



SENIOR PRESIDING JUDGE
FOR ENGLAND AND WALES

**‘WHAT IS CRIME?’: A LECTURE FOR THE
‘THE LIMITS OF CRIMINALISATION’ CONFERENCE¹**

1. It is a real pleasure to be here this evening at this wonderful venue and at so stimulating a gathering of practitioners from across the criminal justice system (“CJS”). Without compromising our respective independence, I believe we have much to learn from one another, as professionals in the CJS. We have very different roles but we each have a strong commitment to justice and I think it is of real value to share our thoughts and views.
2. I should make one matter clear at the outset; although in what I say I am necessarily mindful of my position as a serving Judge, the views I express to you here are my own. The notion that the Judiciary has only one view on any topic, let alone a topic of this nature, is simply unreal.
3. I have now postponed as long as I can the title which confronts me – “What is crime?” – posing a question to which I rather hoped my hosts might have the answer. That said, the title provides a wonderfully broad canvas and I

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propose to take some advantage of that, though acutely conscious that I am here for 20 minutes or so rather than 20 days.

4. Attempts at dictionary definition do not greatly advance the discussion. I am not aware of any statutory definition until the Prevention of Crimes Act 1871 caused it to encompass felonies and particular forms of larceny or fraud relating to coinage – not altogether enlightening for tonight’s purposes.
5. In a scholarly first chapter, *Smith and Hogan’s Criminal Law*² offers this definition³:

“Crimes, then are wrongs which the judges have held, or Parliament has enacted, to be sufficiently injurious to the public to warrant the application of criminal procedure to deal with them.”

While assuredly accurate, this definition does not significantly advance the discussion. Strikingly, if a touch gloomily, the learned author concludes the same chapter with this observation⁴:

“ Readers will by now have realized that the task of defining ‘crime’ by reference to a universal purpose for criminalization or by identifying some universally accepted ingredients such as public wrongs and harms would be extremely difficult. There is no sufficient agreement as to what these purposes or ingredients are. The best that can be offered in practical terms is to consider the process and likely outcomes.”

With respect, for my part, I am wary of a definition founded on process.

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6. What can be said is that crime plainly belongs to the world of public law, not of private legal relations. Although many of our older crimes – assault, theft, fraud – have siblings in the law of tort, crime does not rely on private rights or corresponding private wrongs. The position of the Crown, representing the public interest, is distinct from that of the victim – which both stands in contrast to the position in private law and may explain the serious thinking needed to ensure that victims have a proper place in the CJS. The State does not rely on the consent or standing of any private person to bring criminal proceedings.

7. Care is, however, needed. Much public law, even that involving a department of state, is civil in nature – as is clear from the swathes of applications for judicial review in the Administrative Court. Similarly, the absence of a State party does not mean that the proceedings are not criminal. The Supreme Court has very recently acknowledged the continued right of citizens to bring private prosecutions against those in alleged breach of the criminal law in [*R \(Gujra\) v DPP* \[2012\] UKSC 52; \[2013\] 1 AC 484](#).

8. As it seems to me, therefore, like dictionary definition, general classification does not (or not satisfyingly) illuminate the limits of criminalisation. As a common lawyer should, I shall instead attempt to illustrate the limits of criminalisation, perhaps, in the process of doing so, raising more questions than furnishing answers, using three examples:
 - (I) Morals and the criminal law;
 - (II) Terrorism and freedom of opinion;
 - (III) Drugs, public health, resources and incentives.

(Other examples could of course have been chosen or added – for instance, prostitution, euthanasia, the use of the civil courts, out of court disposals and bigamy. But time is limited.)

(I) *Morals and the criminal law:*

9. One of the benefits of preparing for this evening was the opportunity to dust off two works last looked at as an undergraduate: namely, *Hart, Law Liberty and Morality* (1962) and *Devlin, The Enforcement of Morals* (1965). I speak of the *Hart-Devlin* debate.
10. Lord Devlin had a meteoric rise to the highest court in the land. He was appointed to the High Court bench in 1948 at the almost-adolescent age of 42, and after only eleven years spent a single year as a Lord Justice of Appeal, before being made a Law Lord in 1961. His time in the House of Lords was limited to just 3 years, retiring (somewhat curiously) at the earliest opportunity. Extra-judicially, he had a leaning towards writing and he is perhaps best known for his intellectual sparring with that great liberal thinker HLA Hart.
11. The particular *casus belli* arose out of the Wolfenden Committee's 1957 Report which recommended that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence'. At the time, as Sir Humphrey might have said, that was a bold recommendation, but it was the philosophical premise of the report that was truly radical, in expressing a general view that:

“The function of the criminal law is to preserve public order and decency, to protect the citizen from what is injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable ... It is not the function of the law to intervene in the private lives of our citizens.”

