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Narrowing the Scope of Absurdly Broad Offences: the Case of Terrorist Possession

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Abstract: Many statutory offences in English criminal law appear absurdly broad in their scope. This article examines the role that narrow construction might play in limiting the scope of such offences. As a case study, the article uses the offence of possessing information of a kind likely to be useful to a terrorist, under section 58 of the Terrorism Act 2000; and the House of Lords' interpretation of this offence in the 2009 case of *R v G*. It is argued that, within a purposive approach to statutory interpretation, narrow construction can provide a legally permissible means of narrowing the scope of absurd offences. However, this approach requires courts to address difficult moral questions about the convictions and punishments that they are authorising – questions which, ultimately, they may wish to avoid.

Introduction

English criminal law is increasingly dominated by statutory offences. Interpreted literally, many of these offences are absurdly broad in their scope. For example, recent legislation has apparently criminalised misleading advertising, kissing between teenagers and failure to report your suspicious neighbours to the police.¹ This is not to mention acts capable of assisting or encouraging any of these things, which have also been criminalised – sometimes, even, where the potential assistance and encouragement are unintended.² There are many well-documented problems with such careless expansion of the criminal law – including, most

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¹ I pick these examples because they have been explained and discussed in depth elsewhere. See J Edwards, 'Coming Clean about the Criminal Law' (2011) 5 *Criminal Law and Philosophy* 315; V Tadros, 'Crimes and Security' (2008) 71 *Modern Law Review* 940. As we'll see in due course, there are plenty of further examples to choose from.

² Serious Crime Act 2007, ss 44-46. For a scathing critique of these provisions, see D Ormerod and R Fortson, 'Serious Crime Act 2007: the Part 2 Offences' [2009] *Criminal Law Review* 389.

significantly, the unjust convictions and punishments that it apparently authorises.³ In this paper, however, I examine a problem that has received relatively little attention: what are courts to do when confronted with such apparently absurd provisions?

To illustrate the problem, I'll focus on just one such provision: section 58 of the Terrorism Act 2000 ('the 2000 Act'). This section provides that:

- (1) A person commits an offence if–
 - (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
 - (b) he possesses a document or record containing information of that kind...
- (3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.

Section 58 provides an interesting illustration of the interpretive problems to which absurdly broad offences give rise. For it is one of the few such offences to have been interpreted by the UK's highest court: the House of Lords, in the 2009 case of *R v G*.⁴ In this case, the Lords were forced to confront the absurdity of a literal reading of section 58. As Lord Rodger puts it, giving the opinion of the committee:

Obviously, on one reading, section 58(1) could cover a multitude of records of everyday common or garden information, which might actually be useful to a person who was preparing to carry out an act of terrorism – e.g. a Yellow Pages directory listing outlets where he could buy fertiliser and other chemicals for making into a bomb, a timetable from which he could discover the times of trains to take him to the city where he was going to plant his bomb, or an A to Z directory of that city which he could use to find his way to the target.⁵

³ Modern legislative expansion of the substantive criminal law is the subject of a growing critical literature. A seminal example is D Husak, *Overcriminalization: the Limits of the Criminal Law* (OUP 2008). See ch 1 of this book for a good account of why the expansion of the criminal law generally gives us cause for concern.

⁴ *R v G*; *R v J* [2009] UKHL 13; [2010] 1 AC 43.

⁵ [2009] UKHL 13 at [42].

And in fact, Lord Rodger is only scratching the surface here. For as Jacqueline Hodgson and Victor Tadros write, in their commentary on *G*:

[A]lmost anything that is of general use in carrying out our day-to-day activities is also useful to terrorists. Terrorists might need clean clothes, so washing machine instructions are useful to terrorists. Terrorists might need to meet each other, so instructions about public transport are useful to terrorists. It might be advantageous to terrorists in distracting the authorities to appear to have a sense of humour, so joke books might be useful to terrorists.⁶

These passages have disturbing implications. The maximum penalty for an offence under section 58 is 10 years' imprisonment.⁷ Apparently, then, this section requires the law's subjects to have a reasonable excuse for possessing just about any useful item, on pain of going to prison for 10 years. Clearly, this result seems intolerable. But what, if anything, can courts do to avoid it?

