate all of the decisions on this issue. The aim, instead, is to detect the principal features characterising the most influential among these decisions.

The courts' understanding of the presumption of innocence is rooted in the famous claim by Viscount Sankey LC that "[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 subject to [...] the defence of insanity and subject also to any statutory exception."²³ Two questions are implicit in this sentence.

The first question is about the meaning of the term 'innocence' – thus of its opposite, 'guilt' – as is employed in the phrase 'presumption of innocence'. In other words, the question concerns the scope of the presumption, that is, the identification of the facts to which the presumption attaches. Courts maintain that any reverse burden on these facts *engages* the presumption of innocence.

Courts seem to assign to the presumption a very broad scope, assuming that it is engaged by virtually any reverse burden.²⁴ In this respect their position is akin to expansive proceduralism: any fact that is relevant to the determination of punishment defines guilt – and innocence – and is, therefore, subject to the 'golden thread'.

²³ *Woolmington*, above n. 2, at 95.

²⁴ See: *R. v Lambert* [2002] 2 AC 545; [2001] 2 Cr App R 28, at 525-527; *R. v Johnstone* [2003] UKHL 28; [2003] 1 WLR 1736, at 1749; *Sheldrake v DPP* [2005] 1 AC 264; [2005] 1 Cr App R 28, at 475; *R. v Webster* [2010] EWCA Crim 2819; [2011] 1 Cr App R 16, at 212-213; *Williams*, above n. 4, para. 30.

However, as several decisions point out, this “is not the end of the matter.”²⁵ Establishing that a reverse burden engages the presumption does not yet answer in the affirmative the question as to whether the presumption has been *breached*. As the ECtHR’s decision in *Salabiaku v France* suggests, notwithstanding that any reverse burden is in tension with the presumption, art. 6(2) ECHR prescribes no blanket ban on such evidentiary device. In particular, the presumption is not violated as long as the Contracting State uses a reverse burden “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”²⁶

Distinguishing between engagement and breach of the presumption seems in line with Viscount Sankey’s approach. The golden thread is a broad rule. However, it admits of exceptions, so that not every inroad into the rule is a breach thereof. The issue is that of determining when an exception is legitimate, that is, when a reverse burden is within ‘reasonable limits’. If the burden is found to contravene such limits, it will be read down to an evidential burden, based on section 3(1) of the Human Rights Act 1998, or declared incompatible with art. 6(2) ECHR, based on section 4(2) of the Act.²⁷

In accordance with the Strasbourg jurisprudence, courts have interpreted this second question as that of the importance of the State’s aim in departing from the golden thread and, more significantly, as the question whether the departure is proportionate in light of such aim.²⁸ “Is the derogation from the presumption of

²⁵ *Johnstone*, above n. 24, at 1749. See also *R. v D.P.P., ex p. Kebilene* [2000] 2 AC 326; [2000] 1 Cr App R 275, at 325 and *Lambert*, above n. 24, at 527-528.

²⁶ *Salabiaku v France* (Application no. 10589/83) (1991) 13 EHRR 379, at 388.

²⁷ But according to *AG’s ref. No. 4/2002* [2005] 1 AC 264; [2005] 1 Cr App R 28, at 481, it seems that reading down a legal burden will always be a viable option.

²⁸ Cf. *Janosevic v Sweden* (Application no. 34619/97) (2004) 38 EHRR 22, stating at 506: “the Contracting

innocence justified as representing a reasonable and proportionate response, balancing the importance of what is at stake for the public with the maintenance of the normal rights of the defendant?"²⁹ This enquiry led the courts to consider a number of relevant variables.³⁰ Among these are: the seriousness of the crime (including the significance of maximum penalties);³¹ whether the fact subject to the reversal is part of the offence's core, or *gravamen*;³² when the particular crime is a regulatory offence, whether the defendant was put on notice with respect to the risks involved in the regulated activity, had voluntarily accepted these risks and had had an opportunity to prevent their concretisation;³³ finally, the relative ease of proof of the fact at stake and of the negative thereof.³⁴

States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved."