12. In the public debate that ensued over the course of the decade following Wolfenden’s report, Devlin became a (or the) leading critic of this conception of the criminal law, although he later backed the specific recommendation of decriminalisation. For Devlin, the Victorian judge and moralist James Fitzjames Stephen had articulated a truer conception of the criminal law, with its chief function being the enforcement of moral principles adopted and developed by a society or community. In *‘The Enforcement of Morals’* he described the necessity of a common conception of the good which underpinned all healthy societies, for which the criminal law was but one tool to ensure cohesion and compliance with social norms.

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mob)⁶ and the private sphere was to be inoculated from public morality.

14. On the issue with which Wolfenden was concerned, Hart's liberalism prevailed, presaging the remarkable advance in gay rights which has since taken place. But, more generally, as it would seem, modern governments have not shied away from supporting the introduction of offences which contravene a very public morality: might it be suggested that it is merely the character of that social morality which has altered? Take, for example, incest between consenting (non-vulnerable) adults contrary to [sections 64 and 65 of the Sexual Offences Act 2003](#) (the latter actually requires consent as an element of the offence). How else could such criminalisation be explained? If the avoidance of genetic disorders is advanced as a reason, what then is the justification for the prohibition of same-sex incestuous relationships between *consenting* adults? This is emphatically not a plea to legalise incest; it is just an invitation to analyse the basis on which it is criminalised and a suggestion that that basis may be found in social morality. Or consider the use of the criminal law to combat racial or religious hatred⁷ and to increase sentences where offences are racially or religiously aggravated or where offending relates to sexual orientation.⁸ In part, no doubt, this is utilitarian, to preserve public order; but in part too, this is to use the criminal law for a moral purpose or to advance social policy in a diverse society.
15. My point is this: the enforcement of morals is still widely *but implicitly* considered a valid basis for criminalising conduct that is repugnant to all 'right-thinking people'. The difference between a pre-Wolfenden

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(II) Terrorism and freedom of opinion:

16. The *Hart-Devlin* debate reminds us of the caution needed when the criminal law intrudes on the sphere of personal autonomy. Turning next to the wholly legitimate policy of combating terrorism through prosecution under the criminal law, extremist views can give rise to difficult questions as to the proper boundaries of that law.

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preparation” for committing acts of terrorism or assisting another to commit such acts.

20. This is a formidable array of offences aimed at striking early against a potential terrorist. I do not for a moment suggest that they are unwarranted, excessive or inappropriate. Indeed, if the strategy is to deal with terrorism through the criminal law, they may be much needed. They do, however, illuminate the complexity of bringing terrorism within a framework of criminal law. As “hearts and minds” are of the greatest importance in this area, they also underline the need to differentiate carefully between aspirant terrorists and their fellow travellers on the one hand and the obnoxious but otherwise harmless holder of extremist views on the other.

(III) Drugs, public health, resources and incentives:

21. Our law is clear and for a serving Judge there is no question but that the importation, supply and possession of controlled (i.e., illicit) drugs gives rise to criminal offences and will be treated as such. But in a seminar of this nature, the problem posed by drugs also serves to highlight the limits of the criminal law. One cannot be unaware of a continual undercurrent of (respectable) debate questioning the wisdom of the “war on drugs”. Inescapably, questions arise as to the public health aspect of the misuse of drugs and the contrast between the treatment of drugs on the one hand and the taxation and regulation of alcohol on the other. There are options here – emphatically for others, not serving Judges – to consider. The outcome of such an open debate, were one to take place, incidentally, is far from self evident. What impact would legalising the usage of drugs have on public health? If restrictions were removed from the usage of drugs, so potentially increasing demand, what of the supply side? If some drugs were

legalised, what would happen at the borderline between those drugs thus lawfully supplied and consumed and the next tier (*ex hypothesi*, still illegal)? What would that do to the market? In practical terms, what would be the “harm” to which legalisation would give rise? Where do we stop protecting people from themselves? The complexity of such policy questions is readily apparent.

