Drugs and Criminalisation in Britain, c.1815–c.2000

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Abstract

This thesis is a systematic analysis of the relationship between British drug laws and conceptions of legitimate criminalisation from c.1815 to c.2000. It explores the extent to which historical understandings of what and who can be treated as criminal or requiring regulation, how this should be done, and how this can be justified, were in synergy or tension with the contemporaneous legislation variously regulating, by way of punitive sanctions, substances used for their psychoactive effects.

Part One examines the period from the early nineteenth century to around the outbreak of the First World War, tracing the origins of drug criminalisation to Victorian concerns about criminal and accidental poisonings and pharmaceutical regulation, and analysing these against the growth of the Victorian legislative state. Also discussed here are statutes targeting 'habitual drunkards' and 'inebriates', and the opium suppression movement of the turn of the century. Part Two explores the period from the First World War to c.1960, looking at how the transnational aspects of drug control were constructed alongside domestic controls. These changes are considered through the lens of broader contemporaneous criminal laws and debates about criminalisation. Finally, Part Three focuses on the period c.1960 to the turn of the century, which is when the present system of British drug control was created and (re)shaped. Points of discussion include the enactment of the Misuse of Drugs Act 1971 and the various end-of-century drug policy developments, which are situated against contemporaneous developments in criminal law theory, changes to the processes of law reform, and wider criminal justice policies.

Across the whole timeframe considered, there are clear examples of both synergy and tension between drug legislation and contemporaneous conceptions of legitimate criminalisation. More often than not, the findings are more nuanced, with competing justificatory rationales pulling in different directions. Notwithstanding this complexity, it is argued that drug laws have been more central to the development of the criminal law than has been recognised, and are a window into understanding broader patterns and processes of criminalisation and the substantive criminal law.

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In the latter stages of my PhD research I took up a lectureship at the University of the West of Scotland. I am fortunate to have been given so much time and moral support by my colleagues at UWS to complete this project alongside my new role.

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Declaration

This thesis is the result of my own work and has not been submitted for any other degree at any institution. Where information or ideas have been obtained from any source, that source is acknowledged in the footnotes and/or text.

Nicholas Burgess

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Abbreviations

ACMD	Advisory Council on the Misuse of Drugs
AIDS	Acquired Immune Deficiency Syndrome
ALRA	Abortion Law Reform Association
ASBO	Antisocial Behaviour Order
CDPA	Controlled Drugs (Penalties) Act 1985
CFI	Central Funding Initiative
CJA	Criminal Justice Act
CJPOA	Criminal Justice and Public Order Act 1994
CJSA	Criminal Justice (Scotland) Act 1987
CPS	Crown Prosecution Service
DDA	Dangerous Drugs Act
DHSS	Department of Health and Social Security
DORA	Defence of the Realm Act 1914
DPMA	Drugs (Prevention of Misuse) Act 1964
DPP	Director of Public Prosecutions
DTOA	Drug Trafficking Offences Act 1986
DTTO	Drug Treatment and Testing Order
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
GMC	General Medical Council
HIV	Human Immunodeficiency Virus
HLRS	Homosexual Law Reform Society
ISSA	Intoxicating Substances (Supply) Act 1985
LoN	League of Nations
MDA	Misuse of Drugs Act 1971
OAC	Opium Advisory Committee
PACE	Police and Criminal Evidence Act 1984
PCOB	Permanent Central Opium Board
RPS	Royal Pharmaceutical Society
SSI	Society for the Study of Inebriety
WW1	First World War

Introduction

In England in 1826, pickpocketing a shilling was a capital offence,[1] while the purchase of opium (today a Class A controlled drug)[2] from the local grocer was a child's errand.[3] 42 years later, public hangings were abolished[4] and the first restrictions backed by punitive sanctions on the sale of opium were introduced.[5] In 1898, 'inebriates' who had committed an indictable offence while intoxicated could be detained in a reformatory for three years,[6] but cocaine users and those who injected heroin could purchase and use those substances with almost no regulation. By 1923, the maximum custodial sentence for unauthorised possession of opium was 10 years' penal servitude,[7] whereas until 1968 the maximum sentence for unauthorised simple possession of firearms was just three months.[8] 1967 saw the partial decriminalisation of homosexuality and the enactment of the current law on abortion;[9] four years later the Misuse of Drugs Act 1971 (MDA) – still in force today – made cultivation of cannabis punishable by 14 years' imprisonment.[10] The offence of blasphemy was formally abolished by statute in England in 2008 and in Scotland in 2021.[11] In 2016, it was made an offence to supply 'any substance … which is capable of producing a psychoactive effect in a person who consumes it' (subject to limited exceptions such as alcohol, nicotine, caffeine, and substances controlled by the MDA), with a potential sentence of seven years' custody.[12]

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[1] John Hostettler, *The Politics of Criminal Law: Reform in the Nineteenth Century* (1992) 3; 'The property value-based distinction between (capital) "grand" and … "petty" larceny was abolished [by the Larceny Act 1827, s.2]': Keith Smith, 'Protecting Property from Dishonesty and Harm: Larceny and Malicious Damage' in William Cornish and others (eds), *The Oxford History of the Laws of England: 1820–1914 Fields of Development,* vol 8 (2010) 374.

[2] Misuse of Drugs Act 1971, sch.2.

[3] Frank Dikötter, Lars Laamann and Xun Zhou, 'China, British Imperialism and the Myth of the "Opium Plague"' in James H Mills and Patricia Barton (eds), *Drugs and Empires: Essays in Modern Imperialism and Intoxication, c.1500–c.1930* (2007) 28.

[4] Capital Punishment Amendment Act 1868, s.2.

[5] Pharmacy Act 1868.

[6] Inebriates Act 1898.

[7] Dangerous Drugs and Poisons (Amendment) Act 1923, s.2.

[8] Firearms Act 1937, s.1; Firearms Act 1968, sch.7.

[9] Sexual Offences Act 1967, s.1; Abortion Act 1967.

[10] Misuse of Drugs Act 1971, s.6, sch.4.

[11] Criminal Justice and Immigration Act 2008, s.79; Hate Crime and Public Order (Scotland) Act 2021, s.16.

[12] Psychoactive Substances Act 2016, ss.2–3, 5, 10.

If these crude comparisons show anything, it is that over the past 200 years there have been remarkable changes both to the law's approach to controlling psychoactive drugs, and to our conceptions of what kinds of conduct ought to be subject to the criminal sanction, and to what extent. How can we make sense of this? Are specific examples of drug legislation over the past two centuries a product of their time, fitting neatly within the contemporaneous understandings, aims and/or limits of the criminal law (however those may be measured or defined); or are there instances where the criminalisation of psychoactive substances has been an outlier, standing in contrast to or pulling against the criminal law's conceptual direction of travel? If the development of drug laws and the development of the wider criminal law could be ordered into something resembling parallel, ladder-like spectrums, would the rungs of the central ladder sit horizontally or would they overlap, and if so, where?[13] Moreover, can such a study tell us something more, at a higher level, about the role and influence of drug laws in shaping the criminal law and processes of criminalisation, and vice versa?

This thesis is a systematic analysis of the relationship between British drug laws and conceptions of legitimate criminalisation from c.1815–c.2000. To set the parameters of this thesis, i.e., to ensure suitable breath and narrowness of scope, the following definitions apply. 'British' relates to the territorial UK, including the separate legal systems of its constituent countries. Discussion of supra-national law-making to which Britain was/is subject, and of law in the Crown Colonies, is included only insofar as it is relevant to understanding and analysing domestic legislation. 'Drugs' are substances used for their psychoactive effects and/or which are today 'controlled' drugs under the MDA; discussion of medicines[14] and alcohol is generally outwith the scope of this thesis.

'Conceptions of legitimate criminalisation' is defined in this thesis as the understandings of what and who can be treated as criminal or requiring regulation, how this should be done, and how this can be justified.[15] There are several dimensions to this, i.e., a substantive dimension ('what and who can be treated as criminal or requiring regulation'); a substantive

[13] Metaphor borrowed from: Nigel Walker, *Why Punish?* (1991) 102; Anthony Bottoms, 'Five Puzzles in von Hirsch's Theory of Punishment' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (1998).

[14] e.g., as defined in the Human Medicines Regulations 2012, SI 2012/1916, reg.2 which are not also illicit, controlled drugs.

[15] To paraphrase Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 1. This paraphrase is also used in the abstract to this thesis.

and/or procedural dimension ('how this should be done'); and a normative dimension ('how this can be justified'). This broad scope is intended to capture the different understandings of 'criminalisation' across time which may be relevant to my analysis, including 'criminalisation as a pattern or outcome … i.e., what has been or should be criminalised' through 'legislation, judicial decisions, international treaties [and their] actual implementation'; and 'criminalisation as a social practice … i.e., who criminalises, or should criminalise [and] on what assumptions and according to what processes and principles'.[16]

Drug laws can give rise to some confusion regarding the relationship between criminal law and regulation, mirroring a broader confusion about the relation between the two:

> [T]he relationship between regulation and criminal justice is characterized by blurred and uncertain boundaries. The distinction, for example, between conduct that is controlled by regulatory measures and that which is subject to the criminal law, often appears unclear or even arbitrary.[17]

However, it is precisely because of this lack of clarity and/or arbitrariness that the term 'regulation' has been included in this thesis' definition of criminalisation. Despite the broad scope just set out, 'criminalisation' arguably cannot capture certain aspects which are relevant to this thesis' discussion. These may be relevant because they provide essential context, are based on historical distinctions or understandings, and/or are a useful benchmark or comparator. They include, for example: the early nineteenth century guild-based system of pharmaceutical regulation which later gave way to criminal drug laws;[18] claimed theoretical distinctions between 'regulatory' and 'real' offences;[19] clinical or other interventions which complemented criminal law-based measures;[20] drug addict

[16] Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72(6) *Modern Law Review* 936, 943.
[17] Graham Smith, Toby Seddon and Hannah Quirk, 'Regulation and Criminal Justice: Exploring the Connections and Disconnections' in Hannah Quirk, Toby Seddon and Graham Smith (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (2010) 4.
[18] Text to nn.21ff in ch.1.
[19] Text to nn.102ff in ch.4.
[20] Text to nn.156ff in ch.4.

surveillance policies;[21] and the enactment of ancillary measures regarding drug trafficking asset confiscation.[22] Hence, 'regulation' is employed in a broad, descriptive sense to capture a range of measures that have been used across the time period as parts of more general statutory schemes governing drugs. That said, 'regulation' is not intended to capture interventions which are not primarily underpinned or justified by the threat of penal sanctions, such as taxation, licensing, and advertising restrictions, etc; and this thesis is not interested in whether or how drugs should be legalised, (de)criminalised, or otherwise regulated today.

This thesis is quite strictly focused on being a PhD *in Law*. Particularly in the past 50 years or so, an enormous wealth of material has been written about criminalisation, and about drug controls, across innumerable perspectives and academic disciplines. These include the legal, criminological, historical, sociological, philosophical, and economic, as well as a vast range of interdisciplinary works. It is this extensive scholarship which forms the background to, and the springboard for, my own contribution to the discussion. Yet, while both the development of criminal law as an academic discipline, and the history of British drug laws, have been linked to the construction of the modern state,[23] '[w]hen the law [on drugs] has been discussed, it is primarily from the standpoint of sociological enquiry. Lawyers have not been particularly prominent in the debate'.[24] This thesis thus aims to be the first study to analyse the relationship just described comprehensively and systematically, up to the turn of the twenty-first century, from an academic criminal law perspective. This is not to say that prior works have not done something similar,[25] or that I will not draw (indeed sometimes, quite heavily) on prior criminological, sociological, etc. work. Rather, the claim is that the central focus of my analysis will be criminal law and criminalisation, while drawing on prior sociological (and other) work – rather than being the other way around.

My overall research method has been to work chronologically from c.1815–c.2000, identifying the drug law developments and the conceptions of legitimate criminalisation in

[21] Text to n.89 in ch.4; nn.203–204 in ch.5.
[22] Text to nn.100ff in ch.6.
[23] Chloë Kennedy and Lindsay Farmer, 'Introducing Leading Works in Criminal Law' in Chloë Kennedy and Lindsay Farmer (eds), *Leading Works in Criminal Law* (2024) 1; Michael Shiner, 'British Drug Policy and the Modern State: Reconsidering the Criminalisation Thesis' (2013) 42(3) *Journal of Social Policy* 623, 623–26.
[24] Harvey Teff, *Drugs, Society and the Law* (1975) 1. Similarly, see: Beatrice Brunhöber, 'Drug Offenses' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 789.
[25] The closest study in this vein which I have come across, and which has proved inspirational to this thesis, is Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010).

existence at specific points in time, and analysing each of these two objects of inquiry against one another. Different legal research methodologies are employed according to what is most appropriate for the period under consideration. Charting the legal development of British drug criminalisation has been the relatively easy part, as almost all controls have been instituted by Acts of the Westminster Parliament. More difficult has been trying to unpack the conceptions of legitimate criminalisation in operation at a given point in time. Are the contemporaneous understandings of criminalisation best extracted from theoretical academic writing, from a doctrinal analysis of legislation, from deducing the intentions of legislators, or from something or somewhere else? Simester and Smith rightly state that 'it is a mistake to think that arguments about the criminal law can be propounded exclusively within any one of these domains'.[26] My approach, therefore, has been to draw from the broadest range of sources possible which are relevant to the period under examination. These include primary and secondary legislation; case law; extensive use of Hansard records; official reports of Select Committees, etc.; contemporary accounts and the work of historians alike; works covering science, philosophy, politics, and economics; and a range of academic criminal law and other research and analysis into (drug) criminalisation.

Perhaps the most difficult aspect has been that of assessing where the rungs of the (imaginary) parallel ladders of drug legislation and of criminalisation run horizontally and where they overlap. This is because the question this thesis seeks to address is one of degree; this project is a non-empirical open inquiry which does not easily lend to specific quantifiable findings. As I will show, in each of the periods considered there are examples of synergy between drug legislation and broader conceptions of legitimate criminalisation,[27] and there are also clear examples of tension.[28] More often than not, however, the findings are more nuanced. In Chapter 1, for example, I argue that the nineteenth century pharmaceutical system of regulating drugs was in several ways a microcosm of the Victorian legislative state; but when explored in more detail, it was

[26] AP Simester and ATH Smith, 'Criminalization and the Role of Theory' in AP Simester and ATH Smith (eds), *Harm and Culpability* (1996) 1.

[27] e.g., as argued in Chapter 3, regarding the introduction of drug possession offences by regulations under the Defence of the Realm Act 1914 during the First World War.

[28] e.g., as argued in Chapter 4, regarding the dissonance between several influential authors' requirements for criminalisation in the early to mid-twentieth century, and the doctrinal developments in the Dangerous Drugs Acts 1920–1951.

simultaneously in tension with many of the principles underpinning contemporaneous (criminal) law reforms. Notwithstanding this complexity, the broader, high-level argument in this thesis is that drug laws and wider criminal law developments have had a symbiotic relationship;[29] that, if anything, there is in several respects *more synergy* as time has progressed; and that drug laws have been more central to the development of the criminal law than has been recognised. One rather cynical (but perhaps accurate) explanation for this lack of recognition is that 'most legal academics ignore drug offenses … think[ing] of drug offenses as the "dirty corner" in criminal law' which precludes 'principled academic considerations' amongst an 'embittered, dramatized, and even "furious" [public debate]'.[30] In any event, this is an area worthy of more attention.

Inevitably, there are areas which would merit further study. My original intention was to extend the analysis up to the present day. However, limitations of space rendered it impossible to cover such a long time period appropriately, hence the decision was taken to end the analysis circa the year 2000. This end-point was chosen (admittedly) for its convenience, but also because the last 25 years have seen major developments in drug and criminal law and policy which have already been extensively documented and discussed by others (and also, in a small way, myself).[31] Moreover, because the earliest, formative era of drug criminalisation has received comparatively far less attention, it appeared more pertinent and useful to focus further back in time at the expense of discussing the present. This choice does, however, impact this thesis' overall intention (and claim) to be a comprehensive and systematic analysis, not least because an appropriately in-depth survey of the present might have revealed more about the past; important dimensions here would be the state of British drug law and policy post-devolution[32] and the Human Rights Act 1998.[33] Relatedly, some areas and issues falling within this thesis' timeframe have been given an abridged treatment, glossed over, or even altogether missed. These are identified throughout the work, but include, for example: the interplay of evidence, procedure, arrest, and sentencing reforms in the nineteenth century (and beyond); the impact of the Second

[29] Which may variously involve mutualism, commensalism, and/or parasitism: Encyclopaedia Brittanica, 'Symbiosis' (*Britannica*, 5 June 2025) <https://www.britannica.com/science/symbiosis> accessed 4 July 2025.
[30] Brunhöber (n.24) 789–90.
[31] Nicholas Burgess, 'An Evaluation of the Psychoactive Substances Act 2016' (LLM thesis, University of Glasgow 2021).
[32] See, e.g.: Bryan Christie, 'Summit on Drug Deaths Ends with No Agreement' (2020) 368 *British Medical Journal* m822.
[33] See, e.g.: *Lambert* [2001] UKHL 37.

World War on drug use (and policy); the influence and interplay of British colonial dimensions and inter- and trans-national legislation on domestic drug policy (discussion of which has been primarily confined to Chapter 3); and specific legal and policy issues relating to blood-borne virus infections among drug users in the 1980s and 1990s (and beyond).

I have conducted some archival and other historical primary research, but most primary sources used are primary *legal* sources; hence, many of the drug-related historical (secondary) sources and the criminalisation-related sources will be familiar to people working in those respective fields. However, many non-lawyers might be less familiar with the legal sources (and vice versa), and it is hoped that this thesis might bridge that familiarity gap. Being limited to English-language sources has obscured and/or sidelined other potentially fruitful lines of inquiry; while work to reduce this divide in drug and criminalisation research has been expanding of late,[34] this work cannot claim to be part of that expansion.

This thesis comprises six substantive chapters, in addition to this Introduction and a Conclusion. It is structured into three Parts, each containing two chapters. Each Part is prefaced with an Overview of what is covered and argued, so only a cursory outline is given here. Part One examines the period from the early nineteenth century to around the outbreak of the First World War, tracing the origins of drug criminalisation to Victorian concerns about criminal and accidental poisonings and pharmaceutical regulation, and analysing these against the growth of the Victorian legislative state. Also discussed here are statutes targeting 'habitual drunkards' and 'inebriates', and the opium suppression movement of the turn of the century. Part Two explores the period from the First World War to c.1960, looking at how the transnational aspects of drug control were constructed alongside domestic controls. These changes are considered through the lens of broader contemporaneous criminal laws and debates about criminalisation. Finally, Part Three focuses on the period c.1960–c.2000, which is when the present system of British drug control was created and (re)shaped. Points of discussion include the enactment of the Misuse of Drugs Act 1971 and the various end-of-century drug policy developments, which are situated against contemporaneous developments in criminal law theory, changes to the processes of law reform, and wider criminal justice policies.

[34] James H Mills and Patricia Barton, 'Introduction' in Mills and Barton (n.3); Kennedy and Farmer (n.23) 4.

Part One: c.1815 – c. The First World War

Overview of Part One

This Part, comprised of two chapters, covers the period from the early nineteenth century to around the outbreak of the First World War (WW1). It was during this period that laws regulating the sale of drugs backed by punitive sanctions first emerged. A starting point for this analysis is the Pharmacy Act 1868, but an Act of Parliament is itself the culmination of a process of development.

It is important to note that during the period examined in this Part, neither of this thesis' main objects of inquiry, i.e., criminalisation and British drug laws, can be understood in their modern terms. In the nineteenth century, criminalisation was not thought of as it is today, as an area of academic theorising and debate centred around the application of abstract concepts and normative principles.[1] Similarly, drug criminalisation was in its embryonic stage, with none of the features which appear so familiar today as to be '"self-evident" component[s] of any drug control strategy',[2] such as possession, supply, and trafficking offences; penalties of imprisonment; or the scheduling of substances according to their perceived harm or addictive potential. This is in large part because the very concepts of 'drugs', 'recreational use', and 'addiction' had not yet been established, those being products of later reactions to and interactions between legal, technological, cultural, economic, and other factors.[3]

Although 'criminalisation' and 'drug laws' are tricky terms to apply during this period, attention to this era is required for several reasons. Perhaps most importantly, in terms of methodology, a meaningful systematic analysis requires identifying how various strands of development coalesced into something new coming into being. As relatively little specifically legal (as opposed to, e.g., socio-historical) literature exists in this area, a fair

[1] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 89; Chloë Kennedy and Lindsay Farmer, 'Introducing Leading Works in Criminal Law' in Chloë Kennedy and Lindsay Farmer (eds), *Leading Works in Criminal Law* (2024) 3–7.
[2] Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010) 77.
[3] ibid.

amount of unpacking is required due to the dual challenges of tracing the genealogy of the important legislative 'event' that was the 1868 Act and the legal developments which followed it;[4] and of suitably identifying the aims, conceptual directions, and principles of nineteenth century law-making (in the absence of established theories of criminalisation in the modern sense) which are relevant to this Part's analysis. Only once this has been achieved will it be possible to engage in analysis of this era, and to draw comparisons with, and observe patterns across, later periods as this thesis progresses.[5]

Chapter 1 explores the position with regards to drugs and criminalisation up to and including the 1868 Act. It is argued that the drivers of the 1868 Act were much akin to other nineteenth century legislation, and in this sense the 1868 Act offers a window into understanding Victorian regulatory expansion and legislation generally, and is undoubtedly best conceptualised as part of the nineteenth century legislative state. However, a closer reading of the Act's provisions and operation reveals it was simultaneously in tension with many of the principles underpinning contemporary (criminal) law reforms.

Chapter 2 continues the chronology by examining the period post-1868 to around the outbreak of WW1. After the intensive drive for legislative reforms in the area of drugs and poisons during the first two-thirds of the nineteenth century, the approximately 45-year period covered in Chapter 2 stands out as one of legislative inertia, whereby the statutory regime established by the 1868 Act remained largely unaltered – even though several developments during this period provided prima facie grounds for change. Thus, the focus is on whether the *absence* of any drug legislation post-1868 was in tension or synergy with the law's contemporaneous aims, directions and principles. The conclusion here recognises that arguments can be made both ways, but is that there is overall more conceptual synergy than tension, notwithstanding those prima facie grounds for change. Taking the nuanced conclusions of Chapters 1 and 2 together, the overall conclusion of Part One is that the 1868 Act is even more of a window into conceptions of criminalisation than it appeared in Chapter 1, being a piece of legislation that bridged different time periods which saw changing understandings of criminalisation (and law-making generally) and of drug addiction and use. Relatedly, but more broadly, an argument is introduced that laws placing

[4] ibid 53–54.

[5] e.g., in Part Two I argue several conceptual underpinnings of nineteenth century drug legislation survived well into the twentieth century.

punitive sanctions on the sale of substances used for their psychoactive effects (and which today are controlled drugs) can provide a fruitful lens for analysing developments in the criminal law, looking both backwards and forwards through time – even during the embryonic period of drug criminalisation in the nineteenth century when the very concepts of ‘drugs’ and ‘criminalisation’ were not articulated in their modern senses.

Chapter 1: Drug Controls and the Victorian Legislative State, c.1815–c.1868

The first restrictions backed by punitive sanctions on the sale of what today is a controlled drug (opium) were enacted in the Pharmacy Act 1868.[1] This chapter explores the position with regards to both drugs and criminalisation up to and including the 1868 Act. This is important for several reasons. First, in terms of methodology, a systematic analysis of the relationship between drugs and criminalisation must explore how and why criminal law began to be seen as an appropriate response. Second, much (if not almost all) of the existing literature examining drug laws during this period is primarily socio-historical or socio-economic in focus, analysing developments such as the impact of a burgeoning pharmaceutical profession[2] and the transition to a laissez-faire industrial economy from the late eighteenth to the late nineteenth centuries.[3] Employing the predominantly legal perspective that I set out in the Introduction is, therefore, in itself novel and fills a knowledge gap. Third, and relatedly, such a perspective enables focusing on other, comparatively neglected lines of development such as, inter alia, the role of criminal poisonings in the mid-1800s and the expansion of the Victorian legislative state, whereby the (criminal) law began to be deployed in new ways to address social problems, and fresh ideas concerning the quality of legislation itself were articulated. Fourth, a suitably in-depth exploration of this period, which takes account of these various strands of development, will enable comparisons to be drawn with and patterns to be observed across later periods. Indeed, as I will argue in this chapter and will continue to do throughout this thesis, drug laws offer a window into understanding broader processes and conceptions of criminalisation across time, and vice-versa.

[1] Opium use and the 1868 Act are the starting points in multiple works: Philip Bean, *The Social Control of Drugs* (1974) 19; Geoffrey Harding, *Opiate Addiction, Morality and Medicine: From Moral Illness to Pathological Disease* (1988) 16; 'Pathologising the Soul: The Construction of a 19th Century Analysis of Opiate Addiction' in Ross Coomber (ed), *The Control of Drugs and Drug Users: Reason or Reaction?* (1998) 4; Lawrence Driscoll, *Reconsidering Drugs: Mapping Victorian and Modern Drug Discourses* (2000) 19.

[2] e.g., Virginia Berridge, *Opium and the People: Opiate Use and Drug Control Policy in Nineteenth and Early Twentieth Century England* (rev edn, 1999) ch.10.

[3] e.g., Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010) ch.3.

This chapter is structured as follows. Section 1.1 begins with a brief outline of mid-nineteenth century patterns of opium use. This provides context for later discussion, highlighting that drugs and their use were not seen as issues requiring a criminal law response. Thereafter, a chronology of the various legislative reforms and attempted reforms targeting opium and other drugs from the early nineteenth century to 1867 is set out. This serves to pinpoint the various issues which legislation in this area was designed to remedy, and how this was intended to be achieved. In section 1.2 discussion turns to the 'aims, directions and principles' of nineteenth century law-making; a phrasing used to reflect the variety of conceptual underpinnings of this period's myriad legal reforms. In short, these included: rationality in the law, informed by scientific and statistical evidence; being systematic; consistency and uniformity in legislation; the improvement of public health, living standards and moral character; fairly calibrated punishment; and increasing central government management, but whereby local authorities typically retained most substantive powers of decision-making and of issuing regulations. Finally, section 1.3 brings together the discussion in the preceding sections through an analysis of the Pharmacy Act 1868. It is argued that the drivers of the 1868 Act were much akin to other nineteenth century legislation, and in this sense the 1868 Act can be regarded as a microcosm of Victorian regulatory expansion and legislation generally, and is undoubtedly best conceptualised as part of the nineteenth century legislative state. However, a closer reading of the Act's provisions and operation reveals it was simultaneously in tension with many of the principles underpinning contemporary (criminal) law reforms.