²⁹ *Williams*, above n. 4, para. 31. Consider also *Kebilene*, above n. 25, at 326; *Lambert*, above n. 24, at 527-528; *Johnstone*, above n. 24, at 1749; *D.P.P. v Wright/ R. v Taunton Deane Magistrates' Court* [2009] EWHC 105 (Admin); [2010] 2 WLR 497, at 513-515; *Webster*, above n. 24, at 213-218.

³⁰ An insightful systematic description of the role played by these variables in judicial decisions is offered in *Hamer*, above n. 3.

³¹ See, in particular, *Lambert*, above n. 24, at 525-527; *Johnstone*, above n. 24, at 1751; *AG's ref. No. 4/2002*, above n. 27, at 480; *Williams* above n. 4, para. 44.

³² See, in particular, *Kebilene*, above n. 25; *Lambert*, above n. 24, at 525-530; *Sheldrake*, above n. 24, at 491-492.

³³ See, in particular, *Johnstone*, above n. 24, at 1751. Consider also *Williams*, above n. 4. See the discussion on this factor in *Dennis*, above n. 3, at 485.

³⁴ See, in particular, *Williams*, above n. 4, para. 42; *Johnstone*, above n. 24, at 1751; *AG's ref. No. 4/2002*, above n. 27, at 480.

The most sensible interpretation of what courts are doing in their assessment of proportionality seems to be that they are attempting to determine whether it would be 'reasonable and proportionate' for the State to criminalise behaviour in the complete absence of the element of which the burden has been reversed; in other words, whether this element should be a constituent of the crime. The answer to this question depends on the consideration of the above variables, as they play out in the particular case.³⁵ If the court decides that the element should be considered a constituent of the crime, the reverse burden is found to be in breach of the presumption of innocence.

An example may clarify the courts' reasoning. In a case similar to that of David, the Court of Appeal has decided that the reverse burden in section 1(5) of the Firearms Act 1982 engages art. 6(2) ECHR, yet does not breach it.³⁶ This is chiefly because the strict-liability offence consisting in the possession of a readily convertible imitation firearm is itself legitimate. The Court found that the crime is not exceedingly serious (although it carries a maximum sentence of ten years' imprisonment); that the elements of knowledge or recklessness concerning the characteristics of the weapon are not essential to the crime, given its regulatory nature; and that it is considerably easier for the defendant to prove the absence of those elements than for the prosecution to prove their occurrence.³⁷ These considerations lead to the conclusion that a crime devoid of

³⁵ It is plausible to claim that courts may require that a fact be part of the crime definition also depending upon the comparison between the ease of establishing that fact for the prosecution, on the one hand, and the ease of establishing its negative for the defendant, on the other. There is nothing illogical in using evidential arguments for substantive purposes. These may well be among the reasons that persuaded the legislator to criminalise the possession of a readily convertible imitation firearm – *viz.*, the case of David – without including in the crime definition a *mens rea* element regarding the nature of the object possessed.

³⁶ See *Williams*, above n. 4.

³⁷ *Id.*, paras 39-44.

the element that is subject to the reversal can legitimately stand on its own. In other words, the element is not a constituent of guilt: it is not part of the crime definition. Thus, the reverse burden passes muster.

In contrast to the theories discussed in the previous Section, the approach of the courts follows a rule-exception dynamic.³⁸ Initially, they hint at expansive proceduralism, by construing the presumption of innocence in broad terms. However, they admit of exceptions to the presumption and justify these exceptions adopting an approach that is best characterised as substantivist.³⁹ In the end, courts do seem to delve into the choices of criminalisation through applying the presumption. Instead of passively accepting the crime definition and the consequent burden allocation suggested by the substantive law, courts use art. 6(2) ECHR to address the definitional issue. They do so by determining whether the fact subject to the reversal should be considered a necessary element of the crime and, therefore, should be proved by the prosecution. As Lord Steyn claimed in *Lambert*, the enforcement of the presumption of innocence asks the courts “to concentrate not on technicalities and niceties of language but rather on matters of substance.”⁴⁰ This statement is rather telling when it comes to classifying the courts’ approach to the presumption.

