Criminal Law and the Uses of Theory

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1. The story so far

In a recent article, J.A. Laing has criticised a stance that I took, with my colleague Heike Jung, in our joint review of Antony Duff's impressive book *Intention, Agency, and Criminal Liability*.[1] She has also used her criticisms of our stance as a springboard for criticising Duff's own position on some related matters. I think that her mistakes in criticising our review go some way to explain why she fails in her criticisms of Duff.

The position that Jung and I took in reviewing Duff 's book was that he was too optimistic about the chances of providing a comprehensive theory of *mens rea*. His optimism pushed him towards what we thought was an excessively reductionist view, according to which, by examining the concepts of intention and recklessness, and a few marginal variations, one could illuminate the structure of criminal liability generally, and not merely the rules of liability for certain specific offences. In taking this view, Duff followed the assumption of many contemporary Anglo-American criminal law commentators and reformers that problems about *mens rea* mainly belong to the criminal law's 'general part'.[2] Jung and I saw this as an assumption in need of strenuous questioning, given that virtually nobody makes the same assumption about the *actus reus* elements of crimes. These are widely treated as being very diverse, and not susceptible of being organised into some comprehensive vision. Of course, many people think that some general things can be said even here – about liability for omissions, say, or causation. But nobody, I hope, would seriously suggest that such small pockets of generalisation should be inflated so as to eliminate the obvious diversity from the elements of 'wounding', 'appropriating', 'driving', 'damaging', etc., which figure in the *actus reus* of this or that criminal offence. So why, we

wondered, should so many writers nevertheless hope to eliminate the diversity from *mens rea* elements like 'wilfulness', 'knowledge', 'dishonesty', 'malice', etc., which make equally miscellaneous appearances in the definitions of offences? We suggested that the ambition is no less misguided merely because it is held by a philosopher of Duff's high standing rather than a humble criminal law commentator.

Laing objects that our argument to this effect pushes us in the direction of a general 'theoretical scepticism' with which, she imagines, we would have no wish to be associated.[3] Since I do not know what exactly 'theoretical scepticism' is, I cannot easily comment on whether I, for one, would wish to be associated with it.[4] If it is just a resistance to the current fashion among academic lawyers for conjuring up 'theories' of everything, from precedent to punishment, then I would be keen to sign up as a 'theoretical sceptic' right away. But I suspect that a 'theoretical sceptic', in Laing's lexicon, is supposed to be something a good deal more sinister than this. Two aspects of the position are darkly hinted at. One of these, which I will come back to later, has something to do with the relations between 'normative' and 'descriptive' discourse. A theoretical sceptic apparently cannot adequately recognise the 'descriptive core' of *mens rea* terms.[5] The other aspect, meanwhile, has something to do with morality. One is rescued from theoretical scepticism, apparently, only if one adopts 'a sound theory of moral norms'.[6]

2. Moral norms and criminal responsibility

Part of Laing's problem with our argument, revealed in these last few words, stems from her own profound, but subliminal, scepticism. This is the scepticism of one for whom morality is constantly under threat from the bogey-man of instrumental reasoning, from which it must be artificially protected by being marshalled into some kind of theoretical order.[7] Thus it is not enough just to recognise the force of moral norms. One must recognise the force of a *theory* of moral norms. The mentality will be familiar enough to