1.1 Early to Mid-Nineteenth Century Opium Use and Drug Legislation

During the first two-thirds of the nineteenth century, opium and its various preparations were freely available and widely used across all strata of British society. It is difficult to overstate the drug's ubiquity. It was available in a staggering array of forms, the most popular being either raw or as a tincture of laudanum (opium dissolved in alcohol), but products also included 'opiate electuary, powder of chalk with opium, tincture of soap and

opium',[4] 'lead and opium pills, opiate lozenges, opiate plasters [and] opiate enema',[5] and it was the base ingredient of myriad 'patent medicines' and 'children's draughts … for soothing fractious babies'.[6] It could be purchased from chemists, doctors, 'chandlers, grocers, oilmen, drapers [and] small shopkeepers',[7] 'stationers, newspaper proprietors … butchers, hairdressers and publicans',[8] in 'market stalls and [from] itinerant hawkers',[9] and from the local 'basket maker, shoe maker, smallware dealer, factory operative, tailor, rubbing stone maker and baker'.[10] These retailers in turn benefitted from opium import duties which were reduced in 1836 and finally abolished in 1860; and a complex logistical system of examination, testing, grinding, preparation, wholesale and resale ensured widespread distribution of the drug across the country.[11]

Recreational (or as it was then-known, 'luxurious' or 'non-medical')[12] use did exist 'as an adjunct or alternative to recreational drinking' and 'as a means for … accessing previously unexplored realms of the imagination',[13] but did not give rise to any major concern about the effects of drug use (or misuse), and certainly not to any degree which may have led to the criminalisation of its possession or use.[14] The boundary between 'medical' and 'non-medical' use was, however, not always clear. For example, opium was commonly 'used to counteract the effects of too much drink, as an informal means of "sobering up"',[15] and in the absence of a suitably articulated or settled medical understanding of addiction at the time,[16] the lines between recreational, habitual, and truly medical use are difficult to

[4] Virginia Berridge, 'Victorian Opium Eating: Responses to Opiate Use in Nineteenth-Century England' (1978) 21(4) *Victorian Studies* 437, 440.
[5] Richard Davenport-Hines, *The Pursuit of Oblivion: A Social History of Drugs* (2002) 58.
[6] Harding, *Opiate* (n.1) 8; Davenport-Hines (n.5) 57–58. See also: Terry M Parssinen, *Secret Passions, Secret Remedies: Narcotic Drugs in British Society, 1820–1930* (1983) ch.4.
[7] Berridge, *Opium* (n.2) 117.
[8] Hilary Marland, 'The "Doctor's Shop": The Rise of the Chemist and Druggist in Nineteenth-Century Manufacturing Districts' in Louise Hill Curth (ed), *From Physick to Pharmacology: Five Hundred Years of British Drug Retailing* (2006) 99.
[9] Harding, *Opiate* (n.1) 7.
[10] Berridge, *Opium* (n.2) 25.
[11] Berridge, 'Victorian' (n.4) 438–39.
[12] Virginia Berridge, *Demons: Our Changing Attitudes to Alcohol, Tobacco and Drugs* (2013) 15.
[13] Howard Padwa, *Social Poison: The Culture and Politics of Opiate Control in Britain and France, 1821–1926* (2012) 21. See also: Virginia Berridge, 'The Origins of the English Drug "Scene" 1890–1930' (1988) 32 *Medical History* 51; Parssinen (n.6) 46; Martin Booth, *Opium: A History* (1997) 57.
[14] Harding, *Opiate* (n.1) 7: 'acceptance of the non-medical use of opium is illustrated in the response (or rather the lack of response) evoked by confessions of opium eating among the literary middle classes'. See also: Sharon Ruston, 'Representations of Drugs in 19th Century Literature' (*British Library*, 2014) <https://www.bl.uk/romantics-and-victorians/articles/representations-of-drugs-in-19th-century-literature> accessed 7 November 2022; Berridge, *Opium* (n.2) ch.5; Seddon, *A History* (n.3) 35; Parssinen (n.6) 46–49.
[15] Berridge, *Demons* (n.12) 24, 27.
[16] Seddon, *A History* (n.3) 4–5.

demarcate in modern terminology. As a medicine, opium was a 'universal panacea':[17] a common remedy for 'neuralgia',[18] earache, influenza, haemorrhage, and heart disease; for alleviating 'fatigue and depression' among 'working class factory operatives';[19] and was even used by Prime Ministers' wives during pregnancy.[20]

How, then, did criminal law come to be used to control opium? In pre-industrial Britain the sale of drugs, medicines and other goods was subject only to the 'uneven and patchy' regulation attained through a system of localised, private and self-regulating guilds.[21] Following the transition to a liberal capitalist economy 'a consequent reshaping of the institutional framework for the regulation of markets'[22] ensued which led to the collapse of the guild system, and by the mid-eighteenth century chemists and druggists 'celebrated the values of free trade and open competition' whereby they were 'at liberty to dispense [any] pharmaceutical preparation to [anyone], without interference from physicians or fellow traders'.[23] It was from the need to plug the 'regulatory vacuum' left by the gradual erosion of the old system that 'the nineteenth-century public health movement and the increasing specialisation within the broad medical field (including the rise of the pharmacy profession)' emerged.[24] Perhaps the earliest significant legislative example of this was the Apothecaries Act 1815, which required those 'exercising the Art and Mystery of an Apothecary, to prepare with Exactness, and to dispense such Medicines as may be directed for the Sick by any Physician lawfully licensed'.[25] The Act further provided that apothecaries had to obtain a licence by passing examinations set by the Society of Apothecaries, and breach of the provisions was punishable with fines and a ban on practising.[26] However, Holloway argues that the Act was a failure for numerous reasons. Chief among these was that it 'had no appreciable effect in eliminating the unqualified or in protecting the qualified practitioners': those already practising as apothecaries prior to the Act were allowed to continue; the

[17] Harvey Teff, *Drugs, Society and the Law* (1975) 9.
[18] A term which at the time covered 'a range of complaints [including] shooting pains in the nerves, sciatica, herpes, toothache, migraine, nervous angina and symptoms produced by secondary syphilis': Davenport-Hines (n.5) 74.
[19] Harding, *Opiate* (n.1) 8.
[20] Davenport-Hines (n.5) 56.
[21] Seddon, *A History* (n.3) 43–44. See also: Stuart Anderson, *Pharmacy and Professionalization in the British Empire, 1780–1970* (2021) ch.2.
[22] Seddon, *A History* (n.3) 44.
[23] SWF Holloway, *Royal Pharmaceutical Society of Great Britain 1841–1991: A Political and Social History* (1991) 34–35.
[24] Seddon, *A History* (n.3) 44–45.
[25] Apothecaries Act 1815, s.5.
[26] ibid ss.5, 14.

educational requirements were rather minimal; and the procedure for enforcing the Act was expensive.[27] In any event, an 'apothecary' was not clearly defined in the Act; a problem compounded by the express exclusion of chemists and druggists from the Act's remit despite their practice being 'virtually indistinguishable from that of the apothecaries'.[28]

Even so, the 1815 Act remained an important legislative framework over the following decades, and it was partly by virtue of the extensive powers given to the Society of Apothecaries in the Act that a field of medical study which would later influence the Pharmacy Act 1868 gained traction. Medical jurisprudence,[29] Burney notes, was 'a singularly undisciplined subject in the early decades of the nineteenth century', resulting in 'intellectually and institutionally unsupported medical witnesses [being] routinely humiliated in the adversarial context of the courtroom'.[30] By the end of the 1820s the subject had gained significant legitimacy as 'a universalist, meritocratic, and socially engaged scientific expertise'.[31] It was increasingly being taught at universities by lecturers who campaigned – with the backing of medical journals such as *The Lancet* – for its wider recognition, and in 1831 the Society of Apothecaries required those seeking a licence to practice to have done a three-month course in the subject, which had 'the immediate effect of increasing the number of lectureships in medical jurisprudence attached to metropolitan institutions of medical education'.[32] A number of these lecturers devoted their efforts to toxicology, which was the 'most well-defined and recognisable representative of British medical jurisprudential knowledge'.[33] This status was cemented by the rising fear of criminal poisoning in Victorian Britain, during which time toxicologists developed new, more reliable methods for detecting poison in the body and became increasingly called as expert witnesses in poisoning trials. The foremost toxicologists who were involved in the highest-profile trials, such as Alfred Swaine Taylor,[34] came to bear significant influence on the rapid

[27] SWF Holloway, 'The Apothecaries' Act, 1815: A Reinterpretation, Part II' (1966) 10(3) *Medical History* 221, 227–30, 233. See also: Apothecaries Act 1815, ss.14, 26.
[28] Apothecaries Act 1815, s.28; Holloway, 'The Apothecaries' (n.27) 228.
[29] Now known as forensic medicine.
[30] Ian Burney, *Poison, Detection and the Victorian Imagination* (2006) 40, 42.
[31] ibid 42.
[32] ibid 42–43. See also: WSC Copeman, *The Worshipful Society of Apothecaries of London: A History 1617–1967* (1967) 66–69.
[33] Burney (n.30) 43.
[34] Noel G Coley, 'Alfred Swaine Taylor, MD, FRS (1806–1880): Forensic Toxicologist' (1991) 35 *Medical History* 409.

and prolific attempts to pass poisons and pharmaceutical legislation over the next few decades.

Contemporaries and historians have referred to criminal poisoning in Victorian Britain as 'the crime of the age'.[35] While some studies caution against the unreliability of historical statistics and posit that press hyperbole instilled public fear which was entirely incommensurate with reality,[36] others do evidence a rise in the incidence of criminal poisonings between 1820–1850.[37] What is clear, at least, is that criminal poisoning captured the public's imagination and anxiety, and that by mid-century the 'public press demanded a solution' to the 'epidemic of criminal poisoning that seemed to be ravaging Victorian Britain'.[38] By a large margin, the mid-nineteenth century poisoner's first choice of substance was arsenic. 'Colourless, odourless, tasteless, soluble in water, and fatal in small doses',[39] arsenic was also easily obtainable due to its varied and extensive use in, inter alia, rat poison, wallpaper dye, and medicine.[40] However, 'even at its peak of popularity, arsenic was just one of a number of poisons that claimed the lives … of Britons'.[41] For example, in a review of criminal poisoning in England and Wales from 1750–1914, Watson found that while almost half of cases involved the use of arsenic, 10% involved opiates,[42] and these results are largely mirrored in Merry's similar review of Scottish cases.[43] Parliament apparently recognised this when enacting section 3 of the Prevention of Offences Act 1851, making it an offence to 'apply or administer … any chloroform, laudanum or other stupefying or overpowering drug' in the furtherance of committing a felony, thereby explicitly enmeshing opium (laudanum) in the statutory criminal law for the first time.[44]

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[35] Burney (n.30) 12.

[36] Peter Bartrip, 'A "Pennurth of Arsenic for Rat Poison": The Arsenic Act, 1851, and the Prevention of Secret Poisoning' (1992) 36 *Medical History* 53, 57; Burney (n.30) 20.

[37] Katherine D Watson, 'Poisoning Crimes and Forensic Toxicology Since the 18th Century' (2020) 10(1) *Academic Forensic Pathology* 35; Karen Jane Merry, 'Murder by Poison in Scotland During the Nineteenth and Early Twentieth Centuries' (PhD thesis, University of Glasgow 2010) 31ff; Thomas Rogers Forbes, *Surgeons at the Bailey: English Forensic Medicine to 1878* (1985) ch.8, esp 151–54, Table 8.

[38] Burney (n.30) 64.

[39] Bartrip (n.36) 55.

[40] James C Whorton, *The Arsenic Century: How Victorian Britain was Poisoned at Home, Work and Play* (2010) 113, 204, 239.

[41] ibid xv.

[42] Watson (n.37) 37.

[43] Merry (n. 37) 122. See also: Berridge, *Opium* (n.2) 82, noting that criminal poisonings with opium did occur, and that *representations* of criminal poisoning with opium were influential in poisons legislation.

[44] Laudanum had been mentioned earlier in other sources of law: *Stuart* (1829) Shaw 221, later quoted by the Scottish Institutional Writer Archibald Alison, *Principles of the Criminal Law of Scotland* (1832) 86, involved a

Despite this, at the height of the poison panic arsenic alone was singled out for regulation, and notwithstanding the substance's innumerable legitimate uses, resistance to the Arsenic Act 1851 'was almost non-existent'.[45] The Act required that the details of arsenic sales had to be recorded in a specified form; transactions could only be conducted between persons known to one another or in the presence of a mutual acquaintance; and that the substance was coloured with soot or indigo to make it more easily identifiable.[46] The sale of arsenic as a medicine under a medical prescription was excluded from the Act's remit, and the penalty on conviction for noncompliance was £20.[47]

The passage of the 1851 Act is a key moment in the 1868 Act's legislative genealogy, being the first national statute to restrict the sale of poison, and containing provisions which would be replicated in the latter Act.[48] However, it was soon found to be unfit for purpose. Due to its poor enforcement, Alfred Taylor argued the Act was a 'dead letter', and the arbitrary focus on arsenic alone was 'acknowledged [to have] no principled justification'.[49] The reason for this narrow scope, and indeed the reason no further poisons legislation was passed until 1868, lies in large part to the variously competing and aligning interests of professional groups.

The Royal Pharmaceutical Society (RPS) was founded by Jacob Bell in 1841 and was granted a Royal Charter in 1843 for the purpose of 'promoting a uniform system of education [for] the protection of those who carry on the business of chemists and druggists'.[50] Its reforming ambitions were not confined to pharmaceutical education, however. In the earliest iterations of what became its official publication, the *Pharmaceutical Journal*, the RPS set out to draw attention to and raise the status of pharmacy in Britain,[51] and in the ensuing years it became an increasingly political organisation which sought to control entry into the profession and defend itself and its members from any interference in the practice of pharmacy which was not on its own terms. Arsenic's wide application in medicine and the

prosecution for 'murder, … as also the wickedly and feloniously administering … laudanum' in contravention of the Malicious Wounding etc. (Scotland) Act 1825.

[45] Whorton (n.40) 126.

[46] Arsenic Act 1851, ss.1–3.

[47] ibid ss.4–5.

[48] Discussed at text to n.222 below.

[49] Burney (n.30) 65.

[50] RPS, 'History of the Society' (*RPharmS*) <https://www.rpharms.com/about-us/history-of-the-society> accessed 23 October 2024.

[51] Holloway, *Royal* (n.23) 93–94; Anderson (n.21) 46.

necessity of finding a solution to its use in criminal poisonings provided the RPS with an ideal opportunity to advance its reformist goals.[52] Another organisation with similar goals, the Provincial Medical and Surgical Association,[53] successfully collaborated with the RPS to petition the government to pass the 1851 Act.[54] The arbitrary isolation of arsenic was a result of both organisations recognising the risks to their professional practices if other poisons – a definition which could capture almost all medicines – were similarly regulated.[55]

A year later the RPS' legal status was elevated when the Pharmacy Act 1852 confirmed its charter of incorporation and stipulated that 'all persons before assuming such title [of pharmacist] should be duly examined as to their skill and knowledge by competent persons [the RPS], and that a register should be kept … of all such persons'.[56] While this was a victory for the RPS over the objections of the Society of Apothecaries and the medical practitioners who feared their businesses would be jeopardised,[57] in her seminal work on opium in the nineteenth century Virginia Berridge notes that:

> The exclusive powers of trade which [the RPS] had sought to obtain were rejected. They were incompatible with free-trade principles and no restriction was imposed on the carrying-on of a druggist's business. The Society had not yet fully established the principle of a professional monopoly. Nor had it yet established itself as the controlling body of the profession.[58]

Moreover, Holloway notes that another unintended consequence of the 1852 Act was that:

[52] Bartrip (n.36) 63.
[53] The precursor to the British Medical Association.
[54] Burney (n.30) 61, fn.66, which also notes the wariness of professional competition between the two groups.
[55] ibid 65.
[56] Pharmacy Act 1852, preamble.
[57] For a detailed account, see: Holloway, *Royal* (n.23) 164–75.
[58] Berridge, *Opium* (n.2) 114.

> A fissure opened up between pharmaceutical chemists and the rest; between, on the one hand, members of the [RPS] and non-members who had passed the major examination, and, on the other, the unincorporated mass of chemists and druggists. The [RPS], which had always claimed to speak for the whole profession, became, after 1852, the organisation of a minority, representing less than a third of all retail chemists.[59]

This fragmentation (and the existence of further professional competition) would frustrate attempts to enact pharmaceutical and/or poisons legislation for the next 16 years. The political appetite to address the 'epidemic' of criminal poisoning had not waned by 1857 when a Sale of Poisons Bill was introduced to Parliament.[60] At the Committee stage, Earl Granville stated that the object of the Sale of Poisons Bill was 'to prevent … the sale of poisons for the commission of crime … and the occurrence of accidents by the sale of poisons by mistake', and he lamented both the 'very great difficulty in tracing home to the real murderer the purchase of the poison', and 'the careless, slovenly, neglectful mode in which poison was kept in and dealt out of shops'.[61] The Bill's schedule listed various poisons – including opium – and it sought to create a system of licensing and examination for those who sold them. Additionally, the poisons were to be subject to labelling, recording of sale, and lock-and-key storage requirements, and breach of the provisions would be punishable by fines. Concerned about their ignorance of such a technical field, the Lords referred the Bill to a Select Committee which heard evidence from experts including the toxicologist Alfred Taylor and Jacob Bell of the RPS.[62] Taylor was supportive of the Bill and particularly of its proposal to restrict the sale of opium,[63] citing the numbers of fatalities occasioned by the ease of access to poisons, the success of pharmaceutical regulation in continental jurisdictions, and the 'bad use' of opium in manufacturing towns.[64] Conversely, Bell raised

[59] Holloway, *Royal* (n.23) 180.
[60] Sale of Poisons HC Bill (1857–58) [203].
[61] HL Deb 4 June 1857, vol 145, col 1091.
[62] Select Committee of the House of Lords, *Report on the Sale of Poisons, etc. Bill* (HC 1857 Session 2, 294–XII).
[63] Although Taylor recognised that the sale of small amounts of opium ought not to be proscribed given the drug's ubiquitous use as an effective medicine in everyday life: ibid para 860.
[64] ibid 778, 841, 854. Berridge, *Opium* (n.2) 106–07 also argues that the evidence of other witnesses to the Select Committee on the abuse of opium is an illustration of wider class tensions surrounding the 'recreational'/non-medical use of the drug.

multiple objections including that the Bill would 'be a very great obstruction to [the] ordinary business [of pharmacists]' and 'a great hardship upon the public to be deprived of the use of … opium', and also that restricting opium sales would be unenforceable and create a black market.[65] Moreover, the Bill provided that the granting of licences and the examination of pharmacists would be 'under the control of a board in which [the RPS] would be in a minority', which provided another motivation for the RPS' objection.[66] When the amended Bill was reintroduced the following Parliamentary session the Earl of Derby restated the hierarchy of objectives as being first 'to increase the difficulty of obtaining poisons for criminal purposes, and to give facilities for conviction by enabling proof to be given of the delivery of those poisons', and latterly 'to prevent, as far as possible, the occurrence of those lamentable accidents which partly arose from the ignorance, and from the carelessness of those who exercised the business of selling drugs and poisons'.[67] However, the RPS quickly mobilised 'a storm of protest [which] dissuaded the government from proceeding with [the Bill]'.[68]

A few months later a chemist's assistant in Bradford mistakenly gave the manufacturer of peppermint lozenges arsenic from an unlabelled container, resulting in 20 deaths and prompting another poisons Bill in early 1859.[69] The Bill[70] only required the accurate labelling of listed poisons, the recording of transactions, and that sales had to be conducted between persons known to one another or in the presence of a mutual acquaintance. The list of poisons included opium, but small quantities were exempt. The RPS objected due to the lack of any qualification requirements for chemists and the Bill was withdrawn.[71] As a report of their annual meeting in May 1859 shows, the RPS celebrated this victory and doubled down on their opposition to any legislative proposal which did not accord with their vision:

[65] Select Committee, *Report* (1857) (n.62) paras 5, 12, 69.
[66] Berridge, *Opium* (n.2) 114–15. The Board was to be composed of those appointed by the College of Physicians of London, the Society of Apothecaries of London, and the Pharmaceutical Society: Sale of Poisons HC Bill (1857–58) [203], cl.IX.
[67] HL Deb 4 June 1858, vol 150, col 1508.
[68] Holloway, *Royal* (n.23) 227.
[69] ibid.
[70] Sale of Poisons HC Bill (1859 No 1) [11]; Sale of Poisons [as amended in Committee] HC Bill (1859 No 1) [84].
[71] Holloway, *Royal* (n.23) 227.

> The society, always alive to the interests of [pharmacists], as well as desiring to prevent inconvenience, discomfort and even danger to the public, watched narrowly every attempt made to introduce such unworkable bills, and up to the present time they had been successful in preventing anything either obnoxious or absurd becoming law of the land … [S]uch a measure as would be hailed as practicable and useful … can only be based on compulsory education and increased fitness … of chemists and druggists.[72]

Illustrating that a desire to combat criminal poisoning remained on the political agenda notwithstanding these setbacks, Parliament thereafter passed the Poison Act 1860 and the Offences against the Person Act 1861. The former Act criminalised the administration of poison with intent to endanger life, inflict grievous bodily harm, or cause injury. Section 22 of the latter Act restated a provision passed a decade earlier,[73] criminalising the administration of 'laudanum, or other stupefying drug' in the furtherance of any indictable offence. But it was not until 1863[74] that concerted attempts to regulate poisons and pharmacy were reignited. A short Prevention of Accidental Poisoning Bill was introduced on 22 June 1863, providing that 'any substance of a poisonous nature' must be kept in a hexagonal bottle and labelled as 'poison'.[75] It was rejected a few days later.[76] Another proposal came from a report of the committee of the General Medical Council (GMC), seeking to amend the Medical Act 1858 by allowing the GMC 'to lay down such regulations respecting the education and examination of practitioners in … pharmacy as may appear to them [fit]', and imposing fines for those who sold 'patent quack or other medicines' without publishing their composition.[77] The RPS 'hail[ed] the principle of the proposed measure as correct', but the observation that the GMC was seeking to encroach on its professional

[72] 'Pharmaceutical Meeting, Edinburgh: Annual Report' (1859) 18(7) *Pharmaceutical Journal* 614, 615–16. See also: 'Pharmaceutical Society' *The Daily Scotsman* (7 May 1859) 4.
[73] In the Prevention of Offences Act 1851, s.3: text to n.44 above.
[74] The same year John Simon's *Sixth Report of the Medical Officer of the Privy Council* (C (1st series) 3416, 1863) was published containing a contribution by Alfred Taylor condemning the state of opium sales: text to n.168 below. The Report may have been, as Holloway argues in *Royal* (n.23) 228, 'well timed … propaganda … compris[ing] highly selective evidence, tendentious reasoning … and a list of recommendations [with] only a peripheral bearing on the problems identified', but it was nonetheless highly influential.
[75] Prevention of Accidental Poisoning HC Bill (1863) [181].
[76] HC Deb 30 June 1863, vol 171, col 1841.
[77] 'Reports &c. Presented to the Medical Council, 1863' (1863) 1(128) *British Medical Journal* 632, 636–37.

territory evidenced the RPS' tentativeness.[78] A year later, a direct challenge to the RPS came from the United Society of Chemists and Druggists, when 'the rivalry between it and the [RPS] about who was to control the profession … led to the introduction of competing Bills by the two organisations'.[79] The Bills were referred to a Select Committee which again heard evidence from Alfred Taylor and other experts in the field,[80] but due to the 'fundamental disagreement over control of entry [to the profession]',[81] it was decided that it was 'not expedient to proceed further with either [Bill]'.[82]

The purpose of this section has been to pinpoint the various issues which early to mid-nineteenth century drugs/poisons legislation was designed to remedy, and how this was intended to be achieved. Statutory intervention in this area started to become *penal* not only in its broad form – imposing restrictions backed by punitive sanctions – but was also heavily influenced by the anxiety to combat criminal poisonings. This legislation also had a strong *public health* dimension: since the substances used by criminal poisoners also tended to be commonly-used medicines, accidental poisoning due to improper use of medicines was a major concern and the improved regulation of the dispensing of medicines was a key objective.[83] And the fight over control of entry into the pharmaceutical profession, with the RPS and other organisations exerting significant influence and having been given powers by Acts of Parliament, meant that drug legislation also had an *administrative* – a bureaucratising and institutionalising – nature.[84] The next section discusses the broader growth of the Victorian legislative state in a correspondingly wide range of areas (i.e., penal, public health, and administrative) so that it will be possible to understand the precise degree to which the 1868 Act and later drug-related legislation aligned with the era's conceptions of legitimate law-making.

[78] 'Proposed New Medical Bill, Affecting Pharmacy' (1863) 5(1) *Pharmaceutical Journal* 1, 2.
[79] Berridge, *Opium* (n.2) 115.
[80] Jacob Bell had died in 1859.
[81] Berridge, *Opium* (n.2) 115.
[82] Chemists and Druggists Bills Committee, *Special Report from the Select Committee on the Chemists and Druggists Bill, and Chemists and Druggists (No 2) Bill* (HC 1865, 381–XII) iii.
[83] Tied to this was a subtle undercurrent, which occasionally surfaced, of concern about the 'bad use' of opium amongst the working classes: n.64 (and text to) above.
[84] These various facets have previously been remarked upon. Parssinen notes the public health dimension; Berridge conversely argues that 'the model of public health had little application to substances at this point' and that the primary dimension was administrative, being about professional control; and Seddon draws links to the public health, penal, and administrative aspects, as well as noting the role accidental poisonings played: Parssinen (n.6) 68; Berridge, *Demons* (n.12) 74; *Opium* (n.2) 122; Seddon, *A History* (n.3) ch.3.

1.2 'Aims, Directions and Principles' of Nineteenth Century Legislative Reform

The Victorian era saw massive legal growth and change. In criminal law and criminal justice, for example, Smith argues that an 'overarching theme [was] the persistent effort of English Parliamentarians and criminal justice administrators to "reform" criminal justice administration through the adoption of innovations in policing, prosecution, adjudication, and punishment'.[85] Regulatory criminal laws proliferated;[86] the number of capital offences was greatly reduced and public hangings were abolished; persons accused of offences were given rights to defence counsel as part of a decades-long suite of reforms to trial procedure; and common law offences were widened, narrowed or no longer used according to changing political priorities or social mores.[87] When attempting to make sense of these wide-ranging changes, remark is often made that the common denominator is their piecemeal and haphazard development (a pedigree going back centuries) and that these changes therefore cannot readily be attributed to underlying principles, even where certain patterns are evident.[88]

I do not aim to construct an elegant and comprehensive conceptual account of Victorian legal reforms.[89] However, as with the preceding study of Victorian opium use and drug legislation to c.1868, the law's normative aims and conceptual underpinnings at a certain place and time may be understood by paying proper regard to the broader prevailing

[85] Bruce P Smith, 'English Criminal Justice Administration, 1650–1850: A Historiographic Essay' (2007) 25(3) *Law and History Review* 593, 606.
[86] Jeremy Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (2014) 102.
[87] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 78.
[88] W Blake Odgers, 'Changes in Domestic Legislation' in Council of Legal Education (ed), *A Century of Law Reform: Twelve Lectures on the Changes in the Law of England During the Nineteenth Century* (1901) 162; Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: Cross-Currents in the Movement for the Reform of the Police*, vol 3 (1956) vii; David Roberts, *Victorian Origins of the British Welfare State* (1960) 100; John Hostettler, *The Politics of Criminal Law: Reform in the Nineteenth Century* (1992) 1; Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45' (2000) 18(2) *Law and History Review* 397, 405; Michael Lobban, 'How Benthamic Was the Criminal Law Commission?' (2000) 18(2) *Law and History Review* 427, 432; Raymond Cocks, 'Conclusion' in William Cornish and others (eds), *The Oxford History of the Laws of England: 1820–1914 Fields of Development*, vol 8 (2010) 617; Grant Lamond, 'Core Principles of English Criminal Law' in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law: Anglo-German Concepts and Principles* (2018) 10–11.
[89] But see, e.g.: Farmer, *Making* (n.87).

environment – including the political, institutional, technological, cultural, and economic.[90] In order to try and achieve this, legal developments which are both directly and indirectly relevant to nineteenth century drug regulation are considered. Thus, not only are reforms in the penal, public health, and administrative spheres discussed, but so are (for example) the contemporary aspirational characteristics of statute law more generally, as during this period fresh ideas concerning the quality of legislation itself were expressed. The following discussion is structured by way of a loose chronology, after which the underlying normative concepts are extracted and summarised at the beginning of section 1.3.