In answering this question, we face a familiar dilemma. On the one hand, courts apparently have strong reasons to narrow the scope of provisions like section 58. By interpreting such provisions literally, courts would be authorising convictions and punishments that are seriously and obviously unjust. And ordinarily at least, we have strong reason to avoid doing serious, obvious injustice to one another. On the other hand, courts also have a legal duty to resolve cases before them by applying existing law. In criminal cases, this means deciding upon the scope of offences as the law defines them, rather than as Parliament ought to have defined them. This limitation on courts' decision-making also rests on strong moral foundations, including concerns of democracy; the rule of law; and the inferior epistemic position of courts, relative to Parliament. Hence, while there are strong reasons for courts to narrow the scope of absurdly broad offences, they may be required to exclude these reasons from their consideration.

In what follows, however, I suggest that this dilemma can partially be resolved. In some cases, courts can narrow the scope of absurdly broad offences, without breaching their duties to apply the law. Specifically, I suggest that such cases are possible within the (currently

⁶ J Hodgson and V Tadros, 'How to Make a Terrorist out of Nothing' (2009) 72 *Modern Law Review* 984, 985.

⁷ Terrorism Act 2000 s 58(4).

dominant) purposive approach to statutory interpretation.⁸ On this approach, courts must interpret statutes in a way that achieves the purposes that Parliament meant them to achieve. Ordinarily, the plain meaning of a provision will be the best guide to its intended results. But where the plain meaning leads to results that are seriously and obviously unjust, courts may doubt that Parliament intended those results. In such cases, courts may apply a version of the ‘golden rule’ of interpretation: they may narrow the scope of the relevant offence, in order to avoid the unintended injustice. As we’ll see, this interpretive approach has its problems – especially in cases where Parliament’s intention is hard to discern. But it also provides an attractive way for courts to correct the apparent injustices of absurdly broad criminal offences. To see how, let’s begin by examining the Lords’ decision in *G*.

Narrowing the Scope of Section 58: *R v G*

Lord Rodger’s opinion in *G* is best seen as an application of the golden rule, in the sense just outlined. Although he is not explicit about his choice of interpretive approach, his ambition is clearly to narrow the apparent scope of section 58. As we saw, Lord Rodger recognises that a literal reading of this section renders it absurdly broad. In his view, it follows that Parliament cannot have intended such a reading.⁹ Rather, Parliament’s intention was:

...to catch the possession of information which would typically be of use to terrorists, as opposed to ordinary members of the population. So, to fall within the section, the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act of terrorism. Because that is its nature, section 58(3) requires someone who collects, records or possesses the information to show that he had a reasonable excuse for doing so. The information is such as ‘calls for an explanation’, as Lord Phillips of Worth Matravers LCJ, said in *R v K* [2008] 2 WLR 1026... para 14. Of course, it is not necessary that the information should be useful only to a person committing etc an act of terrorism. For instance, information on where to

⁸ See M Zander, *The Law-Making Process*, 7th edn. (Hart 2015) ch 3.

⁹ [2009] UKHL 13 at [42].

obtain explosives is capable of falling within section 58(1), even though an ordinary crook planning a bank robbery might also find it useful.¹⁰

On this interpretation, the scope of section 58 remains unclear. One can see the basic idea: section 58 was meant to catch information that's useful *specifically* to would-be terrorists, rather than ordinary people. But the above quotation suggests (at least) two different ways of unpacking this idea. One relates to how the relevant information *might be used*: it must 'typically be of use to terrorists, as opposed to ordinary members of the population'. The other relates to the purposes for which the information was *designed*: it must 'be designed to provide practical assistance to' would-be terrorists. Since Lord Rodger treats these meanings as equivalent (when they clearly aren't), it's hard to be sure which he intended. For now, though, let's set this uncertainty aside, and focus instead on how Lord Rodger arrived at his reading of section 58. What evidence does he draw upon? And how does it support his conclusions about the offence's intended scope?

Again, Lord Rodger doesn't answer these questions explicitly. He simply points to a number of sources that courts typically accept as indicators of Parliamentary intent.¹¹ This approach might seem unsatisfactory to some people. Unless we know what legislative intent consists in – or indeed, whether it exists at all – it's hard to know what would count as evidence of it.¹² However, since Lord Rodger's opinion is hardly unusual in declining to tackle this issue, we may fairly leave it aside here. For argument's sake, let's simply assume that the sources usually relied upon for claims about Parliament's intention are valid as such. Which of these sources does Lord Rodger emphasise?