There is, however, a notable limit to the courts’ substantive exercise. It has been recently affirmed⁴¹ that the presumption of innocence is not a valid tool to attack the

³⁸ A similar approach is adopted in Stumer, above n. 1.

³⁹ See Roberts, ‘Drug Dealing and the Presumption of Innocence’, above n. 10, at 35-37. Cf. Stumer, above n. 1, at 54-57.

⁴⁰ *Lambert*, above n. 24, at 526.

⁴¹ See *R. v G* [2008] UKHL 37; [2008] 1 WLR 1379. Cf. *Barnfather v London Borough of Islington Education Authority* [2003] EWHC 418 (Admin); [2003] 1 WLR 2318.

legitimacy of absolute-liability offences or elements – where liability is understood as ‘absolute’ “if it does not require proof of fault [...] and cannot be averted by disproof of fault.”⁴² According to the case law, art. 6(2) ECHR allows scrutiny of the substance of a criminal law provision when a reverse burden on mens rea is involved,⁴³ but prohibits such a scrutiny when mens rea concerning one or more elements is utterly irrelevant to liability and, therefore, there is no such reversal at play. This is a partial departure from the substantivist tack, since the substantivists maintain that the presumption of innocence permits to check the legitimacy of an offence also when no reverse burden is operative. It is doubtful that – what may be dubbed – the ‘restrictive substantivist’ approach adopted by the courts is coherent: if the presumption has substantive purview, why should the presence/absence of a reverse burden make any difference for the presumption’s engagement? The courts’ approach seems to reflect inconsistency in the enforcement of art. 6(2) ECHR, rather than a justified differential treatment of distinct cases.

4. Burdens of proof in criminal justice

This and the following Section advance some arguments in favour of restrictive proceduralism as the only theory compatible with the Convention. The other theories discussed above – including the courts’ two-tiered approach – are shown to be conceptually inadequate, being unable to express the presumption as is laid down in art.

⁴² Duff, above n. 7, at 126. On the other hand, liability “is strict if, although it does not require positive proof of fault, it can be averted by evidence or proof of lack of fault” (*ibid.*). According to Duff’s definitions – which are endorsed here – the offence in David’s case is a strict-liability offence.

⁴³ See, for instance, *Lambert*, above n. 24.

6(2) ECHR. In the absence of clear guidance by the ECtHR,⁴⁴ the arguments proposed here tackle the text of the Convention directly. Thus, they are not to be taken as advancing descriptive claims concerning how this provision is interpreted by the ECtHR; rather, they propose a line of interpretation for future decisions.

Among the several processes involved in a criminal justice system are the processes of criminalisation and of fact finding. Through the former, the State defines crimes, thus determining the boundaries of the criminal law; through the latter the State proves that the facts constituting a crime have obtained. In both processes the State must bear a burden of proof.⁴⁵ This simply means that the State must give reasons for criminalising particular conduct,⁴⁶ on the one hand, and for finding that facts took place which are an instantiation of that conduct, on the other.

Consider first the process of criminalisation. The act of criminalising particular conduct infringes on the people's enjoyment of certain rights and faculties – such as the right to liberty, freedom of thought, freedom of expression, and the right to privacy.⁴⁷ For this infringement to be justified the State must provide sufficient reasons to the

⁴⁴ The rather vague passage from *Salabiaku v France* (above n 26) quoted in Section 3 appears to be the best interpretive tool that the ECtHR has provided so far. True, this passage seems to endorse the substantivist tack. However, as several English decisions have suggested, it is highly doubtful that the ECtHR would explicitly uphold this theory.

⁴⁵ Cf. P. Tomlin, 'Extending the Golden Thread? Criminalization and the Presumption of Innocence' (2013) 21 *Journal of Political Philosophy* 44.

⁴⁶ See D. Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: OUP, 2008), at 99-100 and A. P. Simester & A. von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalization* (Oxford: Hart Publishing, 2011), at 19-32.

