The denial of procedural safeguards in trials for regulatory offences: a justification

The Denial of Procedural Safeguards in Trials for Regulatory Offences: A Justification

Abstract: Regulatory offences are a complex phenomenon, presenting problematic aspects both at the level of criminalisation and at the level of enforcement. The literature abounds in works that study the phenomenon. There is, however, an aspect that has remained largely unexplored. It concerns the relationship between the regulatory framework within which the crime occurs and the procedural safeguards that defendants normally enjoy at trial or at the pre-trial stage: defendants tried for regulatory offences are often denied safeguards that are generally considered as important constituents of trial fairness. Relying on a new conceptualisation of regulatory offences, this paper advances a theory that justifies these exceptional rulings.

*Federico Picinali**

1. Introduction

The so-called 'regulatory offences' have inhabited the criminal justice system for centuries.[1] The literature abounds in works that study the phenomenon. Most of these works address the markedly substantive question as to whether, and how, it is possible to justify the presence of regulatory offences in the system.[2] The strict liability and moral neutrality that often characterise regulatory offences seem at odds with the liberal principles informing our criminal law. Besides, a burgeoning literature on regulation and criminal justice has drawn

* Law Department, London School of Economics and Political Science. I am very grateful to Mike Redmayne, Nicola Lacey, Jules Holroyd, Jeremy Horder, Emmanuel Melissaris, and Nick Sage for the invaluable exchanges I had with them during the research for this article and for their helpful comments and criticisms on previous drafts. An earlier version of the article was presented at the LSE staff seminar in February 2016. I am grateful to all participants for their consideration and comments.

[1] See Jeremy Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in Antony Duff, Lindsay Farmer, Sandra Marshall, Massimo Renzo, and Victor Tadros (eds.) *Criminalization: The Political Morality of the Criminal Law* (OUP 2014).

[2] Consider, in particular, Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *LQR* 225; Peter Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69 *MLR* 29; Grant Lamond, 'What is a Crime?' (2007) 27 *OJLS* 609; Horder, above n 1.

attention to the special enforcement strategies adopted in the regulatory context, and has explored the connections between these strategies and the substantive status of regulatory offences.[3] We have learned that most regulatory agencies prefer consultation strategies to outright condemnation. Criminal prosecution is the last resort, taking place only when compliance could not be achieved through less coercive instruments in the 'regulatory pyramid.'[4] To the extent that this is the case, our worry that the criminal justice system may punish non-culpable offenders seems less warranted: by the time that the consultative interaction between the regulator and the regulatee has failed, the culpability of the latter is very likely.[5] That the regulatory offence does not include a fault element is, therefore, less problematic than it appears at first sight.

This is not to say that the criminal justice scholar should not be troubled by regulatory offences. After all, the compliance strategy is not adopted in all regulatory contexts. Sometimes a prosecution is brought without previously experimenting with other enforcement techniques. This may revive the substantive issues addressed above. Also, regulatory offences are created with a surprising ease, as if the criminal law were 'the quick fix for almost any social problem.'[6] Needless to say, the criminal law is no such panacea. Often, the most that it can do is to perform a purely symbolic role, capable of producing political consensus but ultimately unfit to tackle the underlying problems. These and other issues relating to regulatory offences are reasons for concern and have, indeed, concerned

[3] Consider, in particular, W.G. Carson, 'White-Collar Crime and the Enforcement of Factory Legislation' (1970) 10 *Brit. J. Criminology* 383; Genevra Richardson, 'Strict Liability for Regulatory Crime: The Empirical Research' (1987) *CLR* 295; Nuno Garoupa, Anthony Ogus, and Andrew Sanders, 'The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?' (2011) 70 *CLJ* 229; Hannah Quirk, Toby Seddon, and Graham Smith (eds.) *Regulation and Criminal Justice: Innovations in Policy and Research* (CUP 2014).

[4] The concept of the 'regulatory pyramid' was introduced by Ian Ayres and John Braithwaite in *Responsive Regulation: Transcending the Regulation Debate* (OUP 1995) 35ff. The pyramid represents a desirable arrangement of interactions between the regulator and the regulatee. The vertical dimension indicates the severity of the regulatory response – the most severe response being at the apex. The horizontal dimension indicates the volume of responses. The underlying idea is that coercive instruments should be employed only when compliance cannot be achieved with less severe instruments, such as persuasion and warnings. Thus, the majority of responses should be of a non-coercive nature.

[5] See Carson, above n 3, 394-395, Richardson, above n 3, 296, 303, and Celia Wells and Oliver Quick, *Lacey, Wells and Quick, Reconstructing Criminal Law. Text and Materials* (4th edn., CUP 2010) 666.

[6] Nicola Lacey, 'Criminalization as Regulation: The Role of Criminal Law' in Christine Parker, Colin Scott, Nicola Lacey, and John Braithwaite (eds.) *Regulating Law* (OUP 2004) 163.

the criminal justice scholar. There is, however, a problematic aspect of regulatory offences that has remained largely unnoticed. It regards the relationship between the regulatory framework within which the crime takes place and the procedural safeguards that defendants normally enjoy at trial – or at the pre-trial stage. It is not infrequent that defendants tried for regulatory offences are denied safeguards that are generally considered as important constituents of trial fairness.[7] The reason on which courts seem to put most weight in their attempt to justify this practice is the interest that the public has in a safe performance of the regulated activity: the fewer the procedural safeguards, the easier it is to achieve a conviction, the greater is the deterrent effect.[8] The obvious question is whether the denial of certain procedural safeguards in the regulatory context is, indeed, justifiable. While some scholars have addressed this question with respect to specific safeguards and offences, I advance a theory that justifies the practice as a whole. Section 2 clarifies the concept of regulatory offence adopted here and relies on this concept to formulate the justificatory theory. Section 3 illustrates three cases where different procedural safeguards have been denied to defendants charged with regulatory offences. Section 4 applies the theory to the three cases, showing that it justifies the denial of procedural safeguards in each of them. Section 5 offers some concluding remarks.

2. Regulatory Duties versus Procedural Safeguards: Introducing the Theory

2.1. The Concept of 'Regulatory Offence'

[7] It is important to consider that, according to the ECtHR and the English case law, the fairness of the trial crucially depends on how pre-trial procedures are conducted. For a discussion of the procedural safeguards that are constitutive of trial fairness, see Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn., OUP 2010), in particular Chapters 5, 9, and 11.

[8] In section 4, I will consider this approach in more detail, discussing some relevant case law. The claim that the ease of conviction produces deterrence is controversial and needs empirical testing. I am not discussing this issue here.

Before introducing the theory, it is essential that we clarify the concept of 'regulatory offence.' The concept is notoriously controversial.[9]

Some have attempted to distinguish regulatory offences on evaluative grounds. It is often claimed that these offences are *mala prohibita* rather than *mala in se*. In other words, they do not track moral evaluations as traditional crimes such as murder and rape do: they constitute the wrongness of certain conduct rather than reaffirming a pre-existing moral assessment thereof.[10] Whether or not it is possible to demarcate regulatory from 'real' offences on the basis of their *actual* moral status, a distinction between the two seems to exist at the level of societal perception: normally, those who commit regulatory offences are not perceived by the public as 'real criminals.'[11] Other definitions of the evaluative kind are those hinging on positive and negative traits of the activity to which the offence pertains. Regulatory offences are defined as arising out of activities that are socially beneficial, whereas mainstream criminality possesses no social utility.[12] These beneficial activities, however, are also inherently risky for the society at large: norms punishing regulatory offences exist precisely in order to reduce these risks.[13]

Besides the evaluative definitions, regulatory offences have been characterised by stressing the legal form that they tend to take and the procedural aspects of their enforcement. Thus, regulatory offences are described as being 'part of statutory schemes for the regulation of certain spheres of social or commercial activity'; as being 'generally enforced by the regulatory authority rather than the police'; and as being 'characterised by three features – strict liability, omissions liability, and reverse onus provisions for

---

[9] Cf. Alan Norrie, *Crime, Reason and History. A Critical Introduction to Criminal Law* (3rd edn., CUP 2014) 104-106.
[10] In assessing the legitimacy of strict liability offences, courts often distinguish between acts that are 'truly criminal' and acts that 'are not criminal in any real sense.' This distinction seems to reflect the *mala in se/mala prohibita* divide. See *Sherras* v *De Rutzen* [1985] 1 QB 918, *Gammon Ltd.* v *Attorney General of Honk Kong* [1985] 80 Cr App R 194, *B* v *DPP* [2000] 2 WLR 452. Of course, the fact that a crime is *malum prohibitum* does not necessarily mean that it is not morally wrong to commit it. See Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2006), Chapter 20.
[11] See Norrie, above n 9, 116.
[12] See Anthony Ogus, 'Regulation and its Relationship with the Criminal Justice Process' in Quirk et al., above n 3, 29.
[13] Cf. Ramsay, above n 2, 49.