22. Relevant in this context, is the question of whether there is a self fulfilling element as to which conduct we target in the CJS. Thus only last month, the *Economist* published an illuminating article¹⁶ on the “militarisation” of the US. Special Weapons And Tactics (“SWAT”) teams of domestic police forces who have seen their raids rise from 3,000 a year in the early 1980s to perhaps 1,000 a *week* in 2014. The article questioned whether this was because the drugs industry has become more dangerous or whether this reflected the impact of the US\$35 billion released to local and state law enforcement by the Department of Homeland Security in the eight years between 2001 and 2009. Keeping the kit in full working order requires that it not be stored with mothballs. As asked by the article, was this why the local police department in Keene, New Hampshire (population: 23,409 at the 2010 Census), a town most famous for its world-record breaking pumpkin festival, has a BearCat armoured personnel carrier? The danger is summed up in the aphorism of Abraham Maslow: “*I suppose it is tempting, if all you have is a hammer, to treat everything as if it were a nail*”¹⁷.
23. But the provision of Maslow’s hammer may not be the only driver of the use of the criminal justice system in some areas rather than others. Another may be that, unlike crimes such as domestic violence,

¹⁶ *Armed and Dangerous*, 22nd March 2014

¹⁷ *The Psychology of Science* (1966)

investigating and prosecuting drugs offences is incentivised by proceeds of crime legislation (“POCA”). That is a topic all its own, as shown in the observations of Thomas LJ (as he then was) in *R v Innospec Ltd*¹⁸. Those observations threw into stark relief the potential conflict of interest faced by the SFO in preferring a confiscation order (from which it received a share of the proceeds) rather than a fine (from which it received none). The ultimate decision was necessarily one for the Court¹⁹. In short, if some offences produce proceeds for investigators or prosecutors whereas others do not, is there a risk that the direction of CJS resources might be skewed (however inadvertently)?

Concluding remarks:

24. So, returning to my original questions and exploring the limits of Crime:
 - a. To what extent does or should the criminal law confine itself to the limitation of objective harm as distinct from comprising the means by which society enforces its moral standards?
 - b. To what extent does or should the criminal law range beyond the actual commission of harm so as to encompass preparatory activity and at what risk to the expression of opinions however obnoxious?
 - c. To what extent does or should the criminal law enter into areas which are capable of consideration as matters of public health and are our priorities influenced by the resources and incentives available?

¹⁸ [2010] Crim LR 665

¹⁹ *Archbold 2014*, at para. 5-804

25. I do not, of course, seek to determine the answers to these questions – indeed I am not sure a serving Judge should do so. Rather, I present these different perspectives to stimulate the conversations that practitioners from across the CJS will enjoy over the course of this seminar.

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23. But the provision of Maslow’s hammer may not be the only driver of the use of the criminal justice system in some areas rather than others. Another may be that, unlike crimes such as domestic violence,

¹⁶ *Armed and Dangerous*, 22nd March 2014

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investigating and prosecuting drugs offences is incentivised by proceeds of crime legislation (“POCA”). That is a topic all its own, as shown in the observations of Thomas LJ (as he then was) in *R v Innospec Ltd*¹⁸. Those observations threw into stark relief the potential conflict of interest faced by the SFO in preferring a confiscation order (from which it received a share of the proceeds) rather than a fine (from which it received none). The ultimate decision was necessarily one for the Court¹⁹. In short, if some offences produce proceeds for investigators or prosecutors whereas others do not, is there a risk that the direction of CJS resources might be skewed (however inadvertently)?

Concluding remarks:

24. So, returning to my original questions and exploring the limits of Crime:
 - a. To what extent does or should the criminal law confine itself to the limitation of objective harm as distinct from comprising the means by which society enforces its moral standards?
 - b. To what extent does or should the criminal law range beyond the actual commission of harm so as to encompass preparatory activity and at what risk to the expression of opinions however obnoxious?
 - c. To what extent does or should the criminal law enter into areas which are capable of consideration as matters of public health and are our priorities influenced by the resources and incentives available?

¹⁸ [2010] Crim LR 665

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25. I do not, of course, seek to determine the answers to these questions – indeed I am not sure a serving Judge should do so. Rather, I present these different perspectives to stimulate the conversations that practitioners from across the CJS will enjoy over the course of this seminar.