⁴⁷ As Husak has argued, among these rights there may even be a 'right not to be punished', that is, not to be subject to hard treatment and censure. See Husak, above n. 46, at 92ff.

polity. As Simester and von Hirsch put it, “[g]iven the onerous nature of criminalisation, it is surely right that the default presumption should be against its use – unless the case for [criminalising ...] is clearly established.”⁴⁸

Importantly, the ‘presumption’ that Simester and von Hirsch write about *is not* the presumption enshrined in art. 6(2) ECHR.⁴⁹ A presumption against the use of the criminal law pre-exists the choice of criminalisation, whereas the presumption of innocence does not. For a person to be ‘innocent’ there must be a particular behaviour of which she is innocent. As far as art. 6(2) ECHR is concerned, it is the process of criminalisation that identifies this behaviour. Only when this process has come to an end is it appropriate to speak of an individual’s entitlement to be presumed innocent. In fact, as the provision makes clear, the presumption applies when someone is “charged with a criminal offence.”⁵⁰ Without criminalisation there would be no criminal offence to charge and, therefore, no presumption to enforce.⁵¹ If so – returning to the example of David – it would be a mistake to claim that he should be presumed innocent of possessing a readily convertible imitation firearm, if this behaviour were not criminalised in the first place.

Moreover, a presumption against the use of the criminal law entails that criminalisation cannot be self-referential. The choice to criminalise does not derive its

⁴⁸ Simester & von Hirsch, above n. 46, at 31.

⁴⁹ Cf. Tomlin, above n. 45, at 44-48.

⁵⁰ The same phrase is adopted in the Universal Declaration of Human Rights, art. 11(1) and in the Canadian Charter of Rights and Freedoms, section 11(d).

⁵¹ The fact that the ECtHR adopts an interpretation of ‘criminal charge’ that is autonomous from domestic classifications does not diminish the point advanced here that the presence of a substantive rule is a necessary condition for the operation of the presumption of innocence.

legitimacy from the very fact of being made; it must be grounded in external factors, such as a consideration of the effect that it may yield on the community's enjoyment of rights. Understanding and rebutting the presumption set in art. 6(2) ECHR, instead, does not require looking beyond the content of the criminal law. It is the result of the criminalisation process that provides the exclusive backdrop against which innocence and guilt should be defined. Suppose that David were found to have been in possession of a readily convertible imitation firearm – this behaviour indeed constituting a crime under the Firearms Act 1982. It would be a mistake to claim that David is still entitled under art. 6(2) ECHR to be presumed innocent until his behaviour is shown by the State to fulfil the criteria for criminalisation. According to art. 6(2) ECHR, innocence consists in a lack of correspondence between certain facts and an existing crime definition, thus not between those facts and the idea of what such definition should look like for it to be legitimate. If this were not the case, that is, if innocence and guilt were not to be construed with exclusive reference to an existing crime definition, there would be no good reason for restricting the operation of the presumption of innocence to the stage following criminalisation: it would be sensible to consider this safeguard already operative at the earlier stage in which the lawmaker is defining criminality. However, as was shown above, this is not what art. 6(2) ECHR prescribes.

The arguments proposed in this Section entail that, as far as art. 6(3) ECHR is concerned, the concept of 'guilt' and its negative, 'innocence', are semantically dependent on the criminal law. More precisely, guilt and innocence have no existence before the legal definition of a crime is in place, nor independently of such definition. The logical relation between 'guilt' and 'crime', on the one hand, and 'innocence' and 'non-crime', on the other, is that of bi-directional implication.

5. The presumption of innocence as a fact finding safeguard

The presumption of innocence set in art. 6(2) ECHR, far from requiring the State to put forward reasons for criminalisation, establishes the absence of responsibility of the defendant for already criminalised behaviour as the state of affairs constituting the starting point of fact finding. The reasons for setting this *status quo* pertain to the justification of the presumption of innocence, an issue that is not addressed here.⁵² The prosecution's role is to defeat the presumption: it must give reasons for the fact finder to conclude that the defendant has indeed committed the crime charged. For a guilty verdict to be justified, the State must discharge a burden of proof. What count as sufficient reasons to conclude that certain facts have occurred depends on the relevant standard of proof. Notably, the ECtHR has read the reasonable doubt standard into art. 6(2) ECHR.⁵³ A survey of the arguments underlying this reading lies beyond the scope of the paper.