Farmer notes that reform of nineteenth century criminal law was 'shaped by the rise of the legislative state … the quality of, and motivation behind legislation was different. The aim was to be systematic and rational'.[91] In the 1810s criminal justice was markedly 'particularistic, discretionary, and personalistic', and not 'intended to apply uniformly to classes of crime and criminals'.[92] Deterrence was sought via the imposition of occasional, severe and exemplary punishment, enabled by a vast array of capital offences[93] tempered by judicial discretion,[94] chance royal pardons, and a reluctance among prosecutors and jurors to carry out their function to the strict letter of the law.[95] By the 1820s a reform movement had developed from a combination of religious–humanitarian opposition to such sanguinary laws[96] and pressure from the business community who protested the criminal law's inefficacy in protecting their property interests in 'a torrent of petitions [to] the House of Commons'.[97] Disagreements existed among reformers about how prescriptive legislative intervention ought to be, and the degree to which the severity of punishment ought to be ameliorated,[98] but in a decades-long process Parliament abolished most capital

[90] ibid 34–35; Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (2016) 76.
[91] Farmer, *Making* (n.87) 77.
[92] Martin J Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830–1914* (1990) 57.
[93] The 'Bloody Code'; however, there was also a 'bloodless counterpart': Smith, 'English' (n.85) 617. See also: Harry B Poland, 'Changes in Criminal Law and Procedure since 1800' in Council of Legal Education (n.88) 45–46.
[94] Farmer, 'Reconstructing' (n.88) 412.
[95] Douglas Hay, 'Crime and Justice in Eighteenth- and Nineteenth-Century England' (1980) 2 *Crime and Justice* 45, 52; Keith Smith, 'Punishment: Death and Transfiguration' in Cornish and others (n.88) 138–40; Michael A Rustigan, 'A Reinterpretation of Criminal Law Reform in Nineteenth Century Britain' (1980) 8 *Journal of Criminal Justice* 205, 212: 'by reducing value of stolen property or applying technicalities'; Gerald H Gordon, 'Book Review' 1969 *Juridical Review* 79, 81.
[96] Randall McGowen, 'A Powerful Sympathy: Terror, the Prison, and Humanitarian Reform in Early Nineteenth-Century Britain' (1986) 25(3) *Journal of British Studies* 312.
[97] Rustigan (n.95) 209.
[98] Philip Handler, 'James MacKintosh and Early Nineteenth-Century Criminal Law' (2015) 58(3) *The Historical Journal* 757, 758.

offences, recognising the necessity of rational, effective deterrence,[99] which required that 'the sanctions of the law should be clear, consistent and certain'.[100]

These emergent aspirations of clarity, consistency, rationality and effectiveness are further illustrated by the 'appointment and scope of the 1833 Royal Commission [which] marked a decisive shift in the approach to law reform'.[101] Their 'brief [was to make] recommendations for digesting and clarifying criminal law', which they did in eight Reports over 12 years.[102] They sought the systematic codification of the entire existing criminal law[103] by basing their recommendations for reform on empirical evidence[104] and general principles. These principles are identified by Farmer as the promotion of accessibility and clarity by jettisoning 'archaisms and technicality', which would derivatively improve the efficiency of criminal justice and also 'fulfil a broader educative function, giving publicity to moral distinctions', thereby advancing the 'great object' of deterrence.[105] Moreover, 'expediency necessitated viewing the law as a system such that all parts were made to serve a single object', which 'depended also on the proper identification and classification of the various elements of the criminal law', with a focus on rationality underpinning this exercise.[106] Minor offences such as those eventually created by the Pharmacy Act 1868 were of lesser concern to the Commissioners, whose attention was primarily on 'real' crime,[107] but this does not render their work inapplicable to this discussion: the Commissioners' 1835 Report on general statutory consolidation noted that the principles of clarity, rationality and efficiency also applied to both regulatory criminal offences and

[99] Smith, 'Punishment' (n.95) 146.
[100] Wiener (n.92) 61.
[101] Farmer, 'Reconstructing' (n.88) 407.
[102] Lindsay Farmer, 'Codification' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 387.
[103] Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, 2016) 30.
[104] Smith, 'Punishment' (n.95) 149.
[105] Farmer, 'Reconstructing' (n.88) 411–12.
[106] ibid 414.
[107] ibid 422, fn.107. 'Real' crimes were those which were indictable/imprisonable offences: *Seventh Report of Her Majesty's Commissioners on Criminal Law* (C (1st Series) 448, 1843) 11. Note, however, *Gardner* v *Bremridge* (1901) 3 Adam 309, 309: '*Held* … that by virtue of … the Summary Procedure (Scotland) Act 1864, [s.18(6)] imprisonment is competent as an alternative in a sentence following on a conviction of a contravention of the Pharmacy Acts, 1852 and 1868, those Acts containing no express exclusion of imprisonment'.

non-penal statutes;[108] and, as already discussed, a long-standing objective of pharmaceutical and poisons regulation was to combat criminal poisonings.

Also important here is Farmer's argument that the Commissioners' work resulted from 'an affinity with the Benthamite science of legislation'.[109] Although some commentators have argued that Jeremy Bentham's work was more prophetic than influential, and that a focus on his theories has sometimes obscured other factors which prompted legal reform,[110] it is worth sketching this out. Bentham's attentions stretched far beyond (criminal) law, encompassing morality, sociology, economics and politics. The overarching principle – the 'fundamental axiom' – of his philosophy was utility, i.e., 'the greatest happiness of the greatest number'.[111] Giving effect to this principle had many implications for penal legislation which he set out in great detail, but limitations of space and the extensive body of literature on his work[112] warrants only a selective summary of those implications here.[113] An ardent critic of the common law's obscurity and a supporter of codification, Bentham's science of legislation aspired to the ideal of a 'logically unified' and 'interrelated [series of] substantive rules', created 'according to empirical criteria'.[114] A rational and methodical process of creating legislation would ensure the law was precise, efficient and transparent. This would maximise utility by effectively preventing dangers such as criminal violence and government tyranny.[115] If the law was accessible to the citizen and established a rigid and 'easily monitored policy process' for government decisions,[116] the public and government officials would know how to regulate their conduct according to the law. Moreover, a rational process of law-making would ensure that punishments were accurately calibrated[117] and that their administration would be 'swift [and] certain enough to offset

[108] *Report of the Commissioners Appointed to Inquire into the Consolidation of the Statute Law* (HC 1835, 406–XXXV) 5, 12–14. Moreover, nineteenth century courts 'consistently took the view that regulatory offences … were criminal offences': Horder, 'Bureaucratic' (n.86) 105.
[109] Farmer, 'Reconstructing' (n.88) 419.
[110] Rustigan (n.95) 213–14; Lobban (n.88) 430–32.
[111] Rustigan (n.95) 207.
[112] For a general source, see: David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (1989) pt.IV.
[113] i.e., those which will be revisited in my later analysis of the Pharmacy Act 1868.
[114] Farmer, 'Codification' (n.102) 386.
[115] Guyora Binder, 'Foundations of the Legislative Panopticon: Bentham's *Principles of Morals and Legislation*' in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (2014) 89.
[116] ibid 82.
[117] For Bentham, deterrence was the only justification for the imposition of the 'evil' of punishment. For a discussion of Bentham's views on the limits of punishment, see: Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: The Movement for Reform*, vol 1 (1948) 381–93.

the advantage derived from the offence',[118] thereby deterring crime and corruption at both the individual and general levels. Further corollaries to government policymaking were his 'securities against misrule', which included 'subordinating administrative and judicial decision-making to legislative decision-making' and continuously reviewing the effects of legislation on public welfare.[119]

The Criminal Law Commissioners' Benthamic aspiration of full codification was never realised.[120] However, Wiener argues that the Commissioners did move the criminal law 'a long way in the direction of certainty [and towards] a more uniform and nondiscretionary body of laws … in closer correspondence with accepted moral rules'.[121] In addition to uniformity – whether or not as a direct result of Bentham's theories – the themes of a rational, empirical and detached approach to deterring crime and promoting security were also translated into real legislative action.

Perhaps the most conspicuous manifestation of this was the creation of professional metropolitan and provincial police forces from 1829 onwards.[122] Similar to the progression of pharmacy regulation from localised guilds towards centralised organisations,[123] policing was transformed from being administered by local parish constables and private watchmen to 'effective bureaucracies under close discipline',[124] with a constant accumulation of duties including 'inspect[ing] weights and measures, explosives, contagious diseases of animals … and the relief of tramps'.[125] But police forces were just one type among many centralised bureaucracies created in the mid-nineteenth century. Between 1833–1854 the Victorian legislative state was gradually constructed,[126] as new central government agencies were tasked with overseeing local administrations and the implementation of new regulations broadly aimed at improving the nation's health, living conditions and moral character. These developments were not, however, universally well received: as well as fierce opposition to central agencies from magistrates, rate-payers, property owners and

[118] Rustigan (n.95) 207.
[119] Binder (n.115) 90.
[120] The final product was the Offences against the Person Act 1861: text to n.73 above.
[121] Wiener (n.92) 64–65.
[122] From the Metropolitan Police Act 1829 to the County and Borough Police Act 1856. For a detailed history, see: Keith Smith, 'Stumbling Towards Professionalism: The Establishment of English Policing in the Nineteenth Century' in Cornish and others (n.88) 21–57.
[123] Text to nn.21–24 above.
[124] Hay (n.95) 58.
[125] AT Carter, 'Changes in the Constitution, etc.', in Council of Legal Education (n.88) 126–30.
[126] Roberts, *Victorian* (n.88) 95.

the like,[127] there was often a 'strong ideological hostility to social reform' more generally across the political spectrum.[128] As Roberts notes:

> Very few in the two decades after 1833 embraced wholeheartedly a centralised, paternalistic state … It is not, then, in the political theories of the time, not in any party platform or philosopher's dreams, that the reasons for the growth of England's central government can be found, but only in those forces economic, social, scientific, and governmental that arose from the transformation of English society in the early nineteenth century.[129]

Although centralisation and social improvement cannot, therefore, be ascribed the status of driving principles in the law's reform during this 'formative period', Roberts argues that in legislating these reforms, 'Parliament … established precedents for two principles pregnant with future development: that government might interfere in economic affairs in order to protect the individual and that Whitehall might supervise local government in order to ensure administrative efficiency'.[130] In other words, the aggregate of these reforms led to centralisation and social improvement becoming important aspirational concepts in the latter half of the nineteenth century. But the specifics of these reforms are also important when discussing contemporary understandings of legitimate regulatory criminalisation. They provide insights into the motivations behind and the aims of these new regulatory (criminal) laws and central bureaucracies; the processes vital to their creation; the factors affecting their ongoing legitimacy; and into their substantive forms and scope.

A key motivation for legislative intervention was to address the failures of local government. The old poor law, for example, was found by seven Select Committees to be 'a chaos of inefficient authorities and malpractices',[131] whereby the parochial system

[127] Raymond Cocks, 'Health for the Public' in Cornish and others (n.88) 540.
[128] ibid 540, quoting Peter Mandler, *Aristocratic Government in the Age of Reform: Whigs and Liberals, 1830–1852* (1990) 281.
[129] Roberts, *Victorian* (n.88) 100–01.
[130] ibid 36.
[131] ibid 39.

responsible for ameliorating pauperism was administered according to ethical judgements rather than uniform rules, rendering it open to widespread abuse.[132] Similar considerations prompted Church and education system reforms.[133] Another motivation was a desire to urgently correct the ills of industrialisation, fostered by a growing recognition of the working and living conditions of the poor and buttressed by the increasing quality and quantity of statistical information.[134] The employment and abuses of women and children in factories and mines were among the most 'despised' and 'notorious' of these ills.[135] The 'foul air, dangerous explosions, long hours, fatigue, indecencies and immorality'[136] of these industries led to successive statutes[137] which established effective systems of central government inspection; regulated the fencing and cleaning of dangerous machinery; ended the employment of children under 10; and laid down health and safety rules.[138]

Perhaps the best illustrations of the conceptual bases underpinning the expanding Victorian legislative state (and the most pertinent in relation to drug legislation)[139] are in the area of public health.[140] Among the first drivers of mid-nineteenth century public health legislation was the 'sanitary reform movement which emerged to tackle the issues of "moral and physical" degradation unearthed by the statistical inquiries of the 1830s'.[141] Edwin Chadwick's 1842 *Sanitary Report*[142] painted a bleak picture of disease and poverty in Victorian Britain, linking 'the coincidence of pestilence and moral disorder' to, inter alia, the overcrowding, poor sewerage, and other unhygienic environmental conditions which were 'uncared-for by any authority but the landlord, who weekly collect[ed] his miserable

[132] Peter Dunkley, 'Whigs and Paupers: The Reform of the English Poor Laws, 1830–1834' (1981) 20(2) *Journal of British Studies* 124, 141–42; Odgers (n.88) 132.
[133] Roberts, *Victorian* (n.88) 48–55.
[134] MJD Roberts, *Making English Morals: Voluntary Association and Moral Reform in England, 1787–1886* (2004) 144, 157; Cocks, 'Health' (n.127) 542.
[135] Clark Nardinelli, 'Child Labor and the Factory Acts' (1980) 40(4) *Journal of Economic History* 739, 739; Roberts, *Making* (n.134) 159.
[136] Roberts, *Victorian* (n.88) 61; Alfred Henry Ruegg, 'Changes in the Law of England Affecting Labour' in Council of Legal Education (n.88) 263.
[137] e.g., Factory Act 1833; Mines and Collieries Act 1842.
[138] Ruegg (n.136) 259–60, 264; AE Peacock, 'The Successful Prosecution of the Factory Acts, 1833–55' (1984) 37(2) *Economic History Review* 197.
[139] cf Berridge, *Demons* (n.12) 74, arguing that 'the relationship between drugs and public health was slight'. However, Berridge focuses her account of the 1868 Act without taking full account of some of the conceptual similarities between poisons and public health legislation as I am outlining here. cp Parssinen (n.6) 68.
[140] See, e.g.: Tom Crook, *Governing Systems: Modernity and the Making of Public Health in England, 1830–1910* (2016) ch.4.
[141] Roberts, *Making* (n.134) 158. See also on the inadequacies of common law public health regulation: Odgers (n.88) 142.
[142] *Report of the Poor Law Commissioners on an Inquiry into the Sanitary Condition of the Labouring Population of Great Britain* (HC 1846, 006–XXVI) (*Sanitary Report*).

rents from his miserable tenants'.[143] Other interrelated[144] factors identified were barriers to education, inadequate access to healthcare and medicine, and the heavy use of 'ardent spirits',[145] and a Supplementary Report the following year criticised (among other things) the fatalities occasioned by the sale of opium and other medicines by 'incompetent and unqualified practitioners'.[146] Part VII of the *Sanitary Report* is entitled 'Recognised Principles of Legislation and State of the Existing Law for the Protection of the Public Health'. This Part firstly noted that 'legislative interference for the regulation of some points of the internal economy' (such as the employment of children in factories) had the support of public opinion and had set a precedent for broader public health legislation.[147] It went on to note the disutility of existing public health laws resulting from (like the Poor and Factory/Mines Laws noted above) ineffective local administration, inadequate enforcement mechanisms,[148] and the employment of unqualified persons in the construction and maintenance of 'local works, sewers, roads and drains and houses'.[149] It underscored that the application of expertise and science was an 'indispensable' part of the solution.[150] This translated into recommendations for various administrative measures including the establishment of competent boards of health with sufficient investigatory and enforcement powers to effect the objectives of promoting the extension of medical science and of preventing disease and moral depravity.[151] Lastly, it stressed the importance of uniformity in the content and application of any legislative interference.[152] In short, the legitimacy of increased regulation and legislative interference rested on public support; a strong scientific basis (largely enabled by the 'revolution in the collection and use of social statistics … [which] were seen as the necessary accompaniment of the expansion of

[143] ibid 132–33.
[144] Christopher Hamlin and Sally Sheard, 'Revolutions in Public Health: 1848, and 1998?' (1998) 317 *British Medical Journal* 587, 588: 'It seemed that insanitary conditions caused social as well as biological disease, a psychological degradation that led desperate people to invest their hope in alcohol'.
[145] *Sanitary Report* (n.142) 133–37.
[146] Edwin Chadwick, *Report on the Sanitary Condition of the Labouring Population of Great Britain: A Supplementary Report on the Results of a Special Inquiry into the Practice of Internment in Towns* (C (1st Series) 509, 1843) 174.
[147] *Sanitary Report* (n.142) 279; Cocks, 'Health' (n.127) 536.
[148] *Sanitary Report* (n.142) 296, 302.
[149] ibid 332.
[150] ibid 334.
[151] ibid 340–68. See also on the moralising nature of public health legislation: Judith Rowbotham, 'Legislating for Your Own Good: Criminalising Moral Choice. The Echoes of the Victorian Vaccination Acts' (2009) 30 *Liverpool Law Review* 13, esp 14, 17, 20.
[152] *Sanitary Report* (n.142) 372.

responsibilities and administration');[153] sure deliverability by competent and qualified persons; effective enforcement mechanisms; and the advancement of the twin objectives of improving the nation's physical and moral health.

These recommendations came to partial fruition when the Public Health Act 1848 provided for the establishment of a General and Local Boards of Health which could 'be linked to the local machinery of enforcement with inspectors of nuisances, and surveyors, and a doctor as an officer of health'.[154] The General Board could approve local plans or force action in areas where mortality was unacceptably high,[155] and the local boards could make bye-laws and were given extensive powers.[156] However, the Act suffered various pitfalls which affected its utility and the legitimacy of the bureaucracies it created. Uniformity in the Act's application was absent because of its permissive nature (which placed few obligations on local authorities) and because its scope did not extend to London, thereby compromising its effectiveness at the national level. Additionally, due in part to a lack of 'political and administrative direction' and a perception of autocracy and corruption,[157] the General Board was discontinued in 1854. This 'ushered in an era of localism',[158] whereby Parliament endeavoured to uphold the 'characteristic' principle of allowing 'local people to have the privilege of managing themselves and the right to pursue policies of their own choosing'.[159] Roberts provides numerous illustrations of this localism, and the ways in which the powers of centralised Victorian bureaucracies were limited: the power to issue regulations for prisons and asylums, for example, lay with local justices, and 'the owners of mills, mines and railways were entrusted with drawing up regulations for their safe management'.[160] The centralised Poor Law Commission's capacity to create regulations was, by contrast,

[153] Lindsay Farmer, 'Responding to the Problem of Crime: English Criminal Law and the Limits of Positivism, 1870–1940' in Michele Pifferi (ed), *The Limits of Criminological Positivism: The Movement for Criminal Law Reform in the West, 1870–1940* (2021) 179.
[154] Cocks, 'Health' (n.127) 542.
[155] Deborah Brunton, *Medicine in Modern Britain 1780–1950* (2018) 101.
[156] Cocks, 'Health' (n.127) 542. These powers enabled local authorities 'to construct and manage sewers, drains, wells, water and gas works; to deal with deposits of refuse, closets and slaughter-houses; to regulate offensive trades; to remove nuisances; to protect water-works from pollution; to pave and regulate streets; to regulate dwellings and common lodging-houses; to provide burial and recreation grounds; and to supply public baths with pure water': Odgers (n.88) 145.
[157] Brunton (n.155) 101. Roberts argues that this perception of autocracy was unfounded: Roberts, *Victorian* (n.88) 112.
[158] Roberts, *Victorian* (n.88) 95.
[159] ibid 112.
[160] ibid.

'exceptional'.[161] Similarly, the ostensibly extensive powers given to centralised bureaucracies were, in fact, usually heavily constricted: the Railway Board, for example, could determine 'the radius of curves … settle gauge disputes [and] regulate mail trains', but could not review railway legislation, inspect lines, insist on safe equipment, or set schedules and rates.[162] In sum, the central departments with nationwide power to supervise local administration were, at the time of the General Board's disbandment and increasingly so for some time after, 'ramshakle and weak'.[163]

After its disbandment, the General Board's powers were transferred to the Home Office and the Privy Council under the Local Government Act 1858 and the Public Health Act 1858, respectively. This latter Act required the appointment of a Medical Officer of the Privy Council who had the task of laying annual reports before Parliament detailing the Act's implementation.[164] The appointee, Sir John Simon, continued the motif of '[integrating] scientific expertise into the administration of regulatory controls',[165] overseeing the enactment of a raft of public health legislation which increasingly compelled local authorities to take action (and enabled central authorities such as the Home Office to do so where they failed),[166] eventually culminating with the extensive consolidatory Public Health Act 1875.[167] In his annual reports, Simon also took aim at the regulation of medicines: his *Sixth Report* of 1863, for example, discussed 'the enormous general consumption of opium', including its non-medical use, and noted the desirability of restricting its trade to combat fatal infant poisonings.[168]

As Holland and Stewart argue, the legislation enacted post-1858 'indicat[ed] that public health matters were now at last at the forefront of the political agenda'.[169] These various reforms also saw the increasing use of novel preventative legislative techniques. Whereas '[e]arly encounters with regulatory offences had prompted emphatic endorsement of the universal doctrinal requirement of fault' among the judiciary, by the latter half of the

[161] ibid.
[162] ibid 114–15.
[163] ibid 105–06.
[164] Public Health Act 1858, ss.1, 4–6.
[165] Cocks, 'Health' (n.127) 544.
[166] The Sanitary Act 1866 required local authorities to make sanitary improvements and remove nuisances, and the Public Health Act 1872 required local authorities to appoint inspectors and medical officers.
[167] For a discussion of the Public Health Act 1875's extent, see: Cocks, 'Health' (n.127) 548–53.
[168] *Sixth Report* (n.74) 35, 459–60.
[169] Walter W Holland and Susie Stewart, *Public Health: The Vision and Challenge* (1998) 13. However, (at 11), 'the problems of resistance to central government involvement in local matters continued'.

nineteenth century both the judiciary and parliamentarians had 'conceded the significant doctrinal innovation[s]' of strict and vicarious liability.[170] The Tobacco Act 1842, for example, made those 'receiving, sending out, or having in possession' adulterated tobacco liable to a fine of £200, and it was held (partly on public health grounds) in 1846 that the offence was made out where a tradesman was ignorant of the adulteration.[171] A similar example especially pertinent here is the regulation of food and drink. The adulteration of food and drink (and drugs) had flourished in the absence of any administrative control over its purity,[172] and following a campaign by doctors, chemists and *The Lancet* in the 1850s[173] – as well as the Bradford peppermint/arsenic lozenge disaster[174] and the findings of an 1855 Select Committee which evidenced this widespread practice in great detail[175] – Parliament eventually passed the Adulteration of Food and Drink Act 1860. This Act created the strict liability offence of selling 'as pure or unadulterated any Article of Food or Drink which is adulterated or not pure'[176] (a narrow application which enabled the heavy adulteration of opium and other drugs to continue)[177] and also provided for the appointment of analysts with powers to inspect the purity of food and drink sold in a particular locality.[178] Unfortunately, the Act was a total failure: local authorities were not obliged to appoint analysts, it was rarely enforced, and it relied on members of the public providing samples to the analysts.[179] It was, however, the catalyst for further Acts in 1872

[170] Keith Smith, 'Excluding Fault from Criminal Responsibility: Strict and Vicarious Liability: Quasi-Criminal or Regulatory Offences?' in Cornish and others (n.88) 321, 328, 331. See also: Francis Bowes Sayre, 'Public Welfare Offenses' (1933) 33 *Columbia Law Review* 55, 56–61.

[171] *Woodrow* (1846) 153 ER 907.

[172] JH Hamence, 'The 1860 Act and its Influence on the Purity of the World's Food: Historical Introduction' (1960) 15(11) *Food, Drug, Cosmetic Law Journal* 711; Alan Turner, 'The Development and Structure of Food Legislation in the United Kingdom and Its Interaction with European Community Food Laws' (1984) 39(4) *Food, Drug, Cosmetic Law Journal* 430, 431, Table 1.

[173] PJ Rowlinson, 'Food Adulteration: Its Control in 19th Century Britain' (1982) 7(1) *Interdisciplinary Science Reviews* 63.

[174] Text to n.69 above.

[175] Select Committee on Adulteration of Food, Drinks and Drugs, *First Report* (HC 1855, 432–VIII).

[176] Adulteration of Food and Drink Act 1860, s.1. Another offence under the same section was to 'sell any Article of Food or Drink with which, to the Knowledge of such Person, any Ingredient or Material injurious to … Health … has been mixed'. Whether or not the requirement of 'knowledge' in this latter offence implied the former offence imposed strict liability cannot be certain. However, the judiciary had been willing to impose no-fault liability for the adulteration of tobacco 14 years prior, and in *Cundy* v *Le Cocq* (1884) 13 QBD 207 the fact that some offences under the Licensing Act 1872 mentioned 'knowledge' while others did not was relied on by Stephen J when construing the Act to impose strict liability. The later Sale of Food and Drugs Act 1875 was undoubtedly intended by Parliament (and construed this way by the judiciary) to impose strict liability in certain offences: Smith, 'Excluding' (n.170) 328, fn.28.

[177] For a discussion of the adulteration of drugs, see: Select Committee, *First Report* (1855) (n.175) 22–24; Berridge, *Opium* (n.2) ch.8.

[178] Adulteration of Food and Drink Act 1860, s.2.

[179] Rowlinson, 'Food' (n.173) 66.

and 1875, the latter of which was 'the ancestor' from which decades of future food laws descended.[180] Vicarious liability took a little longer to become established in the criminal law, but was expanded from the 1860s via judicial decisions holding, inter alia, shopkeepers liable for their employees' sales of adulterated goods and of alcohol to on-duty policemen.[181]

Before concluding this section some final, wider motivations for legislative reform merit fleshing out. Parallels can be drawn between the employment of strict and vicarious liability and the Benthamite aspiration of deterrence via swift and certain punishment which had emerged earlier in the century.[182] The desire for rational laws based on scientific evidence and with uniform application cut across both the Statute Law Commissioners' work and the sanitary reform/public health movement.[183] Perhaps more pertinently, Wiener argues that the 'expansive legal standards of personal [and] strict liability', and of the law's uniform application, were 'an instrument to apply increasing pressure on the individual to develop and strengthen … powers of self-regulation' as part of a moral agenda[184] which had at its core 'an expectation of reasonable and proper behaviour and the readiness to punish its absence'.[185] Indeed, such motivations were explicitly voiced in the Parliamentary debate on the Adulteration of Food and Drink Bill, when remark was made 'that by the systematic adulteration of articles of food and drink, the public health was endangered, pecuniary frauds were extensively practised, and the moral character of the country deeply affected'.[186] The employment of strict liability thus gave food and drink merchants (like tobacco tradesmen) 'greater incentive to become "prudent men"'.[187]

As touched on above,[188] this moralising agenda permeated much of the expansion of the Victorian legislative state. Public health reforms, Wiener argues, were not only concerned with improving drainage, housing and the like, but also sought to '[promote] the extirpation of bad and the inculcation of good habits – of diet, cleanliness, and orderliness [as t]he

[180] RE Curran, 'British Food and Drug Law – A History' (1951) 6(4) *Food, Drug, Cosmetic Law Journal* 247, 254.
[181] Smith, 'Excluding' (n.170) 331, citing *Fitzpatrick* v *Kelly* (1873) LR 8 QB 337 and *Mullins* v *Collins* (1873–74) LR 9 QB 292.
[182] Text to nn.109–119 above.
[183] Text to nn.101–110, 139–153 above.
[184] Wiener (n.92) 48.
[185] ibid 71.
[186] HC Deb 29 February 1860, vol 156, col 2026.
[187] Wiener (n.92) 82, quoting *Woodrow* (n.171).
[188] Text to nn.136, 143 above.

success of physical and environmental sanitary reforms depended after all on mass conformity … to new behavioural norms'.[189] Moreover, this broad moralising agenda '[acted] through (and on occasion [contradicted]) an overt philosophy of laissez-faire and non-paternalism'.[190] Even JS Mill, whose famous anti-paternalist statement that 'the only purpose for which power can be rightfully exercised against any member of a civilised community, against his will, is to prevent harm to others'[191] has become 'a foundational reference of Anglo-American criminal law',[192] deemed many state interventions seemingly grounded in morality or paternalism to be legitimate.[193] These included imposing fines on parents for the 'moral crime' of not ensuring their children were literate; prohibiting drunkenness for those with a history of violence when under the influence; regulating alcohol sales to discourage intemperance; and criminalising the irresponsible sale of dangerous goods such as poisonous substances and firearms.[194] Evidencing Wiener's assertion that '[w]hen the free market and the covert moral agenda clashed, the market usually gave way',[195] this latter category of crimes (which Farmer argues also utilised a 'new preventative technique' of 'extending ideas of endangerment [to limit] access to technologies of violence')[196] found extensive legislative expression in the nineteenth century.[197]

[189] Wiener (n.92) 45.
[190] ibid 71.
[191] John Stuart Mill, *On Liberty* (first published 1859, Cambridge University Press 2011) 22.
[192] Albeit 'pulled out of context and denuded of [his] sophisticated philosophical treatment': Bernard E Harcourt, 'Mill's *On Liberty* and the Modern "Harm to Others" Principle' in Dubber, *Foundational* (n.115) 163. See also: Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90(1) *The Journal of Criminal Law and Criminology* 109, 121–22; Richard J Arneson, 'Mill versus Paternalism' (1980) 90(4) *Ethics* 470.
[193] While such interventions may have been acceptable as they 'constituted no great menace to individual liberty', their moral/paternalistic character cannot be discounted. See: Pedro Schwartz, 'John Stuart Mill and Laissez Faire: London Water' (1966) 33(129) *Economia* 71, 74.
[194] Harcourt, 'Mill's' (n.192) 166–67, quoting and summarising Mill (n.191). For discussion of Mill's views on alcohol prohibition, see: Mark H Moore, 'Drugs, the Criminal Law, and the Administration of Justice' (1991) 69(4) *The Milbank Quarterly* 529.
[195] Wiener (n.92) 71, fn.91. Wiener discusses gaming laws and the practices of judges voiding immoral contracts in this context.
[196] Farmer, *Making* (n.87) 251–52.
[197] Farmer gives the example of the Gun Licence Act 1870.

1.3 Analysis of the Pharmacy Act 1868

The preceding section sought to identify, with appropriate breadth, some relevant aims, directions and principles of nineteenth century legal reforms which would enable a meaningful analysis of the Pharmacy Act 1868. Nineteenth century drug and poison legislation's penal, public health, and administrative dimensions necessitated drawing some of these conceptual 'criteria' from reforms in specific, corresponding areas. Further criteria were drawn from the contemporary aspirational characteristics of statute law more generally, since many of these reforms were shaped by the rise of the Victorian legislative state when fresh ideas concerning the quality of legislation itself were articulated. To summarise, these included: (i) rationality in the process of law-making, which entailed the increasing employment of expert and empirical evidence in a continuous and democratic process of policy formulation and improvement; (ii) a focus on being systematic 'such that all parts [of the law] were made to serve a single object' and whereby gaps and inconsistencies were rectified;[198] and (iii) clear, consistent and binding statutory provisions to ensure the law was accessible and uniform in its application. Additionally, (iv) the improvement of public health, living standards and moral character (and the effective deterrence of irresponsible and immoral behaviour and professional/workplace practices) was sought via a widening body of punitive regulatory legislation which utilised novel preventative techniques such as strict and vicarious liability. Further corollaries of effective deterrence (which had developed since the beginning of the nineteenth century) were that the punishment of infractions had to be swift, certain and calibrated fairly. Moreover, (v) largely as a result of the failures of local government earlier in the century, the efficient local administration of these new regulations was pursued through the establishment of central bureaucracies with capacities of oversight; but the legitimacy and existence of those central authorities could be threatened by a lack of public support and/or perceptions of autocracy and corruption. Finally, (vi) in keeping with the still-influential Victorian philosophy of libertarianism and state non-interference, local authorities typically retained most substantive powers of decision-making and of issuing regulations. After an outline of

[198] Farmer, 'Reconstructing' (n.88) 414; above at n.106 (and text to).

the 1868 Act's main provisions, the following discussion uses these points (i) to (vi) as headings to structure the analysis.