exculpation.'[14] Some scholars emphasise that 'the form in which [regulatory] offences are defined often omits any mention of the consequential harm' and that 'the model of enforcement is based on a consultative, us-and-us, rather than them-and-us, conception.'[15] Finally, recent works suggest that the distinctiveness of regulatory offences cannot reside in their regulatory nature – an apparently counterintuitive conclusion, but a sensible and important one. After all, if one defines regulation as 'any practice which has the intention or effect of controlling, ordering, or influencing … behaviour,'[16] the criminal law in its entirety is a regulatory enterprise.[17] Regulatory offences are but one resource in the criminal legislator's regulatory toolkit.[18]

This brief survey is sufficient to appreciate how difficult it would be to give an accurate and comprehensive definition of the concept of 'regulatory offence.'[19] This is especially due to the multifaceted nature of the underlying phenomenon. Were it possible to achieve such definition, moreover, the result may not be worth the effort. Valuable research and appropriate judicial decisions can be, and have been, produced by identifying and exploring a single aspect of the phenomenon – be it the enforcement technique, the moral status, the legal form, etc. This is the tack that I follow here. More precisely, I rely on a teleological or ameliorative[20] definition of regulatory offences, i.e., a definition that focuses on the aspects of the phenomenon that are relevant to the particular problem that one intends to address. As far as the problem addressed in this article is concerned, the relevant aspect is the kind of rules governing the activity to which the regulatory offence pertains. I will describe these rules and then call 'regulatory offences' the offences that pertain – in a way that is yet to be defined – to activities governed by rules of this kind. As with other

[14] Ashworth, above n 2, 228.
[15] Wells and Quick, above n 5, 661.
[16] Lacey, above n 6, 147.
[17] The same holds true if we adopt Julia Black's definition of regulation offered in 'Critical Reflections on Regulation' (2002) 27 *Austl. J. of Leg. Phil.* 1, 26.
[18] See Andrew Sanders, 'Reconciling the Apparently Different Goals of Criminal Justice and Regulation: The "Freedom" Perspective' in Quirk et al., above n 3, 44-45.
[19] The Law Commission has recently recognised, and commented on, this difficulty. See Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) paras 3.43-3.51.
[20] On the 'ameliorative analysis' of concepts, see Sally Haslanger, 'What Good Are Our Intuitions?' (2006) 80 *Arist. Soc. Sup. Vol.* 89, in particular 95-96.

aspects of the phenomenon, this aspect may not characterise every offence that is normally referred to as 'regulatory,' while it may characterise offences that are not normally called thus. As long as the reader is aware of my terminological stipulation, the possible under- and over-inclusiveness of the definition should present no problem. The theory I advance here does not apply in the absence of the relevant aspect and – as it will be evident once the theory and its conditions are presented – it may not apply even when the offence is regulatory under my definition.

Regulatory offences relate to activities or public services that are governed through rules of the sort 'you are authorised/entitled to X, provided that you Y, Z, etc.' These rules authorise the activity – or grant the service – X on the condition that the individual does Y, Z, etc., where Y and Z identify duties whose discharge is functional to the appropriate performance of the activity or distribution of the service.[21] I will call these duties 'regulatory.' A regulatory offence consists in the breach of one of them – NB: no claim is being advanced that every regulatory duty is or should be protected with a criminal sanction. Consider the case of driving. An individual is authorised to drive a car on the condition that, e.g., she has a driving licence, she is not intoxicated, and she does not race on the public way. These conditions impose duties on the individual, which are functional to the appropriate performance of the activity of driving. The breaches of each of these duties are regulatory offences under the Road Traffic Act 1988.[22] Consider next the case of employment. An individual is authorised to employ other people on the condition that, e.g., she ensures the health, safety, and welfare at work of all her employees. This condition imposes a duty on the individual,[23] which is functional to the appropriate performance of the activity of employing. Breaching this duty is a regulatory offence under the Health and Safety at Work Act 1974.[24] For an example of public service, consider the case of benefits. An individual is entitled to benefits on the condition that, e.g., she notifies the Department of

[21] Cf. Richard Glover, 'Regulatory Offences and Reverse Burdens: The "Licensing Approach"' (2007) 71 J. Crim. L. 259, 268-269.
[22] See sections 87(1), 4(1), and 12(1) of the Act, respectively.
[23] It is, in fact, expressly referred to as a 'duty' in section 2(1) of the Health and Safety at Work Act 1974.
[24] See section 33(1)(a) of the Act.

Works and Pension of any relevant change of circumstances affecting her entitlement to the benefit. This condition imposes a duty on the individual, which is functional to the appropriate distribution of the service.[25] Breaching the duty is a regulatory offence under the Social Security Fraud Act 2001.[26]

In light of these examples, someone may contend that my definition of regulatory rules – and consequently of regulatory offences – overlooks the distinction between 'constitutive' and 'side-constraints' regulations. In the case of constitutive regulations – such as the Road Traffic Act 1988 – the individual is not allowed to undertake the activity absent an act of authorisation. Side-constraints regulations – such as the Health and Safety at Work Act 1974 – do not involve such an act, but simply set side-constraints on engaging in a particular activity. Notably, this distinction rests on a 'thick' conception of authorisation as an act of granting powers or rights. The proposed definition of regulatory rules, instead, rests on a 'thin' conception according to which 'to authorise' means to refrain from interfering with the performance of a certain activity. In the case of regulatory activities, the non-interference is qualified by the relevant duties and conditioned on the respect thereof. The thick conception implies the thin conception, given that an act of granting powers implies (a promise of) non-interference – again, subject to the above qualification and condition. Thus, under my definition, licensing regimes are regulatory regimes. Whether or not someone accepts the 'thin' conception of authorisation, it is important to point out that the crucial aspect of my definition of regulatory rules and activities does not lie in this conception. This aspect is, instead, the idea that the regulatee cannot *legitimately* undertake the activity unless she discharges one or more duties that are seen as functional to its performance – an idea that reflects the dynamics of both constitutive and side-constraints regulations.

It should be evident why crimes like murder or causing grievous bodily harm are not regulatory offences under the proposed definition – the categorisation of rape and sexual

[25] The change in circumstances affects the entitlement, and failing to discharge the duty may be a sufficient reason for denying the benefit.

[26] Sections 16(2) and (3) of the Act contain two offences of failing to notify a change of circumstances. Both are more complicated than the sketch I have given in the example. A critical discussion of these offences is offered in Jeremy Horder, 'Excusing Information-Provision Crimes in the Bureaucratic State' (2015) 68 *CLP* 197.

assault may seem more problematic.[27] True, murder is the violation of a duty: the duty not to kill. However, this duty is not functional to the appropriate performance of any specific activity such that it would be meaningful to maintain that an individual is authorised to perform that activity on the condition that she does not kill anyone. In other words, there is no significant connection between discharging the duty not to kill and being authorised to perform a certain activity. There is no power-conferring rule that states, e.g., 'you are authorised to walk on the street – or buy a house, or drink a beer, for that matter – on the condition that you don't kill anyone.' There is only a duty not to kill, which applies irrespective of the activity in which we engage. Unlike the duties breached by regulatory offences, this duty is of general application, not being triggered by our decision to engage in any particular activity.[28] Importantly, the distinction is one of scope, not necessarily one of moral status. The general duty not to kill is a moral duty, but the same is true of the specific duty to ensure the health and safety at work of one's employee.

2.2. The Justificatory Theory

The suggested characterisation of regulatory offences makes it possible to advance a theory that justifies the practice consisting in the denial of certain procedural safeguards to defendants who are tried for offences of this kind. As explained above, people who engage in regulated activities are subjected to specific duties, meaning that they are authorised to engage in those activities only on the condition that they discharge those duties. Some of the duties are protected by criminal sanctions: their breaches are regulatory offences. The

[27] It may be argued that rape and sexual assault are regulatory crimes under my definition: the law authorises individuals to engage in sexual acts on the condition that they discharge the duty to secure consent from the sexual partner. This claim is unconvincing, given that under the Sexual Offences Act 2003 an individual may be acting legally even in the absence of consent, provided that she has a genuine and reasonable belief in consent. Should we then say that the law authorises an individual to engage in sexual acts on the condition that she discharges a duty to believe in consent on the basis of reasonable grounds? This would be a curious duty indeed, given that we cannot believe at will. And restating the duty as a duty to gather reasonable grounds for belief – rather than a duty to believe – may still seem unsatisfactory, given that someone who discharged this duty would be acting criminally unless she also genuinely believed in consent – although I concede that this belief will almost always be present if the duty is discharged – or the sexual partner actually consented. Admittedly, however, the cases of rape and of sexual assault are similar in some relevant respects to the regulatory scenario that I will discuss in sections 3.3 and 4.3. But see below n 103.