⁵² On the justification of the presumption of innocence see, in particular, Roberts & Zuckerman, above n. 10, at 240-252; P. Roberts, 'Taking the Burden of Proof Seriously' (1995) *CLR* 783; Dennis, above n. 3, Ch. 11; A. Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *E&P* 241, at 246-252.

⁵³ See *Ireland v UK* (Application no. 5310/71) (1979-1980) 2 EHRR 25. General statements – i.e., statements not necessarily confined to the ECHR system – to the effect that the presumption of innocence encompasses the reasonable doubt standard can be found in: D. Hamer, 'A Dynamic Reconstruction of the Presumption of Innocence' (2011) 31 *OJLS* 417, at 417; Sundby, 'The Reasonable Doubt Rule', above n. 10, at 458; Ho, above n. 1, at 260; D. Husak, 'Social Engineering as an Infringement of the Presumption of Innocence: The Case of Corporate Criminality' (2013) *Criminal Law and Philosophy*, DOI 10.1007/s11572-013-9232-y, at 3. Cf. Ashworth, above n. 52, at 250-251.

The claims advanced here are that the presumption kicks in when the process of criminalisation is complete⁵⁴ and that its purview is limited by the result of this process. Therefore, the presumption attaches to each fact identified by the law as an element of the crime, without raising the question whether requiring these elements is justified or, most importantly, sufficient for criminal liability. If these claims are sound, it follows that, as far as the ECHR system is concerned, any theory assigning to the presumption a role already in the process of criminalisation is off mark. Substantivism, expansive proceduralism, and the purpose theory fall prey to this objection, since all three theories maintain that the presumption has some influence on the definition of criminality – as the next Section will clarify, this same conclusion applies to the two-tiered approach followed by the courts. Note that nothing said here amounts to a criticism of any of these theories taken ‘in a vacuum’. There may well be grounds for such a criticism – indeed some of them will be mentioned in the concluding Section. However, the focus here is on whether these theories provide for a suitable account of how the presumption of innocence is to be interpreted and enforced in the ECHR context only.

As far as the presumption is concerned, therefore, the State is free to define crimes as it pleases; in other words, it is free to determine the constituents of guilt.⁵⁵ The State may adopt, for instance, the holistic approach to criminalisation described above: it may consider facts A, B, and C to be relevant to punishment and, because of this reason, it may define a crime as the occurrence of all of these facts. Conversely, it may consider

⁵⁴ The process of criminalisation may be completed only with the court’s legal reasoning taking place during the trial.

⁵⁵ This decision is, of course, subject to several constraints that are unrelated to the presumption of innocence. See the next section.

the actus reus (or the mens rea) to be the only constituent of guilt, that is, the only element of the crime: all the other factors are left outside the crime definition. Moreover, the State may provide that, although conviction does not require that these ulterior factors be established, their absence warrants an acquittal or a reduction in punishment. In other words, the State may follow some substantive considerations that suggest treating these factors as exculpatory circumstances, i.e., defences.⁵⁶ As was already hinted at above, this definitional process does not merely involve legislation. The adjudicative activity of the courts is an integral part of criminalisation.⁵⁷ Especially when statutory definitions are vague, it is the dialogue between legislator and courts that is responsible for identifying the elements of the crime. Importantly, since in the eyes of the lawmaker these definitional elements are the constituents of guilt, the presumption of innocence requires that the burden of proving them be on the State.