anyone who has taught undergraduate moral philosophy courses. It is nowadays widely assumed that there must be something particularly theoretical about moral inquiry and argument, else we are just talking superstition or (more euphemistically) 'intuition'. Personally, I find this polarisation of the possibilities, very evident in Laing's essay, hard to comprehend.[8] The theory of morality, so far as I can see, stands to morality roughly as the theory of law stands to law. The legal rules relating to, say, copyright or trusts do not represent the working out of any theory of law; nor are the moral standards concerned with promising or friendship, or anything else, dictated by any moral theory. They are simply morally valid standards in much the way that rules of law are legally valid standards. One must be able to cite moral reasons for following them, just as lawyers must give legal reasons when arguing that a rule should be followed by a court. And just as one would not expect the best legal theorists to be necessarily the best lawyers, so one should not expect the best moral theorists to have necessarily the soundest moral judgement.[9] If anything, indeed, morality is less susceptible to abstraction and generalisation than the law, and so provides less grist to the theorist's mill. The law is at least organised into *systems* (Scots law, International Law, Roman Law etc.), but in spite of the zealous systematising endeavours of Benthamites, Kantians, Thomists etc., morality never has been and never will be a system.[10] Morality is characterised by constant and multi-dimensional conflict, even at the level of ultimate value, for which there is no authoritative resolution of the kind which the legal system, with its institutional character, normally provides. The vast plurality of valid moral concerns which make this conflict so pervasive can easily be mistaken for a kind of anarchic amorality, in which there are no truly *in*valid moral concerns, or in which valid and invalid moral concerns cannot ultimately be differentiated. Those who see this as a serious threat, because deep down they share the sceptical instinct, understandably take refuge in moral 'systems' and 'theories'. But they, and not the rest of us, are the ones who have the problem coming to terms with the facts.

The facts in question, I suspect, are the ones which make sensible criminal lawyers stop short of demanding a comprehensive vision of *actus reus*. Naturally there are some legal

prohibitions which are so powerfully supported by moral and non-moral considerations alike that in one form or another we would expect to find them, and we do find them, in most legal systems. Even here, however, conflicts emerge at the margins. Lines are drawn in different places, with different levels of specificity and generality, reflecting different choices and conventions. And those are just the easy cases. With most crimes in most legal systems, the conflicts have to be negotiated well before we get to the margins; even at their core, different reasons for and against having them point in the direction of markedly different definitions, and different jurisdictions accordingly proceed to different legal solutions (or take different views about whether to proceed to any legal solution at all). There is nothing embarrassing about any of this diversity, nor are criminal lawyers generally embarrassed by it. So why do they react differently when it comes to *mens rea*? Why do they demand that there be a comprehensive vision here, at least within each legal system, and perhaps even beyond? I think that the answer can be found in the commonplace textbook observation that the rules of *mens rea* belong to, or make up, the rules of criminal *responsibility*.[11]

Rules of responsibility, in the sense that matters here, are not normative rules (or 'norms') but *ascriptive* rules. They do not directly govern what should be done by anyone, but whether and how we should count what people have done when we are judging them. This ascriptive character means that rules of responsibility, in the relevant sense of the word, do not call for justification, as normative rules do, according to the value, or desirability, of following them. By following sound ascriptive rules we make a judgement more *accurate*, not more valuable or desirable. It is true that accuracy itself may be regarded as a special kind of value – 'truth-value', as philosophers say – but this classificatory quibble matters little so long as the substance of the distinction is kept in mind (i.e. so long as truth-value is regarded as a *special* kind of value). It is also true that the accuracy of a judgement about somebody can *bear on* that judgement's role in the pursuit of value. Much of the value is drained out of punishment and anger, for example, in the event that those who are subject to them have been inaccurately judged. But the point is that the value which an accurate

judgement may serve in such cases is not among the things which *make* it accurate. The fact that it represents a responsible person as responsible, on the other hand, certainly is. So at the point at which questions of responsibility enter into the picture, questions about the possible value of reliance upon them have, logically speaking, yet to arise. This means that the rules of responsibility which apply when we come to make moral judgements are relatively immune from the value-conflicts which make the normative standards of morality so hard to put in any kind of order.[12] And that in turn makes it possible to provide reasonably general accounts of their content, applicable across the boundaries between different moral judgements that are informed by different moral values. Lawyers, harbouring the modest expectation that the criminal law will stand up to some degree of moral scrutiny, look for the same kind of relative immunity from value conflict, and hence the same kind of relative generality, in the ascriptive rules which apply in the criminal law – the rules, as they normally put it, of criminal responsibility. And they typically take the rules of *mens rea* to belong to this class of legal ascriptive rules.