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SENIOR PRESIDING JUDGE
FOR ENGLAND AND WALES

**‘WHAT IS CRIME?’: A LECTURE FOR THE
‘THE LIMITS OF CRIMINALISATION’ CONFERENCE¹**

1. It is a real pleasure to be here this evening at this wonderful venue and at so stimulating a gathering of practitioners from across the criminal justice system (“CJS”). Without compromising our respective independence, I believe we have much to learn from one another, as professionals in the CJS. We have very different roles but we each have a strong commitment to justice and I think it is of real value to share our thoughts and views.
2. I should make one matter clear at the outset; although in what I say I am necessarily mindful of my position as a serving Judge, the views I express to you here are my own. The notion that the Judiciary has only one view on any topic, let alone a topic of this nature, is simply unreal.
3. I have now postponed as long as I can the title which confronts me – “What is crime?” – posing a question to which I rather hoped my hosts might have the answer. That said, the title provides a wonderfully broad canvas and I

¹ I am most grateful to Greg Callus, Judicial Assistant, for all his help in preparing this talk.

propose to take some advantage of that, though acutely conscious that I am here for 20 minutes or so rather than 20 days.

4. Attempts at dictionary definition do not greatly advance the discussion. I am not aware of any statutory definition until the Prevention of Crimes Act 1871 caused it to encompass felonies and particular forms of larceny or fraud relating to coinage – not altogether enlightening for tonight’s purposes.
5. In a scholarly first chapter, *Smith and Hogan’s Criminal Law*² offers this definition³:

“Crimes, then are wrongs which the judges have held, or Parliament has enacted, to be sufficiently injurious to the public to warrant the application of criminal procedure to deal with them.”

While assuredly accurate, this definition does not significantly advance the discussion. Strikingly, if a touch gloomily, the learned author concludes the same chapter with this observation⁴:

“ Readers will by now have realized that the task of defining ‘crime’ by reference to a universal purpose for criminalization or by identifying some universally accepted ingredients such as public wrongs and harms would be extremely difficult. There is no sufficient agreement as to what these purposes or ingredients are. The best that can be offered in practical terms is to consider the process and likely outcomes.”

With respect, for my part, I am wary of a definition founded on process.

² 13th ed., 2011

³ At p.6

⁴ At p.15

6. What can be said is that crime plainly belongs to the world of public law, not of private legal relations. Although many of our older crimes – assault, theft, fraud – have siblings in the law of tort, crime does not rely on private rights or corresponding private wrongs. The position of the Crown, representing the public interest, is distinct from that of the victim – which both stands in contrast to the position in private law and may explain the serious thinking needed to ensure that victims have a proper place in the CJS. The State does not rely on the consent or standing of any private person to bring criminal proceedings.

7. Care is, however, needed. Much public law, even that involving a department of state, is civil in nature – as is clear from the swathes of applications for judicial review in the Administrative Court. Similarly, the absence of a State party does not mean that the proceedings are not criminal. The Supreme Court has very recently acknowledged the continued right of citizens to bring private prosecutions against those in alleged breach of the criminal law in [*R \(Gujra\) v DPP* \[2012\] UKSC 52; \[2013\] 1 AC 484](#).

8. As it seems to me, therefore, like dictionary definition, general classification does not (or not satisfyingly) illuminate the limits of criminalisation. As a common lawyer should, I shall instead attempt to illustrate the limits of criminalisation, perhaps, in the process of doing so, raising more questions than furnishing answers, using three examples:
 - (I) Morals and the criminal law;
 - (II) Terrorism and freedom of opinion;
 - (III) Drugs, public health, resources and incentives.

(Other examples could of course have been chosen or added – for instance, prostitution, euthanasia, the use of the civil courts, out of court disposals and bigamy. But time is limited.)

(I) *Morals and the criminal law:*

9. One of the benefits of preparing for this evening was the opportunity to dust off two works last looked at as an undergraduate: namely, *Hart, Law Liberty and Morality* (1962) and *Devlin, The Enforcement of Morals* (1965). I speak of the *Hart-Devlin* debate.
10. Lord Devlin had a meteoric rise to the highest court in the land. He was appointed to the High Court bench in 1948 at the almost-adolescent age of 42, and after only eleven years spent a single year as a Lord Justice of Appeal, before being made a Law Lord in 1961. His time in the House of Lords was limited to just 3 years, retiring (somewhat curiously) at the earliest opportunity. Extra-judicially, he had a leaning towards writing and he is perhaps best known for his intellectual sparring with that great liberal thinker HLA Hart.
11. The particular *casus belli* arose out of the Wolfenden Committee's 1957 Report which recommended that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence'. At the time, as Sir Humphrey might have said, that was a bold recommendation, but it was the philosophical premise of the report that was truly radical, in expressing a general view that:

“The function of the criminal law is to preserve public order and decency, to protect the citizen from what is injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable ... It is not the function of the law to intervene in the private lives of our citizens.”