The situation differs when it comes to possible exculpatory circumstances identified by the law. As suggested above, *prima facie* the presumption of innocence allows the placing on the defendant of the burden of proving these circumstances. By its very meaning a defence aims at exculpating for a conduct that, absent the defence, would be criminal: therefore, it would seem that defences are utterly independent of the

⁵⁶ Possible relevant considerations are those offered in R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007), Ch. 9. The expected-cost-of-error model that Hamer has adopted in order to explain the allocation of burdens of proof (see Hamer, above n. 3 and Hamer, above n. 53) could in fact be used as a tool to determine what elements should be part of the crime definition and what may, instead, constitute defences. In other words, this model may be employed already at the stage of criminalisation, as opposed to being a means of explaining (or of prescribing) the burden allocation with regard to definitional elements – which, as argued here, should always be for the prosecution to prove.

⁵⁷ See note 13 above.

definition of such conduct, thus not being subject to the presumption. In fact, often this is not the case. A defence may merely consist in the negation of an element of the crime so that there is an overlap between the defence and the crime definition. It appears, therefore, that the application of the presumption to exculpatory circumstances is less straightforward than was suggested a few sentences ago.

Once the State has identified an element of the crime, it cannot provide a defence that totally or partially overlaps with such an element⁵⁸ and then place on the accused the burden of proof for this defence.⁵⁹ In other words, the presumption of innocence mandates that defences overlapping with elements of the crime are to be disproved by the prosecution to the satisfaction of the applicable standard – possibly after the defendant has satisfied the respective evidential burden. Otherwise, the State would contravene its obligation to prove the defendant's guilt. This, however, does not represent a substantial limitation on the process of criminalisation. It consists in a straightforward formal requirement: 1. If the lawmaker decides that A is an element of the crime, –A qualifies as an overlapping exculpatory circumstance; 2. Stating that the prosecution has the burden of proving A means that it has the burden of proving – (–A), the negation of the defence; 3. The presumption of innocence places on the prosecution

⁵⁸ Quite eloquently Paul H. Robinson refers to overlapping defences with the phrase “failure of proof defences”. See P. H. Robinson, ‘Criminal Law Defenses: a Systematic Analysis’ (1982) 82 *Columbia Law Review* 199, at 204-208.

⁵⁹ Thus, if ‘unlawfulness’ is an element of murder, self-defence to murder qualifies as an overlapping defence: the respective burden of proof cannot be placed on the defendant. Similarly, the burden of proof on automatism must rest on the prosecution if criminal responsibility requires a voluntary act, understood as a behaviour over which the agent is able to exercise control.

the burden of proving A, and 4. Thus, the defendant cannot be asked to bear the burden of proving the defence –A.

Determining whether an exculpatory circumstance overlaps with an element of the crime is not always an easy task. The common law defence of insanity is indicative of this difficulty.⁶⁰ In any case, if insanity is found to overlap with an element of the crime (possibly, the ‘voluntary act requirement’ or a specific mens rea element), according to the theory supported here the burden of proof on the defence should not be reversed, contrary to what common law prescribes. Even statutory defences may create such definitional uncertainty. An example is the relationship between the defence set in section 40 of the Health and Safety at Work Act 1974 and the offence obtained through combining sections 33(1)(a) and 2(1) of the Act. The offence consists in the employer’s failure to discharge the duty “to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.” The defence consists in the fact that “it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty ...” Now, given that an element of the offence is the employer’s failure to do what was reasonably practicable, the fact that it was not reasonably practicable to do more than was actually done seems to overlap with the element. If this is the case, according to the present theory the burden of proof on the defence should not be reversed, contrary to what the Act prescribes.⁶¹

Although the presumption of innocence imposes the formal limit on the allocation of the burden of proof for overlapping defences which has just been discussed, such

⁶⁰ See, in particular, P. Westen, ‘The Supreme Court’s Bout With Insanity: *Clark v. Arizona*’ (2006) 4 *Ohio State Journal of Criminal Law* 143.

⁶¹ In *R. v Chagot Limited* [2008] UKHL 73; [2009] 1 WLR 1 the House of Lords seemed not to bat an eyelid with regard to this issue of definition.

safeguard has no say whatsoever with regard to the question whether a defence indeed overlaps with one or more elements of the crime. More generally, it has nothing to say concerning the existence of grounds for the law to define crimes through certain elements, to provide particular defences or to draw a conceptual and definitional distinction between elements of the crime and defences. It is important to reaffirm that these issues concern the conceptualisation and definition of criminality and, as such, belong within the substantive process of criminalisation.