The main source that Lord Rodger draws upon in interpreting section 58 is its statutory context. This consists partly in the structure of the section itself. As we've just seen, section 58 contains two principal elements: the offence of possession in section 58(1), and the defence of reasonable excuse in section 58(3). From Parliament's provision of this defence, Lord Rodger argues, we may infer something about its intentions in relation to the offence: the information targeted must be such that we may demand an excuse for possessing it. This interpretation gains plausibility when we place section 58 in its wider statutory context. Lord

¹⁰ [2009] UKHL 13 at [49].

¹¹ On which, see Zander (n 8).

¹² For a recent discussion, see R Ekins, *The Nature of Legislative Intent* (OUP 2012).

Rodger concentrates especially on comparing it with its neighbouring provision, section 57. Section 57 provides that:

(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

Section 57 creates an offence of *preparation*: it targets those who are actually involved in the early stages of terrorist plots. Despite the unusual structure of this section,¹³ its explicit focus on terrorist purpose is enough to make this clear. Previously, the Court of Appeal had taken section 58 to have a similar aim to this provision. It had therefore held that lack of a terrorist purpose was a ‘reasonable excuse’ for the purposes of section 58(3).¹⁴ In *G*, however, Lord Rodger rejects this interpretation. For him, the differing language of the two sections suggests that they have different aims.¹⁵ Because section 57 is explicitly an offence of preparation, section 58 should *not* be seen as a disguised example of such an offence. Rather, it should be seen as an offence of *mere possession*: the targeted ‘mischief’ is the information itself, rather than the purposes of those who possess it. In turn, we should not count lack of a terrorist purpose, in and of itself, as a ‘reasonable excuse’ for possessing such information.¹⁶

To support this interpretation, Lord Rodger also draws on sources beyond the 2000 Act. In particular, he argues that his interpretation is consistent with other usages of the term ‘reasonable excuse’. The Court of Appeal’s approach – to interpret ‘reasonable excuse’ as lack of a terrorist purpose – is inconsistent with these other usages, in two ways. First, it ‘imposes

¹³ The structure is unusual in the role that it gives to the relevant inculpatory intention. Normally, one would expect this intention to be part of the required *mens rea* for the offence. Instead, however, lack of such an intention is made a defence under section 57(2). For discussion and criticism of this way of structuring offences, see e.g. RA Duff, ‘Perversions and Subversions of Criminal Law’ in RA Duff et al (eds), *The Boundaries of the Criminal Law* (OUP 2010) 93-97; V Tadros and S Tierney, ‘The Presumption of Innocence and the Human Rights Act’ (2004) 67 *Modern Law Review* 402, 406-416.

¹⁴ *R v K* [2008] EWCA Crim 185; [2008] QB 827. The Court of Appeal’s approach to section 58 is discussed further in the next section.

¹⁵ [2009] UKHL 13 at [73].

¹⁶ [2009] UKHL 13 at [74]-[75].

on [the term “reasonable excuse”] a construction which is utterly different from the construction which has been put on the equivalent defence in other statutes.’¹⁷ Second, it is inconsistent with the ordinary meaning of that term. Lord Rodger complains that the Court of Appeal’s approach ‘robs the adjective “reasonable” in section 58(3) of all substance’.¹⁸ If the Court of Appeal were correct, then a criminal purpose other than a terrorist purpose would constitute a ‘reasonable excuse’ for the purposes of section 58. For example, one could excuse one’s possession of bomb-making instructions on the basis that one planned to use them in a bank robbery. Again, this is taken as a sign that Parliament did not intend such an interpretation.¹⁹

Finally, Lord Rodger also supports his reading with consequentialist arguments. In particular, he argues that police and prosecutors can be trusted to remedy any over-inclusiveness that might remain on his interpretation of the offence. Here, Lord Rodger is responding to objections raised by counsel for the defendants. They had argued that terrorism legislation cannot have been intended to catch non-terrorists, and that to use it in this way could be counter-productive. Lord Rodger seems to concede – at least for the sake of argument – that these are valid objections. But he responds that they lack force in practice. Prosecutors are ‘very familiar with the need to exercise a wise discretion’ in their choice of charges.²⁰ And this wisdom is reinforced in the context of section 58, where prosecutions require the consent of the Director of Public Prosecutions.²¹ Given this, the chances of this section being used against people other than suspected terrorists are ‘slim indeed’.²² The risks of interpreting it as an offence of mere possession are therefore minimal.