12. In the public debate that ensued over the course of the decade following Wolfenden’s report, Devlin became a (or the) leading critic of this conception of the criminal law, although he later backed the specific recommendation of decriminalisation. For Devlin, the Victorian judge and moralist James Fitzjames Stephen had articulated a truer conception of the criminal law, with its chief function being the enforcement of moral principles adopted and developed by a society or community. In *‘The Enforcement of Morals’* he described the necessity of a common conception of the good which underpinned all healthy societies, for which the criminal law was but one tool to ensure cohesion and compliance with social norms.

13. HLA Hart’s intellectual lineage was of a more liberal variety⁵, and, perhaps also influenced by his positivism, had a much thinner conception of the role that law – particularly the criminal law – could or should play in resolving disputes over private behaviour. For Hart, a different Victorian had given the better answer: John Stuart Mill articulating his famous ‘Harm Principle’ in his *magnum opus* *‘On Liberty’*. With certain prescribed exceptions, an act was worthy of prohibition or censorship only if (and only to the extent) that it caused harm to others. Freedom of thought and expression were subject therefore only to limited prescribed exceptions (incitement of an angry

⁵ See, generally, Nicola Lacey, *A Life of H.L.A. Hart; The Nightmare and the Noble Dream* (2004); see esp., at pp. 256 *et seq* on the Hart-Devlin debate.

mob)⁶ and the private sphere was to be inoculated from public morality.

14. On the issue with which Wolfenden was concerned, Hart's liberalism prevailed, presaging the remarkable advance in gay rights which has since taken place. But, more generally, as it would seem, modern governments have not shied away from supporting the introduction of offences which contravene a very public morality: might it be suggested that it is merely the character of that social morality which has altered? Take, for example, incest between consenting (non-vulnerable) adults contrary to [sections 64 and 65 of the Sexual Offences Act 2003](#) (the latter actually requires consent as an element of the offence). How else could such criminalisation be explained? If the avoidance of genetic disorders is advanced as a reason, what then is the justification for the prohibition of same-sex incestuous relationships between *consenting* adults? This is emphatically not a plea to legalise incest; it is just an invitation to analyse the basis on which it is criminalised and a suggestion that that basis may be found in social morality. Or consider the use of the criminal law to combat racial or religious hatred⁷ and to increase sentences where offences are racially or religiously aggravated or where offending relates to sexual orientation.⁸ In part, no doubt, this is utilitarian, to preserve public order; but in part too, this is to use the criminal law for a moral purpose or to advance social policy in a diverse society.
15. My point is this: the enforcement of morals is still widely *but implicitly* considered a valid basis for criminalising conduct that is repugnant to all 'right-thinking people'. The difference between a pre-Wolfenden

⁶ See the observation of the famous US Supreme Court Justice, Oliver Wendell Holmes, as to falsely shouting fire in a crowded theatre and causing panic: *US v Schenk* (1919) 249 US 47.

⁷ See, the *Public Order Act 1986*, s.18 and the *Racial and Religious Hatred Act 2006*, .

⁸ See, the *Criminal Justice Act 2003*, ss. 145 and 146.

society and the present day is not so much that Hart won and Devlin lost, but that what concerns “right thinking people” changes over time.⁹ The basis for us finding certain acts fundamentally unacceptable is much the same. To an extent at least, we do prohibit that which offends our sense of decency. Plainly the limits of doing so need careful consideration.

(II) Terrorism and freedom of opinion:

16. The *Hart-Devlin* debate reminds us of the caution needed when the criminal law intrudes on the sphere of personal autonomy. Turning next to the wholly legitimate policy of combating terrorism through prosecution under the criminal law, extremist views can give rise to difficult questions as to the proper boundaries of that law.