1.3.1 Outline of the Pharmacy Act 1868

The Pharmacy Act 1868 shared the same penal, public health, and administrative dimensions as earlier drugs and poisons legislation. It was penal as the issue of criminal poisoning remained a concern during the Act's passage through Parliament,[199] and the Act placed restrictions backed by punitive sanctions on the sale of opium – a substance used 'recreationally' at the time and which today is a controlled drug – for the first time.[200] Opium was included in Part 2 of Schedule A which required that the 'box, bottle, vessel, wrapper or cover … be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison'.[201] By contrast, the sale of poisons listed in Part 1 of Schedule A (such as arsenic, prussic acid, and cyanide)[202] were subject to more stringent restrictions in addition to the labelling requirements, including that the particulars of the sale were recorded in a specified form and that transactions could only be conducted between persons known to one another or in the presence of a mutual acquaintance.[203] The less stringent restrictions on opium were a compromise position: 'Doctors and the public health men argued for further restrictions, while the pharmacists fought to limit control of the drug to a manageable level'.[204] However, 'patent medicines' were excluded from the Act's remit.[205] The penalties for noncompliance with the Act were the same for all the listed poisons: £5 for the first offence and £10 for every

[199] HC Deb 15 July 1868, vol 193, col 1219. So close was this tie that one contemporary commentator expressed surprise that the Poisons and Pharmacy Act 1908, which amended the 1868 Act, provided 'no statement that the ready accessibility of poisons leads to crime … in view of some of the provisions of the Act, and the genesis of the agitation which caused them to be enacted': H Wippel Gadd, 'The Poisons and Pharmacy Act, 1908 in Relation to the Public Health and Safety' (1908) 6(1) *Medico-Legal Society Transactions* 162, 163.

[200] Text to nn.12–16 above; Misuse of Drugs Act 1971, sch.2.

[201] Pharmacy Act 1868, s.17.

[202] These poisons were variously used as medicines, abortifacients and wallpaper dyes: Berridge, *Demons* (n.12) 57; above at n.40 (and text to).

[203] Pharmacy Act 1868, s.17.

[204] Berridge, *Opium* (n.2) 119.

[205] Pharmacy Act 1868, s.16; note these were often opium-based: above at n.6 (and text to).

subsequent offence.[206] The strict liability provisions of the Adulteration of Food and Drink Act 1860 were extended to medicines,[207] and employers were made vicariously liable for offences committed by their apprentices and servants.[208]

The Act's public health and administrative dimensions can be seen in its regulation of the pharmaceutical profession. The Act required 'for the safety of the public that persons keeping open shop for the retailing, dispensing or compounding of poisons, and persons known as chemists and druggists' to 'possess a competent practical knowledge of their business'.[209] To achieve this, the RPS was established as the central governing body of pharmacists, and pharmacists had to gain qualifications through passing examinations set by the RPS and registering as professionals under the Act.[210] However, during the Act's passage several objections were raised and significant amendments made. Among the first was that the Bill as originally drafted gave the government too little control over the RPS' decision-making, so it was decided that the Privy Council would have the authority to oversee that the RPS' 'examinations were conducted in a proper manner', and also that the RPS could not make further regulations without the Privy Council's approval.[211] Another amendment meant that chemists' assistants and apprentices needed only pass a 'modified' (minor) examination to enable their compulsory registration under the Act instead of the major examination required of their employers.[212] A more principled objection was also raised: although generally supportive of the Bill, the Marquess of Salisbury argued against what he saw as an un-English paternalistic overreach when it was proposed that all poisons had to be sold in a distinctively-shaped 'poison bottle' to reduce the risk of accidental poisonings occurring in the dark:

[206] cp *Gardner* (n.107) above.
[207] Pharmacy Act 1868, s.24.
[208] ibid s.17.
[209] ibid preamble.
[210] ibid ss.1, 4–5.
[211] HL Deb 15 June 1868, vol 192, col 1555; Holloway, *Royal* (n.23) 232.
[212] Sale of Poisons and Pharmacy Act Amendment HL Bill (1867–68) 181; cp [as amended in Committee] HL Bill (1867–68) 238.

> Hitherto we had proceeded upon the principle of protecting persons from wrongs or injuries wilfully wrought by others; but we had never acted upon the principle of protecting sensible people from possible dangers merely because foolish people might have it in their power to injure themselves … This … principle of legislation [is] totally opposed to the habits of this country [and] one that … would tend … to greater evils than those which it sought to prevent.[213]

The 'poison bottle' idea was thereafter defeated by 45 votes to 39.

1.3.2 Rationality

A cursory overview of the 1868 Act's legislative genealogy (set out in section 1.1 above) suggests rationality in its creation. It was the combined result of multiple failed Bills; two thorough Select Committee Reports which analysed empirical data and heard interdisciplinary testimony from experts with toxicological, pharmaceutical, and business experience; the influence of numerous professional groups representing pharmaceutical and medical interests; and detailed scrutiny in both Houses of Parliament before its eventual enactment. There was wide support for poisons legislation following the 'epidemic' of criminal poisonings which had captured the public's imagination and anxiety, indicating a strong democratic mandate for legislative action. Additionally, the positioning of opium in Part 2 of Schedule A – with its less stringent restrictions on sale – was arguably a utilitarian compromise which recognised the necessity of the drug's continued availability in the absence of other effective medication, while simultaneously reducing the risk of accidental opium poisoning through labelling requirements and enabling tighter control over other substances such as arsenic.

However, on closer examination the story of a rational process of law-making is less convincing. The Act's genealogy was marked by long periods of legislative inertia and

[213] HL Deb 18 June 1868, vol 192, col 1746. Lord Redesdale, who was in favour of the poison bottle, countered (at 1748) that 'many instances of such legislation already existed; persons were every day being punished for stepping from a train in motion'.

policymaking stagnation, resulting from various extraneous influences, and during which time the problems which poisons legislation was intended to address were exacerbated. Leeson, King and Fegley present a particularly scathing analysis of the role of professional groups in the 1868 Act's gestation.[214] They argue that the actions of the RPS and other organisations in frustrating the numerous attempts to pass poisons legislation – and in particular the desire of these professional groups to establish a monopoly on the sale of drugs – indicates their lobbying was motivated not by public interest considerations, but was 'the product of rent-seeking by health professionals',[215] i.e., a desire to secure their profits against competition from the myriad traders who sold drugs as a side-line. Their conclusion that the situation was '[not much] "more complex [than] one of conspiratorial plotting … for self-interested ends"'[216] is probably overly cynical: to dismiss the decades-long efforts of the RPS in promoting pharmaceutical education and safety as purely greed-driven paints in too-broad brushstrokes; there were, after all, members of professional organisations who sought not to place too stringent restrictions on essential and widely relied-upon medicines; and a desire of any profession to restrict its area of practice to those with suitable expertise could, in any context, be open to such criticisms. However, many examples discussed section 1.1 above do bear out the overall thrust of Leeson et al's argument that the vested interests of professional groups were a significant contributing factor to this legislative inertia. Collaboration between professional groups was rare, and even when it did occur with the Arsenic Act 1851, the result was a stripped-down, 'dead letter'[217] statute which applied to only one of the many 'poisons that claimed the lives … of Britons'.[218] The Sale of Poisons Bill 1857 failed due to disagreements between the medical and pharmaceutical professions and because the RPS objected to having a minority role in the granting of licences and the examination of pharmacists. And even when a short Bill was introduced in the wake of the Bradford disaster two years later requiring only modest restrictions on the sale of poisons, which likely would have prevented such accidents occurring in future, the RPS objected as it was not on their own terms.

[214] Peter T Leeson, M Scott King and Tate J Fegley, 'Regulating Quack Medicine' (2020) 182 *Public Choice* 273.
[215] ibid 281.
[216] ibid 285, quoting Virginia Berridge and Griffith Edwards, *Opium and the People: Opiate Use in Nineteenth-Century England* (2nd edn, 1987) 76.
[217] Above at n.49 (and text to).
[218] Whorton (n.40) xv.

What is more important for my purposes, though, is not simply the (perhaps unsurprising) observation that professional groups sought to protect their own interests when confronted with a new legal regime,[219] but that for decades legislators were paralysed in their efforts to enact laws because of this professional wrangling. Decisions not to proceed with legislation disregarded both the well-evidenced need for Government action and the public's wider calls for a solution to the issue of criminal poisonings. Instead, the focus was entirely on the separate issue of uncertainty surrounding who should control the pharmaceutical profession.[220] The question of to whom professional responsibility should be entrusted was, of course, extremely important; but an inability to pass even modest labelling requirements[221] for poisonous substances because of such uncertainty was an irrational conflation (or an irrational prioritisation) of the matters requiring Government attention. Moreover, as a further example of irrationality in the process of law-making, there were few advancements in policy formulation or improvement over this time, or at least policy stagnation in many areas. Each subsequent poisons Bill largely recycled provisions which had appeared in previous (failed) ones, and there is little in the text of 1868 Act which does not bear a striking resemblance to what had been attempted in the years before.[222] The hierarchy of objectives of poisons legislation – namely first to combat criminal poisonings, and second to prevent accidental poisonings due to the ignorance of those who sold them – also remained largely unchanged throughout the mid-nineteenth century, even as it became apparent that the priority (insofar as successfully passing legislation) was the latter.

[219] i.e., '[moving] beyond notions of "power struggles" … which have limited explanatory power and tend to rely on vague and thinly theorised notions of "influence"': Toby Seddon, 'The Regulation of Heroin: Drug Policy and Social Change in Early Twentieth-Century Britain' (2007) 35(3) *International Journal of the Sociology of Law* 143, 149.
[220] This professional wrangling continued during the 1868 Act's passage through Parliament: Berridge, *Opium* (n.2) 119; Holloway, *Royal* (n.23) 235.
[221] Above at nn.69–71 (and text to).
[222] e.g., text to n.48 above.

1.3.3 System

More positively, the 1868 Act was systematic insofar as it addressed and joined up several interrelated issues as part of a greater 'whole', and corrected some gaps and inconsistencies. Although Holloway makes a strong argument that 'the Act was more a patchwork quilt of amendments than a seamless web of legislative thought',[223] it was a comprehensive Act in a number of respects (or at the very least, ambitious in its scope); especially when compared to the legislation which had preceded it, and when the early, formative period of poisons/pharmaceutical regulation is taken into account.

In the nineteenth century the distinction between a poison and a medicine was very blurred, with the same substance often being used for both purposes.[224] Yet, before the 1868 Act, the law had attempted to draw such a distinction by dealing with individual substances in a context-specific manner and in separate statutes. This caused arbitrariness in the law, and this narrow and piecemeal approach meant that broader (and sometimes more pressing) issues were left unaddressed. For example, the Arsenic Act 1851 had singled out that substance for regulation in order to combat criminal poisonings, even though it was only one of numerous substances used by criminal poisoners and had many legitimate uses; and the offence of using 'chloroform, laudanum or other stupefying or overpowering drug'[225] in the furtherance of a felony did nothing to alleviate the more common problem of deaths occurring from accidental poisonings. By listing numerous substances in its schedule, the 1868 Act went a long way to remedying the Arsenic Act's arbitrariness, and the various requirements it laid down for their sale (accurate labelling, recording of sales, etc.) aimed to advance the twin objectives of preventing both criminal and accidental poisonings for the first time in a single statute.

Further similar examples of the 1868 Act bringing together interrelated areas which prior laws had dealt with independently were the regulation of the pharmaceutical profession and laws concerning the adulteration of consumable goods. As well as being piecemeal in nature, the legal landscape created by the Apothecaries Act 1815 and the Pharmacy Act

[223] Holloway, *Royal* (n.23) 239.
[224] Above at nn.40–43 (and text to).
[225] Prevention of Offences Act 1851, s.3; Offences against the Person Act 1861, s.22.

1852 was unsuited to the regulation of – and caused more fragmentation than unity amongst – those who sold medicines.[226] The 1868 Act's prescription of a compulsory system for the registration, licencing and examination of pharmacists was, by contrast, far more comprehensive; and its extension of the provisions of the Adulteration of Food or Drink Act 1860 to medicines was an important corrective. This is not to say that these provisions were necessarily effective: as discussed below, various problems stemming from the lack of clarity and uniformity of the 1868 Act's provisions arose, and the Adulteration of Food or Drink Act 1860 was a total failure.[227] However, this does not detract from the Act's accordance with the contemporary aspirational principle of ensuring legislation was *systematic*. The 1868 Act was not merely an exercise in statutory consolidation or a scattergun approach to discrete problems. Compared to previous legislation which had taken a compartmentalised approach to poisonous substances and the issues they caused, the 1868 Act's approach was remarkably holistic: it augmented established regulatory regimes where they existed (such as with the adulteration of consumable goods) and created entirely new ones where they did not (i.e., pharmaceutical regulation). Additionally, it remedied some arbitrary gaps in the law and promoted the policy ends of preventing both accidental *and* criminal poisonings.

1.3.4 Clarity and Uniformity

The Act's provisions were prima facie clear, apparently setting out straightforward rules prescribing a uniform class of persons who could sell specific poisons (listed in a seemingly unambiguous schedule), and the manner in which these were to be sold. However, after the Act's introduction, it became apparent that what might seem the most elementary definitional question – that of who could trade in poisons and medicines and was entitled to use the title of 'chemist' – was uncertain. Those registered as pharmaceutical chemists under the Act were permitted to sell, dispense, or compound 'poisons', but not explicitly *medicines*. Although this enabled registered persons 'to dispense "poisonous" prescriptions', this uncertainty led the '[RPS to promote unsuccessful] bills to amend the

[226] Text to nn.57–59 above.
[227] Text to n.179 above.

Pharmacy Act … in 1881, 1891 and 1899' to remedy this anomaly.[228] An amendment which *did* become law on a similar but slightly different issue came just a year after the Act's enactment. Medical practitioners had been disallowed from being registered under the Act[229] and were not given an explicit exemption to its provisions,[230] making them liable to fines for the 'retailing, dispensing or compounding of poisons'. The Pharmacy Act 1869 remedied this, granting medical practitioners an exemption to supply medicines themselves and enabling them to be registered under the Act.[231] Another issue related to the protected title of 'chemist'. Likely (and understandably) interpreting this protection as applying only to those who traded in medicines and poisons, a number of people who variously advertised themselves as 'scientific instrument maker and technical chemist', 'photographic chemist', 'botanic chemist', 'analytical chemist', and 'shipping druggist' were successfully prosecuted under the Act.[232] Conversely, due to an apparent lack of clarity regarding the interplay between the 1868 Act and the Apothecaries Act 1815, pharmaceutical chemists found themselves prosecuted under the latter Act for prescribing medications over the counter.[233]

Consistency and uniformity are also notably absent features in some of the Act's most important provisions, which – compounded by issues of clarity and inadequate enforcement – made the Act ineffective in achieving some of its main goals. As already noted, a principal aim of the Act was to ensure that those who sold drugs 'possess[ed] a competent practical knowledge of their business',[234] a cornerstone of which was uniformity of chemists' qualifications.[235] Due to the multiple avenues to becoming registered under the Act, however, this was not the case: pharmacists who had passed the RPS' major

[228] Holloway, *Royal* (n.23) 240.
[229] Pharmacy Act 1868, s.23.
[230] ibid ss.16–17.
[231] Pharmacy Act 1869, ss.1, 3, 4.
[232] Holloway, *Royal* (n.23) 241; *Bremridge* v *Hume* (1895) 2 Adam 24; *Bremridge* v *Turnbull* (1895) 2 Adam 29. See also: *Gray* v *Bremridge* (1887) 1 White 445, 453, criticising the 'defective' draughtsmanship in the Act and holding (following the House of Lords in *Pharmaceutical Society of Great Britain* v *London and Provincial Supply Association Ltd* (1880) 5 App Cas 857) that the word 'person' did not include a company or corporation; *Tomlinson* v *Bremridge* (1894) 1 Adam 393, a 6-judge decision extensively discussing who the 1868 Act applied to, and holding that although the Pharmacy Act 1868, s.17 made employers vicariously liable, s.15 only made the person who conducted the transaction liable.
[233] Holloway, *Royal* (n.23) 258; Anon, 'The Medical Defence Association' (1879) 1(953) *British Medical Journal* 518.
[234] Pharmacy Act 1868, preamble.
[235] *Pharmaceutical Society* v *Wheeldon* (1890) 24 QBD 683, 689: '[T]he intention of the legislature was expressly to [insist] upon one uniform qualification for every person who should sell, whether on his own account or for any other person, such dangerous commodities'.

examination; those who had passed its minor examination; assistants who had passed its modified examination and had been employed for three years; and those who were in business as chemists prior to the Act were all entitled to carry on the business (and title) of chemist. Additionally, due to poor enforcement, it was rare for assistants to be qualified, even after an 1880 House of Lords decision expressly held that sellers of poisons under the Act must be so qualified;[236] and as there were no effective checks carried out to ascertain whether someone actually had been in business prior to the Act, there was an 'open-door policy' whereby 'no one who ran a chemist's shop had any difficulty getting their name on the register, even though he may never have dispensed a medical prescription in his life'.[237] Even general sales of drugs (including opium) by non-chemists persisted post-Act, as 'voluntary "policing" by the [RPS'] inspection was insufficient to fulfil the Act's purposes'.[238] In the particular case of opium, this was actually enabled by the RPS who in 1869 'advocated an interpretation of the Act' in which '"preparations of opium" [i.e. containing >1% opium] were distinguished from "preparations containing opium"', with only the former subject to control.[239]

However, the most inconsistent and unclear provision of the Act was arguably the 'enormous loophole'[240] of excluding 'patent medicines' from its remit. Not only did this enable non-chemists to continue to sell poisonous substances – further compromising the aim of ensuring those who sold poisonous substances had a competent knowledge of their business – but it impacted the effectiveness of the Act's goal of reducing accidental poisonings.[241] Patent medicines (more accurately, *proprietary* medicines, as they were protected by trademarks rather than patents)[242] were variously sold as remedies for any and every ailment. While some contained harmless ingredients, many contained powerful drugs (including opium and its derivatives such as morphine) in dangerous concentrations.[243] As the 1868 Act had increased the difficulty of obtaining ordinary preparations of these powerful drugs, proprietary medicines saw a post-Act surge in

[236] Holloway, *Royal* (n.23) 280–81; *Pharmaceutical Society of Great Britain* (n.232).
[237] Holloway, *Royal* (n.23) 240.
[238] Berridge, *Opium* (n.2) 121.
[239] ibid.
[240] Parssinen (n.6) 71.
[241] 'The number of children dying from opium overdoses was, however, permanently reduced' post-1868: Berridge, *Opium* (n.2) 120.
[242] ibid 123.
[243] Above at n.6 (and text to).

popularity. Two classes of such medicines caused particular issues. As Lomax argues, the continued sale of opium-based infant sedatives meant that 'the interests of small children were sacrificed … [even though] the government had a good knowledge of the extent to which infants were drugged and killed by opiates'.[244] More notorious, however, was chlorodyne – a mixture composed primarily of chloroform and morphine which was invented in the 1850s. Soon after, several other chlorodynes appeared on the market. Sales rocketed, medical journals increasingly reported chlorodyne poisoning cases, a professional scare of expanding chlorodyne use ensued,[245] and 'the inquest records filled with the victims: suicides, accidental overdoses, chlorodyne addicts'.[246] An unsuccessful Bill[247] in 1884 sought to restrict the sale of patent medicines, but 'in accord with their laissez-faire principles, the government did not support [it]'.[248] It was argued that it would be 'harassing legislation' for both consumers and traders to subject patent medicines which may contain only small amounts of poison to the 1868 Act's regulations.[249] It was not until a series of cases in the 1890s in which chlorodyne dealers were prosecuted under the 1868 Act that the patent medicine question was cleared up: it was held that the Act's patent medicine exception applied only to medicines actually issued with a government patent, resulting in all proprietary medicines containing scheduled poisons having to be sold by registered pharmacists.[250] It is ironic that judicial interpretation had to take up the slack on such elementary issues of definitional clarity, given that a primary aspiration of nineteenth century legislation was to address the deficiencies of the obscure and discretionary common law.

[244] Elizabeth Lomax, 'The Uses and Abuses of Opiates in Nineteenth-Century England' (1973) 47(2) *Bulletin of the History of Medicine* 167, 176.
[245] Berridge, *Opium* (n.2) 126–30.
[246] Holloway, *Royal* (n.23) 247.
[247] Patent Medicines HC Bill (1884) [9].
[248] F Charles Tring, 'The Influence of Victorian "Patent Medicines" on the Development of Early 20th Century Medical Practice' (PhD thesis, University of Sheffield 1982) 79.
[249] HC Deb 26 March 1884, vol 286, col 810.
[250] *Pharmaceutical Society* v *Piper and Co* [1893] 1 QB 686; *Pharmaceutical Society* v *Armson* [1894] 2 QB 720.

1.3.5 Regulatory Expansion

Two characteristic features of the Victorian legislative state were the proliferation of regulatory statutes and the central oversight of local administrations. There is a strong affinity between the 1868 Act and the first of these. The Act's pursuit of an express public health goal via the creation of a regulatory scheme is a repeatedly observable trope throughout nineteenth century law-making. The Act was passed at a time when social improvement had become cemented as an important aspirational concept; the legitimacy of certain government interference with free trade had been established; and public health was at the forefront of the political agenda. Although the complexity and obscurity of the Act's provisions did lead to inefficacy (in some cases actually regressing rather than advancing public health), and the argument that the Act was heavily influenced by organisations which were not always motivated by improving public health and safety is convincing,[251] the Act does appear to have been a genuine attempt by legislators to address the negative health effects caused by an unregulated drug trade. From a general perspective, therefore, the Act sits comfortably in synergy with the legislative zeitgeist. But the connection between the Act and the expansion of public health laws is not merely temporal, or 'slight',[252] or only superficially evidenced by the 'public safety' purpose stated in its preamble. The issues of inadequate access to healthcare and the fatalities occasioned by the sale of opium and other drugs by unqualified practitioners had been recognised in the earliest drivers of public health legislation, i.e. the sanitary reform movement, and continued to feature in official reports relating to public health over the following decades.[253] Additionally, many of the motivations and problems underpinning both public health reforms and the 1868 Act were identical, such as the generally poor living conditions of the populace, the failures of local administration, and the lack of appropriate qualifications among those entrusted with responsibility. Moreover, advances in scientific expertise and the 'revolution in the collection of social statistics'[254] precipitated legislative action in both cases.

[251] Text to nn.214–219 above.
[252] Berridge, *Demons* (n.12) 74; cp n.84 above.
[253] e.g., text to n.168 above.
[254] Farmer, 'Responding' (n 153) 179.

As well as recognising that poor sewerage, overcrowding, and the indiscriminate sale of adulterated medicines by unqualified persons was detrimental to the nation's physical health, the sanitary reform and public health movements also linked these issues to *moral* disorder. This motif also surfaced in other newly-regulated areas such as the employment of women and children in factories and mines, leading to a moralising agenda finding extensive expression in the Victorian legislative project.[255] This agenda is apparent doctrinally in the 1868 Act, most notably through its utilisation of the relatively novel legislative techniques of strict and vicarious liability: no-fault liability would give the myriad unqualified traders in drugs and poisons 'greater incentive to become "prudent men"',[256] in the same way as it had done for food, drink and tobacco traders under previous legislation. Additionally, by placing the sale of drugs in the hands of qualified, upstanding pharmacists, the Act could address certain habits among the general public which had been viewed with certain degrees of ignominy, such as the 'bad use'[257] of opium in manufacturing towns, the extensive opium-eating and child-doping in the Fenlands,[258] and the general culture of heavy self-medication.

The other behaviour targeted by poisons legislation was, of course, criminal poisoning. Although the 1868 Act's multifaceted purposes preclude its categorisation as a substantively criminal law, it did have a penal function which was aimed, in part, at deterring crime, so it is worth briefly discussing its assonance with the Benthamite aspiration of effective deterrence which had become embedded in the criminal law since the beginning of the nineteenth century. Effective deterrence, as previously discussed,[259] required punishment to be fairly calibrated, swift, and certain. Doctrinally at least, the Act appears consonant with these conditions: it provided a graded structure of fines (£5 for the first offence, £10 thereafter);[260] offences were triable under summary procedure; and the imposition of strict and vicarious liability ought to have maximised certainty of punishment for breach of its provisions. Additionally, as Farmer argues in relation to Victorian firearms law, the 1868 Act utilised 'a new preventative technique' of 'extending ideas of

[255] Text to nn.135–136, 188ff above.
[256] Wiener (n.92) 82, quoting *Woodrow* (n.171); above at n.187 (and text to).
[257] Above at n.64 (and text to).
[258] Berridge, *Opium* (n.2) ch.4.
[259] Text to nn.117–118 above.
[260] cp *Gardner* (n.107) above.

endangerment [to limit] access to technologies of violence'.[261] As legislative tools to achieve the 'great object' of effective deterrence, these features of the Act should not be discounted, notwithstanding that effective enforcement of the Act was frustrated in practice due to issues with the clarity of its definitional provisions, and because policing the Act was left to the voluntary remit of the RPS in the absence of an English public prosecutor.

1.3.6 Centralisation

The 1868 Act's establishment of the RPS as the central governing body of the pharmaceutical profession was prima facie assonant with the Victorian project of creating central bureaucracies tasked with overseeing the effective and efficient implementation of new regulations. The most common stimulus for centralisation was to address the historical failures of local administrations, which was also a primary driving force behind the 1868 Act. The collapse of the old chemists' guild system and the inadequacies of existing regulatory legislation such as the Apothecaries Act 1815 left the mid-nineteenth century drugs/poisons trade in a state of chaotic heterogeneity under little (if any) control, necessitating the creation of a central authority in overall charge.[262] The legitimacy of central authorities depended on public trust in their competence, and could be jeopardised (as occurred with the General Board of Health) by perceptions of autocracy and corruption.[263] The RPS had obtained a Royal Charter of incorporation in 1843 which was confirmed by the Pharmacy Act 1852, so it was an authoritative and well-established organisation to place in charge. Additionally, to assuage MPs' concerns that the RPS would otherwise have too much power, the 1868 Act provided that the RPS was under the overall control of the Privy Council. This (in theory) eliminated the risk of autocratic decision-making, and can also be regarded as being broadly in synergy with the Benthamite principle of ensuring administrative decision-making was subordinate to democratic processes. Furthermore, whereas the permissive nature of prior 'centralising' legislation had produced patchy implementation of regulatory rules, the RPS' legitimacy as a central authority was

[261] Farmer, *Making* (n.87) 251–52.
[262] Text to nn.21–24 above.
[263] Text to n.157 above.

(ostensibly) bolstered by the 1868 Act's obligatory requirements to oversee the registration and qualification of pharmacists.

However, closer examination reveals that the RPS' decision-making powers were exceptional relative to other Victorian central bureaucracies. The ability of central authorities to create any regulations was rare,[264] but the 1868 Act conferred on the RPS extensive powers to do so. The Society's Council could create regulations for the setting of examinations, appointment of examiners, regulation of the register of pharmacists, and the adding of substances to the schedule of controlled poisons. Additionally, it was the RPS' *members as a whole* who were vested with the powers of prescribing regulations for the 'keeping, dispensing and selling' of poisons under the 1868 Act, rather than the Society's Council.[265] While the passing of any regulations required the Privy Council's consent, the 'real power and control rested with the [RPS]'.[266] The RPS' members had little desire to impose more stringent restrictions upon themselves, and as the Privy Council could only approve the RPS' regulations (not force them to act) a stalemate resulted. Even when the Privy Council managed to convince the Council of the Pharmaceutical Society to prepare regulations imposing minor rules for the keeping and dispensing of medicines, the regulations were voted down by members at the RPS' annual meetings in 1870 and 1871. In 1871 a Bill was introduced in the Lords seeking to transfer the powers to make regulations relating to the 'keeping, dispensing and selling' of poisons from the RPS' members to the Society's Council.[267] It passed in the Lords, but was withdrawn before its second Commons reading due to opposition from chemists. Conversely, later in the century the Privy Council became the source of frustration when it rejected proposals to add a dozen substances (including 'Indian hemp')[268] to the poisons schedule as it sought to 'foster competition and remove restraints on trade and industry'.[269] In essence, the aims of the Victorian project of centralisation had been thwarted: by effectively engaging in autocratic decision-making by omission, the RPS' members ensured that no new regulations for the safer storage and sale

[264] Text to nn.160–163 above.
[265] Pharmacy Act 1868, s.1; Holloway, *Royal* (n.23) 251.
[266] Berridge, *Opium* (n.2) 120.
[267] Pharmacy HL Bill (1871) 206, cl.2.
[268] i.e., cannabis.
[269] Holloway, *Royal* (n.23) 288; Gadd (n.199) 170: 'It has not always been easy to obtain the addition of substances to the list of poisons, the [RPS Council] having submitted the names of many drugs to the Privy Council from time to time without success'.

of poisons could be implemented, while the Privy Council blocked attempts to advance the Act's main goal of restricting the sale of poisons.