Could the Scope of Section 58 Have Been Narrowed Further?

Is this interpretation of section 58 as narrow as we could have hoped for? Or could the Lords have interpreted it in a still narrower way? I believe that a narrower interpretation was

¹⁷ [2009] UKHL 13 at [76]. Lord Rodger fails to cite any cases in support of this assertion, which is unsurprising: courts have not interpreted ‘reasonable excuse’ in any consistent way. See CJ Newman and B Middleton, ‘Any Excuse for Certainty: English Perspectives on the Defence of “Reasonable Excuse”’ (2010) 74 *Journal of Criminal Law* 472.

¹⁸ [2009] UKHL 13 at [77].

¹⁹ [2009] UKHL 13 at [77].

²⁰ [2009] UKHL 13 at [80].

²¹ Terrorism Act 2000 s 117.

²² [2009] UKHL 13 at [80].

possible. For one thing, Lord Rodger's arguments are not decisive for the view that section 58 targets mere possession, rather than the early stages of terrorist preparation. Given the available evidence, the alternative interpretation is equally plausible. As the Court of Appeal had held in an earlier case:

The natural meaning of [section 58] requires that a document or record that infringes it must contain information of such a nature as to raise a reasonable suspicion that it is intended to be used to assist in the preparation or commission of an act of terrorism. It must be information that calls for an explanation. Thus the section places on the person possessing it the obligation to provide a reasonable excuse. Extrinsic evidence may be adduced to explain the nature of the information... What is not legitimate under section 58 is to seek to demonstrate, by reference to extrinsic evidence, that a document, innocuous on its face, is intended to be used for the purpose of committing or preparing a terrorist act.²³

Notice that this interpretation accommodates the differing language of sections 57 and 58. According to the Court of Appeal, the two provisions have the same purpose: to catch would-be terrorists in the early stages of their preparations. But they are nevertheless distinct. In fact, the distinction is analogous to that proposed by the Lords in *G*: whereas section 57 relates to the circumstances of possession, section 58 relates to the character of the material possessed. Put differently: section 57 applies where one is found in possession of an article, in incriminating circumstances; section 58 applies where the article is incriminating by nature. In both cases, though, what's 'incriminating' about the possession of the article is the suspicion of terrorist purpose to which it gives rise.

Other evidence also supports the view that Parliament intended this narrower reading of section 58. Indeed, Lord Rodger himself sometimes lapses into this view in his judgment in *G*. As we just saw, he seems to concede that this section is undesirably over-inclusive, to the extent that it catches people other than would-be terrorists. And earlier in his judgment, he describes the purpose of the section thus:

²³ *R v K* [2008] EWCA Crim 185 at [14].

Parliament must have proceeded on the view that, in fighting something as dangerous and insidious as acts of terrorism, the law was justified in intervening to prevent these steps being taken, even if events were at an early stage or if the defendant's actual intention could not be established.²⁴

In support of his interpretation, Lord Rodger quotes Lord Lloyd's report on counter-terrorism legislation. This report recommended the retention of offences like sections 57 and 58.²⁵ If anything, however, the report actually supports the Court of Appeal's view. For Lord Lloyd, early intervention was again the justifying aim of the section 57 offence: this offence allows the police to take action where they find a person in possession of otherwise innocent articles, in incriminating circumstances.²⁶ In the single paragraph of his report that addresses the section 58 offence, he says similar things:

Its purpose is similar to that of the offence of possession described above [i.e. the section 57 offence] and the case in favour of retaining the power is very much the same. It is designed to catch the possession of targeting lists and similar information, which terrorists are known to collect and use.²⁷

One may make similar observations about the history of the 2000 Act generally. For example, take the consultation paper that preceded that Act. Again, this paper devotes just a single paragraph to the proposed section 58 offence. But this paragraph broadly approves Lord Lloyd's recommendation. The offence 'is designed principally to catch those compiling or possessing targeting information', in order to 'help the police and the security forces to disrupt... terrorist attacks'.²⁸ This again suggests a narrower interpretation of section 58 than Lord Rodger endorsed.