[28] Cf. Law Commission, above n 19, paras 1.9-1.12.

theory advanced here is that *any justified regulatory duties*[29] *justify the denial of procedural safeguards if either of the following conditions obtain: a) if the procedural safeguard is inconsistent with the regulatory duty assumed by the defendant, so that the defendant could not at the same time enjoy the safeguard and discharge the duty; or, in the absence of such an inconsistency, b) if the contents of the regulatory duty are such that no defendant would have reasonable grounds to complain about the denial of the procedural safeguard* – neither the defendants who have diligently discharged their regulatory duty, nor those who haven't. Call the conditions set in a) and b), respectively, 'deontic contradiction' and 'unreasonable complaint.' Cases falling under 'deontic contradiction' involve an inconsistency between the duty and the safeguard. For example, consider a defendant bound by a regulatory duty to give particular information to the authorities. If she has such a duty, she could not at the same time enjoy a procedural safeguard consisting in a privilege not to give such information when requested by those authorities. The question arises as to why in 'deontic contradiction' the duty should take priority over the conflicting safeguard and not vice versa. As the case studies discussed later will evidence – see, in particular, sections 4.1 and 4.2 – deciding that the procedural safeguard takes priority may render the duty nugatory, in the sense of effectively removing it from the regulatory regime – an outcome that is unwarranted if the duty is justified. However, resolving the deontic conflict in favour of the regulatory duty is justified by two further considerations. First, the bearer of the duty has already engaged in the regulated activity; by doing so, she has imposed risks and burdens on others; also, she has enjoyed the advantages connected to exercising the activity, including the fact that other agents discharged their regulatory duties. This individual should now do her share by discharging the regulatory duty, lest she free-ride on the efforts made by, and the burdens imposed on, other people. Second, by undertaking the regulatory activity, the individual can be taken to have voluntarily accepted the regulatory regime and the responsibilities that flow from it. For these responsibilities to be taken seriously, she should be made to bear the

[29] Whether they are enforced through the criminal law or not.

consequences of her decision, and thus discharge her regulatory duties.[30] I will consider the argument from voluntary acceptance again in the following sections.

Cases falling under 'unreasonable complaint' do not involve a deontic inconsistency. And yet, the specific contents of the regulatory duty and of the procedural safeguard are such that a denial of the latter, while making the prosecution case easier, could not be the object of reasonable complaint on the part of any defendant. For example, consider a defendant bound by a regulatory duty to acquire some information and to make it available to the public. Asking the defendant to bear at trial the burden of proving that she has such information would be a departure from the presumption of innocence,[31] which places on the prosecution the burden to prove the defendant's guilt. However, the defendant who has diligently discharged the regulatory duty does not have reasonable grounds to complain about the reverse burden of proof: not only was it her choice to undertake the regulated activity and to assume the related duties, but also – and more importantly – her defence is not set back by having to bear the burden. If she has acquired the information and already made it available, it will be sufficiently easy for her to do so again at trial – thus saving the prosecution time and energy. In fact, not even the defendant who has failed to discharge the duty has reasonable grounds to complain about the reverse burden. First, she is responsible for the predicaments of her defence: she made the decision to engage in the regulatory activity and failed to discharge a related regulatory duty. This is the reason for which she will find it hard to prove that she had the relevant information. Second, if failure to discharge the duty is itself a constitutive element of guilt,[32] this further undermines the defendant's complaint. The predicaments of her defence are not only indicative of a failure

[30] Notably, the strength of this argument may vary depending on how difficult it was for the agent to know about the applicable duties at the time of deciding to undertake the activity.

[31] I am here relying on the courts' understanding of the presumption and assuming that the knowledge of, or belief in, the information would be relevant to the defendant's guilt. I will say more about the presumption of innocence in the following sections.

[32] As previously pointed out – and as we will see again in the following sections – this is often the case. In particular, if in our example this weren't the case, there wouldn't be a curtailment of the presumption of innocence – given that the presumption does not require the prosecution to prove facts that are not constitutive of the defendant's guilt. It may be that the failure to discharge the duty is not a constitutive element of guilt. If so, the first point still holds.

to discharge a regulatory duty, but also of her guilt. This shows that denying a procedural safeguard in cases falling under 'unreasonable complaint' may be a valuable device to tell the guilty and the innocent apart. The defence of the former is made more difficult; not that of the latter. If these arguments are sound, it follows that also in cases falling under 'unreasonable complaint' the denial of the procedural safeguard is justified.

In discussing the conditions 'deontic contradiction' and 'unreasonable complaint,' I have assumed that the relevant regulatory duty is justified. The justification of the duty is an obvious requirement of the theory. As we will see later, justifying the duty may often be more problematic than determining whether either of the conditions obtain. I now turn to introduce three case studies on which to test the theory; more precisely, I will show that in these cases the theory justifies the courts' decisions to deny a procedural safeguard. It goes without saying that the theory does not track the courts' reasoning – if it were otherwise, it would be idle to advance it. As evidenced in the next sections, the courts' reasoning is at times insufficient or muddled. Moreover, courts fail to recognise the key role played by regulatory duties. As a result of this inattention, they haven't formulated a general and coherent approach to the problem addressed here. This is the approach provided by the above justificatory theory. The goal in proposing this theory is precisely that of fostering consistency, coherence, and transparency. However, it is important not to mistake the claim that the theory provides a general approach for the claim that this approach is exclusive. The generality of the approach does not entail that procedural safeguards may not be denied for reasons other than those underlying the theory. Instead, it means that the reasons underlying the theory justify by themselves a denial in all cases that satisfy the conditions set in it.

3. Three Case Studies

3.1. O'Halloran and Francis v UK[33]

In *O'Halloran*, the Grand Chamber of the European Court of Human Rights (ECtHR) decided two separate applications. The vehicles of both applicants were caught on cameras while driving above the speed limit. Each applicant received a notice informing him that the police intended to prosecute the driver of the vehicle and requesting that the applicant disclose the name and address of the person who was driving at the relevant time, pursuant to section 172(2) of the Road Traffic Act 1988. This section imposes a duty to inform on the vehicle owner: 'Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies – (a) the person keeping the vehicle shall give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police.' The first applicant disclosed the information and was convicted for speeding. The second applicant failed to disclose the information. He was convicted under section 172(3) of the Act, which criminalises the failure to comply with section 172(2). The Court was called to answer the question as to whether the duty to inform imposed by section 172(2) is compatible with the right to a fair trial enshrined in article 6(1) of the Convention. The Court decided for compatibility. It did so notwithstanding that the duty is in flat contradiction with the privilege against self-incrimination, a safeguard that is normally regarded as a constitutive element of the right to a fair trial. According to the leading case of *Saunders* v *UK*:[34]

> the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment [sic] of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to

[33] (2008) 46 EHRR 21.
[34] (1997) 23 EHRR 313.

> evidence obtained through methods of coercion or oppression in defiance of the will of the accused.[35]

It is hard to question that the duty imposed by section 172(2) is an instance of coercion or compulsion of the accused. The Court in *O'Halloran* tried to downplay the logical tension between the duty and the privilege[36] in the attempt to avoid the otherwise inevitable conclusion that the defendants did not enjoy the safeguard. The Court noted, in particular, that the compulsion involved in the case was moderate; that the duty imposed by section 172(2) is in the public interest; and that the applicants can be taken to have accepted this duty as part of the responsibilities and obligations created by the regulatory regime concerning motor vehicles. Then, with the characteristic ambiguity of many of its decisions, the Court concluded from these factors that 'the essence of the applicants'… privilege against self-incrimination has not been destroyed' and that, consequently, 'there has been no violation of Art. 6(1) of the Convention.'[37]

The Grand Chamber's reasoning notwithstanding, commentators,[38] the Privy Council,[39] and possibly the very concurring opinion of Judge Borrego Borrego in *O'Halloran*[40] suggest that the truth of the matter is a different one. Cases like *O'Halloran* constitute an exception to the operation of the privilege against self-incrimination: the defendant simply does not enjoy the privilege. How can this exception be justified?

3.2. Nottingham City Council v Amin[41]

The defendant, a taxi driver licensed by the local authority under section 37 of the Town Police Clauses Act 1847, was hailed by two plain-clothes police officers while driving in an

---

[35] *Saunders*, ibid., 337.

[36] The tension is even more obvious if one adopts Mike Redmayne's characterisation of the privilege as shielding suspects and defendants against the imposition of duties to cooperate with the authorities. See Mike Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 *OJLS* 209.

[37] *O'Halloran*, above n 33, 416.

[38] See Redmayne, above n 36, 228-231; Andrew Ashworth, '*O'Halloran and Francis v UK*' (2007) *Crim LR* 897; Ashworth and Redmayne, above n 7, 149-150.

[39] See *Brown* v *Stott (Procurator Fiscal, Dunfermline) and another* [2001] 2 WLR 817.

[40] *O'Halloran*, above n 33, 416 ff.

[41] [2000] 1 WLR 1071.

area not covered by his licence. He stopped and took the officers to the requested address in return for a fare. He was charged under section 45 of the Act, which makes it a crime to ply for hire without having previously obtained a licence. The magistrate dismissed the information on the ground that the defendant had been entrapped and that, as a result, the evidence obtained against him had to be excluded pursuant to section 78 of the Police and Criminal Evidence Act 1984. The section states that a 'court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, *including the circumstances in which the evidence was obtained*, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it' (italics added). The section reaffirms the right to a fair trial, protected by art. 6(1) ECHR. Therefore, it is often interpreted in light of the ECtHR case law.[42] The local authority appealed the decision arguing that the magistrate was wrong in excluding the evidence. The crucial question to be decided by the High Court was whether the defendant was entitled to the exclusion of the evidence as a countermeasure against unfair proactive tactics on the part of the police.