1.3.7 State Interventionism versus Libertarian Principles

The final criterion for evaluation is that of striking a balance between state interventionism and the overt Victorian libertarian/laissez faire philosophy. This balancing exercise is observable in the post-1854 'era of localism' whereby central authorities' powers were limited in favour of giving local people 'the privilege of managing themselves'.[270] While the RPS did have extensive powers to create regulations, its powers of enforcement and inspection, by contrast, were much more in line with those of other central bureaucracies: the inadequacies of the RPS' enforcement powers have already been noted; and like (for example) the Railway Board's inability to inspect railway lines, '[the RPS'] inspectors were given no powers of entry or right to inspect business records or registers'.[271] A balance between state intervention and libertarian principles was also struck in the content of the 1868 Act's provisions, which were explicitly tempered by anti-paternalist sentiment when the Marquess of Salisbury successfully argued against the proposition that all poisons had to be sold in a distinctly-shaped 'poison bottle'.[272] More broadly, the Act's use of penal sanctions to prevent the irresponsible sale of poisonous substances – while not banning their sales outright – was a legislative intervention to which even JS Mill, the apparently ardent anti-paternalist, subscribed: '[i]n other words, there is an affinity between the system of pharmaceutical regulation under the 1868 Act [and] classical conceptions of freedom'.[273]

[270] Roberts, *Victorian* (n.88) 95, 112.
[271] Berridge, *Opium* (n.2) 121.
[272] Text to n.213 above.
[273] Seddon, *A History* (n.3) 47.

1.3.8 Concluding Observations

It is worth restating why this chapter's exploration of drug controls up to and including the 1868 Act was important, despite that Act being neither squarely a substantive criminal law, nor having as its primary target the regulation of opium as being a drug used for its psychoactive effects. First, in advancement of the goal of a meaningful systematic analysis, the point at which criminal law began to be seen as an appropriate response to drugs has now been fully explored with reference to the historical, legal, technological, political, economic, and other factors that precipitated change. The primarily legal (as opposed to socio-historical, etc.) perspective I have employed enabled focusing on comparatively neglected lines of development, including the role of criminal poisonings and the expansion of the Victorian legislative state, whereby the (criminal) law began to be deployed in new ways to address social problems, and fresh ideas concerning the quality of legislation itself were articulated. This different approach has revealed the important observation that the 1868 Act – the earliest Act to place restrictions backed by punitive sanctions on the sale of a substance which today is a controlled (Class A) drug – appears to be a microcosm of Victorian regulatory expansion and legislation generally, and is undoubtedly best conceptualised as part of the nineteenth century legislative state. In this way, criminal drug legislation at the point of its inception can offer a window into understanding broader processes and conceptions of criminalisation. Yet, a closer reading of the 1868 Act has also revealed that it was simultaneously in tension with many of the principles underpinning contemporary (criminal) law reforms. As the groundwork for the remainder of Part One (and this thesis as a whole) has now been laid, comparisons can be drawn with and patterns observed across later periods as this thesis progresses.

Chapter 2: 1868 – c. The First World War

This chapter continues the chronology of Part One by focusing on the period between the Pharmacy Act 1868's enactment and the outbreak of the First World War (WW1). During this period the 1868 Act remained the primary legislative framework for controlling drugs. There is a tendency in some of the literature examining legal approaches to drugs to jump from the 1868 Act to discussion of the creation of the new transnational system of drug control c.1910.[1] 45 years, however, is the longest period of time in the history of British drug criminalisation for no substantive legislative intervention to have occurred with regards to drugs, and this period of legislative inertia is rarely (if at all) analysed as such.

The question which this chapter aims to answer, then, is whether the *absence* of new legislation during this period was in synergy or tension with the directions, aims and principles of the (criminal) law; taking into account the contemporary technological, political, cultural and historical landscape. There were several developments which prima facie provided grounds for further legislative action. These included, inter alia: the development of 'disease' theories of addiction; the passing of statutes targeting habitual drunkards and inebriates; and the increasing domestic agitation to suppress the international opium trade. The conclusion here is nuanced, recognising that arguments may be made both ways; but that there is more conceptual synergy than tension, notwithstanding the existence of prima facie grounds for change. This nuanced conclusion resembles that of Chapter 1, where it was argued that the 1868 Act was in many ways a microcosm of the Victorian legislative state, although there also existed several points of conceptual tension with the drivers underpinning contemporaneous legal reforms. Taking together the conclusions of both chapters in Part One, the overall conclusion is that at the point of their emergence in the nineteenth century, laws targeting substances used for their psychoactive effects were, on balance, more aligned with contemporaneous conceptions of legitimate criminalisation than has been recognised. This overall conclusion forms the basis

[1] e.g., Philip Bean, *The Social Control of Drugs* (1974) 20; and, to some extent, Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010) 55–56.

for comparison with, and drawing patterns across, the later periods discussed in Parts Two and Three of this thesis.

2.1 (Perceived) Drug-Related Problems Post-1868

The numerous instrumental problems with the 1868 Act (poor enforcement, unclear provisions, etc.) and the various conceptual points of tension discussed in the latter section of Chapter 1 arguably provided the strongest bases of all for further law-making, but interests of brevity preclude revisiting those points in any detail here. While some legal changes occurred,[2] more importantly for present purposes, the passing of the Act itself opened the door, legally and politically, for wider drug regulation. As Seddon concisely notes, three important aspects of the Act were that:

> It marked the *beginning of the conception of opium and opiates as a* '*problem*' … It was the *starting point of the idea that medical professionals were the appropriate gatekeepers and dispensers of opium and opium-based products* [and i]t marked the *beginning of the idea that legislative regulation of opium supply could be an effective way of dealing with the 'problem'*.[3]

In other words, the Act made drugs governable where a 'problem', particularly one evidenced by medical science, could be identified. Against this background, the continuing (and in many ways intensifying) problems opiates and other drugs caused in the latter quarter of the nineteenth century might have prompted further legislation.

[2] SWF Holloway, *Royal Pharmaceutical Society of Great Britain 1841–1991: A Political and Social History* (1991) 273: 'The forty years between the Pharmacy Act 1868 and the Poisons and Pharmacy Act 1908 saw radical changes in the trade of chemist and druggist', both in practical terms and as a result of judicial decisions, but these are out of the scope of this thesis as they primarily relate to the rise of pharmaceutical retailing in department stores and changes to the RPS' constitution.
[3] Seddon, *A History* (n.1) 53–54 (original emphasis).

One such problem was the previously-discussed[4] use of opium-based patent medicines, particularly chlorodyne, which led to a professional scare and increases in reported cases of both poisoning and chlorodyne addicts. But 'in the second half of the nineteenth century, there were other copious and appealing substances to be swallowed',[5] including chloral – a new drug obtained by chlorine acting on alcohol. Chloral began to be substituted by 'drunkards' for alcohol, and by 1879 'chloralism' was, according to a number of contemporary persuasive sources, widespread.[6] Another was the use of morphine, which had come into widespread use from the 1860s precipitated by the mid-century invention of the hypodermic syringe.[7] The hypodermic injection of morphine was enthusiastically embraced by doctors as a safer, more exact, and more effective treatment for a wide range of conditions, while also providing a means for them to elevate their status as the utilisers of a new technology at the forefront of scientific discovery, 'distinct from the mass of quacks, herbalists, patent-medicine vendors and manufacturers'.[8] However, in the 1870s physicians began discussing the '"disease" of drug addiction', as it became clear that the repeated and incautious hypodermic administration of morphine was dangerous after all.[9] By the 1880s,

> [D]octors were as busy elaborating the dimensions of morphinism and delineating the outlines of the typical morphia habitue as they had once been in analysing those conditions where hypodermic usage was invaluable … Most accepted a stereotype whereby morphine addiction was vastly increased and increasing …[10]

[4] Text to nn.244–250 in ch.1.
[5] Richard Davenport-Hines, *The Pursuit of Oblivion: A Social History of Drugs* (2002) 94; Virginia Berridge, *Opium and the People: Opiate Use and Drug Control Policy in Nineteenth and Early Twentieth Century England* (rev edn, 1999) chs.11, 16.
[6] Davenport-Hines (n.5) 94, 96–97; Berridge, *Opium* (n.5) 143.
[7] Terry M Parssinen and Karen Kerner, 'Development of the Disease Model of Drug Addiction in Britain, 1870–1926' (1980) 24 *Medical History* 275; Timothy A Hickman, 'Dangerous Drugs from Habit to Addiction' in Paul Gootenberg (ed), *The Oxford Handbook of Global Drug History* (2022) 214.
[8] Berridge, *Opium* (n.5) 140.
[9] Parssinen and Kerner (n.7) 277–78; Berridge, *Opium* (n.5) 142.
[10] Berridge, *Opium* (n.5) 144.

An accompanying stereotype was that '[a]ddiction became identified with gender; the hypodermic habit was feminised'.[11] The rise of this stereotype has been charted well by Zieger.[12] In brief, eminent physicians, medical texts, and literary fiction alike popularised a trope of the deceptive, immoral, and weak female morphine addict, which by the 1880s had become a sensational topic in popular discourse. Similarly, and simultaneously, 'a melodramatic presentation' of East London Chinese opium dens 'as a haunt of evil' emerged in Victorian literature and medical texts, prompting doctors' condemnation and calls to shut them down for fear the 'menace' of opium smoking might spread to the English working classes.[13]

It was not only the depictions of hypodermic morphine addiction and East London opium dens (with their associated gendered and racial underpinnings) which were layered with moral overtones. The newly-promulgated 'disease' concept of addiction itself, far from being purely scientific, was 'a hybrid medical and moral theory'[14] whereby judgements relating to the addict's character were blended with those relating to the causes and treatment of their condition.[15] The 'most influential' figure in this field was Dr Norman Kerr,[16] who authored a treatise[17] on the subject and founded the Society for the Study of Inebriety (SSI). For Kerr, inebriety was 'for the most part the issue of certain physical conditions … the natural product of a depraved, debilitated, or defective nervous organization, … as unmistakably a disease as is gout, or epilepsy, or insanity'.[18] Variants of the disease included 'alcoholomania, opiomania, morphinomania, chloralomania and chlorodynomania';[19] and 'predisposing factors' included one's sex, age, religion, race, and

[11] Davenport-Hines (n.5) 79.
[12] Susan Zieger, '"How Far am I Responsible?": Women and Morphinomania in Late-Nineteenth-Century Britain' (2005) 48(1) *Victorian Studies* 59. See also: Davenport-Hines (n.5) 79; Berridge, *Opium* (n.5) 144–45.
[13] Berridge, *Opium* (n.5) 196–98.
[14] ibid 155.
[15] Peter McCandless, '"Curses of Civilization": Insanity and Drunkenness in Victorian Britain' (1984) 79 *British Journal of Addiction* 49, 53–54; Hickman (n.7) 224.
[16] Mariana Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (1998) 50; Phil Handler, 'Intoxication and Criminal Responsibility in England, 1819–1920' (2013) 33(2) *Oxford Journal of Legal Studies* 243, 255; Terry M Parssinen, *Secret Passions, Secret Remedies: Narcotic Drugs in British Society, 1820–1930* (1983) 87; Berridge, *Opium* (n.5) 151.
[17] Norman Kerr, *Inebriety: Its Etiology, Pathology, Treatment and Jurisprudence* (1st edn, 1888).
[18] Parssinen and Kerner (n.7) 280, quoting Norman Kerr, 'President's Inaugural Address' (July 1884) 1 *Proceedings of the Society for the Study of Inebriety* 2, 3.
[19] Berridge, *Opium* (n.5) 154. Also included under 'forms of inebriety' was 'inebriety of syphilis' and 'inebriety of sunstroke': Kerr, *Inebriety* (n.17) 54–57.

wealth.[20] Importantly, inebriety was also thought to be hereditary.[21] In this way, as Valverde notes, the disease theory of addiction was linked to the eugenicist/Social Darwinist 'degeneration theory' of the 1880s which:

> [T]ranslated old moral judgements about the mentally handicapped, about single mothers, and about vice, into the scientific language of evolution … one did not have to decide whether a condition was biological or moral: bodily features were moralized and moral vices were blamed for causing physical degeneration.[22]

When, in the 1900s, a 'wide consensus emerged on most of the important aspects' of the disease model of addiction – including that alcohol and drug addiction were both forms of the same disease – much of the moral vocabulary remained.[23]

Concerns surrounding chlorodyne and hypodermic morphine addiction and East London opium dens were likely a distorted reflection of reality.[24] However, these concerns were backed by the scientific and medical evidence of the day and given force by their moralistic underpinnings, so prima facie persuasive grounds for further legislative intervention did exist. But moving from assertion to proof, would further legislative intervention have been in synergy with the directions, aims and principles of the contemporary (criminal) law? Once again, the answer to this question is best achieved with reference to contemporaneous legal reforms.

[20] Kerr, *Inebriety* (n.17) xiv-xvi.
[21] ibid xv; McCandless (n.15) 55.
[22] Valverde, *Diseases* (n.16) 51.
[23] Parssinen and Kerner (n.7) 283–84.
[24] Berridge, *Opium* (n.5) 145, 200–01; 'Morality and Medical Science: Concepts of Narcotic Addiction in Britain, 1820–1926' (1979) 36(1) *Annals of Science* 67, 75; Frank Dikötter, Lars Laamann and Xun Zhou, 'China, British Imperialism and the Myth of the "Opium Plague"' in James H Mills and Patricia Barton (eds), *Drugs and Empires: Essays in Modern Imperialism and Intoxication, c.1500–c.1930* (2007) 20–28.

2.2 The Habitual Drunkards Act 1879 and Inebriates Act 1898

Spurred on by public opinion,[25] disease theories of addiction, and the efforts of Norman Kerr and the SSI,[26] from 1870 onwards there were concerted Parliamentary attempts to develop new laws for dealing with habitual drunkards and inebriates. Two Bills were introduced in 1870 and 1871,[27] which sought to enable the compulsory detention in a 'licensed reformatory, asylum or refuge … for a sufficient length of time afterwards as may be necessary for the due protection and … restoration of the mind and health' of a habitual drunkard, defined as, 'any person who, by reason of frequent, excessive or constant use of intoxicating drinks, is incapable of self-control, and of proper attention to and care of his affairs and family or who is dangerous to himself or others'. Both Bills failed, but with the backing of the British Medical Association, the police, and medical publications, a Select Committee was set up to examine the issue and reported in 1872.[28] As Johnstone notes, the witnesses to the Select Committee were at pains to stress they were not targeting 'regular drunkards', but a narrower type:

> [T]he drinking behaviour of the people 'accused' of being habitual drunkards was regarded as of [less] importance [than] their competency and conduct in general. People could get drunk as often as they pleased, without risking being labelled 'habitual drunkard' and without being subjected to 'legislative interference', provided their drunkenness didn't interfere with their ability to perform their duties or make them an annoyance or a threat to the public [and they] did not commit crimes … neglect their obligations to their families and … make themselves a burden on society.[29]

[25] RW Branthwaite, 'The Inebriates Act, 1898' (1927) 25(1) *British Journal of Inebriety* 5, 6.
[26] Leon Radzinowicz and Roger Hood, *A History of English Criminal law and its Administration from 1750: The Emergence of Penal Policy*, vol 5 (1986) 289.
[27] Habitual Drunkards HC Bill (1870) [197]; Habitual Drunkards HC Bill (1871) [38].
[28] Radzinowicz and Hood (n.26) 294–96; Select Committee on Habitual Drunkards, *Report on Habitual Drunkards* (HC 1872, 242–IX).
[29] Gerry Johnstone, 'From Vice to Disease? The Concepts of Dipsomania and Inebriety, 1860–1908' (1996) 5 *Social and Legal Studies* 37, 42. See also: HC Deb 4 March 1870 vol 199, cols 1242–45.

The Select Committee came out in favour of legislation, and two further Bills were introduced in 1872 and 1873.[30] However, they failed due to fears of excessive interference with individual liberty.[31] It was not until 1879 that a heavily watered-down Act was passed. The Habitual Drunkards Act 1879 provided that 'a person who [is] by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs', could apply to enter a retreat; but once there, they were not entitled to leave until the expiration of the term mentioned on their application (up to a maximum of 12 months) and could be forced to undergo treatment. Although such detention was voluntary and not explicitly penal, non-compliance with the rules of the retreat was an offence, and escapees could be apprehended and returned.[32] Unsurprisingly, the Act was a failure as few habitual drunkards were keen to label themselves as such and to voluntarily surrender their liberty. Over the following years support for further legislation increased,[33] and concern about habitual offenders more generally grew from the 1890s.[34] Eventually, the Inebriates Act 1898 was passed. This allowed judges to sentence habitual drunkards who had committed an indictable offence while intoxicated to detention in an inebriate reformatory for up to three years (as well as any other punishment allowed by law). Additionally, those convicted of drunkenness offences three times within 12 months were also liable upon a fourth conviction on indictment (or if they consented to be dealt with summarily, on summary conviction) to detention for up to three years.[35]

The answer to the question of whether there is tension between the existence of inebriates' legislation and the lack of any equivalent legislation targeting opium and other drug addicts is mixed. On one hand – suggestive of tension – the same disease theories of addiction which were so instrumental to the Habitual Drunkards and Inebriates Acts' creation applied to opium and other drugs with similar vigour in the medical textbooks. There was certainly a willingness and desire amongst those involved in the push for legislation to extend the

[30] Habitual Drunkards HC Bill (1872) [279]; Habitual Drunkards HC Bill (1873) [11].
[31] Radzinowicz and Hood (n.26) 297.
[32] Habitual Drunkards Act 1879, ss.3, 10, 25, 26.
[33] Radzinowicz and Hood (n.26) 302–04.
[34] Lindsay Farmer, 'Responding to the Problem of Crime: English Criminal Law and the Limits of Positivism, 1870–1940' in Michele Pifferi (ed), *The Limits of Criminological Positivism: The Movement for Criminal Law Reform in the West, 1870–1940* (2021) 184.
[35] Inebriates Act 1898, ss.1–2.

Acts' application to drugs beyond 'intoxicating liquors'.[36] During the passage of the 1879 Act, amendments were put forward 'to include habitual opium eating with habitual excess in partaking of alcoholic liquors', and to include 'narcotics' in the Act's terminology due to the 'great abuse of morphia, chloral, and other narcotics'.[37] However, these amendments were withdrawn as it was suggested that 'the subject was too important to be introduced without notice, and … to adopt the suggestion might imperil the Bill'.[38] There were more forceful moves to extend the definition later in the century, with Norman Kerr and the Inebriates Legislation Committee of the British Medical Association arguing for the inclusion of 'forms of intoxication other than the alcoholic form' before official committees.[39] Adding some weight to the suggestion that the terminology 'intoxicating liquors' might have been either a quirk of legislative drafting or the result of political precautionary hesitation – as opposed to a clearly delineated, principled, and deliberately materially different approach to non-alcoholic intoxicants – the Acts did not, in fact, exclusively apply to alcohol, but to any drug that could be drunk (such as laudanum or chloral).[40] To return to the terminology employed in Chapter 1's analysis of the 1868 Act,[41] this is suggestive of a lack of rational law-making insofar as laws were reformed counter to the scientific and expert evidence of the day. Relatedly, the seemingly arbitrary legal distinction between users of substances which could be drunk and those who injected or smoked drugs is an area of tension with regards to the Victorian legislative project's aim of being systematic,[42] whereby gaps and inconsistencies in the law were remedied so that similar laws worked towards a common goal; especially so as opiates were consumed in all three ways.

Another 'criterion' discussed in Chapter 1 which can be moulded into this analysis relates to the character-building and moralising nature of the nineteenth century legislative state, which I have argued the Pharmacy Act 1868 was part of.[43] In his seminal work, Garland argues that the Inebriates Act 1898 was a deeply character-focused statute,[44] driven by a 'new criminology' which more broadly:

[36] Kerr, *Inebriety* (n.17) 354–55.
[37] HL Deb 15 May 1879, vol 246, col 390.
[38] ibid.
[39] Berridge, *Opium* (n.5) 166.
[40] ibid 165.
[41] Text to nn.197–199 in ch.1.
[42] ibid.
[43] Text to nn.255ff in ch.1.
[44] See also: Johnstone (n.29) 38; Valverde, *Diseases* (n.16) 76.

> [D]emanded the firm regulation of all those groups such as inebriates, the feeble-minded, vagrants, epileptics, and habituals that were previously 'within the law' … opened up the possibility of an *anticipatory* form of regulation [of] the 'pre-delinquent', the 'near criminal' or the 'presumptive criminal', and … implied a new and more penetrating form of intervention. Sanctions were aimed not at meeting degrees of guilt, but at transforming aspects of character.[45]

There is a more-than-slight conceptual dissonance between this 'new criminological' focus on building the character of habitual drunkards via the 1879 and 1898 Acts, and the 'regulation' of other, primarily non-alcoholic, inebriates via only the patchily-enforced system of pharmaceutical checks under the 1868 Act, and where the character-building focus extended only to the traders of drugs and not their consumers. As discussed below,[46] the regulation of alcohol, its users, and other substances and their users, do not lend to simple or easy comparison due to myriad historical, cultural, economic, and legal factors; and the scope of this thesis generally excludes discussion of alcohol. Nonetheless, it is noteworthy here, as an area of tension insofar as the potential for conceptual linkage went unrealised, that between the two moralising projects of the mid-Victorian legislative state and the 'new criminology' of the end of the century, non-alcoholic inebriates seem to be one of the very few groups that were *not* targets of 'legal–moral' improvement. Before the end of the nineteenth century drug traders (pharmaceutical chemists, 'quack vendors', and 'patent medicine' manufacturers); alcohol traders;[47] alcohol inebriates; the 'feeble-minded, vagrants, epileptics and habituals';[48] the poor; and even factory owners were subject to some form of character-building legal regulation. By contrast, problematic drug users –

[45] David Garland, *Punishment and Welfare: A History of Penal Strategies* (rev edn, 2018) 100–01. For similar criminal law-focused (as opposed to criminological) analyses, see: Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (2012) esp 179–80; Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (2016) ch.2, esp 52ff; 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) 4(2) *Criminal Law and Philosophy* 109. For another analysis of Robert Louis Stevenson's *The Strange Case of Dr Jekyll and Mr Hyde* (1886), in the specific context of the construction of Victorian drug users, see: Lawrence Driscoll, *Reconsidering Drugs: Mapping Victorian and Modern Drug Discourses* (2000) ch.2.

[46] Text to nn.82–89 below.

[47] For accounts of alcohol trade regulation, see, e.g.: Virginia Berridge, *Demons: Our Changing Attitudes to Alcohol, Tobacco and Drugs* (2013) ch.3; Paul Jennings, 'Policing Public Houses in Victorian England' (2013) 3(1) *Law, Crime and History* 52. For the temperance movement's moralising influence on social policy, see: Lilian Lewis Shiman, *Crusade against Drink in Victorian England* (1988).

[48] Garland (n.45) 101.

whether presented or perceived as excessive opium/laudanum users; 'weak and deceptive' morphine-using women; threatening Chinese opium denizens; or abased 'cocainists'[49] – were not.

On the other hand, strong arguments can be made that the post-1868 creation of inebriates' legislation in the area of alcohol(ics) regulation, and the post-1868 legislative inertia in the area of drug regulation were in synergy. Moreover, to a certain degree, these arguments can resolve some of the conceptual tension noted in the preceding paragraph.

Although the periodisation fits slightly messily into my analysis, Garland argues that from 1895–1914 the (Benthamite) aspiration of uniformity of punishment became superseded. No longer were '"the special characteristics of the criminal himself … a negligible quantity" [and] any mental, moral or familial inquiry … of the individual criminal [absent]'.[50] Instead, concomitant with the 'new criminology' was an increasing focus on the individual via the use of probation orders (which could include conditions to abstain from 'intoxicating liquor'),[51] Borstal training, preventative detention, licensed supervision, and supervised fines.[52] Indeed, Valverde argues that the 1879 and 1898 Acts 'did not even attempt to construct a homogenous population of medicalised inebriates. Rather, they sought to govern three distinct groups in different ways'.[53] The 1879 Act, which was based on voluntary committal in a privately-run retreat, was intended for 'middle- and upper-class inebriates' whose cooperation was borne of 'moral and financial pressure from their families'.[54] The other two groups, targeted by the 1898 Act, were 'police-court recidivists … a social menace not deserving of due process' who could be committed in inebriate reformatories for three years following four convictions for drunkenness offences instead of 'the usual, very short jail term'; and those convicted of indictable offences who could be committed to a reformatory without medical testimony, and were 'almost exclusively mothers charged with child neglect'.[55] Valverde further notes, following Zedner's work,[56]

[49] Davenport-Hines (n.5) 119–22.
[50] Garland (n.45) 14, quoting H Havelock Ellis, *The Criminal* (first published 1889, Contemporary Science Studies 1910) x–xi.
[51] Administration of Justice Act 1914, s.8.
[52] Garland (n.45) 17–18.
[53] Valverde, *Diseases* (n.16) 76. This was explicitly expressed at the 1898 Bill's Second Reading in the Lords: HL Deb 22 July 1898, vol 62, cols 802–07. See also: Johnstone (n.29) 43.
[54] Valverde, *Diseases* (n.16) 76.
[55] ibid.
[56] Lucia Zedner, *Women, Crime and Custody in Victorian England* (1991) ch.6.

that 'the vast majority of habitual drunkards put away under the Acts were [poor] women', whose 'alcoholism was subsumed under the banner of feeble-mindedness'.[57] Similarly, Beckingham argues that while the 1879 and 1898 Acts 'said nothing of class or gender, the gaze of inebriate criminal justice would fall on women'.[58]

It is thereby that the apparent incongruity in the law's differing approach to the popular portrait of the 'feminised' and 'weak' hypodermic morphine addict at this time,[59] who could not be subject to detention in an inebriate reformatory, can be explained. Upper-class inebriety 'was never a distinct object of governance',[60] and hypodermic morphine, as a 'primarily medically administered drug [meant] those using and abusing it [were] reasonably well-to-do'.[61] The new criminology's criteria for recognising and identifying 'pre-delinquents' and 'near criminals' – which like the 'disease' theory of addiction was tied to tropes borrowed from and connected to Social Darwinism and eugenics[62] – excluded this type of 'respectable' addict from the 'new and penetrating form' of anticipatory intervention.

Going further, the aim of recognising incipient deviants was coloured by the persistence of Victorian liberal thought. As previously noted, only those inebriates who offended, neglected their familial obligations, or made themselves a societal burden were targeted by the 1879 and 1898 Acts;[63] hence the reformatory was deemed the appropriate place for women convicted of child neglect. By contrast, Davenport-Hines notes that 'opium-eaters and even morphine addicts often managed to maintain their habits without jeopardising their employment or domestic stability',[64] and Berridge similarly views the available historical evidence as indicating that 'only a small number of [morphine users] were unable to lead some form of active life'.[65] Even Norman Kerr, the most influential advocate of the disease theory and ardent advocate of extending inebriates' legislation to all drugs,

[57] Valverde, *Diseases* (n.16) 53, 66.
[58] David Beckingham, 'Bureaucracy, Case Geography and the Governance of the Inebriate in Scotland (1898–1918)' (2019) 37(8) *Environment and Planning C: Politics and Space* 1434, 1437.
[59] Zieger (n.12).
[60] Valverde, *Diseases* (n.16) 81, i.e., being subject only to voluntary committal.
[61] Virginia Berridge, 'Victorian Opium Eating: Responses to Opiate Use in Nineteenth-Century England' (1978) 21(4) *Victorian Studies* 437, 455.
[62] Garland (n.45) 172–74; Lacey, *In Search* (n.45) 52; Berridge, *Opium* (n.5) 165–66. See also: HC Deb 8 March 1898, vol 54, cols 1036–40.
[63] Johnstone (n.29) 42.
[64] Davenport-Hines (n.5) 119.
[65] Berridge, *Opium* (n.5) 148.

observed in his 1888 treatise *Inebriety* that whereas 'alcohol infuriates many of its users [who] are maddened and commit acts of violence' and cause public disturbances, opium by contrast 'rarely hurries its devotees into … misdeeds. The opium inebriate does not destroy his furniture, beat his wife, dash his child's head against the wall, or pursue his narcotic career dealing with his hands death and desolation all around'.[66] The omission of non-drinkable drugs from the inebriates' legislation can therefore be regarded as according with a Millian, harm principle-based conception of legitimate criminalisation:[67] the dangers associated with (and the non-autonomous image of)[68] habitual drunkards simply did not apply to opiate addicts.