The wider statutory context of section 58 provides further reasons to endorse the Court of Appeal's view. Most importantly, the section 58 offence is classified as a 'terrorism

²⁴ [2009] UKHL 13 at [49].

²⁵ Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, vol 1 (Cm 3420, 1996).

²⁶ *Ibid*, paras 14.4-14.5.

²⁷ *Ibid*, para 14.8.

²⁸ *Legislation against Terrorism: a Consultation Paper* (Cm 4178, 1998) para 12.14.

offence'.²⁹ This means that those convicted of this offence are subject to exceptional requirements, including requirements to notify the police about their residence and travel arrangements.³⁰ Such restrictions are difficult to explain if they can apply to those who are not proved, or even suspected, to be would-be terrorists. Besides this, Lord Rodger's reading of section 58 is difficult to reconcile with other offences that Parliament has since created. For example, consider the offence of disseminating terrorist publications, under section 2 of the Terrorism Act 2006. For the purposes of this offence, 'terrorist publications' include any publication that is useful to would-be terrorists.³¹ The offence also catches the possession of such publications, 'with a view to' disseminating them.³² If Lord Rodger's reading of section 58 is correct, then arguably, it would have been unnecessary for Parliament to enact a further offence with such a broad scope.

Despite all this, you might still feel compelled to reject the narrower, purpose-based interpretation of section 58. Perhaps you're persuaded by Lord Rodger's central point: that if Parliament had intended sections 57 and 58 to have similar functions, it wouldn't have enacted two separate provisions using such different language. Even if we accept this view, however, the Lords' interpretation of section 58 remains needlessly broad. Narrower readings of this section are available, that are nevertheless consistent with its creating an offence of mere possession.

To illustrate this point, consider first the *actus reus* of the offence. As we saw, this remains unclear following Lord Rodger's remarks. On their most plausible construction, however, these remarks suggest the following. Material falls within section 58 if, first, it is useful to would-be terrorists; and second, it is *not* useful to 'ordinary members of the population'. On this interpretation, the offence still catches a disturbingly wide array of information. For example, it seems to catch detailed plans of utilities or public transport networks, and advanced information on chemistry or computing.³³ Even by Lord Rodger's own lights, these results seem unacceptable. For in his view, remember, the information caught by section 58 must 'call for an explanation': we should be justified in demanding a

²⁹ Counter-Terrorism Act 2008 s 41(1)(a).

³⁰ Counter-Terrorism Act 2008 ss 47-52. Failure to comply with these requirements is a criminal offence under s 54 of this Act.

³¹ Terrorism Act 2006 s 2(3)(b).

³² Terrorism Act 2006 s 2(2)(f).

³³ Remember, according to their Lordships, the fact that material has uses other than terrorist uses does not exclude it from the scope of section 58. See the quotation at n 10 above.

reasonable excuse for its possession. Lord Rodger's interpretation thus implies that specialist information requires explanation, if would-be terrorists might also find it useful. But surely, we cannot seriously demand – Parliament cannot seriously have been demanding – that citizens answer to a criminal court for their unusual hobbies or interests.

These concerns are aggravated by Lord Rodger's view of what counts as a reasonable excuse for the purposes of section 58(3). Firstly, of course, he is clear that the absence of a terrorist purpose is insufficient for this defence. Moreover, though, he suggests that any mere attempt to 'explain away' one's possession is insufficient. At times, he even implies that 'reasonable excuse' actually means *justification*: to claim the defence, defendants must provide good reasons for their possession of the relevant material.³⁴ Again, it's unclear whether Lord Rodger really meant to make such a strong claim.³⁵ But he clearly did mean to exclude at least some innocent purposes from the scope of the defence. For example, in his view, curiosity and personal amusement don't necessarily count as reasonable excuses.³⁶ Such a restrictive interpretation of the defence raises further concerns about the range of material falling within the *actus reus*. As we just saw, it's doubtful whether we may demand any kind of explanation for possessing much of this material. If 'explanation' really means 'good reason', then this doubt is only strengthened.