The High Court allowed the appeal: admitting the evidence – the Court maintained – would not have rendered the trial unfair. The decision of the Court is not particularly elaborated and it mainly rests on a brief survey of the ECtHR case of *Teixeira de Castro* v *Portugal*.[43] In *Teixeira* – a drug case – the ECtHR concluded that when police officers incite the commission of an offence such that there is nothing to suggest that the offence would have been committed without their intervention, the evidence obtained as a result of the incitement must be excluded, lest the trial be unfair.[44] The High Court recognised that in *Amin* the police officers acted as agent provocateurs and that 'on a precise and literal reading of [*Teixeira*'s] language' one may reach the conclusion that the taxi driver received an unfair trial. However, the Court decided to depart from this reading. It distinguished *Amin* from *Teixeira* on the grounds that the criminal activity alleged in the former was

[42] Cf. Ashworth and Redmayne, above n 7, Chapter 11.3.
[43] (1998) 28 EHRR 101.
[44] See *Teixeira*, ibid., 113-116.

'much more minor' and that, unlike in *Teixeira*, the defendant in *Amin* was not 'in any way prevailed upon or overborne or persuaded or pressured or instigated or incited to commit the offence.'[45]

The High Court's attempt to reconcile the decision in *Amin* with that in *Teixeira* – more precisely, to present the former as a case of legitimate entrapment – is unconvincing. Pace the Court, the fact that the offence in *Amin* was minor speaks against the use of proactive enforcement, rather than in favour of it. After all, someone may reasonably argue that costly enforcement tactics should only be reserved for the more serious crimes. Also, while the Court is right in pointing out that the officers did not pressure or coerce the defendant, this fact is hardly sufficient to conclude that their conduct was legitimate. Cases like *Amin* are generally referred to as 'test-purchase cases,' that is, cases where officers – or other individuals on their behalf – demand to buy goods or services in order to test whether a trader or provider is respecting the terms of her licence.[46] Test purchases are normally backed by courts; but they are difficult to reconcile with the general rules on state entrapment. To see why, consider the leading case of *R* v *Looseley*.[47] In *Looseley* – another drug case – the House of Lords stressed that proactive police conduct is legitimate only in the presence of 'reasonable suspicion' that the defendant is currently engaged in a criminal activity.[48] Admittedly, Lord Hoffman suggested that this requirement also applies to test purchases.[49] It is, however, evident that in cases like *Amin* police officers act in the absence of reasonable suspicion – and are readily allowed to do so.[50] As recognised by

[45] *Amin*, above n 41, 1080-1081.

[46] Another example of test-purchase case is *London Borough of Ealing Trading Standards* v *Woolworths plc* [2001] LLR 502. The case involved the sale of an '18' category film (Rambo) to a minor who was acting on behalf of a council's trading standards officer.

[47] [2001] 1 WLR 2060.

[48] Ashworth convincingly suggests that two other factors 'may be distilled' from *Looseley*: first, the officers must be duly authorised to carry out the operation, in compliance with the appropriate code of practice; second, the officers must do no more than provide the individual with an unexceptional opportunity to commit the offence. See Andrew Ashworth, 'Re-drawing the Boundaries of Entrapment' (2002) *Crim. LR* 161, 170.

[49] See *Looseley*, above n 47, 2078.

[50] Consider also *Woolworths*, above n 46.

commentators,[51] this puts *Amin* – and test-purchase cases, in general – in tension with the rules on entrapment.[52] At least one of these rules does not apply to test purchases. As a result, the defendant is denied the normal level of protection against proactive police tactics. How can this exception be justified?

3.3. R. v Johnstone[53]

The defendant was found in possession of a considerable number of 'bootleg' records. In addition, a parcel sent by him and containing the same kind of material was seized. The records comprised performances by famous artists, whose names were registered as trade marks. The defendant was charged under section 92(1)(c) of the Trade Marks Act 1994, which punishes the possession, custody, or control of goods infringing trade marks with a view to sell them or let them for hire.[54] The defendant was convicted and the case eventually came before the House of Lords. One of the questions that the House of Lords addressed is whether it would be against the presumption of innocence – enshrined in art. 6(2) ECHR – to impose on the defendant the legal burden of proving the defence provided by section 92(5) of the Act. The section states that '[i]t is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign [e.g., the artist's name] in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.' The language is unambiguous: the section creates a reverse burden – i.e., it imposes a legal burden of proof on the defendant. The question is whether the reverse burden is legitimate.

When English courts inquire into the implications that the presumption of innocence has for the allocation of burdens of proof, they usually start by citing Viscount Sankey's famous

[51] See Ashworth, above n 48, 167 and Mike Redmayne, 'Exploring Entrapment' in Lucia Zedner and Julian V. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 157, 167-168. In *The Criminal Process*, above n 7, 289 Ashworth and Redmayne, referring to test-purchase cases, add that 'while requiring suspicion might be appropriate in cases involving shopkeepers, it would be far more difficult in the *Amin* scenario.'

[52] Consider that, although *Amin* came before *Looseley*, it was not overruled in the latter case. In fact, the House of Lord cited the High Court's decision multiple times with warm approval.

[53] [2003] 1 WLR 1736.

[54] The crime description is, in fact, more complex than reported here.

passage in *Woolmington* v *DPP*,[55] stating 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 … any statutory exception.'[56] It is easy to appreciate the similarity between this passage and the statement of the presumption of innocence in art. 6(2) of the Convention,[57] especially when the latter is combined with the ECtHR's recognition that reverse burdens of proof may constitute legitimate exceptions to the presumption, if used 'within reasonable limits.'[58] Curiously, the 'golden thread' was not mentioned in *Johnstone*, which cited exclusively art. 6(2) ECHR. However, it was the starting point for the Court of Appeal in *R.* v *S*[59] – a case presenting similar facts to *Johnstone*'s and heavily relied upon by the House of Lords. In any case, the question to answer was, invariably, whether the defence in section 92(5) constitutes a legitimate exception to the general rule that it is for the prosecution to prove the defendant's guilt. In *S* and in *Johnstone*, the Court of Appeal and the House of Lords, respectively, sanctioned the exceptional status of the defence.

The scope of the golden thread and of the presumption of innocence is hotly contested, as it depends on the controversial question concerning the meaning of 'guilt.' For our purposes, it is unnecessary to address this debate.[60] It is sufficient to recognise that courts tend to construe these rules in broad terms, assuming that guilt comprises any fact that is relevant to the determination of punishment – more precisely, to the questions as to whether and to how much it would be legitimate to punish the defendant.[61] The rules state that it is for the prosecution to prove any such facts. This means that virtually every reverse burden of proof is an exception to the golden thread and to the presumption of innocence: it

[55] *Woolmington* v *DPP* [1936] 25 Cr App R 72.
[56] *Woolmington*, ibid., 95.
[57] The article states that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'
[58] *Salabiaku* v *France* (1991) 13 EHRR 379, 388.
[59] See *R.* v *S* [2003] 1 Cr App R 35, para 14.
[60] For a survey of the debate and a defence of the so-called 'restrictive proceduralist' view, see Federico Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (2014) 13 *L Prob & Risk* 243. For further discussions on the meaning and the justification of the presumption of innocence consider the articles in *Criminal Law and Philosophy* Volume 8, Issue 2 (2014).
[61] See Picinali, above n 60, 248 ff.

lowers the protection of the defendant, by making it easier for the prosecution to establish guilt.[62] As an exception, each reverse burden needs justification. How is it possible to justify the reverse burden imposed by section 92(5) of the Trade Marks Act 1994? So far, I haven't presented and discussed the justification given by the House of Lords in *Johnstone*; this discussion is better left for the next section and will serve as an introduction to my alternative justification of the decision in this case.

4. Regulatory Duties versus Procedural Safeguards: The Theory 'in Action'

In section 2, I described regulatory offences as relating to activities or public services that are governed through rules of the sort 'you are authorised/entitled to X, provided that you Y, Z, etc.' These rules authorise the activity – or grant the service – X on the condition that the individual does Y, Z, etc., where Y and Z identify regulatory duties. The breach of some of these duties may be proscribed by the criminal law, thus constituting a regulatory offence. I then put forward a theory to justify the denial of certain procedural safeguards to defendants who are tried for regulatory offences. To reiterate: according to this theory, any justified regulatory duties justify the denial of procedural safeguards if either of the following conditions obtain: a) if the procedural safeguard is inconsistent with the regulatory duty assumed by the defendant, so that the defendant could not at the same time enjoy the safeguard and discharge the duty; or, in the absence of such an inconsistency, b) if the contents of the regulatory duty are such that no defendant would have reasonable grounds to complain about the denial of the procedural safeguard. I called the former condition 'deontic contradiction' and the latter 'unreasonable complaint'.