The mistake here does not reside in the view that the rules of criminal responsibility, in the relevant sense of 'responsibility', ought to be relatively general, reflecting the generality of their moral counterparts. The mistake lies, rather, in the view that the rules of *mens rea* are rules of responsibility in the relevant sense. By and large they are not. On the contrary, what lawyers mean when they speak of the *mens rea* element of a crime usually turns out to be a normative element, which is justified by the difference which one's state of mind in acting may make to the value of what one does. To use a familiar and illuminating contrast, *mens rea* generally makes a difference to what wrong one is doing, be it morally or legally, not to one's moral or legal responsibility for doing that wrong.[13] The difference between, say, taking with intention to deprive permanently and taking with intention to deprive temporarily, or between intentional wounding and accidental wounding, has no immediate connection with any ascriptive rules. It is a difference in point of normative rule, and so is hostage to all the normal conflicts of value which surround the moral (and for that matter non-moral) justification of such rules.

Take intentions, for example, by which Laing's 'moral theory' would apparently set so much store.[14] Sometimes, in morality and elsewhere, intentions can admittedly make all the difference to the rightness or wrongness of an act. There is nothing wrong with moving house frequently, so long as one is not doing it with the intention of evading one's creditors. There is nothing wrong with selling discount airline tickets, unless one's intention is to force one's competitors out of business. In other cases, one does a wrong whatever one's intentions, but one's intentions nevertheless make a difference to which wrong one is doing. Think of the difference between murder and manslaughter, or between embezzling trust money and investing it in some crazy scheme. In yet another group of cases, meanwhile, one's intentions make no difference to one's wrongdoing at all. Official censorship by content has the public meaning that it authoritatively condemns the whole way of life of those who hold the views censored, and that is so whether or not it is intended by the government to condemn the way of life in question. Allied with arguments against the condemnation of whole ways of life, and afforced by a variety of instrumental arguments against censorship, that fact serves to explain why there is a prima facie moral rule against official censorship by content, a rule which is not sensitive to governmental intention.[15] The intention in this situation does not affect the moral value of the act, and hence the wrongness of the act, even though many other things, both for and against it, do. This example helps us to see how the importance of intention depends on the difference it makes to the value of one's action, which depends in turn on which particular value we are talking about, which particular action, and which particular intention. Or rather, I should say, that is how intention gets its *main substantive* importance in moral thinking, lending it whatever importance it may have as a possible *mens rea* element in crime. Intention figures in some moral norms, but not others; it sometimes, but not always, affects the wrongness of what one does. That is why it matters for some crimes and not others. And the same is true, I am suggesting, of most of the other things that are normally counted as or counted towards the *mens rea* elements in the definitions of crimes.

The same is not true, however, of some other elements in criminal liability, which play a genuinely ascriptive role, and which take their cue from ascriptive moral rules. They include the doctrines of infancy and insanity, and the so-called 'voluntary conduct' requirement. The burden of these is different from the burden of most *mens rea* rules. They do not affect the wrongness of what one did. That you broke your promise involuntarily (i.e. by way of involuntary conduct) does not make it alright that you broke your promise. You were still bound not to. It was still the same wrong. The point is merely that, because you failed involuntarily, you were not responsible for failing; your wrong did not reflect badly on you. Children and the insane, again, are by no means morally permitted to kill or maim where sane adults would be required not to do so. The wrong remains the same. The point is, however, that where the wrong is committed by a child or an insane person, questions about their moral responsibility immediately arise, questions which normally do not arise when a sane adult is the perpetrator. When adapted to legal use, then, such factors as infancy, insanity and involuntariness do yield genuine rules of criminal responsibility, in the sense which interests us – rules, moreover, which really do belong to the general part of the criminal law.[16]

This is a view which Jung and I also ventured, in passing, in our review of Duff, and to which Laing devotes a good deal of attention.[17] Her objections seem to be on three fronts.