Even further, there is some affinity here with the influential Victorian jurist JF Stephen's view of appropriate criminalisation.[69] This is perhaps surprising: Stephen, who in 1873 famously debated Mill's ideas in a 'scathing attack',[70] has often been 'depicted as urging "the necessity for authoritarian measures such as censorship", as fighting for the "enforcement" of "religious belief", [and] as promoting "authority rather than freedom"'.[71] Stephen certainly did support the enforcement of morals.[72] On this reading, my claim to an affinity between the drug law inertia I discuss here and Stephen's thought is prima facie at odds with my argument that the non-extension of the inebriates' legislation to users of non-drinkable drugs constituted an anomaly in the moralising ambition of both the Victorian

[66] Kerr, *Inebriety* (n.17) 90. Although he and other medical men deemed narcotics were more damaging than alcohol to their users: Parssinen and Kerner (n.7) 281–83.

[67] Radzinowicz and Hood (n.26) 289, quoting in this context John Stuart Mill, *On Liberty* (first published 1859, Cambridge University Press 2011) 175: 'it [is] perfectly legitimate that a person who had once been convicted of any act of violence to others under the influence of drink should be placed under a special legal restriction, personal to himself'.

[68] Loughnan (n.45) 179–80.

[69] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 64, 77–89. Farmer describes Stephen's writing as 'representative' of the mid-Victorian legislative state, but I have omitted direct discussion of Stephen thus far because Stephen's work largely concerned the definition and classification of the substantive ('real') criminal law, which is of less relevance to this Part. See, e.g.: Jeremy Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal law* (2014) 103: 'Like his predecessors, Stephen felt able to shrug off the need for even a cursory analysis of such offences'.

[70] Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90(1) *The Journal of Criminal Law and Criminology* 109, 123. See: James Fitzjames Stephen, *Liberty, Equality, Fraternity* (first published 1873, Stuart D Warner ed, Liberty Fund 1993) 108.

[71] Greg Conti, 'James Fitzjames Stephen, John Stuart Mill, and the Victorian Theory of Toleration' (2016) 42(3) *History of European Ideas* 364, 365, quoting: Andrew Pyle, 'Introduction' in Andrew Pyle (ed), *Liberty: Contemporary Responses to John Stuart Mill* (1994) xvii; James Munby, 'Law, Morality and Religion in the Family Courts' (2014) 16 *Ecclesiastical Law Journal* 131, 133; AW Brown, *The Metaphysical Society: Victorian Minds in Crisis* (1947) 132.

[72] Farmer, *Making* (n.69) 86; Marc O DeGirolami, 'James Fitzjames Stephen: The Punishment Jurist' in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (2014) 185.

legislative state and the 'new criminology' of the end of the century. Indeed, in *Inebriety*, Kerr cited Stephen in advancement of his view that all forms of inebriety (alcohol or otherwise) ought to be treated alike:

> Sir James Stephen in his new criminal code lays down that it ought to be the law of England that no act is a crime if the person who does it is, at the time when it is done, prevented either by defective mental power or by any disease affecting his mind, from controlling his own conduct. … If we accept Sir James Stephen's deliverance … how, in justice and fairness, can [the subjects of alcoholic or other narcotic heredity] be guilty of unlawful design? … There would be an enormous gain to the administration of justice … if the bench and the bar would co-operate with the professors of the healing art in the exclusion of all cases of inebriety of the insane from those penalties of the law which should be reserved for the sound of mind.[73]

However, Farmer notes that Stephen deemed that only for 'gross violations of plain moral duties' was punishment appropriate,[74] and that he 'conclude[d] that enforcement of [mere] vices through law would be generally inexpedient'[75] as criminalised behaviour had to be both 'capable of distinct definition and of specific proof, and … of such a nature that it is worthwhile' to impose the criminal law's 'harshness'.[76] Hence, whereas the 'worth' of committing certain classes of alcohol inebriates to reformatories could be 'specifically proved' by the 1898 Act's requirements of evidencing repeated summary offences or a conviction on indictment, it was unlikely such proof would be available for opiate inebriates. Indeed, as DeGirolami notes, Stephen took aim with 'severe judgment' at the 'invidious[ness]' of prosecuting affairs of morality such as adultery and simple public drunkenness.[77] Additionally, Kerr's suggestion that Stephen's writings promoted the legal

[73] Kerr, *Inebriety* (n.17) 358–65.
[74] It might be argued that the inebriates' legislation aimed at treatment, not punishment, but this overlooks the undoubtably penal nature of the reformatories and their purpose of control.
[75] Farmer, *Making* (n.69) 87–88.
[76] Stephen, *Liberty* (n.70) 97; Farmer, *Making* (n.69) 88.
[77] DeGirolami (n.72) 189.

application of his broad-spectrum disease theory was an erroneous and selective interpretation. Not only does the above-quoted passage contradict Kerr's own claims expressed elsewhere in *Inebriety* about the capacity and largely non-deviant nature of narcotic users, but it makes a normative claim about how the law ought to treat inebriates by conflating that issue with the contextually-different and tangentially-relevant contemporary jurisprudence on the criminal responsibility of the insane. Although Stephen's views on the criminal responsibility of the insane softened over time, 'he carefully qualified his argument [that] "a person should not be liable for any act done when he is deprived by disease of the power of controlling his conduct … unless the absence of the power of control has been caused by his own default"'.[78] 'The reason why ordinary drunkenness is no excuse for crime', Stephen noted, 'is that the offender did wrong in getting drunk'.[79] Thus, while Stephen did express some alignment with the 'disease' model of insanity with respect to drunkenness,[80] he took a nuanced and pragmatic view towards transposing this theory into the law. It is therefore doubtful that Stephen necessarily would have deemed all inebriates ought to be treated alike with regards to the Inebriates legislation.[81]

Finally, regard must briefly be taken of the vastly different historical and temporal position of alcohol relative to other drugs. Culturally, the use of alcohol had been ingrained in Britain and Europe for hundreds, if not thousands of years;[82] whereas morphine, chloral and cocaine were first synthesised in the nineteenth century. Economically, alcohol's mass-production in Britain from the eighteenth century was encouraged by the state as a substantial source of domestic revenue, making it cheap and easily accessible;[83] whereas opium had to be imported from across the world and only became considerably cheaper as import duties were gradually reduced and eventually abolished between 1828 and 1860.[84]

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[78] Martin J Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830–1914* (1990) 273–74, quoting James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 2 (first published 1883, Cambridge University Press 2014) 177.

[79] Stephen, *A History* (n.78) 165; 'ordinary' meaning 'not brought into this state by some kinds of fraud'.

[80] ibid 132–67.

[81] In any event, the dominant conception of criminal responsibility/insanity at the time remained attached to the *M'Naghten* (1843) 8 ER 718 rules: Wiener (n.78) 274–75.

[82] David T Courtwright, *Forces of Habit: Drugs and the Making of the Modern World* (2001) ch.1; Berridge, *Demons* (n.47) 31–32.

[83] Berridge, *Demons* (n.47) 97–99; Nicholas Mason, '"The Sovereign People are in a Beastly State": The Beer Act of 1830 and Victorian Discourse on Working-Class Drunkenness' (2001) 29(1) *Victorian Literature and Culture* 109; Seddon, *A History* (n.1) 70.

[84] Berridge, *Opium* (n.5) ch.1. Export duties on opium from British India to China, however, were a significant source of revenue throughout the mid-nineteenth century: SD Stein, *International Diplomacy, State*

Legally, there had been calls from medical circles for the legislative regulation of problem drinkers ('dipsomaniacs') since the early decades of the nineteenth century;[85] whereas other drugs only became subsumed into disease theories of addiction in its final decades. While not suggestive of conceptual *synergy*, these historical differences do at least indicate a neutral *lack of tension* between the passing of the 1879 and 1898 inebriates' legislation and the simultaneous legislative inertia with regards to the regulation of drugs and their users. Put simply, there were sufficient material differences between the objects targeted by the law to enable different approaches; and as those material differences arose largely due to alcohol becoming problematised earlier than other drugs, it was alcohol(ics) which were subject to legal regulation first.[86] It was not until a 1908 Departmental Committee Report that there was official acceptance that 'inebriates' should extend to those who use 'any intoxicating thing', including 'morphia or cocaine'.[87] However, the Inebriates Act 1898 was not amended along these lines: drug addiction only emerged as a distinct issue around 1910;[88] and 'alcohol questions were not successfully articulated with questions of illicit drug taking until … well after World War II'.[89]

Aside from the Pharmacy Act 1868's conceptual and instrumental deficiencies, the Habitual Drunkards/Inebriates' Acts of 1879 and 1898 provide the most concrete frame of reference for analysing whether the lack of more extensive drug controls in the approximately 45 years post-1868 was in synergy or tension with contemporaneous understandings of appropriate criminalisation. They were the closest Britain came to enacting further domestic drug legislation, being successful (i.e., enacted) legal reforms which targeted the

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Administrators, and Narcotics Control: The Origins of a Social Problem (1985) 8. Britain's role in the international opium trade, including the mid-nineteenth century 'opium wars' with China, is discussed at text to nn.90ff below and nn.105ff in ch.3.

[85] Valverde, *Diseases* (n.16) 48.

[86] As a corollary, this can also partly explain why concerns surrounding Chinese opium dens and cocaine addiction were insufficient to cause those users to be subject to regulation along the lines of the Inebriates Acts. At the international level, too, alcohol was the first substance to be subject to legal controls: Seddon, *A History* (n.1) 67.

[87] Departmental Committee on the Inebriates' Acts, *Report of the Departmental Committee Appointed to Inquire into the Operation of the Law Relating to Inebriates and to Their Detention in Reformatories and Retreats* (Cd 4438, 1908) para 60; Berridge, *Opium* (n.5) 166–67. For detail and analysis of the Report, see: Johnstone (n.29) 43–50; Mariana Valverde, '"Slavery from Within": The Invention of Alcoholism and the Question of Free Will' (1997) 22(3) *Social History* 251, 267–68.

[88] Parssinen (n.16) 103.

[89] Valverde, *Diseases* (n.16) 50. However, the Summary Jurisdiction (Separation and Maintenance) Act 1925, s.3 provided that '"habitual drunkard" … shall be interpreted as though in the definition of that term in section three of the Habitual Drunkards Act, 1879, the reference to the habitual intemperate drinking of intoxicating liquor included a reference to the habitual taking or using, except upon medical advice, of opium or other dangerous drugs within the meaning of the Dangerous Drugs Acts, 1920 and 1923.'

users of (certain, drinkable) intoxicating substances, and which were passed squarely between the 1868 Act and the onset of WW1. Against this background, venturing decisive answers to the question of tension or synergy is difficult as arguments can be made both ways. However, the comparative weight of those arguments leans towards a conclusion that for all its faults, the pharmaceutical system of regulation established by the 1868 Act did accord with contemporary conceptions of the appropriate regulation of drugs, their vendors, and their users until at least the turn of the twentieth century.

2.3 The Opium Trade Suppression Movement and the First International Drug Controls

There remains one major unexplored area of reform during this period which prima facie provided grounds for the further regulation of drugs. This was the drive, both in Britain and internationally, to suppress the international opium trade and Britain's role in it; a campaign which was 'lumped together' with that of ending cannabis ('Indian hemp') use in British India.[90] This culminated in a series of international agreements between 1909–1914 which, although frustrated by WW1, would form the basis for the first British Dangerous Drugs Acts in the 1920s, and would become pivotal to the establishment of the global drug control system's central tenets – many of which survive today. As a bridge between Parts One and Two of this thesis, the remainder of this chapter briefly[91] outlines the opium and cannabis trade suppression movements and the beginnings of this international framework. It is argued that the existence of the opium movement – which eventually succeeded in bringing about drug law reforms[92] – was not in tension with the legislative inertia which has been the overall focus of this chapter.

Britain fought two Opium Wars with China between 1839–1842 and 1856–1860, seeking to restore the lucrative opium trade between India and China following the Chinese authorities' efforts to prohibit the import and consumption of the drug in the mid-

[90] James H Mills, *Cannabis Britannica: Empire, Trade, and Prohibition 1800–1928* (2003) 94.
[91] There is extensive existing literature on this subject: ibid chs.5–6; Berridge, *Opium* (n.5) ch.14; Stein (n.84) chs.2–5; Bean, *The Social* (n.1) ch.2.
[92] For comment on the movement's causal impact, see: Stein (n.84) 16.

nineteenth century.[93] Parliamentary calls to end Britain's role in the international opium trade were periodically aired from at least 1840, but it was not until the 1870s that an organised and concerted domestic movement to suppress the trade was formed.[94] The movement was comprised of: pressure groups such as the Quaker-led Society for the Suppression of the Opium Trade; politicians 'from among the Radical, nonconformist wing of the Liberal Party'; clergy including the Archbishop of Canterbury; and some of those involved in the Victorian temperance movement.[95] The suppression movement's motivations were religious and humanitarian, with the opium trade deemed to be at odds with Christian morality;[96] detrimental to the progress of Christian missions in China;[97] physically, socially and morally degrading to the Chinese populace; and a shameful, embarrassing abuse of Britain's 'civilising' colonial power.[98] Similarly, towards the end of the century there was agitation in Westminster to curb the cultivation, trade and consumption of cannabis in India, which was said to be morally and socially destructive to the Indian people.[99] Mills notes that the cannabis question was 'simply caught up in the politics of opium', as 'another way of darkening the reputation of the Government of India … by emphasizing its murky dealings in drugs'.[100] Opposition to ending the opium trade centred on fiscal and private economic concerns,[101] but in the face of growing abolitionist support, two Royal Commissions were established to investigate the cannabis and opium issues. Both were conducted between 1893–1894. The Indian Hemp Drugs Commission reported first, in 1894.[102] In short, the conclusions which followed its eight volumes of evidence were that the moderate consumption of cannabis produced few consequences to users or wider society; that 'prohibition … would be unjustifiable';[103] and that a system of

[93] ibid ch.2. Dimensions of the British/Chinese opium trade are discussed further at text to nn.105ff in ch.3.
[94] Berridge, *Opium* (n.5) 176.
[95] ibid 176–81; Stein (n.84) 9–11; Brian Harrison, 'The British Prohibitionists 1853–1872: A Biographical Analysis' (1970) 15(3) *International Review of Social History* 375.
[96] Berridge, *Opium* (n.5) 181.
[97] Stein (n.84) 10–11.
[98] ibid 13–14.
[99] Mills (n.90) 100.
[100] ibid 95, 101.
[101] Julia Buxton, *The Political Economy of Narcotics: Production, Consumption and Global Markets* (2006) 27–29.
[102] Indian Hemp Drugs Commission, *Report of the Indian Hemp Drugs Commission 1893–94*, vols 1–8 (first published 1894–95, collected edn, Hardinge Simpole/National Library of Scotland 2010).
[103] ibid 272. Mills notes that the Commission's rejection of prohibition was heavily influenced by JS Mill's theories of political economy: Mills (n.90) 120. See also: Oriana Josseau Kalant, 'Report of the Indian Hemp Drugs Commission, 1893–94: A Critical Review' (1972) 7(1) *International Journal of the Addictions* 77, 90.

licensing and taxation would enable sufficient control.[104] The Report of the Opium Commission the following year has been regarded as a 'whitewash', but as Berridge argues:

> The Commission can hardly be accused of neglecting its duty … [It] asked 29,000 questions of 723 witnesses and collected 2,500 pages of evidence … It found that the evil effects of opium eating in India had been greatly exaggerated, … denied the connection between opiate use and crime, and refused to believe that the Indian government's connection with opium was any barrier to the spread of Christianity … [T]he anti-opium case had been defeated not by unfair state management but by the realities of the Indian experience … The Commission was less of a cover-up than the anti-opiumists proclaimed …[105]

Support for both the anti-cannabis and anti-opium lobbies thereafter declined, and the Reports' publication ushered in an 11-year period of Parliamentary silence on the question.[106] However, Stein notes that in 1906 changes occurred in Britain, China and America which brought Britain's Far Eastern opium policy back into focus.[107] In Britain, the Liberal Party – who were 'fervently opposed to the [opium] traffic and had been the mainstay of anti-opium agitation for over thirty years'[108] – won a landslide majority at the general election. Soon after, the Commons famously resolved 'that the Indo-Chinese opium trade is morally indefensible, and requests His Majesty's Government to take such steps as may be necessary for bringing it to a speedy close'.[109] In China, a concerted anti-opium campaign was initiated whereby opening new opium shops and using new land for poppy cultivation were prohibited; existing shops and poppy farmland had to be registered and gradually wound up; opium addicts were expected to reduce their consumption; and anti-

[104] Indian Hemp Drugs Commission (n.102) 287–290; Mills (n.90) 118–120.
[105] Berridge, *Opium* (n.5) 187–88. See also: RK Newman, 'India and the Anglo-Chinese Opium Agreements, 1907–14' (1989) 23(3) *Modern Asian Studies* 525, 529–30.
[106] Stein (n.84) 16; Mills (n.90) 124–25.
[107] Stein (n.84) 16.
[108] ibid 20.
[109] HC Deb 30 May 1906, vol 158, col 516. For earlier attempts to pass similar motions, see: HC Deb 10 April 1891, vol 352, cols 285–344 (motion rejected); HC Deb 24 May 1895, vol 34, cols 278–324 (resolving 'that the system by which the Indian Opium Revenue is raised is morally indefensible').

opium societies were provided government funding.[110] In the USA, diplomatic efforts 'directed at seeking an international solution to the Far Eastern opium problem' got underway.[111]

Britain was hesitant to accede to America's initiative of an international commission or investigation into the Far Eastern trade and use of opium: there was 'a dislike of proposals for collective action in areas where the liberal traditions of British foreign policy decreed an individual response';[112] and Britain and China were on the verge of settling the '10-year' Anglo-Chinese Opium Agreement whereby opium imports into China would be reduced by 10% per year, 'leading to the total extinction of the trade in 1917'.[113] However, in 1909, delegations from 13 countries (including the UK) met in Shanghai on the basis of the American initiative.[114] A number of recommendations were made, including that each government would suppress opium smoking and that the non-medical use of opium was a matter for 'prohibition or careful regulation … with increasing stringency'.[115] Although the absence of ratification rendered these recommendations merely advisory, it sparked another meeting in 1911 and the signing of the Hague International Opium Convention in 1912.[116]

The Hague Convention (which Britain ratified in 1914) provided that the Contracting Parties would enact national legislation for the control and distribution of opium, its derivatives including heroin and morphine, and cocaine;[117] and that statistics relating to the drug trade would be exchanged.[118] However, it did not aim to suppress drug traffic due to, inter alia, the financial implications for opium-producing countries, instead 'pursu[ing] the idea of trimming off the excess of production over the amount for legitimate (medical and

[110] Stein (n.84) 17.
[111] ibid 16, ch.3.
[112] Berridge, *Opium* (n.5) 240–41.
[113] Newman (n.105) 535.
[114] For detail, see: Toby Seddon, *Rethinking Drug Laws: Theory, History, Politics* (2023) ch.5; Helena Barop, 'Building the "Opium Evil" Consensus: The International Opium Commission of Shanghai' (2015) 13(1) *Journal of Modern European History* 115; Stein (n.84) ch.4.
[115] Barop (n.114) 135, quoting International Opium Commission, *Report of the Shanghai Commission on Opium 1909*, vol 1 (1909) 84.
[116] Paul Knepper, *International Crime in the 20th Century: The League of Nations Era, 1919–1939* (2011) 117.
[117] The control of cannabis was also raised, but 'the Conference swept it aside' with 'kind words' about further research: Mills (n.90) 155–56.
[118] International Opium Convention (signed 23 January 1912, entered into force 28 June 1919) 8 LNTS 187 (Hague Convention). See also: Joy Mott and Philip Bean, 'The Development of Drug Control in Britain' in Ross Coomber (ed), *The Control of Drugs and Drug Users: Reason or Reaction?* (1998) 33.

scientific) purposes'.[119] Two further conferences concerning the Convention's ratification followed in 1913 and 1914, but achieved little in advancing its implementation due to the Parties' vested political and financial interests, and the outbreak of WW1 prevented further international action.[120]

Prior to around 1911, the movement to suppress the international opium trade (and the ancillary drive to end cannabis use in India) was not focused on curbing the drug's import into, export from, or trade or use within the territorial UK.[121] The movement's consensus goals for legal and policy reforms were firmly centred on opium's place in the Crown Colonies. There was therefore no direct tension between the existence and aims of the suppression movement – influential and successful as it was – and the absence of further domestic drug regulation in the approximately 45 years post-1868. There was little in the way of what might be labelled 'indirect' or minor points of tension either. Although Berridge argues that 'the foundation of a fully fledged anti-opium movement … did have a significant domestic impact, in particular in contributing to changed perceptions of domestic opium use',[122] this attitudinal shift was neither a substantive or normative one, nor one widely or deeply subscribed to. For the most part, the shift was merely one towards increased openness to reflecting on the domestic drugs question; and even then, this only found purchase in certain circles.[123] In any event, 'the debate was confused': while the anti-opiumists deemed moderate narcotic use impossible and emphasised 'the need for [greater] domestic as well as Indian restriction', they simultaneously argued that 'the Indian government would do well to follow' the existing English pharmaceutical approach.[124]

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[119] Knepper (n.116) 117. 'Britain was then the world's largest commercial producer of morphine and Germany that of cocaine': Toby Seddon, 'The Regulation of Heroin: Drug Policy and Social Change in Early Twentieth-Century Britain' (2007) 35(3) *International Journal of the Sociology of Law* 143, 146. See also: William B McAllister, 'Foundations of the International Drug Control Regime: Nineteenth Century to the Second World War' in David R Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (2020) 4–8.

[120] Virginia Berridge, 'The Making of the Rolleston Report, 1908–1926' (1980) 10(1) *Journal of Drug Issues* 7, 11, 13; Mott and Bean (n.118) 33.

[121] Berridge, *Opium* (n.5) ch.14; Stein (n.84) ch.4, 129; Seddon, *A History* (n.1) 68; Geoffrey Harding, 'Pathologising the Soul: The Construction of a 19th Century Analysis of Opiate Addiction' in Coomber (n.118) 5–6.

[122] Berridge, *Opium* (n.5) 173, 189.

[123] e.g., addiction specialists. She notes later that 'the anti-opium movement can hardly be said to have disseminated views hostile to opiate use throughout the British public even by the end of the century': ibid 193.

[124] ibid 189–90.

With the debate thus framed – and in light of the two Royal Commissions' conclusions – it is perhaps less surprising that calls for more restrictive domestic drug legislation did not feature in the spirited, lengthy, and cross-party Parliamentary re-affirmations of the importance of combatting the 'morally unjustifiable' and 'evil' opium trade in the British Empire.[125] Even post-1911, when Britain signed and ratified the Hague Convention, the view of both the government and the medical profession was that the extension of pharmacy legislation would be appropriate and sufficient to meet Britain's Convention obligations;[126] all of the drugs covered by the Convention had been explicitly controlled under an updated poisons schedule since 1908.[127] Overall, up to the outbreak of WW1 the normative view regarding the domestic regulation of drugs remained one centred on and committed to the system established by the Pharmacy Act 1868 – which in turn was based on the normative bases of law-making of the Victorian legislative state. What had occurred by 1911 on the heels of the suppression movement was not a departure from those normative bases, but at most a reinterpretation of those older norms to fit with new changes. On the international stage, Britain had subscribed to a novel set of instrumental goals for the control of drugs, but these were in alignment with the controls Britain already had in place. Similarly, while the Commons' resolution that the opium trade was 'morally indefensible' symbolically underscored a shift in attitudes towards opium – a drug which not long previously had been taken unselfconsciously as a part of everyday life[128] – such semiotics had not yet been imported to the domestic trade or use of opium (or any other drug).

The conclusions of both chapters in this thesis' Part One are nuanced. Chapter 1 argued that the Pharmacy Act 1868 was in several ways a microcosm of the Victorian legislative state – and may therefore be regarded as a window into conceptions of criminalisation (and law-making more broadly) at this time – although a closer reading of its provisions and operation reveals several points of tension with the conceptual underpinnings of

[125] HC Deb 6 May 1908, vol 188, cols 339–80. At the turn of the century in England there was even a minor, emerging proto-subculture of 'self-conscious recreational [users of] opium and hashish … mescal and cocaine': Berridge, *Opium* (n.5) 238. However, 'the population as a whole had no awareness of cannabis and its properties': Mills (n.90) 6.

[126] Virginia Berridge, 'War Conditions and Narcotics Control: The Passing of Defence of the Realm Act Regulation 40B' (1978) 7(3) *Journal of Social Policy* 285, 289–90, fn.17.

[127] Poisons and Pharmacy Act 1908, sch.1. Cocaine and morphine were included at the suggestion of the RPS, but 'both drugs were, in fact, covered by the inclusion of "Alkaloids, all poisonous vegetable alkaloids and their salts" in … the 1868 Act': HB Spear and Joy Mott, 'Cocaine and Crack within the "British System": A History of Control' in Philip Bean (ed), *Cocaine and Crack: Supply and Use* (1993) 30.

[128] Berridge, *Opium* (n.5) 3.

nineteenth century statutory reforms. Chapter 2's conclusion is that – recognising arguments may be made both ways – there is overall greater synergy than there is tension between the continued operation of the 1868 Act and the absence of further drug legislation to WW1, notwithstanding the existence of several prima facie grounds for reform. Taking these chapters' conclusions together, it is clear that the 1868 Act is even more of a window into conceptions of criminalisation than it appeared in Chapter 1, being a piece of legislation which bridged changing understandings of drugs and addiction and of criminalisation during this period.[129] Two further (related) points worth drawing out are that, first, patterns are already becoming observable, looking both backwards and forwards through time. Second, that from their inception, laws placing punitive sanctions on the sale of substances used for their psychoactive effects (and which today are controlled drugs) can provide a fruitful lens for analysing developments in the criminal law, having inter alia: cut across the 'regulatory'[130] and 'real'[131] spheres of the criminal law; been among the first areas in which doctrinal innovations including strict and vicarious liability were introduced;[132] and their existence and development having been justified across several bases including the prevention of harm (both to others and paternalistically), the promotion of morality, and minimal state interference.[133]

The features which were noted in the Overview of Part One as being 'self-evident component[s] of any drug control strategy' – possession, supply, and trafficking offences; penalties of imprisonment; and the scheduling of substances according to their perceived harm or addictive potential – remained absent at this point in the chronology.[134] This would soon change after the outbreak of WW1, and it is this shift which the following Part will explore.

[129] e.g., between the Victorian legislative state/the Benthamite view of law-making and punishment (text to nn.93–119 in ch.1), and the late-nineteenth and early-twentieth century's 'new criminology' as described by Garland and others (text to nn.44ff above).
[130] e.g., being enmeshed with legislation targeting the adulteration of food.
[131] i.e., having been influenced by, and responded to, the issue of criminal poisoning.
[132] Text to nn.171, 256 in ch.1.
[133] cp Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, 2016) ch.4, describing these bases as key parts of the 'fabric' of modern criminal law.
[134] Seddon, *A History* (n.1) 77.

Part Two: The First World War – c.1960

Overview of Part Two

Part Two, comprising Chapters 3 and 4, focuses on the period from the First World War (WW1) to the early 1960s. This periodisation is reflective of several key developments in Britain's approach to drugs, and in conceptions of criminalisation.[1] This Part sits between the system of pharmaceutical regulation established during the Victorian legislative state, which was the subject of Part One, and the current (post-1960s) legal and policy framework which will be the focus of Part Three.

Key developments in Britain's approach to drugs during the period examined in this Part included, inter alia: the crisis conditions and emergency criminal law measures of WW1; the influence of an increasingly comprehensive transnational drug control framework which began to be constructed in the early 1910s and gained traction post-1920; the progression of and innovations observable in the approximately ten successive Dangerous Drugs Acts (DDA) and other miscellaneous legislation from 1920 to the mid-1960s (which, in the main, gave effect to Britain's new Treaty obligations and widened the net of drug regulation); and the establishment of a medical–penal policy approach post-1926 (the 'British System') which aimed to treat addicts while punishing suppliers.