To conclude, it seems that restrictive proceduralism is the only theory among those proposed so far that withstands the challenge advanced in this and, in particular, the previous Section. According to such theory the safeguard represented by the presumption of innocence is unaffected by decisions about criminalisation: it exclusively concerns fact finding, a process that is logically distinct from – albeit necessarily related to – the making of these decisions.

6. Human rights protection: not a prerogative of substantivism

In *R. v G* Lord Hope wrote that “when article 6(2) [ECHR] uses the words ‘innocent’ and ‘guilty’ it is dealing with the burden of proof regarding the elements of the offence and any defences to it. It is not dealing with what those elements are or what defences to the offence ought to be available.”⁶² This statement is perfectly in line with the understanding of the presumption of innocence advocated here. It is, however, at odds with the restrictive substantivist approach generally adopted by English courts.

⁶² *R. v G*, above n. 41, at 1388.

When assessing whether the presumption of innocence has been breached through considering whether conduct without the element subject to the reverse burden could legitimately be made a crime, courts weigh reasons for criminalising. They are, in other words, deliberating on whether the State has satisfied its burden of proof concerning the choice of criminalising such conduct, i.e., the decision to infringe on the enjoyment of certain rights by the community. The presumption of innocence has nothing to do with the allocation and the discharge of this burden.

Importantly, this is not to say that substantive judicial review is unwarranted. Such a conclusion would be inconsistent with the reiterated recognition of the important law-making role played by courts. Rather, the claim advanced here is that this review should not be carried out under art. 6(2) ECHR.⁶³ Other means are available to determine whether a fact should be included in the crime definition – and, thus, proved by the prosecution, as the presumption requires – or whether the negative of such fact may, instead, be considered to provide a mere non-overlapping defence – whose burden of proof may, therefore, be placed on the defendant.

To begin with, English criminal jurisprudence equips courts with useful tools through which to review the legitimacy of substantive law, notably, the presumption that mens rea is an essential ingredient of every offence,⁶⁴ along with the test setting out the conditions under which such presumption may be rebutted.⁶⁵ Moreover, the

⁶³ As Roberts and Zuckerman point out, “even if the scope and content of criminal prohibitions ought in principle to be amenable to substantive judicial review, it does not follow that evidentiary concepts like the presumption of innocence are the right forensic tools for the job” (Roberts & Zuckerman, above n. 10, at 287). Consider also Ashworth, above n. 52, at 252-255.

⁶⁴ See *Sweet v Parsley* [1970] AC 132; [1969] 53 Cr App R 221, at 224.

⁶⁵ See *Gammon Ltd. v Attorney General of Honk Hong* [1985] AC 1; [1985] 80 Cr App R 194, at 199.

abovementioned sections 3(1) and 4(2) of the Human Rights Act 1998 confer on the courts the power to implement Convention rights either through interpretation or through a declaration of incompatibility. This means that courts are allowed to alter or censure a criminal provision that constitutes an unjustified interference with, in particular, the right to privacy, freedom of thought, conscience and religion, freedom of expression, and freedom of assembly and association.⁶⁶ Whether courts resort to home-made substantive principles or to the European substantive wisdom, they are able to avail themselves of a rather detailed and often coherent case law.⁶⁷ Such a case law seems to be missing in respect of the presumption of innocence, both at the national and at the European levels.