(1) First there is an obvious *ad hominem* objection. Laing supposes that Jung and I cannot consistently allow any general rules in this area once we have denied the generality of *mens rea* elements, because a 'theoretical sceptic' cannot pick and choose about his scepticism.[18] I think I have already explained what is wrong with this challenge. It fails to recognise how much turns on the difference between the normative rules of *mens rea*, which are hostage to the pervasiveness of value conflict, and hence prone to fragmentation, and the ascriptive rules now under discussion which, not being justified by the value of following them, are largely immune from the same conflict, and hence more accessible to generalisation.[19]

(2) Then Laing makes some objections to the idea that the most basic general rules of criminal responsibility might be 'capacity-based.' To these objections, the answer is that

Jung and I did not say that they were. In fact we said nothing, in the bare half-sentence on the subject which we included in our review, about how the rules concerning infancy, insanity and involuntariness are to be rationalised.[20] One might try to present them as capacity-based rules, but one need not. Elsewhere, as it happens, I argued against a capacity-based rationalisation of the voluntary conduct requirement in English criminal law.[21] I would be prepared to extend that position to the insanity rules. And just in case it was explication rather than rationalisation that Laing had in mind when she described these rules as capacity-based, let me add that there is no obvious link with capacities at that level either. The voluntary conduct rule requires voluntary conduct, not a capacity for voluntary conduct. The insanity rule requires that one knew the nature and quality of one's act and knew it was wrong, not that one had the capacity to do so. The infancy rule requires that one be over ten before one incurs criminal liability, not that one had the capacity to think and behave as if one were. So it is just not clear where capacities are supposed to come into the picture.

(3) Finally, Laing seems to harbour doubts about the actual legal standing of the rules we mentioned. Is there really a 'voluntary conduct' requirement in the criminal law? Is it univocal? Does the exclusion of the insane really do much work in narrowing the field of criminal liability? In asking these and related questions, Laing makes it clear that she mistook our proposal that the ascriptive rules in question are *general* rules for a proposal that they are *invariant*, *clear*, *powerful* rules. As it happens, I believe that the importance of these rules has been underestimated, both as legal tools and as repositories of real moral refinement. But that is beside the point. For even if, when it comes to serious legal and moral argument, these ascriptive rules pale into utter insignificance beside the *mens rea* elements of criminal liability, or are hard to spell out, or often have to be restricted in their application because of urgent normative pressures, that would still give us no reason to hope, as Laing seems to hope, that a general theory of *mens rea* will charge in to save the day. More likely it would corroborate our original suspicion that many of the major battles now raging between and among criminal lawyers and their moral and political critics will not be

won or lost on the playing fields of theory. They will be settled, if at all, in the muddy trenches of substantive moral and legal argument.

This is not to say, of course, that these substantive arguments raise no theoretical *issues*. Jung and I would scarcely have written such a long and decidedly theoretical review of Duff if we had found no theoretical issues in his work to discuss. In particular, we relied on a host of important theoretical distinctions in criticising his views. We invoked, for example, the distinction between auxiliary and operative reasons, the distinction between reason-giving and enabling conditions, the distinction between explanatory and guiding reasons, and the distinction between instrumental and intrinsic value.[22] To the list I have just added another crucial theoretical distinction, namely that between normative and ascriptive rules. So I would not be one to deny the theoretical depth of the subject. If that is what a 'theoretical sceptic' denies, then obviously I am no theoretical sceptic.

3. The 'descriptive core' of mens rea

I suspect that Laing will not be entirely happy, however, with what I have been saying about normative and ascriptive rules. The final part of her essay is directed at Antony Duff's tendency to inflate the role of 'ascriptive' and 'normative' thinking where *mens rea* elements are concerned, at the expense of straightforwardly 'descriptive' work.[23] To some extent Duff walks into this criticism, since his own use of these classifications is fairly opaque, and at times confused. He speaks, for example, of 'ascriptions of intentional agency' which 'express normative judgements of responsibility'.[24] If he uses 'responsibility' in the sense in which we have used it here, a judgement of responsibility is not strictly normative but ascriptive. And, in any case, it is hard to see how an ascriptive judgement could 'express' a normative one, although there are various ways in which the two may work together. Perhaps Duff uses 'normative' loosely to cover 'moral', 'legal', 'prudential' etc., thereby embracing both the ascriptive and normative dimensions of these; and perhaps he is also

distracted by the multiple meanings of the word 'responsibility', which can be used to make normative points ('switching off the lights was my responsibility; I agreed to do it...') as well as ascriptive ones ('...but all the same I wasn't responsible for them being on all night; I was knocked out by a burglar').