Key developments in conceptions of criminalisation during this period related to the very definition of 'crime', i.e., whether the (theoretical, claimed) distinction between regulatory offences (*mala prohibita*) and 'real' crimes (*malum in se*) remained tenable, whether 'criminal law could still be given a central-case analysis in terms of serious wrongdoing',[2] and (in turn) what this meant for the substance and moral legitimacy of the criminal law as a whole. Several influential writers proposed various definitions of 'crime', each with their own explicit and/or implicit requirements for criminalisation. The most influential of these was Glanville Williams' procedural definition (i.e., 'a crime is an act capable of being

[1] Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010) 77; Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 64.

[2] Jeremy Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (2014) 103.

followed by criminal proceedings having a criminal outcome, and a proceeding or outcome is criminal if it has certain characteristics which mark it as criminal')[3] which implicitly entailed commitments to *mens rea* and to legality.[4] Further, related, developments included the rise of penal-welfarist approaches to crime and the criminal law's shifting approaches to vice.

The 1960s have been chosen as the end point of this Part as around then the transnational drug conventions had developed and matured to become regarded as '"normative", rather than mere[ly] contractual',[5] in nature; the British System was abandoned (or at least amended);[6] and the landmark, still-in-force Misuse of Drugs Act 1971 was enacted, repealing all preceding Dangerous Drugs legislation. Additionally, from the 1960s onwards the concept of criminalisation was further developed, debated, and articulated in a more sophisticated, systematic and/or modern manner by writers such as Williams, Hart, Devlin, Ashworth, and others; penal-welfarist approaches to crime fell out of favour among lawmakers; and towards the end of the twentieth century criminal law theorists, driven by concerns about 'overcriminalisation', began advocating for a return to 'classical' conceptions of criminal law-making.[7]

In terms of this thesis' primary objective – a systematic inquiry into the relationship between the development of British drug laws and the question of criminalisation at specific points in time – each of the interrelated yet discrete developments covered in this Part prompt different research questions and therefore analytical angles. For example, the unprecedented influence of transnational criminal law raises questions regarding, inter alia, the legitimacy of enacting domestic criminal legislation on the bases of international politics and (inter)national security, rather than on the 'traditional' grounds of (national) morality, harm prevention, etc., which had informed poisons laws, and criminalisation practices more generally, in the previous century. The development of the DDAs, by contrast, necessitates a more doctrinal analytical approach in examining how the regulatory nature of previous poisons legislation was transformed into 'real' criminal drug laws; the extent to which

[3] Glanville Williams, 'The Definition of Crime' (1955) 8(1) *Current Legal Problems* 107, 130.
[4] Farmer (n.1) 100–03.
[5] Neil Boister, 'The Growth of the Multilateral Suppression Conventions in the First Half of the 20th Century' in Neil Boister, Sabine Gless and Florian Jeßberger (eds), *Histories of Transnational Criminal Law* (2021) 53, quoting JG Starke, *An Introduction to International Law* (6th edn, 1972) 47.
[6] Philip Bean, *Drugs and Crime* (3rd edn, 2008) 13.
[7] Farmer (n.1) 102–05.

similar trends can be observed in other contemporaneous criminal laws; and how this was justified. And both the existence and practical implementation of the 'British System' raises, inter alia, questions of drug users' criminal responsibility and the appropriate approach to dealing with them (which had occupied the minds of legislators to varying degrees since the debates on habitual drunkards and inebriates in the 1870s), and whether there may have been a peculiar culture or outlook towards criminalisation in Britain.[8]

These multiple and overlapping lines of development make a linear analysis like that employed in Part One impossible. Hence, while an overall chronological structure is employed within each chapter, in order to give appropriate space to answering these and other questions, the overall structure of this Part is primarily thematic.

Chapter 3 is the chapter in this thesis which primarily focuses on, in broad terms, international aspects which impacted British drug criminalisation. These include the changes brought about during WW1 and its aftermath, i.e., the drug regulations created under the Defence of the Realm Act 1914; the incorporation of the Hague International Opium Convention into the WW1 Peace Treaties; and the associated enactment of the DDA 1920. Attention is latterly given to the establishment of the League of Nations as the central organ of the transnational drug control regime and the several (drug) Conventions created under the League's auspices during the interwar period. As the scope of this thesis is limited to British criminalisation and drug laws, certain issues are necessarily skimmed over or altogether unexplored. These include the foreign/international social, economic, and legal developments which had a bearing on the early transnational drug control system as a whole, but which are of either tangential importance in the British context or cannot be examined with exclusive reference to English-language sources.[9] It is also due to this scope that only one chapter in this thesis has as its primary focus the international aspects of drug prohibition. Later chapters will refer to and discuss international frameworks where relevant; but those international frameworks could be the subject of several separate theses, and similar arguments and considerations which are outlined in Chapter 3 in

[8] Richard Davenport-Hines, *The Pursuit of Oblivion: A Social History of Drugs* (2002) 162: American politicians 'were soon carried away by puritanical zeal into a policy that was idealistic, punitive, and unforgiving'.

[9] See, e.g.: Charles D Kaplan, 'Book Review' (1987) 27(2) *British Journal of Criminology* 213, 216, noting domestic developments in countries such as Germany, the Netherlands, France, Turkey and Siam – as well as '[non-]state bureaucracies, e.g., economic multinationals and internationally articulated social movements' – also shaped the transnational system.

relation to the early transnational Conventions, particularly those relating to legitimacy, could apply to the current international frameworks.

Chapter 4's focus turns to the domestic. It chronologically sets out the legal and policy developments regarding dangerous drugs from 1920 to the late 1950s. From this outline, and with reference to existing literature, several themes are thereafter extracted for analysis. Broadly speaking, these are: developments in legal doctrine; the rise of penal-welfarism; and the law's approach to vice. In brief, it is argued that, doctrinally, the era's dangerous drugs legislation was in tension with contemporaneous conceptions of criminalisation; that it is only in specific and tightly-framed contexts that a real connection between penal and welfarist approaches was in operation; and that although the control of vice was often given as a justification for intervention by legislators and policymakers – i.e., as something necessitating control via criminalising legislation – there are few (if any) clear principles underpinning this. Hence, there is therefore some, but only limited synergy observable during this period between the law's approach to drugs and to other 'vicious' objects and behaviours.

The higher-level argument of this Part is that despite there being numerous difficulties in identifying coherent principles underpinning drug criminalisation at both the supra-national and domestic levels – and there also existing several clear points of tension – drug legislation is nevertheless a valuable case study and window into this era's conceptions and processes of criminalisation more generally.

Chapter 3: International Developments Affecting British Drug Criminalisation, The First World War – c.1960

This chapter's analytical theme is a focus on international developments – i.e., those not rooted in domestic British affairs – which impacted drug criminalisation in Britain during the period from the First World War (WW1) to the turn of the 1960s. Included in this definition of 'international developments' are the setting up of the League of Nations (LoN) as the organ responsible for the global control of drugs, and the creation of several transnational Conventions under the LoN's auspices to effect this. Also included are the emergency drug control measures enacted in Britain in response to the crisis conditions of total, global war; and the initiatives to dismantle Western-controlled opium monopolies, and to reduce opium use, in the Far East.

This chapter is structured as follows. Section 3.1 considers the emergency measures enacted during WW1 under the Defence of the Realm Act 1914 (DORA). It is argued that these regulations amounted to justifiable criminalisation, despite their extraordinary ambit; and that while they shared many apparent similarities with modern drug laws (such as possession offences), these regulations were more conceptually and substantively similar to the nineteenth century system of pharmaceutical/poisons regulation than what came later. The measures did, however, latently introduce what would become key institutional, legislative, and conceptual features of British drug criminalisation, such as control by the Home Office and police; drug offences being regarded as 'real' rather than regulatory crimes; (calls for) tougher penalties; the linking of drugs with (inter)national security; and a conflation of drugs with (im)morality and vice. Moreover, it is noted that these features had largely crystallised *before* the transnational framework had been incorporated into domestic legislation through the Dangerous Drugs Act (DDA) 1920.

Section 3.2 then considers the consequences of the Paris Peace Conference. The Conference led to the incorporation of the International Opium Convention 1912 (Hague Convention)[1] into the WW1 Peace Treaties, necessitating the enactment of the DDA 1920,

[1] International Opium Convention (signed 23 January 1912, entered into force 28 June 1919) 8 LNTS 187.

and to the establishment of the LoN. The novelty and legitimacy of enacting domestic criminal law on the basis of an international agreement, in the absence of any significant domestic problem, is discussed in section 3.2.1. It is argued that the DDA 1920 conformed to a 'thin' conception of democratic (procedural) legitimacy. However, the reasons for extending the DDA 1920's scope beyond that required by the Convention – i.e., a fear of 'reverse-colonisation' by 'Orientals' which was presented as a service to humanity – militates towards the 1920 Act being at odds with a 'thick' conception of substantively legitimate criminalisation. Thereafter, section 3.2.2 begins with an outline of the LoN's role in the emergent transnational drug control framework and of the League's associated Conventions. It seeks to extract the tenets, principles, and justifications underlying the expansion of this framework and, inter alia, its entanglement with the broader control of vice (obscenity and prostitution). This is done with a view to laying the groundwork for Chapter 4 which will discuss the British interpretation of and approach to implementing these new transnational obligations. Chapter 3 concludes that few reliably sound principles can be extracted, hence the British framework was based not on internationally agreed norms, but instead developed according to separate, or at least parallel, reasons for criminalisation. Moreover, notwithstanding the absence of principle at the supra-national level, drug laws provide a valuable window into the development of (transnational) criminal law, having been the precursor area for substantial later growth.

3.1 The First World War and the Defence of the Realm Act 1914

This section discusses the regulations made for controlling drugs during WW1 under DORA. This period was an important turning point in Britain's control of drugs in several respects. Writers such as Berridge, Padwa, and Stein have demonstrated this through invaluable primary historical research, and Seddon argues these regulations were an important legislative 'event' in explaining the 'structural underpinnings' of post-War drug controls.[2] This section aims to complement these works by addressing a question which has not yet

[2] Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010) 70; 'The Regulation of Heroin: Drug Policy and Social Change in Early Twentieth-Century Britain' (2007) 35(3) *International Journal of the Sociology of Law* 143, 144.

been fully explored, i.e., of the *degree* to which the DORA regulations were or were not a turning point as regards the question of criminalisation. Specifically, this section looks backwards at the extent to which the DORA regulations were a continuation or departure from the existing pharmaceutical/poisons regulatory regime; forward to the impact (either direct or indirect) they had on later developments; and overall through the lens of what and who can be treated as criminal or requiring regulation, how should this be done, and how this can be justified.

DORA was passed a few days after war was declared.[3] Townshend notes it was an economically-expressed statute – consisting of just two sections – and enacted in haste with little parliamentary debate.[4] It enabled regulations to be made by executive fiat 'for securing the public safety and defence of the realm',[5] an extraordinary emergency power which was used extensively throughout WW1. Among these was regulation 40, which dealt with 'intoxicants, drugs and malingering', and made it an offence to supply intoxicants to an on-duty member of HM Forces, or to off-duty members for the purposes of either eliciting information to assist the enemy or to make them unable to discharge their duties. Regulation 40A extended this to supplying intoxicants for non-medical reasons to soldiers undergoing hospital treatment. Regulation 40B, introduced in mid-1916, made it an offence for the first time for anyone to possess, supply, or offer to supply (to anyone) cocaine or opium without a prescription or licence; to prepare opium for smoking; to occupy, manage, or frequent a premises used for opium smoking; or to possess opium smoking-related paraphernalia. Regulation 40C criminalised malingering by service personnel; and the short-lived[6] regulation 40D made it an offence for any woman with a venereal disease to have sexual intercourse with a member of the British or Allied Forces.

Why were these regulations created? As noted at the end of Chapter 2, Britain had already committed itself to the further regulation of drugs prior to WW1; but in pre-War Britain, there was little interest among medical professionals in creating further drug regulations

[3] DORA was passed on 7 August 1914, extended on 28 August 1914, and superseded by a third which came into effect on 27 November 1914: Andrew G Bone, 'Beyond the Rule of Law: Aspects of the Defence of the Realm Acts and Regulations, 1914–1918' (PhD thesis, McMaster University 1994) 1. Numerous DORA Regulations manuals were published during WW1. The edition to 31 August 1918 is used here, being the only one to contain all regs.40A–D: Charles Cook (ed), *Manuals of Emergency Legislation: Defence of the Realm Manual* (6th edn, 1918).

[4] Charles Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (1993) 57–58.

[5] DORA, s.1.

[6] In force March–November 1918.

(i.e., beyond poisons and pharmacy legislation), and direct advocacy of prohibition along Far Eastern and American lines was rare.[7] Even among government departments there was reluctance to take responsibility for drugs, with the Home Office assuming control as the last resort.[8] However, rumours of recreational cocaine and opiate use amongst soldiers quickly spiralled into hysterical press reaction to an ostensible 'cocaine epidemic', with 'demands for an absolutist response [and] substantial prison sentences for those found in possession of the drug. Its effects were said to be horrific, with murders committed under its influence and soldiers driven to violence and disruption'.[9] This menacing perception – of which another part was dealers supplying drugs to soldiers via prostitutes[10] – soon found purchase in official, medical, and public opinion. Preventing drug use among civilians, however, was a lesser concern.[11] The extension of drug controls to the civilian population under regulation 40B was intended to stem the flow of drugs to the military up-stream, rather than to address civilian use per se:

> 'So long as the civilian can get it', Sergeant Francis Lloyd wrote to the London police in July 1916, 'there are no real means of preventing the soldier from getting or being given it.' The only way to keep members of the armed forces from receiving cocaine, military authorities believed, would be to prevent the general population from procuring it.[12]

[7] Virginia Berridge, 'War Conditions and Narcotics Control: The Passing of Defence of the Realm Act Regulation 40B' (1978) 7(3) *Journal of Social Policy* 285, 289–91; SWF Holloway, *Royal Pharmaceutical Society of Great Britain 1841–1991: A Political and Social History* (1991) 392.
[8] Berridge, 'War' (n.7) 292.
[9] ibid 298. See also: HB Spear and Joy Mott, 'Cocaine and Crack within the "British System": A History of Control' in Philip Bean (ed), *Cocaine and Crack: Supply and Use* (1993) 32–38.
[10] Richard Davenport-Hines, *The Pursuit of Oblivion: A Social History of Drugs* (2002) 168–69; Virginia Berridge, 'Drugs and Social Policy: The Establishment of Drug Control in Britain 1900–30' (1984) 79 *British Journal of Addiction* 17, 20–21; Terry M Parssinen, *Secret Passions, Secret Remedies: Narcotic Drugs in British Society, 1820–1930* (1983) 131; SD Stein, *International Diplomacy, State Administrators, and Narcotics Control: The Origins of a Social Problem* (1985) 93.
[11] The lack of any real domestic drug abuse problem has been charted by many, e.g., Howard Padwa, *Social Poison: The Culture and Politics of Opiate Control in Britain and France, 1821–1926* (2012) 101; Davenport-Hines (n.10) 171, fn.111; Berridge, 'War' (n.7) 300–01; Seddon, 'The Regulation' (n.2) 147.
[12] Padwa (n.11) 98.

The other major driver of the DORA regulations was the fear of opium smuggling, specifically the threat it posed to British commerce. With 'convenient access to international ports, [a] relatively loose opium control regime and commercial interests all over the globe, prewar Britain was an illicit drug dealer's dream'.[13] An Interdepartmental Conference on the Opium Traffic, comprising the Colonial Office, Home Office, Foreign Office, Board of Trade, and Board of Customs, was convened in 1916 following a memorial submitted to the Foreign Office the previous year by the shipping company Alfred Holt and Co.[14] The company alleged an endemic opium smuggling problem, resulting in foreign fines, reputational damage, and extensive delays in setting sail due to having to search crew members. It recommended tightening drug controls, giving the police search and seizure powers, and increasing penalties for smugglers. The Interdepartmental Committee concurred: '[w]ith trade already constrained by the war, the committee agreed that "any unnecessary delay" to shipping caused by the search or expulsion of British liners would be "prejudicial to national interests"'.[15] The above-mentioned concerns of soldiers' cocaine use coalesced with this commercial dynamic, and when regulation 40B was implemented, the reaction was universally favourable amongst the government, police, medical professionals and the public.[16]

What can be said about regulation 40B from a criminalisation perspective? The importance of regulation 40B in the history of UK drug laws, including its innovation of criminalising the possession and supply of drugs, is discussed below. However, it is first worth noting that it would be a mistake to conflate regulation 40B with DORA regulations more broadly in pursuit of an argument that these novel restrictions on drug possession and supply went against contemporary norms of legitimate criminalisation. The process of criminalisation (i.e., by executive fiat) and the substance of the DORA regulations themselves did attract some criticism at the time as being the 'disproportionate response [of] an avowedly liberal state', an unacceptable undermining of civil liberties, and an attack on the rule of law.[17] The Act's brief but extensive enabling provisions, particularly those authorising civilians to be tried by military courts, were deemed 'the most unconstitutional thing' that had ever

[13] ibid 95.
[14] See, e.g.: ibid 95–97; Stein (n.10) 89, 91–92.
[15] Padwa (n.11) 97.
[16] Berridge, 'War' (n.7) 297–99.
[17] Bone (n.3) 4–24.

happened in Britain.[18] While there is debate among historians regarding the extent to which DORA 'impinged on traditional notions of "English liberty" and legal "conventions and restraints" that ensured freedom of the individual',[19] Townshend's argument that Parliament's 'only value was to give a democratic form to the dictatorial edicts of an autocratic cabinet' – edicts which were deliberately 'constructed to be judge-proof' – is convincing.[20] However, regulation 40B, by contrast, was far less inapposite as regards both its process of criminalisation and its substantive provisions. As already noted, Britain was committed to the further regulation of drugs pre-War, hence the executive did have some procedural basis for taking action in this area. Additionally, when contextualised against other DORA regulations created in response to the crisis conditions of total war such as the criminalisation of flying kites (regulation 25) and whistling for taxis (regulation 12D), regulation 40B's comparative impact on stretching the criminal law's appropriate bounds is put into perspective; if not appearing rather reasonable given the degree of popular sanction for controlling drugs.

Furthermore, although regulation 40B's prohibitions of drug possession and supply share an apparent functional similarity to modern drug laws, framing this development as a wholesale departure from the pre-War legislative response to drugs would be a misrepresentation. Conceptually, regulation 40B was more akin to a modification or development of the nineteenth century poisons and pharmacy-based regulation than the paradigm of substantively criminal law-based drug control which would dominate from the 1920s (with mostly increasing veracity) until the present day. Semantically, regulation 40B employed the objective and value-neutral pharmaceutical terms 'cocaine', 'opium', 'intoxicant', 'sedative', and 'stimulant drug', etc., eschewing the value-laden concept of 'dangerousness' which was being extensively used in contemporary media discourse and would later find legislative expression in the post-War DDAs. The form of the regulations is also reminiscent of pharmacy legislation, with detailed requirements for the issuance of prescriptions containing cocaine; the recording of transactions involving opium and cocaine; the accurate labelling of containers; and the licensed import and manufacture of

[18] Townshend (n.4) 59, quoting HL Deb 27 November 1914, vol 18, col 220.
[19] Michael Reeve, *Bombardment, Public Safety and Resilience in English Coastal Communities during the First World War* (2021) 100.
[20] Townshend (n.4) 62, 66.

the drugs.[21] The link to previously-existing legislative form is further borne out by the reasons for extending the control of drugs under DORA specifically. In a memorandum to the Interdepartmental Conference on the Opium Traffic, Malcolm Delevingne, the Home Office official in charge of the drugs question, stated that:

> The most convenient way of dealing with the question would be by a Regulation under the Defence of the Realm Act, which would give power to control dealings in opium, etc. similar to the power which has been given for controlling dealings in war material … if this method is adopted, Regulation 51 would give the Police the necessary powers of search and seizure.
>
> The difficulty of dealing with the question in this way is that its bearing on the 'Defence of the Realm' is neither very direct nor important … *The only alternative method would be legislation which may be difficult to get and would possibly not be regarded as uncontroversial*.[22]

There are several potential explanations as to why a new legislative framework would have been controversial. First, as already noted, while both the medical profession and the government recognised that further drug controls were inevitable,[23] the immediate (to late 1913) pre-War view was that the extension of pharmacy laws would be appropriate and sufficient to meet Britain's Hague Convention obligations.[24] Proceeding under DORA would be the most expedient way to 'neutralise [such] opposition' to controls going beyond

[21] Such provisions are outwith the ambit of later criminal drug laws, most obviously those discussed in Part Three of this thesis. The Dangerous Drugs Regulations 1921, SR & O 1921/865, reg.9 (made under the DDA 1920) did also stipulate similar recording/labelling requirements (see also: Seddon, *A History* (n.2) 73). However, by 1923 the breach of such recording/labelling requirements 'through inadvertence' by medical/pharmaceutical professionals was made distinct from other drug-related criminal offences: Dangerous Drugs and Poisons (Amendment) Act 1923, s.9. Separation of the pharmaceutical and dangerous drugs frameworks was achieved at the international level by the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (signed 13 July 1931, entered into force 9 July 1933) 139 LNTS 303 (Limitation Convention) (see: n.157 below); and at the domestic level by the Pharmacy and Poisons Act 1933 (text to nn.80ff in ch.4).

[22] Quoted from Berridge, 'War' (n.7) 295 (emphasis added).

[23] Parssinen (n.10) 133.

[24] Berridge, 'War' (n.7) 289–90, fn.17.

established lines.[25] Second, in the related area of addressing the venereal-diseases-among-soldiers question under regulation 40D, 'War Office and Home Office papers were sensitive to the moral and political objections to "state regulation of vice"'.[26] Third, Delevingne's statement may have been his own reflection that the political and institutional building blocks to advance his zealous personal ambition for a fully-fledged international penal system of drug control[27] were not yet in place, i.e., the only *suitable* 'alternative method' in his view. Or, fourth, it might simply have been an awareness that any regulations made under DORA (regardless of their subject) would almost certainly be uncontroversial, 'becom[ing] part of the broader uncontested task of winning the war'.[28] Whatever the precise reason, this suggests that an explicitly penal normative focus to drug control had not yet crystallised by 1916, and that regulation 40B should not, therefore, be conceptualised as part of such.

Reeve suggests that emergency wartime legislation (including DORA) can be linked to the public safety discourse and legislation of the nineteenth century, via the role played by contemporary conceptions of risk in 'defining dangers, structuring and managing anticipation of harmful events'.[29] Whether this analysis holds for DORA as a whole is beyond the scope of this thesis, but the concept of risk perception does do further work in drawing parallels between regulation 40B and nineteenth century poisons and pharmacy regulation. O'Malley notes that the nineteenth century 'was the era of great programs that tackled issues of health risks by great engineering projects delivering pure water, established sewerage systems and creating pure food and drug regulation'.[30] These links were charted extensively in Chapter 1.[31] The notable point here is O'Malley's argument that these programs exemplified a conception of '"epidemiological risk", in which individuals are not centred at all. The focus, rather, is on populations'.[32] A similar conception of risk can be seen operating in regulation 40. The risks of opium and cocaine – and the transmission of

[25] Stein (n.10) 93; Parssinen (n.10) 132.
[26] Bone (n.3) 12.
[27] Based on the US focus on supply: John Collins, *Legalising the Drug Wars: A Regulatory History of UN Drug Control* (2022) 20.
[28] Padwa (n.11) 98. Holloway (n.7) 393 notes *The Lancet* 'welcomed' the 'innovation … being secured without controversy under the stimulus of a great war'.
[29] Reeve (n.19) 95.
[30] Pat O'Malley, 'Governmentality and Risk' (2009) Sydney Law School Legal Studies Research Paper 9/98, 15–16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478289> accessed 3 April 2025.
[31] Text to nn.122ff in ch.1.
[32] O'Malley (n.30) 16. See also: Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, 2010) 218.

venereal diseases[33] – were not seen as pertaining to the individual; the offences not framed as being against the person or couched in terms of the deleterious effect on *individual* health (or of dangerous individuals).[34] Rather, they were offences against the state, created to ameliorate the risk of the population (and especially the armed forces) being weakened physically, morally, and financially to the detriment of the war effort.

This depersonalised, mid-nineteenth century conception of risk and 'victim' is also mirrored in terms of the *offender*: regulation 40B does not appear to mark a major change in how (criminal) responsibility or blameworthiness was ascribed to drug users. Put briefly, in the 1920s the drug offender became a specific object deserving of (and worthwhile actively pursuing through) the severe, indictable criminal sanction; an amalgamated construct of quasi-medicalised addicts, immoral women, transnational criminal gangsters, and threatening (typically 'Oriental') aliens.[35] This was given institutional weight by a series of LoN-driven Conventions targeting the 'interlocking and self-reinforcing activities' of the vicious traffic in women, drugs and obscene publications.[36] As discussed in Chapter 2,[37] similarly morally-loaded and character-driven perceptions were manifest in UK 'intoxicant' law and policy discourse to *some* (albeit limited) degree in the latter part of the nineteenth century, most notably in relation to Chinese opium dens and the 'disease' theory of addiction-based legislation targeting (primarily female) habitual drunkards and inebriates. More broadly, (as also discussed in the previous chapter)[38] Garland charts a penal shift from uniformity to individualisation between 1895–1914 whereby the Victorian ideology of treating all offenders alike in a uniform carceral system of punishment (with '"the special characteristics of the criminal himself being a negligible quantity" [and] any mental, moral or familial inquiry … of the individual criminal [absent]') was replaced with an individualised focus via the use of probation orders (which could include conditions to abstain from

[33] As criminalised by reg.40D.
[34] See, e.g.: Laura Lammasniemi, 'Regulation 40D: Punishing Promiscuity on the Home Front during the First World War' (2017) 26(4) *Women's History Review* 584.
[35] See: Seddon, 'The Regulation' (n.2); 'Women, Harm Reduction and History: Gender Perspectives on the Emergence of the "British System" of Drug Control' (2008) 19 *International Journal of Drug Policy* 99; Paul Knepper, *International Crime in the 20th Century: The League of Nations Era, 1919–1939* (2011) chs.1–2; 'Dreams and Nightmares: Drug Trafficking and the History of International Crime' in Paul Knepper and Anja Johansen (eds), *The Oxford Handbook of the History of Crime and Criminal Justice* (2016); Neil Boister, 'The Growth of the Multilateral Suppression Conventions in the First Half of the 20th Century' in Neil Boister, Sabine Gless and Florian Jeßberger (eds), *Histories of Transnational Criminal Law* (2021).
[36] Knepper, *International* (n.35) 71.
[37] Text to nn.11–24 in ch.2.
[38] Text to n.50 in ch.2.

'intoxicating liquor'),[39] Borstal training, preventative detention, licensed supervision, and supervised fines.[40] Recall, however, that during this period no action (legislative or otherwise) was taken against (the largely mythical) opium dens and that the inebriates legislation applied only to substances which could be drunk, thereby pertaining almost exclusively to alcohol(ics). In other words, the risk of the alcohol inebriate (and, increasingly, the criminal more generally) had become individualised, with blameworthiness contingent on their own particular circumstances; whereas the drug user remained – legally at least – the outlier in this regard, altogether depersonalised, and best dealt with via established regulatory pharmacy laws.[41]

Notwithstanding that regulation 40B did create hitherto unknown offences of drug possession and of frequenting a place for opium smoking (thereby addressing opium dens), various aspects of regulation 40 demonstrate a closer affinity with the nineteenth century conception of the drug user/offender than the post-1920s one.[42] All regulation 40B offences were triable only summarily,[43] and as noted already, targeting civilian drug use or addiction was of minor, ancillary importance.[44] Additionally, a strong case can be made for regulation 40 lacking the instrumental focus of later drug laws, instead being of more symbolic value. Lammasneimi argues this point in relation to regulation 40D, noting the paucity of solid evidence for the existence of a venereal disease epidemic and the absence of a statistical increase in venereal diseases until the final years of the war, as well as the low prosecution and conviction rates of women accused of this offence.[45] Nonetheless, she notes, the threat of 'poisonous women … poison[ing] a regiment' justified action via a framework which

[39] Administration of Justice Act 1914, s.8.

[40] David Garland, *Punishment and Welfare: A History of Penal Strategies* (rev edn, 2018) 14, 17–18, quoting H Havelock Ellis, *The Criminal* (first published 1889, Contemporary Science Studies 1910) x–xi.

[41] Stein (n.10) 5 even argues that, '[i]n fact, it is only because the addict played so unimportant a role in the evolution of national and international drug policies, that these programmes take the forms that they do … if the control of addicts or addiction had been the objective, most of the resources directed at controlling traffic would have been channelled into domestic and international treatment and rehabilitation programmes'.

[42] The 'Chinese connection' with opium smuggling was raised in Alfred Holt and Co.'s memorial (text to n.14 above), but this was in a qualitatively different manner (i.e., as an aside to the much wider prejudicial effect opium smuggling was having on British shipping commerce) to that which would follow in the 1920s: Berridge, 'Drugs' (n.10) 20; Padwa (n.11) 95.