To address these doubts, Lord Rodger could have asked: why might the mere possession of certain articles warrant criminal liability? Whilst any answer to this question will be controversial,³⁷ we can imagine answers that are at least plausible. If the increased

³⁴ See e.g. [2009] UKHL 13 at [79]. Here Lord Rodger insists that an excuse must be 'objectively reasonable', and that lack of a terrorist purpose, although a perfectly good 'explanation', is not reasonable in this sense. The disposal of the *G* case itself also supports this reading: the defendant's paranoid schizophrenia was held totally irrelevant to whether his actions were reasonable (at [88]).

³⁵ See e.g. [2009] UKHL 13 at [81]. Lord Rodger is deliberately vague here, saying only that whether an excuse is reasonable will depend on 'the particular facts and circumstances of the individual case'. Relevant circumstances might include 'the defendant's age, his background, his associates, his way of life, the precise circumstances in which he collected or recorded the information, and the length of time for which he possessed it'. This remark is hard to reconcile with the court's disposal of *G*'s case. How can one's age, background, associates and way of life do any more to make one's actions 'objectively reasonable' than mental illness can?

³⁶ [2009] UKHL 13 at [83]-[84].

³⁷ The controversy is due to the following problem. Those who possess dangerous articles don't necessarily threaten the harms associated with those articles. So how could it be just to convict and punish people merely for possessing them? For criticism of mere possession offences along these lines, see e.g. A Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) 5 *Criminal Law and Philosophy* 237; D Husak, 'Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction' (2004) 23 *Law and Philosophy* 437; MD Dubber, 'The Possession Paradigm' in RA Duff and SP Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005).

availability of a given article would significantly decrease our security from terrorist threats; and if our liberty would not significantly be damaged by prohibiting possession of that article; then legislators might be justified in imposing such a prohibition.³⁸ This kind of rationale suggests several limitations that could be placed on the scope of section 58. It suggests that, to fall within the offence, material should have as few uses as possible besides terrorist uses. And it suggests that readily available information should be excluded: prohibiting the possession of such information will do little to improve our security from terrorist threats.³⁹ But whatever the merits of these suggestions, the point remains that *any* plausible rationale for the section 58 offence will suggest limitations on its scope. If we are struggling to identify such limitations, then failure to identify a plausible rationale might well be to blame.

The Broader Outlook for Narrow Construction

What lessons can we learn from Lord Rodger's opinion in *G*? Can we learn anything about narrow construction more generally, as a strategy for limiting the scope of absurdly broad offences? First and foremost, it's notable that Lord Rodger treats this interpretive approach as legally permissible. A literal reading of section 58 yields manifestly unjust results; thus, the court was entitled to find that the intended scope of this offence is narrower than its apparent scope. Although Lord Rodger doesn't acknowledge this, this rule of interpretation has longstanding precedent. For example:

The rule by which we are to be guided in construing acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done.⁴⁰

³⁸ This kind of justification parallels that which is sometimes offered for offences of weapon possession. See e.g. A Cornford, 'Preventive Criminalization' (2015) 18 *New Criminal Law Review* 1; A Ripstein, 'Prohibition and Preemption' (1999) 5 *Legal Theory* 235, 255-260; Tadros, 'Crimes and Security' (n 1) 943-946.

³⁹ These suggestions are drawn from Hodgson and Tadros, 'How to Make a Terrorist out of Nothing' (n 6) 989.

⁴⁰ *Perry v Skinner* (1837) 2 M&W 471, 476, *per Parke B.*

The court will not ascribe to Parliament an unjust intention, but the court cannot override Parliament and its statutes. If the court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice.⁴¹

If this is correct, then courts are free to engage in the type of narrow construction examined here – so long, at least, as the resulting interpretation actually reflects Parliament’s intention.⁴² The dilemma highlighted at the outset – between doing serious injustice and refusing to apply to the law – can sometimes thus be resolved.