In order to determine whether the theory applies to a particular case, two sets of issues must be addressed. First, it must be established that a regulatory duty exists and that it is

[62] Cf. Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' (2005) *Crim LR* 901, stating at 920 that the decision in *Johnstone* can be understood as an exception to the 'foundational principle' that 'if liability for the offence incorporates elements of adverse moral evaluation of the defendant's conduct the state's prosecuting agencies should justify to the court why it should make those adverse moral evaluations. Any burdens on the defendant in respect of these evaluations should be evidential only.'

justified. If it didn't exist or it wasn't justified, the duty could not possibly displace the procedural safeguard. When the duty is not explicitly stated in a statute, the question of its existence is determined by answering the question of its justification – a point that I will come back to later. Second, the relationship between the duty and the procedural safeguard must be clarified: would enjoying the latter be consistent with discharging the former? If not, is it the case that, given the content of the regulatory duty, no defendant would have reasonable grounds to complain about the denial of the procedural safeguard? I will now address these issues with respect to the three cases presented above. This will give us the opportunity to test the theory – in other words, to assess whether it justifies the denial of procedural safeguards in these cases.

4.1. A Duty to Inform

The main problem in *O'Halloran* was not that of determining whether the duty imposed by section 172(2)(a) of the Road Traffic Act 1988 is compatible with the privilege against self-incrimination. The ECtHR attempted to reconcile the duty with the privilege. However, under any sensible reading of *Saunders* and construal of the privilege, it is evident that the two are inconsistent: if the defendant is already subject to a duty to inform the investigating authorities about the identity of the perpetrator, she cannot also enjoy the privilege not to give to those authorities that very – potentially self-incriminating – information.[63] The crucial question in *O'Halloran* concerned, instead, the justification of the regulatory duty. The ECtHR seemed to confuse the two issues, assuming that whether the duty is compatible with the safeguard depends on whether the duty is justified.[64] In fact – as we saw earlier – the Court used reasons that may support the duty as reasons to conclude that the duty and the safeguard are compatible. Here I don't intend to object to this way of reasoning in general: it may well be that in some cases the relationship between justification and compatibility should be framed in these terms. However, I object to using this way of

[63] One can enjoy a privilege not to X only if she does not have a duty to X. Cf. Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-14) 23 *Yale L. J.* 16, 38-40.

[64] That is – in the language of the ECtHR – whether the duty is a proportionate means to achieve a legitimate aim.

reasoning in a case like *O'Halloran*, where logic settles the question of compatibility. While discussing compatibility, the Court stressed, in particular, that 'those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles.'[65] Now, the voluntary acceptance of the regulatory regime is an important consideration. However, given that the question of the compatibility between the duty and the privilege is already settled by the logical relationship between the two, the voluntary acceptance of the duty has no role to play in such a question. As we saw in section 2.2, the argument from voluntary acceptance contributes to justifying the conclusion that the regulatory duty takes priority over the procedural safeguard. However – as we shall soon see – voluntary acceptance is also relevant to determining whether the duty is justified in the first place. Using the typical language of the ECtHR, we may say that this factor is relevant to whether the duty is a proportionate means to achieving a legitimate aim set by the state – the aim being road safety. If this preliminary analysis is correct, *O'Halloran* may satisfy condition 'deontic contradiction' of the justificatory theory: pace the ECtHR's framing of the issue, this is a case of inconsistency between the duty and the safeguard. Thus, if we conclude that the duty imposed by section 172(2)(a) is justified – and accept the reasons mentioned in section 2.2 as to why regulatory duties should take priority – it follows that the denial of the safeguard is equally justified.

The Privy Council in *Stott*[66] clearly recognised that section 172(2)(a) makes an inroad into the privilege against self-incrimination. In assessing whether the inroad is justified, virtually every opinion delivered in the case gave prominence to the public interest in the regulatory regime and to the voluntary acceptance thereof on the part of the car owner and driver.[67] Lord Steyn's words stressed, in particular, the public interest point. He wrote:

> The effective prosecution of drivers causing serious offences is a matter of public interest. But such

[65] *O'Halloran*, above n 33, 414. Cf. ibid., 404-408.
[66] Above n 39.
[67] It should come as no surprise that the ECtHR in *O'Halloran* quoted *Stott* with regard to the latter factor.

> prosecutions are often hampered by the difficulty of identifying the drivers of the vehicles at the time of, say, an accident causing loss of life or serious injury or potential danger to others. The tackling of this social problem seems in principle a legitimate aim for a legislature to pursue.[68]

Lord Bingham of Cornhill and Lord Hope of Craighead emphasised the voluntary acceptance of the regulatory regime – including the very duty to inform – on the part of the individual who chooses to own a car or drive. Lord Bingham wrote that '[a]ll who own or drive motor cars know that by doing so they subject themselves to a regulatory regime which does not apply to members of the public who do neither. Section 172 – he continued – forms part of that regulatory regime.'[69] In a similar vein, Lord Hope remarked that '[a] person who submits to registration as the keeper of a motor vehicle must be taken to have accepted responsibility for its use and the corresponding obligation to provide the information when required to do so.'[70]

Elaborating on *Stott*, Mike Redmayne recognised that section 172(2)(a) constitutes an exception to the privilege and argued that the duty it creates is justified.[71] Redmayne convincingly noted that the justification of the duty cannot depend exclusively on public interest, such as the interest in maintaining road safety. This is because appeal to public interest could potentially 'justify the erosion of all manner of rights.'[72] A further element is, therefore, needed in order to justify the duty to inform without creating the danger of a slippery slope. Redmayne found this element in the voluntary acceptance of the regulatory regime, echoing, and sharpening the remarks in *Stott*. He wrote:

> Car ownership and driving are heavily regulated activities, requiring licenses, vehicle registration and the like. The [Road Traffic Act] might be seen as part of this regulatory structure. Those who wish to own or drive cars can be seen as accepting the duties imposed by this structure, including the duty to account for the degree of sobriety in which they drive, and to explain who was driving

[68] *Stott*, above n 39, 710. For statements of a similar tenor, see also 711.
[69] *Stott*, ibid., 705.
[70] *Stott*, ibid., 723.
[71] Redmayne, above n 36, 229-230. See also Ashworth, above n 38, 899.
[72] Redmayne, above n 36, 229.

their vehicle at a particular point in time. People wanting to avoid this obligation – which might involve incriminating themselves or an intimate – can choose not to drive.[73]

Public interest, coupled with voluntary acceptance, provides a justification for the duty to inform imposed by section 172(2)(a). The duty is functional to the enforcement of the regulatory offences relating to driving, which in turn is functional to road safety, a legitimate public goal. This *per se* does not justify the duty. What is needed is that the individual who chooses to engage in the regulated activity of owning a car or driving has voluntarily accepted the regulatory regime and, therefore, the duty itself.[74] It is the voluntary choice to own a car or drive that implies the voluntary acceptance of the regime. In fact, not only explicit acceptance is unnecessary; it is not even necessary that the individual is aware of the duty. It suffices that she is put in the condition to know the regime before she decides to engage in the regulated activity. To use the Supreme Court of Canada's words, the individual must be 'put on notice' that the conduct in question is regulated[75] and given access to the relevant rules. If, this notwithstanding, she remains unaware of the duty, her negligent ignorance is no ground to object to the denial of the privilege against self-incrimination with respect to the information covered by the duty.[76] It is plain that those who decide to own or drive cars in the United Kingdom are alerted as to the presence of rules that regulate car ownership and driving, and are in the position to know what these rules are.

Notice that the voluntary acceptance argument would not suffice to justify the recognition of a duty to inform in case of non-regulatory offences. This is because there is no activity such that by choosing to engage in this activity we can be taken to have

[73] Redmayne, ibid., 229-230. Cf. Andrew Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart 2013), 79. The Supreme Court of Canada relies on a similar argument to justify regulatory duties. See *R.* v *Wholesale Travel Group Inc.* [1991] 3 SCR 154, 227-233. The relevance of the choice – whether to participate in the regulated activity – to the justification of the regulatory duty is recognised also in *Sweet* v *Parsley* [1970] AC 132, 163.

[74] In fact, the duty in section 172(2)(a) applies to the owner of the car, not the driver.

[75] See *Wholesale*, above n 73, 230.

[76] For a recent general discussion of the relationship between responsibility and awareness, see Nicola Lacey, 'Responsibility without Consciounsess' (2015) *OJLS* doi: 10.1093/ojls/gqv032.

voluntarily accepted a duty to give self-incriminatory information concerning non-regulatory crimes. Someone may argue that we do accept such a duty by deciding to live in a society, whatever the specific activity or role that we may perform in it.[77] This argument, however, could not be cashed out without explaining, first, how we can be taken to have chosen whether or not to live in a society; second, how we have been put in the position to know about the duty prior to making the alleged choice. More importantly, the argument could not be cashed out without rejecting the privilege against self-incrimination altogether.