Laing's objections, however, go deeper than any of this. They concern the very nature of thought and language. The problem for her is that Duff is attempting to give an account of a concept P ('intention' being the concept in point) by doing something other than 'describing' P. And that, she thinks, is a process that has been entirely discredited by the insights of Fregean logic.[25]

I must say that I would not be so confident as Laing in saying what Duff is attempting to do. Nor am I sure why descriptions are supposed to be so impervious to normative and ascriptive thinking. When I describe somebody as a coward or a dilettante, I straightforwardly describe him; but in doing so I also invoke both normative and ascriptive rules. Perhaps the claim that this is a description is precisely what Laing doubts. Certainly, in criticising the way in which Jung and I illustrated the diversity of *mens rea* concepts, Laing contrasts those on our list which she thinks of as 'guilt-assuming' concepts with those which are truly 'mental state' concepts, which she repeatedly casts as 'descriptive', or as highlighting a 'descriptive core'.[26] But if that is her contrast then it is Laing, not Duff, who violates the Fregean principle. For the obvious implication is that, in giving an account of the concept of a 'reckless person' or a 'malicious person' (both in her terms guilt-assuming), she would take herself to be doing something other than, or at any rate more than, just describing a person. This suggests that Laing is actually less moved by Frege than by Hare. She is trading on a corrupted version of the fact/value distinction which leads her to hold that an assertion in which normative or ascriptive rules play a constitutive part necessarily lies beyond the realm of straightforward description.[27] Even Duff, for all his confused terminology, does not make this mistake. He claims only that 'ascriptions of intentional agency do not describe *neutral* facts' (whatever those are supposed to be), not that they do

not describe facts at all.[28] Of course they do. They describe, in his view, the very fact that someone acted as she did in spite of a countervailing reason which applied to her.[29]

What Laing finds unsatisfactory about Duff's reliance on this fact is that it is admittedly not, or not simply, a fact about the agent's *mind*. She is concerned, in my view unduly and damagingly, with what an intention is *really* like – what it is like, so to speak, 'in the objects' of the mental world.[30] This mirrors a mistake which many legal scholars make about causation, which leads them to hive off from their accounts of causation those elements of causal discourse (e.g. the principles of *novus actus interveniens*) which are plainly imposed by our human patterns of thinking rather than being located, as it were, in the fabric of the universe itself. These become 'policy considerations', 'value judgements' etc. which are added to 'factual' causal statements.[31] The problem, or at any rate the immediate problem, is that this distances the study of 'causation' from the *concept* of a cause, which does have sensitivity to things like *novus actus*. The same thing can happen with intention. Now I do not know, and frankly do not greatly care, whether there are things called 'intentions' in the objects, mental or otherwise, independently of our understanding of the world. But I do care that we have an accurate account of the *concept* of intention which is *part* of our understanding of the world – an account which not only captures its mentalistic flavour but also, for example, makes sense of 'parliamentary intention', 'the government's intention', and 'the company's intention' as well as 'my intention' and 'your intention', and explains the fact that there are genuinely borderline cases (evidential uncertainty apart) between the intended and the unintended.

Yet I also care that we recognise, as both Laing and Duff largely fail to do, that the law sometimes has its own specialised concepts, including (in some legal systems) specialised concepts going by the name of 'intention'. We should never forget how close legal authorities can get to the Humpty Dumpty position – they can not only choose what people should do, but also choose what, for certain purposes and within certain limits, their words will mean. Sometimes the technical meanings chosen are deliberate adaptations of the non-technical meanings of the words in question; sometimes they are the accidental creations of