Second, however, the decision in *G* also highlights a complication here: Parliament’s intention as to the scope of offences can be unclear. Sometimes, different sources will support different accounts of Parliament’s intention. For instance, reading the whole statute might lead us to prefer the possession-based reading of section 58; examining its history might lead us to prefer the preparatory reading. In such cases, no single interpretation of the provision is legally required. To decide which of the competing interpretations to make legally authoritative, courts must therefore look beyond the statute. Like all such law-creating acts, these decisions must be guided by moral concerns – which in criminal law, include the need to avoid unjust convictions and punishments. Thus, where Parliament’s intention as to the scope of an offence is unclear, courts cannot avoid the question: to what extent do the competing interpretations of the offence authorise such injustice?⁴³

The need to confront this question in cases of this kind suggests a third lesson: narrow construction can be a difficult enterprise for courts. Judges are unlikely to want to tackle such moral questions openly; thus, the task of narrow construction is easily left unfinished. This is especially likely in novel statutory contexts, such as terrorism, where there may be limited

⁴¹ *In re Maryon-Wilson's Will Trusts* [1968] Ch 268, 282, *per* Ungood-Thomas J.

⁴² Of course, there are cases of narrow construction in which this condition isn’t satisfied – and thus, which really should be seen as refusals to apply the law. Whether such fictitious ‘interpretation’ can ever be a legitimate means of avoiding unjust results in criminal cases is a question for another occasion.

⁴³ The topic of this paragraph – judicial decision-making in cases that are under-determined by the applicable sources – is controversial. I assume here that courts must look beyond the law in order to decide some such cases: see e.g. HLA Hart, *The Concept of Law* (OUP 1961) ch 7.1; J Raz, *The Authority of Law* (OUP 1979) ch 4. But this assumption has been criticised: most famously, in R Dworkin, *Law's Empire* (Harvard University Press 1986). Arguably, however, this dispute is academic in the present context. Even if courts must stay within the law in deciding such cases, the justness of conviction and punishment seem likely to be among the applicable legal principles.

resources within the law to justify courts' choice of interpretation. Ultimately, this is the biggest failing of Lord Rodger's judgment in *G*. Despite his ambition to narrow the scope of section 58, he never identifies clearly the type of wrongdoing that (in his view) Parliament meant the offence to target. Thus, it's no surprise that he fails to provide a satisfactory interpretation of either the *actus reus* of the offence, or the reasonable excuse defence. The result is that section 58 remains both vague and worryingly broad in its scope.

These difficulties tell against the view that courts *should always* adopt narrow construction when confronted with absurdly broad offences. In some cases, this interpretive approach is both legally permissible and *pro tanto* desirable; but even in these cases, judges may wish to avoid the open creativity and moral reflection that narrow construction can demand. Especially when Parliament leaves few clues as to its intention, such creative interpretation can raise similar concerns to refusal to apply the law. Indeed, drawing a bright line between these two things can be difficult in practice. Interpretations can be more or less plausible as understandings of Parliament's intention – and thus, can resemble refusals to apply the law to a greater or lesser degree. As we saw at the outset, judges' duties to apply the law also rest on strong moral foundations. Thus, despite the merits of narrow construction, judicial caution about it is understandable.

Still, where the apparent results of an offence are so obviously unjust, one might yet argue for a *presumption* in favour of narrow construction. For although concerns about judicial creativity are genuine, they should not be overstated. On the type of narrow construction examined here, ascertaining Parliament's intention remains the priority: the goal is to avoid injustices that Parliament didn't mean to authorise. Given the scale of those injustices in the context of absurdly broad offences, narrow construction seems likely to be justified in that context.

Recent remarks from the Supreme Court suggest some support for this view. In a 2013 case, for example, the Court considered a provision that, on a literal reading, created a strict liability homicide offence.⁴⁴ Delivering the judgment of the Court in that case, Lords Hughes and Toulson said:

⁴⁴ *R v Hughes* [2013] UKSC 56; [2013] 1 WLR 2461. The offence at issue was causing death by driving whilst unlicensed and/or uninsured under s 3ZB of the Road Traffic Act 1988. See also the Court's more recent application of the same reasoning in *R v Taylor* [2016] UKSC 5; [2016] 1 WLR 500.