4.2. A Duty to Tolerate Random Checks

Compared to *O'Halloran*, *Amin* is a harder case for my theory. We have established that test-purchase cases constitute an exception to the general rules on state entrapment. The individual is denied the normal level of protection against police proactive tactics, given that officers are not required to have reasonable suspicion before testing whether she abides by the terms of her licence. However, we haven't yet clarified whether there is a justified regulatory duty that would be inconsistent with the safeguard represented by the requirement of reasonable suspicion – in which case *Amin* would satisfy condition 'deontic contradiction' of the theory – or there is a justified regulatory duty such that no defendant would have reasonable grounds to complain about the denial of the procedural safeguard – in which case *Amin* would satisfy condition 'unreasonable complaint' of the theory. Unlike in *O'Halloran*, in *Amin* the relevant regulatory duty is not clearly stated and must be inferred from the regulatory regime. Here, the question of the existence of the duty is determined by answering the question of its justification. In other words, the existence of the duty depends on whether it is justified to infer the duty from the regulatory regime. I will argue that the regulation of the activity at issue in *Amin* includes a duty that is inconsistent with the safeguard represented by the requirement of reasonable suspicion. If so, the case satisfies condition 'deontic contradiction' of the theory. If we accept the reasons

[77] A possible starting point for a formulation of this argument may be the arguments from implicit consent or promise criticised by M.B.E. Smith in his article 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale L. J.* 950, 960-964.

for which regulatory duties should take priority in case of inconsistency, the denial of the safeguard is justified.

The performance of some regulatory activities is conditioned on the acquisition of a licence, whose terms must be respected by those who participate in the activity. This is true of taxi driving: sections 45ff of the Town Police Clauses Act 1847 require that taxi drivers are licensed by local authorities, and, among other duties, they impose a general duty to abide by the terms of the licence. Engaging in the regulated activity without a licence and violating the terms of the licence are criminal offences.[78] I do not intend to question the need for a licensing regime in the case of taxi driving – or any other regulatory activity for that matter.[79] I simply assume that there is such a need and concentrate on the problems that directly engage the theory defended here.

The individual who drives a taxi is authorised to do so by the local authority. The authority confers on the individual the prerogative to perform the regulated activity on the condition that she respects the terms of the licence. The licence may be revoked if these terms are not respected. The conditional relationship between the authorisation and the duty to respect the terms of the licence implies that the authority reserves the privilege to check whether the individual is discharging the duty. If this weren't the case, the authority may be unable to enforce the duty to respect the terms of the licence, and to exercise effectively its power to revoke the licence. The fact that the authority has a privilege to run checks means that the licensee has no claim that the authority does not do so.[80] Now, it seems possible to justify the denial of the reasonable suspicion requirement on the basis that the licensee has no such claim[81] – in fact, we would still have to show that the licensee has no claim that the authority does not run *random* checks, that is, checks without reasonable suspicion. However, I intend to defend a stronger position. Given that running checks is

[78] In fact, the Act considers a series of specific violations rather than referring in general to the violation of the terms of the licence.

[79] Another important issue that I do not address here is whether and when a licensing regime should be backed up by criminal sanctions.

[80] Privileges and no-rights are correlatives. See Hohfeld, above n 63, 32-33.

[81] If this is correct, one may consider extending the formulation of the justificatory theory so as to encompass no-rights that derive from a regulatory regime – rather than merely duties. I find this amendment promising, but I haven't yet considered it with sufficient care.

arguably the most efficient way for the authority to ensure that the terms of the licence are respected – and, therefore, that the regulated activity is performed properly – and given that the licensee is already under – indeed, she has voluntarily accepted – a duty to respect these terms, it seems reasonable to conclude that a licensing regime also involves a duty on the part of the licensee to tolerate – i.e., to accept and subject herself to – the checks from the authority. The crucial question is whether this duty also regards random checks. I will argue that it does.

There is a public interest in random checks, which rests on their greater potential for effective enforcement.[82] First, random checks do not require an evidential basis, given that they can be carried out without reasonable suspicion. This eases considerably the job of the authority. Second, if individuals are aware of the possibility of being picked at random, this is likely to produce a stronger deterrent effect. Any individual knows that she may be put to the test irrespective of whether she has given grounds for reasonable suspicion. Third, a system of random checks does not exclude that the authority may still carry out targeted checks when it has grounds to suspect that an individual is violating the terms of her licence. These considerations of efficiency or functionality, however, are not yet sufficient to justify a duty to tolerate random checks. After all, similar considerations apply outside the context of regulatory regimes, where the requirement of reasonable suspicion seems solidly grounded. It is precisely by looking at the ordinary justification of this requirement that we can see why the requirement may be dispensed with in a licensing regime.

The requirement of reasonable suspicion as a basis for proactive police tactics is often justified with the claim that it is not the role of the state to engage in individualised virtue-testing. As Lord Nicholls of Birkenhead wrote in *Looseley*, '[t]he investigatory technique of providing an opportunity to commit a crime … should not be applied in a random fashion, and used for wholesale "virtue-testing," without good reason. The greater the degree of

[82] I am aware that a system of random checks involves the risk of abuses on the part of the authority, and that this risk should be taken into account when assessing whether the system is in the public interest. My discussion here proceeds under the assumption that abusers can be effectively discovered, disciplined, and deterred.

intrusiveness, the closer will the court scrutinise the reason for using it.'[83] A few paragraphs later he mentioned reasonable grounds for suspicion as providing a legitimate reason for the proactive police operation.[84] A more refined justification for the requirement follows from Ashworth's and Redmayne's claim that the role of the state should be 'largely reactive,' in that 'it is not legitimate for the State to seek to use criminal sanctions against those who are not committing crime.'[85] The state should not, in other words, create opportunities to commit crime in addition to those already present, unless this is done with the aim to secure to justice those who are currently engaged in criminal activity.[86] This view is based on the consideration that crime should be triggered only when necessary to effectively combat criminality, and thus to protect citizens. Testing law-abiding citizens' resistance to temptation has no protective function.[87] At best, it interferes with their lives; at worst it disrupts them. Requiring reasonable suspicion is, therefore, a necessary precaution: it increases the probability that those who are targeted by proactive tactics are, in fact, already engaging in criminal activity, thus creating a healthy and protective distance between the state and the law-abiding.

Why, then, shouldn't reasonable suspicion be required also in the presence of a licensing regime? The individual who engages in the regulated activity is authorised to do so on the condition that she respects the terms of her licence. Given that the authorisation proceeds from the authority, it is reasonable to maintain that the authority has a privilege to control that *anyone* who engages in the regulated activity is entitled to do so, irrespective of whether this person has given the authority reasons to doubt her dependability.[88] Moreover,

---

[83] *Looseley*, above n 47, 2069.
[84] *Looseley*, ibid., 2070.
[85] Ashworth and Redmayne, above n 7, 289. See also Redmayne, above n 51, 161-163.
[86] For a thorough defence of the 'currently engaged' test, see Redmayne, ibid.
[87] For a different view, see Louis M. Seidman, 'Entrapment and the "Free Market" for Crime' in Paul H. Robinson, Stephen Garvey, and Kimberley Kessler Ferzan (eds.), *Criminal Law Conversations* (OUP, 2009).
[88] Of course, the checks of the authority must comply with certain requirements including, most notably, the respect for individual dignity and for personal integrity. Consider also the text accompanying n 48 and, in particular, the requirement that officers do not offer an exceptional opportunity to commit the crime. The authority is not entitled to offer exceptional opportunities to commit a crime because doing so would not be functional to testing whether the licensee is fit for the job, i.e., capable of respecting the terms of the licence in the presence of normal opportunities to violate them.

as mentioned above, random checks are an effective way to ensure that the activity is carried out according to the rules. Besides these considerations, it is important to stress that the licensee herself decided to sign up for the licensing regime and voluntarily accepted the relevant terms. The combination of these grounds justifies the licensee's duty to tolerate random checks on the part of the authority. In particular, by signing up to the regime the licensee can be taken to have accepted, and to have subjected herself to, that extent of scrutiny and testing on the part of the authority which is functional – if not necessary – to the proper exercise of the regulated activity. If random checks are an instance of such functional testing – and they may well be, given the considerations of efficiency mentioned earlier – the licensee can be taken to have assumed a duty to tolerate such checks, thus waiving the protective distance that the requirement of reasonable suspicion is otherwise set to maintain.[89]

4.3. A Duty to Ensure

In accordance with section 92(5) of the Trade Marks Act 1994, the defendant in *Johnstone*[90] was required to bear the burden of proving 'that he believed on reasonable grounds that the use of the sign [i.e., the artists' names on the records' covers] in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.' The reverse burden is an exception to the golden thread – and the presumption of innocence – unanimously considered a fundamental procedural safeguard and constitutive of trial fairness. For the theory defended here to be able to justify this exception, we must identify and justify a regulatory duty that would satisfy either condition 'deontic contradiction' or condition 'unreasonable complaint' of the theory. I will argue that those who trade in products displaying registered trademarks are under a duty to *ensure* that these products do not infringe the trademark, that is, to acquire trustworthy information on the products'

[89] In fact, it seems possible to extend this argument to any regulatory activity as characterised in section 2.1, whether or not a licence is necessary to engage in it: when the violation of a regulatory duty is criminalised the requirement of reasonable suspicion may not apply to proactive enforcement strategies aimed at testing whether the individual would commit the regulatory offence.