misfired attempts to capture the non-technical meanings in pithy definitions and simple jury directions. But both the deliberate and the accidental processes are responses to the need to meet the special demands of the legal context. In our review of Duff, Jung and I explained how such demands could arise in connection with *mens rea* terms, including terms like intention, malice and recklessness. Since we had no great fear of instrumental reasoning, and had no inclination towards moral scepticism to repress, we did not hold back from recognising that some of the demands of the legal context may be instrumental demands.[32] And since we did not suppose that anyone would require *mens rea* concepts to pass the extreme test of correspondence to things existing 'in the objects' of the mental world, whatever that mental world may be like, we did not trouble to defend our view, which we would still stand by, that the resulting legal concepts could be more or less mentalistic, more or less normatively loaded, more or less instrumentally tailored, and more or less fuzzy round the edges, to suit the particular occasions of their use.

Behind the struggle to relate *mens rea* terms back to the 'objects' of the mental world lies the view that the distinction between *actus reus* and *mens rea* is something more than a handy lawyer's classification. Laing apparently thinks that it is a distinction to be found in the structure of wrongdoing generally, moral as well as legal.[33] Thus the propensity that Jung and I exhibit to collect together 'guilt-assuming' and 'non-guilt-assuming' terms under the heading of *mens rea* makes not only for untidiness, but also, by implication, for the kind of incongruous juxtaposition which would only be tolerated by a lawyer who has taken too many 'positivistic pills'.[34] But I suspect that the *actus reus – mens rea* distinction itself can only be properly digested if one swallows one's positivistic pills first. It is true, of course, that non-lawyers (particularly moral philosophers) sometimes find it useful to borrow the distinction for presentational purposes. But we should not take this form of flattery too seriously. Lawyers find it hard enough to make the distinction work consistently even in their specialised and systematised world.[35] Without that systematisation, I venture that the distinction soon outlives its usefulness. It is a conceit of lawyers that the world is just as tidily divided up as they, for purposes of pleading, proof and exposition, have constructed

it. In every wrong, for the tort lawyer, there is duty, breach, and damage. In every wrong, for the English criminal lawyer, there is *actus reus* and *mens rea*. The German criminal lawyer carves things up differently again – into *Tatbestand*, *Rechtswidrigkeit*, and *Schuld* – where some of what we would call *mens rea* belongs in the first category and some in the third.[36] No doubt these patterns have their philosophical roots and resonances, but they are still fundamentally patterns constructed and adopted for the specialised purposes of legal education, argument and analysis – and patterns, moreover, which impose their own distortions on the subject matter. If they break down, or inconsistencies come to their surface, we should not be disconsolate, but remind ourselves that the main casualty is the lawyer's tidy textbook. Better, I think, that we not distort the rights and wrongs of the world just for the sake of tidiness.

To forestall any misunderstanding, let me add that I am not doubting that the various definitional elements of crimes that can be collected under the heading of *mens rea* are vitally important elements of crimes. The point is not that the law would be just as well off without them. The development of such elements, loosely though they are clustered, is one of the hallmarks of a civilised system of criminal justice, and is rightly guarded as such. There is considerable moral force in the legal maxim *actus non facit reum nisi mens sit rea*, in spite of the fact that it necessarily invokes technical legal classifications. But it is rather like the moral force of the well-known 'harm principle'. The harm principle tells us, among other things, not to criminalise harmless activities. But it does not tell us how, or even when, to criminalise harmful ones. It leaves a great deal of the detail open to negotiation on other grounds, including other moral grounds. That is why it does not justify a criminal law in which, for example, all the various prohibitions on taking property, carrying weapons, polluting rivers, selling children into slavery, etc. are boiled down to one grand rule against causing harm. But nor does it dictate the terms of their demarcation; countless different ways of dividing up criminal offences are perfectly compatible with the harm principle. My point is simply that the *actus non facit reum* principle has similar limitations. For all that it alerts us to and reflects a significant knot of moral concerns about the structure of criminal

offences, it does not in the process restrict legislators and judges to a short *table d'hôte* menu of possible ways to respond to those concerns. It does not impose conceptual parsimony. It leaves open the possibility that the demand for *mens rea* should be met in different ways, and to different degrees, in the context of different criminal offences.