This is a statute creating a penal provision, and one of very considerable severity... To label a person a criminal killer of another is of the greatest gravity. The defendant is at risk of imprisonment for a substantial term. Even if... a sentence of imprisonment were not to follow, the defendant would be left with a lifelong conviction for homicide which would require disclosure in the multiple situations in which one's history must be volunteered, such as the obtaining of employment, or of insurance of any kind. Nor should the personal burden or the public obloquy be underestimated; to carry the stigma of criminal conviction for killing someone else... is no small thing. A penal statute falls to be construed with a degree of strictness in favour of the accused. It is undoubtedly open to Parliament to legislate to create a harsh offence or penalty, just as it is open to it to take away fundamental rights, but it is not to be assumed to have done so unless that interpretation of its statute is compelled, and compelled by the language of the statute itself.⁴⁵

The Supreme Court speaks here of 'strictness' in construction. But really, it was engaged in narrow construction: its interpretation of the relevant offence was narrower in scope than a literal interpretation of that offence. Thus, one might read the Court here as endorsing the following principle: courts should avoid 'harsh' readings of criminal offences, unless and until they have sufficient evidence that Parliament intended such a reading. If this is correct, then narrow construction has an important role to play in limiting the scope of unjust criminal laws more generally. For not only can this approach be useful and permissible; in the absence of clear Parliamentary intention, it may be legally required.

When Parliament Intends Absurdity: the Limits of Narrow Construction

At this point, however, we must confront the limits of narrow construction as a means of dealing with absurdly broad offences. Narrow construction could play this role in relation to section 58, because the intended scope of this provision was plausibly narrower than its apparent scope. But it cannot play this role where Parliament clearly meant an offence to be as broad as it appears. In such cases, courts can avoid authorising unjust convictions only by

⁴⁵ [2013] UKSC 56 at [26].

refusing to apply the law; and they can apply the law only at the cost of authorising unjust convictions.

Unfortunately, such cases do exist. In fact, examples can be found in the case law on terrorism legislation. For instance, take the case of *R v Gul*, decided by the Supreme Court in 2013.⁴⁶ This case concerned the definition of ‘terrorism’ for the purposes of terrorism legislation.⁴⁷ Essentially, the issue was whether this definition includes actions directed at any government, regardless of legitimacy or democratic credentials. If so, then justified freedom-fighters are (legally speaking) terrorists – even when there is official support for their cause. In the Court’s view, Parliament clearly intended that the definition of terrorism include all such actions. Thus, offences of (for example) encouraging terrorism catch the encouragement of justified freedom-fighting. This result seems wrong: convicting those who encourage justified freedom-fighting as terrorist offenders seems unjust. Yet the Court could have avoided it only by refusing to apply the law. Thus, the best it could do was to apply the law reluctantly, whilst urging Parliament to reconsider the disputed definition.⁴⁸

Moreover, cases like this will continue to occur. Just recently, for example, Parliament enacted the Psychoactive Substances Act 2016 – one of the new Conservative Government’s first major pieces of criminal legislation. This Act sets new standards for criminal legislative absurdity. It makes it an offence to produce, supply and possess with intent to supply any ‘psychoactive substance’⁴⁹ – the definition of which catches everything from flowers to paint to oxygen.⁵⁰ Coffee, alcohol, tobacco and sugar avoid inclusion only because of a long list of exceptions, tucked away in a schedule to the Act.⁵¹ It is doubtful whether criminal courts will be able to narrow the scope of this definition without resorting to fiction. For arguably, the definition is designed precisely to evade the difficult questions that were raised about the Act’s rationale: as one commentator puts it, the Act ‘is not supposed to make sense’.⁵²

⁴⁶ *R v Gul* [2013] UKSC 64; [2014] AC 1260.

⁴⁷ Found in s 1 of the 2000 Act.

⁴⁸ [2013] UKSC 64 at [59]-[64].

⁴⁹ Psychoactive Substances Act 2016 ss 4, 5 and 7.

⁵⁰ A psychoactive substance is one which ‘is capable of producing a psychoactive effect’ if consumed. A substance produces such an effect if ‘by stimulating or depressing the person’s central nervous system, it affects the person’s mental functioning or emotional state’: Psychoactive Substances Act 2016 s 2. So if I smell something and it makes me happy, it is a psychoactive substance.

⁵¹ Psychoactive Substances Act 2016 sch 1.

⁵² Ian Dunt, ‘Home Office drug advisers try to clear up Theresa May’s mess’, <<http://www.politics.co.uk/blogs/2015/08/17/home-office-drug-advisers-try-to-clear-up-theresa-may-s-mess>>, accessed 19 April 2016.

Worryingly, the same could now be argued of many other criminal statutes too. Such legislation puts criminal courts in a position that is not merely difficult, but impossible.