Finally, criminal law scholars have theorised a range of principles with the purpose of directing the choice of criminalisation. Among these are the principles that: criminal law should be used only to prevent harm to others; criminal law should target only conduct that is substantially wrongful; punishment should be proportionate to the seriousness of the wrongdoing, and that criminal law should be resorted to as an *ultima*

⁶⁶ The implementation of convention rights applies in two directions in that the State may have to alter and censure an existing provision both for violating the rights of the defendant and for not protecting adequately those of the victim. See J. Rogers, 'Applying the Doctrine of Positive Obligations in the European Convention on Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings' (2003) *CLR* 690 and B. Emmerson, A. Ashworth, A. Macdonald, *Human Rights and Criminal Justice*, 2nd edn (London: Sweet & Maxwell, 2007), at 746-767. In other words, in the light of the HRA 1998, criminal law should not merely represent *the charter of the defendant*, but also *the charter of the victim* – with some provisos that cannot be discussed here. It is open to question whether the judicial alteration of criminal law to the detriment of the defendant would not constitute a violation of section 7(8) of the Act and of art. 7 ECHR. Cf. *R. v H* [2001] EWCA Crim 1024; [2002] 1 Cr App R 7.

⁶⁷ See Emmerson et al., above n. 66, Ch. 8.

ratio.⁶⁸ It is open to debate whether courts are the most appropriate institution for the enforcement of these broad directives, especially considering that their definition and significance are issues as yet unresolved in the scholarship. However, at the least these appear useful instruments for the democratic confrontation occurring at the legislative stage. It is at this stage that the awareness of these principles may make a difference.⁶⁹

Let us assume that any of David's rights were endangered by a prosecution for possessing a readily convertible imitation firearm under the Firearms Act 1982: the suggested understanding of the presumption of innocence could be relied on not to fail him. Human rights enforcement is not the prerogative of a substantivist approach to the presumption. Conceiving of the presumption as a fact finding safeguard does not necessarily diminish the protection of citizens before the decisions to criminalise

⁶⁸ See, in particular, Husak, above n. 46, Ch. 2; Simester & von Hirsch, above n. 46, Chs 1 and 2; A. Ashworth, *Principles of Criminal Law*, 6th edn (Oxford: OUP, 2009) Ch. 2; A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *LQR* 225. The growing area of the so-called pre-emptive offences presents special problems for the operation of these principles. See P. Ramsay, 'Preparation Offences, Security Interests, Political Freedom' in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, V. Tadros (eds.), *The Structures of the Criminal Law* (Oxford: OUP, 2011).

⁶⁹ As Andrew Ashworth reports, some of these principles do make an appearance in the legislative debate, although they are not reflected consistently in the recently enacted criminal laws. "In response to a parliamentary question, Lord Williams of Mostyn has stated that offences 'should be created only when absolutely necessary', and that '[i]n considering whether new offences should be created, factors taken into account include whether: – the behaviour in question is sufficiently serious to warrant intervention by the criminal law; – the mischief could be dealt with under existing legislation or by using other remedies; – the proposed offence is enforceable in practice; – the proposed offence is tightly drawn and legally sound; and – the proposed penalty is commensurate with the seriousness of the offence. The Government also takes into account the need to ensure, as far as practicable, that there is consistency across the sentencing framework.'" (Ashworth, 'Is the Criminal Law a Lost Cause?', above n. 68, at 229).

certain conduct. On the contrary: it forces courts to face the definitional problems directly and openly, instead of hiding their incursions into the process of criminalisation under the pretence of merely enforcing a trial right. This implies a tidier, more transparent, and franker treatment of the issues involved in, respectively, the process of criminalisation and that of fact finding.⁷⁰ Also, it warrants a more effective substantive review. The judicial scrutiny of legislative definitional choices – as well as the constructive judicial intervention especially required when these choices are not made evident by the statute – would not be conducted under the guidance of the rather confused and unsystematic set of criteria that courts have elaborated in their substantivist implementation of art. 6(2) ECHR. Limiting the purview of this provision as suggested here would amount to an invitation to courts to rediscover, develop, and employ more solid jurisprudential principles and precedents in their review of the substantive law.

⁷⁰ Cf. P. Roberts, 'Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions' in A. P. Simester (ed.), *Appraising Strict Liability* (Oxford: OUP, 2005), in particular, at 176-185 and H. Stewart, 'The Right to Be Presumed Innocent' (2013) *Criminal Law and Philosophy*, DOI 10.1007/s11572-013-9233-x, at 12-13.