17. For John Stuart Mill, political ideology deserved to enjoy near-absolute protection: unless the threat of imminent harm might be caused by incitement of an angry mob, speech could not and should not be criminalised. The attraction in general terms of such a view is, I would suggest manifest in a democracy – and must extend to views with which a majority would strongly disagree or find obnoxious.¹⁰ However, in the terrorism context, acute difficulty can arise when seeking to strike the right balance between the need to strike early (especially when dealing with suicide bombings where there are very real risks in simply observing the development of the plot) and not criminalising what are no more than extremist views.

⁹ This is not the occasion to debate relative as against “absolute” moral values.

¹⁰ Subject to public order considerations. See too, *Art. 10, ECHR*, though (as the Article itself makes clear) the right is not absolute.

18. The criminal law, generally speaking, does not have purely prospective effect, and only infrequently criminalises omissions. The “ordinary” criminal law is of a sufficient width to criminalise incitement¹¹, attempts and conspiracies. The boundaries, however, are relatively carefully confined. Thus, for example, an attempt requires an act “which is more than merely preparatory to the commission of the offence”¹² and there is no conspiracy without an agreement, however informally entered into¹³.
19. The Terrorism Acts passed in 2000 and 2006 have resulted in offences antecedent to any act of terror and, even taking into account the *mens rea* requirements for the commission of such offences, significantly wider than the inchoate offences already noted. The definition of “terrorism” in s.1 of the *Terrorism Act 2000* (“TA 2000”) is of great width and worldwide in its scope¹⁴. Fund-raising is caught by the *TA 2000*, ss. 15 and following. Ss. 57 and 58 of the same Act deal with the possession of articles and the collection of information for terrorist purposes. S.1 of the *Terrorism Act 2006* (“TA 2006”) criminalises statements directly or indirectly encouraging the commission of acts of terrorism, including “glorifying” the “commission or preparation (whether in the past, in the future or generally)” of acts of terror: *TA 2006*, s.1(3)(a). S.2 of the *TA 2006*, deals with the dissemination of terrorist publications. Ss. 3 and 4 of the same Act addresses the application of ss. 1 and 2 to internet activity – perhaps a matter of very considerable interest in the light of the use of the internet and social media in the terrorism context.¹⁵ S.5 of the *TA 2006* makes it an offence if a person with the relevant intent engages in any conduct “in

¹¹ Formerly a common law offence, now pursuant to ss. 44 and following of the *Serious Crime Act 2007*.

See, recently, *R v Sadique (No.2)* [2013] EWCA Crim 1150; [2014] 1 WLR 986

¹² *Criminal Attempts Act 1981*, s.1(1).

¹³ *Criminal Law Act 1977*, s.1.

¹⁴ See, *R v Gul* [2013] UKSC 64; [2013] 3 WLR 1207

¹⁵ See, *The Financial Times*, 29th March, 2014, “*Jihad by Social Media*” relating to Syria today.

preparation” for committing acts of terrorism or assisting another to commit such acts.

20. This is a formidable array of offences aimed at striking early against a potential terrorist. I do not for a moment suggest that they are unwarranted, excessive or inappropriate. Indeed, if the strategy is to deal with terrorism through the criminal law, they may be much needed. They do, however, illuminate the complexity of bringing terrorism within a framework of criminal law. As “hearts and minds” are of the greatest importance in this area, they also underline the need to differentiate carefully between aspirant terrorists and their fellow travellers on the one hand and the obnoxious but otherwise harmless holder of extremist views on the other.

(III) Drugs, public health, resources and incentives:

21. Our law is clear and for a serving Judge there is no question but that the importation, supply and possession of controlled (i.e., illicit) drugs gives rise to criminal offences and will be treated as such. But in a seminar of this nature, the problem posed by drugs also serves to highlight the limits of the criminal law. One cannot be unaware of a continual undercurrent of (respectable) debate questioning the wisdom of the “war on drugs”. Inescapably, questions arise as to the public health aspect of the misuse of drugs and the contrast between the treatment of drugs on the one hand and the taxation and regulation of alcohol on the other. There are options here – emphatically for others, not serving Judges – to consider. The outcome of such an open debate, were one to take place, incidentally, is far from self evident. What impact would legalising the usage of drugs have on public health? If restrictions were removed from the usage of drugs, so potentially increasing demand, what of the supply side? If some drugs were

legalised, what would happen at the borderline between those drugs thus lawfully supplied and consumed and the next tier (*ex hypothesi*, still illegal)? What would that do to the market? In practical terms, what would be the “harm” to which legalisation would give rise? Where do we stop protecting people from themselves? The complexity of such policy questions is readily apparent.

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