[90] Above n 53.

quality as non-infringing goods.[91] I will concede that the duty to ensure is consistent with the procedural safeguard according to which the prosecution must bear the burden to prove the defendant's guilt – in particular, that the defendant didn't reasonably believe that the goods did not infringe trademarks. However, I will argue that denying this procedural safeguard is justified[92] on different grounds: while the denial pursues legitimate aims of law enforcement, it cannot be the object of reasonable complaint on the part of any defendant, due to the particular content of the duty to ensure.

When the House of Lords in *Johnstone*, as well as the Court of Appeal in *S*,[93] concluded that the reverse burden imposed by section 92(5) is legitimate, they relied on a series of disparate factors, in particular: (1) the need for protecting consumers, honest manufacturers, and traders from counterfeiting; (2) the difficulty for the prosecution to prove the negative of the facts stated in section 92(5) and, therefore, the serious problems of law enforcement that would be caused if the reverse burden were found to be illegitimate; (3) the fact that 'those who trade in brand products are aware of the need to be on guard against counterfeit goods' and 'of the need to deal with reputable suppliers and keep records, and of the risks they take if they do not'[94]; and (4) the fact that the defendant is particularly well placed to bear the burden imposed by section 92(5), in that the relevant facts are 'within her knowledge.'[95] Factors 1-3 support two arguments that seem to justify the reverse burden without the need to posit first the duty to ensure. In fact, neither argument turns out to be sufficiently convincing. Factors 1 and 2 suggest a rough public interest argument in favour of departing from the golden thread. To the extent that it is

[91] Cf. Antony Duff, 'Strict Liability, Legal Presumptions, and the Presumption of Innocence' in Andrew Simester (ed.) *Appraising Strict Liability* (OUP 2005) 138, discussing the duty to ensure in the context of health and safety at work.

[92] For someone following the restrictive proceduralist approach defended in Picinali, above n 60, it seems more precise to argue that the procedural protection does not apply to the facts covered by the duty because these facts are not constitutive of guilt – i.e., they are not part of the offence definition. The presence of the duty makes it legitimate to craft the offence so that the negatives of these facts are not elements thereof – while the facts may be treated as (non-overlapping) defences. In other words, rather than having an impact on the procedural safeguard, the regulatory duties have an impact on the substantive issue consisting in the definition of the offence.

[93] Above n 59.

[94] *Johnstone*, above n 53, 1751.

[95] See *Johnstone*, ibid., 1751 and *S*, above n 59, para 48.

important to protect consumers, manufacturers, and traders, it is important to ease the job of the prosecution. This facilitates the conviction of guilty defendants and enhances the deterrent effect of the law. Obviously, it would be dangerous to uphold the curtailment of a procedural right based on this argument alone. After all, while possibly it facilitates true convictions, the curtailment of a procedural right such as the presumption of innocence may also increase the risk of false convictions. More work would have to be done to identify the trade-off between these outcomes that would satisfy the public interest. Moreover, if given credit in this rough form, the public interest argument could be replicated for virtually every crime and could be used to argue in favour of all sorts of advantages given to the prosecution.

Factor 3 suggests an additional argument directly supporting the reverse burden. Commenting on the justification of reverse burdens in trials for regulatory offences, David Hamer wrote that the defendant:

> may be taken to have had reasonable notice of the conditions governing the activity, and to have agreed to comply with them. Among these conditions are reverse burdens … From a moral viewpoint the defendant may be taken to have voluntarily traded his ordinary procedural rights for the opportunity to profitably engage in the regulated activity.[96]

Hamer's is a voluntary acceptance argument similar to that discussed above – in particular, with reference to the duty to inform in *O'Halloran*. The idea is that the defendant has been alerted as to the presence of certain regulatory conditions, which include reverse burdens: by choosing to engage in the regulated activity, she may be taken to have voluntarily accepted these conditions and, thus, relinquished a procedural safeguard. Although defensible, the voluntary acceptance argument carries less weight in the case of reverse burdens. This is because reverse burdens are technical devices concerning the proof of facts

[96] David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 *CLJ* 142, 167. Cf. Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (4th edn., OUP 2010) 282, Glover, above n 21, and Dennis, above n 62, 920-921, who restates the argument and gives a list of cases that can be accounted for by relying on it.

at trial, rather than norms imposing general standards of conduct for the regulated activity. Their meaning and implications are, therefore, less accessible to the layperson, who is used to the 'do/don't' parlance of most conduct rules. Moreover, they are often phrased in such terms that the courts themselves struggle to understand whether they are reverse burdens at all. Admittedly, section 92(5) is simpler and clearer than other norms imposing reverse burdens: as noted above, its language seems unambiguous, at least to the trained eye. However, language is not everything when it comes to reverse burdens: the very courts involved in the case of *Johnstone* disagreed as to whether section 92(5) should be read down so as to impose an evidential burden only,[97] i.e., the less demanding burden to adduce evidence sufficient to make the defence a live issue at trial. In light of all these reasons, it is implausible to claim that the interested individuals are put in the position to tell in advance what is expected of them in the case that they had to face trial. The reverse burden and, consequently, the departure from the golden thread are better justified by establishing first the duty to ensure.

The regulatory offence in section 92 of the Trade Marks Act 1994 establishes a duty not to deal in products that infringe trademarks. This duty would often be violated if prior to dealing in products dealers did not possess trustworthy information on the products' quality as non-infringing goods. In fact, the most obvious and safest way for a dealer to comply with section 92 is to *ensure* – i.e., acquire trustworthy information to the effect – that the products are non-infringing. A dealer who engages in commerce without having this information is relinquishing control as to whether she is complying with the law. To the extent that we value the duty in section 92, we should also value that dealers act responsibly with respect to this duty, implementing the most obvious and safest strategy to comply with it. It is on this ground that the duty to ensure should be inferred from the regulatory regime.[98]

[97] See *Johnstone*, above n 53, 1748-1749.

[98] Notice that there doesn't seem to be any serious issue concerning the knowledge of, or access to, the duty to ensure on the part of the regulatee. As long as she is expected to be aware of the duty in section 92, and as long as ensuring the non-infringing nature of the goods is the obvious way to discharge this duty, it is reasonable to expect that the regulatee is also aware of the duty to ensure.

Now, it is plausible to interpret the presumption of innocence as a privilege – or a liberty-right.[99] In other words, thanks to the presumption, defendants are under no duty to prove their innocence to the fact finder or the court.[100] There is no inconsistency between bearing the duty to ensure and not bearing a duty to prove one's innocence, as the duty to ensure is not a duty to prove anything to anyone – let alone the fact finder. Condition 'deontic contradiction' of the theory is not satisfied. However, the denial of the protection afforded by the presumption of innocence with respect to the issue of reasonable belief can be justified on the basis of condition 'unreasonable complaint.' Here, it is necessary to introduce a pragmatic consideration that hints at the fourth factor relied upon by the House of Lords in *Johnstone*, and mentioned earlier in this section. The dealer who has diligently discharged the duty to ensure should not find it difficult to make the relevant information available if asked to do so.[101] Indeed, if she has collected reliable information on the quality of the products she deals in, she should be able to hand this information over when needed.[102] As mentioned before, the House of Lords in *Johnstone* seemed to rely on a rough public interest argument in favour of denying the safeguard: easing the job of the prosecution is ultimately beneficial to consumers, manufacturers, and traders involved in the regulated activity. A serious problem with this argument is that, while easing the job of the prosecution increases the chance of obtaining true convictions, it also increases the risk of false convictions – *per se* a reasonable ground for complaining about the denial of the safeguard. This is where the pragmatic consideration steps in. Individuals who have diligently discharged the duty to ensure are very likely to be innocent under section 92 of the Trade Marks Act 1994. This will depend on whether, aside from having reasonable grounds for belief, they also had a genuine belief – which is probably always the case. Precisely because they have discharged the regulatory duty, these individuals should not

[99] The alternative would be to claim that the presumption of innocence is a claim-right. Under this reading, the defendant would have a right that the state proves her guilt while the state would have the correlative duty towards the defendant to prove her guilt. This seems an awkward interpretation of the presumption as it assumes that the state would be failing – i.e., violating the right of – the defendant if it did not prove her guilt.

[100] On the relationship between privileges and duties, see Hohfeld, above n 63, 32 ff.

[101] See Duff, above n 91, 138 and Hamer, above n 96, 167.