4. A happy ending

Although this kind of thinking is supposed to lead Jung and me to the subversions of 'theoretical scepticism', Laing warns that readers should be 'alert' to a 'theoretical program' in the views that we defend.[37] That we had such a 'program' cannot be denied. I hope it will be clear by now what it was all about. It concerned the uses and abuses of theory in the study of legal doctrine and moral principle. We thought that Duff, like many other contemporary writers on important and controversial issues in the criminal law and beyond, was too ready to diagnose theoretical problems where only ordinary moral and legal problems exist. We thought that this was itself the major, although obviously not the only, theoretical problem in his work. Laing's tenacious but ultimately unsuccessful criticisms, of Duff's book as well as of our essay, have made me all the more confident that we were thinking along the right lines.[38]

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[1] Laing, 'The Prospects of a Theory of Criminal Culpability: Mens Rea and Methodological Doubt', *Oxford J Leg Stud* 14 (1994) 000; replying to Gardner and Jung, 'Making Sense of Mens Rea: Antony Duff's Account', *Oxford J Leg Stud* 11 (1991), 559, an extended review of Duff, *Intention, Agency and Criminal Liability*, (Oxford 1990) - hereafter referred to as 'Laing', 'Gardner and Jung' and 'Duff' respectively.

[2] Glanville Williams, *Criminal Law: The General Part* (London 1961), 31; Law Commission, *A Criminal Code for England and Wales*, (London 1989), 190; C.M.V. Clarkson and H.M. Keating, *Criminal Law: Text and Materials*, (2nd ed, London 1990), 152; J.C. Smith and Brian Hogan, *Criminal Law* (7th ed, London 1992), 53 and 72-4. This latest edition of Smith and Hogan finally nails its colours to the mast on this score by eliminating a chapter called 'The Effect of Particular Words' which drew attention to the heterogeneity of *mens rea* terms and terms implying *mens rea* (c.f. *Criminal Law* (6th ed, London 1988), 120ff). Even that chapter had always been a bit of a half-hearted concession, falling as it did under the 'General Principles' rubric, but outside the official, and fully regimented, '*Mens Rea*' section. Now the scant remains of it are hidden away in the chapter on strict liability.

[3] Laing, 8. .

[4] In particular, I have been unable to work out what the connection is supposed to be between this 'theoretical scepticism' and the 'methodological doubt' of Laing's title. Nothing in our review of Duff was directed against his method, which struck me then, and strikes me now, as impeccable.

[5] Laing, 8-9.

[6] Laing, 8.

[7] At 20-1, Laing insists that 'the applicability of instrumental reasoning' is 'subject to the requirements of a greater theory of morality or intrinsic value', suggesting that instrumental reasoning is, for her, more of a challenge to moral reasoning than a part of it.

[8] See especially Laing, 14: if Jung and I refuse to have a moral theory determining the shape of the criminal law we must, it is said, 'help [our]selves to the device of intuition'.

[9] For an excellent *exposé* of the myth that moral theory exists to resolve moral conflicts and settle moral controversies, and that well-trained moral philosophers are therefore better-qualified than others to identify the resolutions and dictate the settlements, see Anne MacLean, *The Elimination of Morality* (London 1993).

[10] C.f. Joseph Raz, 'The Relevance of Coherence', *Boston University LR* 72 (1992), 273 at 310-11.

[11] Some current examples: C.M.V. Clarkson and H.M. Keating, *Criminal Law: Text and Materials*, above note 2, 147-50; Nicola Lacey, Celia Wells and Dirk Meure, *Reconstructing Criminal Law: Text and Materials*, (London 1990), 34-6; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, (London 1993), 36.

[12] I say 'relatively' because the claim is not that ascriptive rules are value-free. It is merely that their relationship with value is not, like that of normative rules, a direct justificatory relation.

[13] I discuss this contrast further, in collaboration with Stephen Shute and Jeremy Horder, in our introduction to Shute, Gardner and Horder (eds), *Action and Value in Criminal Law* (Oxford 1993). See also George Fletcher, *Rethinking Criminal Law* (Boston 1978), 454ff.

[14] Laing, 9-10.

[15] See Joseph Raz, 'Free Expression and Personal Identification' , *Oxford J Leg Stud* 11 (1991) 303.

[16] I should add here for the sake of completeness that the rules of English Law relating to provocation, diminished responsibility and duress are also ascriptive rules, but differ from the three listed in the text in that they are ascriptive rules activated only on certain normatively structured conditions. This explains why they are less general in application than those discussed in the text. When such normatively structured ascriptive rules are relied upon, we normally say that an *excuse* has been offered. Even at this level the distinction between ascriptive rules and normative rules is ultimately preserved, however, in the familiar contrast

between excuse and justification. See again the introduction to *Action and Value in Criminal Law*, above note 13.

[17] Laing, 10-15.

[18] Laing, eg 13 and 15.

[19] Of course this does not make them uncontroversial. It is merely that the controversy is about the nature of morality and moral agency rather than about the justificatory force of particular moral values. Moral controversy and moral conflict are not the same thing, incidentally, although some moral controversy (eg about abortion and euthanasia) can best be explained in terms of the underlying moral conflict.

[20] Gardner and Jung, 562.

[21] 'The Activity Condition in Criminal Law', in Heike Jung, Heinz Müller-Dietz and Ulfrid Neumann (eds), *Recht und Moral: Beiträge zu einer Standortbestimmung*, (Baden-Baden 1991).

[22] See Gardner and Jung 564, 568, 571, 573.

[23] Laing, 26.

[24] Duff, 84.

[25] Concerning which Laing cites, and essentially reiterates, P.T. Geach's critique of H.L.A. Hart in 'Ascriptivism', *Philosophical Review* 69 (1960), 221.

[26] Laing, e.g. 9 and 10.

[27] The *locus classicus* is R.M. Hare, *The Language of Morals*, (Oxford 1952), 111ff.

[28] Duff, 84.

[29] Contrary to Laing's claim (21), Jung and I did not attack this concept of intention in our review. I for one do not know how to go about attacking a concept. What Jung and I did was to criticise Duff for using the word 'intention' to *label* this concept: Gardner and Jung, 573. That judges and legislators can behave like Humpty Dumpty (see below) does not mean that philosophers can do the same. One of their main jobs is to expose such behaviour.

[30] See John Mackie, *The Cement of the Universe: A Study of Causation*, (Oxford 1974), 1-2. Notice that speaking of 'the objects' of the 'mental world' involves no assumptions (e.g. dualist or physicalist assumptions) about the status of this 'world'.

[31] For instance, Richard Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts', *Iowa Law Review* 73 (1988), 1001 at 1011ff.

[32] We did not even rule out, as Laing with her fear of creeping instrumentalism assumes we meant to, that some of the instrumental demands are also moral demands. C.f. Laing, 20-1.

[33] Laing, 3-4.

[34] Laing, 3.

[35] See Paul H. Robinson, 'Should the Criminal Law Abandon the Actus Reus–Mens Rea Distinction?' in Shute, Gardner and Horder, (eds), *Action and Value in Criminal Law*, above note 13.

[36] For a brief exposition, see Claus Roxin, Gunther Arzt and Claus Tiedemann, *Einführung in das Strafrecht und Strafprozeßrecht*, (Heidelberg 1988), 19-23.

[37] Laing, 9

[38] Along the right lines, but certainly not without error. Two mistakes in our review, which I now freely acknowledge, have been brought to light by other respondents. First, Jung and I were too quick to grant Duff his belief-centred analysis of 'direct' intention, or intention proper: A.P. Simester, 'Paradigm Intention', *Law and Philosophy* 11 (1992), 235. Second, we provided a garbled and inadequate account of why the criminal law should normally disregard the quality of an offender's motive (although I still believe, for different reasons, that it should): Alan Norrie, 'Subjectivism, Objectivism, and the Limits of Criminal Recklessness', *Oxford J Leg Stud* 12 (1992), 45.