[102] Absent particular circumstances, being incapable of handing over the information is evidence that the duty to ensure was not discharged.

find it difficult to discharge the burden of proof regarding the issue of reasonable belief,[103] especially if we consider that the respective standard of proof is the preponderance of the evidence. Therefore, it is unlikely that they will be convicted. Individuals who haven't diligently discharged the duty to ensure may indeed find it difficult to bear the burden of proof. However, if these individuals were, in fact, dealing with infringing goods – a fact that is for the prosecution to prove – it is very likely that they are guilty under section 92 – as it is very unlikely that they had a reasonable belief that the goods were non-infringing. If they are indeed guilty, denying the safeguard produces gains in law enforcement at no cost. In the marginal case that they aren't guilty,[104] we can at least argue that their negligence in discharging the duty to ensure is the cause of their predicament and that this fact undermines a possible complaint for not enjoying the safeguard. Condition 'unreasonable complaint' of the theory is satisfied. Those who have diligently discharged the duty to ensure – and therefore are very likely to be innocent – will not be set back by the reverse burden and thus have no reasonable ground to complain about it. Those who haven't diligently discharged the duty are responsible for the predicaments of their defence; moreover, if they haven't discharged the duty, it is very likely that they are guilty. Both facts undermine their demand for the safeguard. The pragmatic consideration built upon the duty to ensure shows that imposing a reverse burden would not increase the risk of false convictions, contrary to what would be threatened by a direct defence of the reverse burden resting on the public interest argument alone. If there were such an increased risk, this would give diligent defendants a reasonable ground for complaint. Absent the increased risk, the gain in law enforcement produced by the reverse burden is a decisive factor.

---

[103] This argument does not seem to apply to the case of rape and sexual assault. See above n 27. Even if a duty to ensure consent exists, we should not conclude that someone who has discharged this duty should not find it difficult to prove this in court – given that the relevant information usually comes in oral form, and that the complainant always denies the presence of consent. What this shows is that, even though rape and sexual assault may fall under the definition of regulatory offences given in section 2.1, it does not necessarily follow that the theory defended in this article would justify the denial of any procedural safeguard in trials for these sexual offences.

[104] The case is marginal because it is very unlikely that someone may have a reasonable belief that the goods are non-infringing if she hasn't discharged the duty to ensure and is, in fact, dealing with infringing goods.

5. Concluding Remarks

Regulatory offences are a complex phenomenon, presenting problematic aspects both at the level of criminalisation and at the level of enforcement. In this article, I have explored a particular problem concerning trials for regulatory offences and the related pre-trial procedures. Scholars and courts have put forward different arguments in the attempt to justify exceptions to specific procedural safeguards in trials for regulatory offences. This article, instead, justifies these departures appealing to a single theory that focuses on regulatory duties and on their relationship with trial safeguards. In doing so, this article either rejects or refines the arguments already available. We have seen that sometimes courts shy away from openly stating that a procedural safeguard does not apply and that they do not consistently recognise the key role that regulatory duties should play as factors in the decision – this failure is especially evident when the duties are not explicitly stated in a statute. However, precisely because regulatory duties are a key common feature of regulatory offences, it seems that it is the failure to recognise their role that prevented courts from formulating a general approach to the problem. The hope is that the theory presented here will provide a rational and general framework for courts to decide on the availability of procedural safeguards in trials for regulatory offences, thus giving them the opportunity to stand by their decisions and to deliver them transparently.

My theory has been applied and tested with reference to the following pairs of duties and safeguards: the duty to inform under section 172(2) of the Road Traffic Act 1988 and the privilege against self-incrimination; the duty to tolerate random checks under the licensing regime of the Town Police Clauses Act 1847 and the requirements for legitimate entrapment; the duty to ensure under the regime of the Trade Marks Act 1994 and the golden thread. However, the range of application of the theory is potentially vast. For instance, in trials for the violation of the duty prescribed in section 2(1) of the Health and

Safety at Work Act,[105] the departure from the golden thread represented by the defence in section 40 of the Act 1974[106] may be justified on grounds similar to those discussed with reference to *Johnstone*.[107] To offer another example, a duty to tolerate random checks may justify dispensing with the requirement of reasonable suspicion in the proactive policing of the offence under section 11(1) of the Video Recordings Act 1984 – prohibiting the supply of classified video recordings to persons who don't meet the age requirement.[108]

In this article, I reaffirm the well-known doctrine that 'trial fairness' is a flexible concept. As the English courts and the ECtHR have recognised, most procedural rights are not absolute. As a result, exceptions to these rights do not necessarily constitute departures from trial fairness. If legitimate, they are fully compatible with a fair trial. The contribution that this article makes to the understanding of trial fairness lies in recognising that the responsibilities that defendants assume prior to being investigated or prosecuted may influence the determination of whether they were given a fair trial. Should someone reject the details of my theory, I hope that at least I convinced her of this basic point.

[105] Stating that '[i]t shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.'

[106] Stating that, in proceedings concerning the violation of a duty prescribed by the act, it shall be for the employer (although the act also prescribes duties for the employees and other individuals) to prove 'that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty.'

[107] See Duff, above n 91, 137-139.

[108] See *Woolworths*, above n 46.

References

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

Ashworth A., 'Re-drawing the Boundaries of Entrapment' (2002) *Criminal Law Review* 161.

Ashworth A., '*O'Halloran and Francis v UK*' (2007) *Criminal Law Review* 897.

Ashworth A. and Redmayne M., *The Criminal Process* (4th edn., OUP 2010).

Ayres I. and Braithwaite J., *Responsive Regulation: Transcending the Regulation Debate* (OUP 1995).

Black J., 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

Carson W.G., 'White-Collar Crime and the Enforcement of Factory Legislation' (1970) 10 *British Journal of Criminology* 383.

Choo A., *The Privilege Against Self-Incrimination and Criminal Justice* (Hart 2013).

Dennis I., 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' (2005) *Criminal Law Review* 901.

Duff A., 'Strict Liability, Legal Presumptions, and the Presumption of Innocence' in Simester A. (ed.) *Appraising Strict Liability* (OUP 2005).

Garoupa N., Ogus A., and Sanders A., 'The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?' (2011) 70 *Cambridge Law Journal* 229.

Glover R., 'Regulatory Offences and Reverse Burdens: The "Licensing Approach"' (2007) 71 *Journal of Criminal Law* 259.

Green S.P., *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2006).

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

Haslanger S., 'What Good Are Our Intuitions?' (2006) 80 *Aristotelian Society Supplementary Volume* 89.

Hohfeld W.N., 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-14) 23 *Yale Law Journal* 16.

Horder J., 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in Duff A., Farmer L., Marshall S., Renzo M., and Tadros V. (eds.), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014).

Horder J., 'Excusing Information-Provision Crimes in the Bureaucratic State' (2015) 68 *Current Legal Problems* 197.

Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010).

Lacey N., 'Criminalization as Regulation: The Role of Criminal Law' in Parker C., Scott C., Lacey N., and Braithwaite J. (eds.), *Regulating Law* (OUP 2004).

Lacey N., 'Legal Constructions of Crime' in Maguire M., Morgan R., and Reiner R. (eds.), *The Oxford Handbook of Criminology* (OUP: 2007).

Lacey N., 'Responsibility without Consciounsess' (2015) *Oxford Journal of Legal Studies* doi: 10.1093/ojls/gqv032.

Lamond G., 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609.

Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010).

Norrie A., *Crime, Reason and History. A Critical Introduction to Criminal Law* (3rd edn., CUP 2014).

Ogus A., 'Regulation and its Relationship with the Criminal Justice Process' in Quirk H. et al. (eds.), *Regulation and Criminal Justice: Innovations in Policy and Research* (CUP 2014).

Picinali F., 'Innocence and Burdens of Proof in English Criminal Law' (2014) 13 *Law, Probability & Risk* 243.

Quirk H., Seddon T., and Smith G. (eds.), *Regulation and Criminal Justice: Innovations in Policy and Research* (CUP 2014).

Ramsay P., 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69 *Modern Law Review* 29.

Redmayne M., 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 *Oxford Journal of Legal Studies* 209.

Redmayne M., 'Exploring Entrapment' in Zedner L. and Roberts J.V. (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012).

Richardson G., 'Strict Liability for Regulatory Crime: The Empirical Research' (1987) *Criminal Law Review* 295.

Roberts P. and Zuckerman A., *Criminal Evidence* (4th edn., OUP 2010).

Sanders A., 'Reconciling the Apparently Different Goals of Criminal Justice and Regulation: The "Freedom" Perspective' in Quirk H. et al. (eds.), *Regulation and Criminal Justice: Innovations in Policy and Research* (CUP 2014).

Seidman L.M., 'Entrapment and the "Free Market" for Crime' in Robinson P.H., Garvey S., and Kessler Ferzan K. (eds.), *Criminal Law Conversations* (OUP, 2009).

Smith M.B.E., 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950.

Squires D., 'The Problem with Entrapment' (2006) 26 *Oxford Journal of Legal Studies* 351.

Wells C. and Quick O., *Lacey, Wells and Quick, Reconstructing Criminal Law. Text and Materials* (4th edn., CUP 2010).