[43] The maximum sentence was 6 months' imprisonment (with or without hard labour) and/or a £100 fine, but this applied to *all* summary offences under DORA Regulations (including, e.g., whistling for taxis). Indeed, 'the penalties imposed were usually light, consisting of fines': Stein (n.10) 99. The severity of this maximum sentence, therefore, ought not to be taken as an indication (cf Padwa (n.11) 100) of a marked shift from the Pharmacy Act 1868's regulatory approach to one of seeing drug violations as 'real' crime. The *summary* nature of the offence is what is important.

[44] Text to n.12 above.

[45] Lammasniemi (n.34) 589–90.

conflated chastity with patriotism, and which was based on preventative medicine/sanitary considerations and the containment of physical and moral contamination.[46] Likewise, by 1917, evidence of anything more than minor wartime cocaine use among the military or civilian population was accepted even in official circles to have been non-existent.[47] Additionally, there were few prosecutions under regulation 40B,[48] with 'most infractions [being] of a "technical and minor" nature [resulting] more from the administrative oversights of careless pharmacists than from the schemings of traffickers'.[49] Yet, the perception of cocaine and opium poisoning soldiers legitimised action by conflating abstinence from 'intoxicants' with national security, within (as argued above) a mainly conceptually pharmaceutical regulatory scheme.

Inasmuch as regulation 40B's purpose was arguably more symbolic than instrumental, its value as regards future development should also be duly recognised. Notwithstanding its greater similarity to the nineteenth century drug regulation system than the post-1920 one, DORA did signal the imminent emergence of a new approach.

There is some disagreement as to the impact DORA had, however: Bean argues that '[i]t is doubtful whether [DORA] had any bearing on the later [DDAs which were] implemented as a result of International Conventions';[50] whereas Berridge argues that the DDA 1920 'was an extension, and a reaffirmation, of wartime control'.[51] That both arguments hold significant water (and are not necessarily mutually exclusive or irreconcilable) underscores the importance of nuanced analysis as this chapter progresses. As discussed at section 3.2 below, the DDA 1920 was passed as a result of the Paris Peace Treaty's stipulation that 'ratification of the peace treaty should be deemed in all respects equivalent to ratification of the [Hague] Convention'.[52] In this direct and strictly legal sense, then, DORA was immaterial; and the advantage of Bean's analysis is that it does not seek to adapt domestic legal norms 'which are causally efficacious within a circumscribed geographical area' to

[46] ibid 585, 590. See also: Phillipa Levine, *Prostitution, Race and Politics: Policing Venereal Disease in the British Empire* (2003) 162; Edward J Bristow, *Vice and Vigilance: Purity Movements in Britain since 1700* (1977) 150.
[47] Berridge, 'War' (n.7) 303; Stein (n.10) 98–99.
[48] Berridge, 'War' (n.7) 302.
[49] Padwa (n.11) 101.
[50] Philip Bean, *The Social Control of Drugs* (1974) 24, 32, 35. All successive DDAs were enacted due to international obligations except the Dangerous Drugs and Poisons (Amendment) Act 1923 and the DDA 1967 (and nor was the Drugs (Prevention of Misuse) Act 1964).
[51] Berridge, 'War' (n.7) 286.
[52] Treaty of Versailles (signed 28 June 1919) 225 CTS 188 art.295.

explain relationships between states or between domestic and international legislation.[53] On the other hand, some institutional, legislative and conceptual changes introduced under DORA became key features of post-War UK drugs legislation. These included the Home Office and the police becoming the institutions responsible for drug policy and enforcement, respectively;[54] the creation of possession offences and increased (calls for) penalties for contraventions of drug laws; a linking of drugs as posing a threat to (inter)national security; and a conflation of drugs with sex and prostitution within a broad concept of vice. In these indirect ways, the DORA regulations provided a springboard for later developments, hence Berridge is right to recognise DORA's important explanatory value.

Additionally, this increasingly sinister and 'criminal' perception of drugs was not static between the end of the War and the DDA 1920's introduction, but continued gathering momentum and force.[55] The famous case of Billie Carleton succinctly demonstrates this.[56] An up-and-coming '"leading lady" in the West End theatre', Carleton died of an apparent cocaine overdose following a Victory Ball in November 1918.[57] The press immediately fabricated[58] a 'fantasy world of orgiastic drug-taking indulgence' in response to this death of an attractive 22-year-old actress,[59] in which 'a fear that national stability was threatened by a wave of unrestrained narcotic use was current'.[60] The *News of the World* reported that hundreds of young people 'were indulging in vicious habits … indescribable orgies, and courting the dangers so painfully exemplified by Billie Carleton's fate';[61] the *Daily Mail* 'quoted an expert's observation that "men do not as a rule take to drugs unless there is a hereditary influence, but women are more temperamentally attracted"';[62] *The Times* termed narcotics 'the newest "national vice"';[63] and the *Daily Express* argued that '[t]he drug-taker should no longer be looked upon as a weak-minded fool, but he should be dealt

[53] Stein (n.10) 2–3.
[54] Berridge, 'Drugs' (n.10) 21; *Opium and the People: Opiate Use and Drug Control Policy in Nineteenth and Early Twentieth Century England* (rev edn, 1999) 264; Padwa (n.11) 100.
[55] Regulation 40B remained in force until the 1920 Act.
[56] For more detail: Marek Kohn, *Dope Girls: The Birth of the British Underground* (1992) ch.5; Stein (n.10) 100–04.
[57] Seddon, 'Women' (n.35) 100.
[58] Padwa (n.11) 104.
[59] Stein (n.10) 103.
[60] Berridge, *Opium* (n.54) 261.
[61] Quoted from Stein (n.10) 103.
[62] Seddon, 'Women' (n.35) quoting Kohn (n.56) 107.
[63] Quoted from Padwa (n.11) 103.

with as a criminal [while the] drug vendor, the vile instrument of this debauchery, should be dealt with as a felon'.[64]

The vendor in Carleton's case, Raoul Reginald De Veuelle, *was* dealt with as a felon. A coroner's jury found him guilty of Carleton's manslaughter for supplying her cocaine in a culpable and negligent manner.[65] He was charged with manslaughter the following day. The coroner was correct to state that it was 'a settled principle … that if a person does an unlawful act [which] causes death … he is guilty [of manslaughter]'.[66] However, manslaughter charges were previously very rarely deployed in overdose cases, with successful convictions being even rarer.[67] As Stein notes, '[i]f [they] had been, many a pharmacist who had fallen foul of … the Pharmacy Acts would have been guilty of a similar offence'.[68] De Veuelle was later acquitted of manslaughter following trial in April 1919 (despite the judge's directions to convict), but he pleaded guilty to a charge of conspiracy to supply cocaine.[69] When sentencing, the judge stated that 'traffic in this deadly drug is the most pernicious thing … following the practice of this habit are disease, depravity, crime, insanity, despair and death'.[70] These remarks – and the relative novelty of his manslaughter charge and trial itself – are illustrative of a shift which had by then occurred in the relationship between drugs and the criminal law.[71] Even before the introduction of the DDA 1920 and the influence of transnational drug control treaties, drugs in Britain had developed a distinctly criminal character. De Veuelle's anecdotal case might, of course, have been prosecuted as Carleton's manslaughter in any event. However, it is difficult not to view the DORA regulations as an important moment in the history of British drug criminalisation

[64] ibid.
[65] Kohn (n.56) 95.
[66] Quoted from Stein (n.10) 102. In the context of pharmacy, see, e.g.: *dicta* in *Pharmaceutical Society* v *Wheeldon* 1890 24 QBD 683, 690. Today, Carleton's decision to take the drug would likely break the causal chain for manslaughter in England and Wales: *Kennedy (No 2)* [2007] UKHL 38, cf *Rebelo* [2021] EWCA Crim 306 and the position in Scotland per *MacAngus* v *HM Advocate* 2009 SLT 137. For an early Scottish case where a charge of culpable homicide was found relevant where a 'servant with the charge of drugs which were sold in the shop … culpably dispensed to a customer such [a dose] as to cause death', see: *Robert Henderson and William Lawson* (1842) 1 Broun 360. See also: Law Commission, *Criminal Law: Involuntary Manslaughter* (Law Com CP No 135, 1994) pt.2.
[67] RE Ferner and Sarah E McDowell, 'Doctors Charged with Manslaughter in the Course of Medical Practice, 1795–2005: A Literature Review' (2006) 99(6) *Journal of the Royal Society of Medicine* 309; RE Ferner, 'Medication Errors that have Led to Manslaughter Charges' (2000) 321(7270) *British Medical Journal* 1212. See also: *Markuss* (1864) 176 ER 598; *Ruddock* v *Lowe* (1865) 176 ER 672, fn.1.
[68] Stein (n.10) 104.
[69] Kohn (n.56) 95.
[70] Stein (n.10) 102–03.
[71] Also noted by Spear and Mott (n.9) 37–38.

which enabled, in large part, such a prosecution to occur. These emergency regulations, which were conceptually and substantively similar to the nineteenth century system of pharmaceutical/poisons regulation, latently introduced precedents through an expedited process of accretion in the context of total, global war that quickly took hold in both the national *and* international drug discourses and legal spheres. While the Home Office had recommended the extension of regulation 40B into peacetime three weeks prior to Carleton's death,[72] by 1919 '[Malcolm] Delevingne was all the more convinced of the necessity of an absolute approach'.[73] This enthusiasm drove him to fend off arguments that the new Ministry of Health should be in charge of the drug question, arguing the matter was a police one and that the Home Office's close relations with the police meant his department was best placed to deal with it.[74]

3.2 The Paris Peace Conference and its Consequences

Having considered the emergency measures passed due to the onset of global, total war, this section discusses the other international aspects (i.e., those not rooted in domestic British affairs) which impacted drug criminalisation in Britain. These broadly relate to the consequences arising from the Paris Peace Conference and resulting Peace Treaties. The Hague Convention's incorporation into those Peace Treaties and the associated enactment of the DDA 1920 is considered first, in section 3.2.1. Thereafter, the creation of the LoN and its influence on the transnational system of drug control is discussed at 3.2.2.

3.2.1 The Paris Peace Conference and the Dangerous Drugs Act 1920

There are several dimensions to this thesis' definition of criminalisation,[75] i.e., 'what and who can be treated as criminal or requiring regulation' (a substantive dimension); 'how this

[72] Stein (n.10) 104–05.
[73] Berridge, *Opium* (n.54) 262.
[74] ibid 264.
[75] Text to nn.15–16 in Introduction.

should be done' (a substantive and/or procedural dimension); 'and how this can be justified' (a normative dimension). The DDA 1920's enactment as a result of international developments raises analytical issues in relation to each of these procedural, substantive, and normative dimensions, which are explored in the following discussion. A summary and doctrinal analysis of the DDA 1920's provisions in the domestic context will follow in Chapter 4; what is explored here, in keeping with the theme of Chapter 3 as a whole, relates only to its international aspects.

This section is subdivided into three subsections and is structured as follows. It begins (at 3.2.1.1) with a brief outline of the supra-national process which led to the DDA 1920's enactment. It is argued that notwithstanding some, loose, legal precedent, the enactment of domestic criminal law in this way was novel: this was the power of the criminal sanction being exercised within the territorial UK due to international developments which had little to no bearing on specifically domestic issues. The discussion is then taken forward (at 3.2.1.2 to 3.2.1.3) and framed around the concept of legal legitimacy, which is a useful lens for analysis in this context. Legitimacy, however, is a notoriously fluid concept which has several contextually-dependent meanings; and an inquiry into the legal legitimacy of transposing international (drug control) frameworks into domestic criminal law could be a thesis in its own right.[76] Therefore, for reasons of scope, practicality, clarity, and space, Coicaud's[77] broad and authoritative[78] understanding of legitimacy in criminal law and justice is employed to facilitate analysis. It is argued (at 3.2.1.2) that the enactment of the DDA 1920 did conform to a 'thin' conception of procedural (democratic) legitimacy insofar as it incorporated the new transnational obligations into domestic law. However, (discussed at 3.2.1.3) the DDA 1920's provisions went further than that required by the Hague Convention. The rationale for this – while not tied to a transnational treaty – was nonetheless tied to international aspects. In brief, this extended scope was to counter perceived 'threats' of Chinese origin. After setting this out, it is concluded that the DDA

[76] A complexity outlined in Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, 2018) ch.2, esp 36–39.

[77] Jean-Marc Coicaud, 'Crime, Justice, and Legitimacy: A Brief Theoretical Inquiry' in Justice Tankebe and Alison Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (2013).

[78] Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102(1) *Journal of Criminal Law and Criminology* 119, 124, and at 132: 'It is a remarkable fact that two of the leading social science writers on legitimacy, David Beetham and Jean-Marc Coicaud, each independently developed the same … conceptualization of the central components of legitimacy'.

1920 did not conform to Coicaud's 'thick' conception of substantive/normative legitimate criminalisation.

3.2.1.1 Outline of the Dangerous Drugs Act 1920's Supra-National Process of Enactment

Stein has charted how ratification of the Hague Convention became an essential element of the post-WW1 Peace Treaties.[79] Germany and Turkey, as major drug-producing countries, had refused to ratify and sign the Convention. In August 1918 the US and Britain deliberated whether the Convention should be brought into force among a minority of states, but the British Foreign Office deemed this would render the Convention a dead letter. Following the Allied victory the possibility of compelling Germany and Turkey's ratification at the Paris Peace Conference presented itself: 'since both countries happened to have been on the losing side, [Britain and the US] availed themselves of the opportunity of securing an imposed solution [which] was not likely to recur soon'.[80] A joint British/American proposal was advanced to this effect, the cooperation of the Allied states was secured, and 'the enemy powers had no alternative but to acquiesce'.[81] The complexity of the preparatory work done across a multitude of issues by various Peace Conference committees and commissions ensured that once drafted the provisional Treaty was essentially impossible to amend, and it was presented to the defeated belligerents 'as a *dictat* rather than a text which would form the basis for subsequent negotiations'.[82]

The DDA 1920 was passed thereafter to give effect to Britain's new obligations. Bean states that this was 'the first act of domestic and social legislation to be passed as a result of an international agreement';[83] a novelty which itself prompts a series of questions. Was there any precedent (at all) for this process of enacting domestic criminal law which may have

[79] Stein (n.10) 114–22. For more detail, see: Peter Krüger, 'From the Paris Peace Treaties to the End of the Second World War' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (2012).
[80] Stein (n.10) 122.
[81] ibid.
[82] ibid.
[83] Bean, *The Social* (n.50) 23.

provided some legal basis for (if not legitimised) it? Did this legal procedure conform to principles of democratic/procedural legitimacy, or was the ordinary criminalisation process (of democratically-elected legislators enacting penal laws) illegitimately circumvented? Were the substantive provisions which were transposed from transnational to domestic law legitimate? Did the DDA 1920's provisions 'faithfully abide by the Convention',[84] or did they go further? If they went further, what were the normative bases behind this extended scope, and were those rationales legitimate?

To answer the first question, Boister notes that the Submarine Cables Convention 1884 created an offence of breaking or injuring a submarine cable via an 'indirect mechanism [which] became the standard: the treaty outlined an inter-state norm and the parties promised to criminalize it'.[85] Westminster subsequently passed the Submarine Telegraph Act 1885. Another example is the White Slavery Convention 1910.[86] An inter-state conference was convened in 1902 following 20 years of increasing concern about 'white slavery', i.e., the international traffic of women and girls. In the early 1880s, a House of Lords Select Committee report 'detailed the decoying of young girls for immoral purposes to Belgium' – an action which was not criminal at the time.[87] The 1902 conference was followed by a 1904 Agreement and the 1910 Convention.[88] The latter was 'explicitly transnational in scope', creating offences targeting the cross-border traffic of women, and provided that criminalisation was to be achieved via national law.[89]

There was, therefore, some precedent for the process of law-making by which the DDA 1920 was enacted. However, the qualitative differences in substance and scope between the Submarine Cables Convention/the 1885 Act and the Hague Convention/DDA 1920 are extreme. Additionally, by the time the 1910 White Slavery Convention was created, British primary legislation outlawing the traffic of women ('procuration') had been in existence for 25 years.[90] It was thus unnecessary to pass an Act transposing the offences prescribed by

[84] ibid.
[85] Boister, 'The Growth' (n.35) 41; Convention for the Protection of Submarine Telegraph Cables (signed 14 March 1884) 163 CTS 391 art.2 created the offence, art.12 provided states would enact domestic criminal laws.
[86] International Convention for the Suppression of the White Slave Traffic (signed 4 May 1910) 3 LNTS 278.
[87] Paul Knepper, *The Invention of International Crime: A Global Issue in the Making* (2010) 101.
[88] Boister, 'The Growth' (n.35) 42.
[89] ibid.
[90] Criminal Law Amendment Act 1885, s.2.

the 1910 Convention into national law.[91] The Hague Convention, by contrast, required the creation of a wholly new primary legislative regime for the control of certain drugs. For these reasons, the precedent for the manner of the DDA 1920's creation was weak; but was this process nonetheless a legitimate one with regards to the domestic criminalisation of drugs?

3.2.1.2 'Thin' (Procedural/Democratic) Legitimacy and the Dangerous Drugs Act 1920

'Legitimacy' is a notoriously fluid concept escaping easy and singular definition.[92] Coicaud's framing of legal legitimacy is useful here for two principal reasons, further to those of authoritativeness, scope, practicality, clarity and space already stated.[93] First, it includes both 'thin' (procedural) and 'thick' (substantive/normative) conceptions which can be moulded into my analysis of (legitimate) criminalisation. Second, Coicaud's conditions for legitimacy are applicable to the time and place under consideration (avoiding the risk of inappropriately shoehorning modern understandings into a historical context) as Coicaud derives them by juxtaposing 'pre-modern and pre-democratic Western societies' whereby legitimacy imposed 'bare-boned limits' on the exercise of (presumably, e.g., an absolute monarch's) power.[94] Early 1920s (territorial) Britain, albeit an imperial power without universal franchise, cannot be said to have been pre-modern and pre-democratic; and while the Hague Convention did apply to 'the British Dominions beyond the seas', the DDA 1920 itself applied only in the UK.

Coicaud argues that 'Legitimacy is the recognition that those who are not in a position of power grant to those in commanding positions to have the right to hold and be in power. It

[91] Although the 1910 Convention did create a strengthened focus on transnational enforcement. The Criminal Law Amendment Act 1912, s.2 amended the 1885 Act and reinstated whipping as a punishment for procuration, but this was not a direct result of the 1910 Convention. See, e.g.: HL Deb 28 November 1912, vol 12, cols 1181–91, 1196.
[92] Bottoms (n.78) 124.
[93] At nn.77–78 (and text to) above.
[94] Coicaud (n.77) 44–45.

is the process through which power and obedience are justified'.[95] He further asserts such justification requires the satisfaction of three conditions, namely:

> First, those in power must deliver services to those who are not in power … Second, the services provided must respond to and reasonably satisfy key needs and expectations of non power-holders [which] are crystallised in what is viewed as right, including their rights, by actors. Third … the needs/rights benchmark entails the responsibility and accountability of the institutions and the mechanisms of exercise of power, and of those … in positions of leadership.[96]

A superficially attractive argument could be made that the second and third conditions were absent in the DDA 1920's creation: that despite no 'need' to address an actual domestic drug problem, Westminster (like the Central Powers) was compelled into enacting a punitive drug control regime imposed by the decisions of unelected and unaccountable civil servants from foreign states at the Paris Peace Conference. Speaking generally, Boister notes that '[t]here is a democratic deficit in the development of transnational criminal law'.[97] However, as noted above, there was broad domestic expectation (both public *and* political) for a legislative response to the criminal character drugs had assumed by the time of the Peace Conference. There were also high-ranking elected officials (including Foreign Secretary Arthur Balfour) in Britain's delegation to the Peace Conference who played an active role in incorporating the Hague Convention into the peace settlements. Indeed, the Convention's incorporation was spearheaded by Britain with a sense of pride, with several members of Britain's delegation expressing concern at the risk of the Americans getting 'all the credit' for the resolution.[98] Lastly, democratic oversight and accountability was enabled by the (admittedly brief)[99] debates on the Dangerous Drugs Bill in both Houses of Parliament. The reaction to the Bill among legislators was almost universally favourable.

[95] ibid 40.
[96] ibid.
[97] Neil Boister, 'The Concept and Nature of Transnational Criminal Law' in Neil Boister and Robert J Currie (eds), *Routledge Handbook of Transnational Criminal Law* (2015) 24.
[98] Stein (n.10) 121.
[99] Berridge, *Opium* (n.54) 262.

The House of Commons was said to 'unanimously be in hearty sympathy' with its 'general objects', and its international dimension was lauded.[100] It was stated that the Bill would address the 'great [and] growing evil' of the domestic 'drug habit';[101] and a recurring theme was that it was an important corrective to Britain's prior role in the 'traffic' of opium (and the nineteenth century Opium Wars fought between Britain and China), which was variously described as a 'very black chapter' and 'one of the most disgraceful pages in our history and one which we can never look back upon without a sense of shame'.[102] The only major concerns raised related to the Bill's potential effect on businesses and the pharmaceutical profession,[103] and the possible hypocrisy of creating a distinction in the criminal law between drugs and alcohol was briefly acknowledged.[104]

3.2.1.3 'Thick' (Substantive/Normative) Legitimacy and the Dangerous Drugs Act 1920

The process by which the DDA 1920 was enacted therefore has a strong claim to fulfil Coicaud's 'thin' conception of procedural/democratic legitimacy, and insofar as it gave effect to Britain's international obligations. But the Act went further than the requirements of the Hague Convention in important respects, hence other (normative) drivers for its enactment must have been at work. This subsection considers whether the substance of those further provisions, and those other drivers, were legitimate instances of criminalisation.

Section 5 of the Act, which dealt with prepared opium and was copied over from DORA regulation 40B,[105] was not required by the Convention, but as 'opium smoking … was a practice that had few advocates in Britain [and] was indulged in primarily by persons of

[100] HC Deb 10 June 1920, vol 130, col 716.
[101] ibid 717.
[102] ibid 716, 725.
[103] Included in this was the direct risk to pharmacists' businesses; the lack of an appeals process for pharmacists found in contravention of the Act; and the potential for the creation of a monopoly of licensed drug producers: ibid 718, 721–22.
[104] ibid 718.
[105] Text after n.5 above. This criminalised manufacturing, selling, possessing or using opium; frequenting or managing a place used for opium smoking; and possessing opium smoking-related paraphernalia.

Chinese extraction, measures directed at its extinction were unlikely to arouse much opposition'.[106] Another provision which 'clearly went beyond what was required'[107] was section 8, which enabled extension of the Act's provisions by regulations to 'any other drug of whatever kind is or is likely to be productive, if improperly used, of ill effects substantially of the same character or nature as or analogous to those produced by morphine or cocaine'. The reasons for this power to make regulations were stated as being twofold: one reason being that such powers were 'contemplated … in Article 14 of the Convention'; and 'another reason [being that Britain's] representatives in China and Japan have repeatedly referred to the disastrous effect of the traffic which is being carried on with China in morphia and cocaine to a very large extent'.[108] The first reason given was a stretch:[109] Article 14 provided for the extension of the Convention to 'all new derivatives of morphine, of cocaine, or of their respective salts, and to every other alkaloid of opium … liable to similar abuse and productive of like ill-effects'. The Convention was narrowly framed to cover only opiates and cocaine and did not target 'any other drug of whatever kind'.

The driver common to both instances of the DDA 1920's scope extending beyond the Convention's requirements was the perception of 'threats' of Chinese origin. When coupled with the primary reasons given for the DDA 1920's enactment – i.e., to give effect to a Convention which was expressly orientated towards addressing the Chinese consumption of and traffic in opium,[110] and as a corrective to Britain's 'shameful' historical role in the international opium trade – a clear picture emerges. Not only was the Act the first British 'domestic and social legislation to be passed as a result of an international agreement',[111] but it was a domestic criminal law shaped above all else, directly and indirectly, by factors affiliated to China – a foreign jurisdiction. Knepper argues that the contemporary perception of these Chinese threats was:

[106] Stein (n.10) 124.
[107] ibid; cf text to n.84 above.
[108] HC Deb 10 June 1920, vol 130, col 715.
[109] Stein (n.10) 124.
[110] The Hague Convention (n.1) ch.IV related only to China, and the Convention itself was based on the 1909 Shanghai Opium Commission which specifically focused on opium in its Far Eastern context: text to nn.107ff in ch.2.
[111] Bean, *The Social* (n.50) 23.

> [N]ot a timeless sociological fear of strange, inscrutable people, nor even a binary conception of 'otherness', but a specific historical fear founded on a definite sequence of events. Britain's view of narcotic drugs was not a reaction to a domestic context, but rather was shaped in the British Empire … The Chinese … were addicts not because they were Asian, but because British colonial policy had made them so.[112]

The 'sequence of events' giving rise to this 'specific historical fear' included the Opium Wars of the 1840s and 1850s; the anti-opium trade lobby of the late nineteenth century; the first international opium conferences and agreements; and the 'Colonial conceptions of drug addicts [which] shaped League [of Nations] discussions and policies'.[113] The resultant 'specific fear' was one of 'reverse colonisation', whereby 'drug trafficking would enable an otherwise inferior people to turn the tables on the imperial rulers. And given past exploitation, these peoples were motivated to seek revenge'.[114]

This fear of reverse colonisation was promulgated between the 1860s to the 1940s[115] in, inter alia, literary fiction;[116] press reporting of the London opium dens (which 'evoked both guilt of empire and fear of reprisal');[117] and by high-ranking figures including Malcolm Delevingne, who argued in 1935 that '[t]he tables will indeed be turned with a vengeance if the Far East, which has been one of the chief victims of the illicit traffic from the West, should now, armed with the knowledge that the West has taught it, become a menace to the West itself'.[118] Kim similarly notes that 'contemporary observers … described … "witnessing a strange spectacle of the West repelling with terror the same poison that it

[112] Knepper, 'Dreams' (n.35) 210. Some historians have questioned the reality of Chinese opiate addiction being caused by British imperialism, noting opium use had been a widespread and culturally accepted practice in China from the eighteenth century: Frank Dikötter, Lars Laaman and Xun Zhou, 'China, British Imperialism and the Myth of the "Opium Plague"' in James H Mills and Patricia Barton (eds), *Drugs and Empires: Essays in Modern Imperialism and Intoxication, c.1500–c.1930* (2007). However, Knepper's assertion that this was the British *perception* in the 1920s remains valid.

[113] Knepper, 'Dreams' (n.35) 211.

[114] ibid 212.

[115] i.e., the period during which opium monopolies were imposed in Asia by European colonisers. See, e.g.: Diana S Kim, *Empires of Vice: The Rise of Opium Prohibition across Southeast Asia* (2020) 54–55.

[116] Knepper, 'Dreams' (n.35) 211–12; Berridge, *Opium* (n.54) 196–97.

[117] Knepper, 'Dreams' (n.35) 211; Berridge, *Opium* (n.54) 198–99.

[118] Malcolm Delevingne, 'Some International Aspects of the Problem of Drug Addiction' (1935) 32 *British Journal of Inebriety* 125, 145; Knepper, 'Dreams' (n.35) 211.

had once forced on the East"'.[119] Moreover, she argues there was a broad view among European colonisers that (white) Europeans had a special susceptibility to the perils of opium, informed by:

> [A]n understanding of race as biologically determined physical attributes of groups, which connected to their potential for progress and moral development. 'It is … scientifically proven that opium addiction is particularly more dangerous for the European races but it does not affect the yellow races to the same degree', asserted the [French] Governor General for Indochina in 1921.[120]

Not only did the 'otherwise inferior peoples' have the *motivation* to seek revenge, but they had the capacity to effect it. Similar racial tropes were aired during the DDA 1920's passage through Parliament, when the 'fine qualities' of sobriety and temperance exhibited by the 'Chinese race' – 'with the one exception of opium smoking' – were juxtaposed against 'the long-established habits of the human race, especially of the Western races, which have been accustomed to use alcohol in moderation'.[121]

The DDA 1920 thus evidently fits into Knepper's 'sequence of events'. The barely-veiled fear of 'reverse colonisation' is observable in both its rationales for enactment and its substantive provisions. But what can be said about this as a basis for criminalisation? The malleable concept of legitimacy can be put to work again here. On one hand, and in some limited respects, this rationale can be seen as acting in furtherance of Coicaud's first condition that 'those in power must deliver services to those who are not in power'. As previously noted, there were genuine concerns about a growing domestic and foreign drug habit, and the eradication or amelioration of this habit's dangers undoubtedly qualifies as such a 'service'. Delivering this service, though, necessitated recognising the realities of the globalised nature of drug use and trade. Opium use *was* a widespread practice in Asia;[122]

[119] Kim (n.115) 66, quoting Paul Gide, 'L'opium' (Thèse, lib de la société du recueil Sirey 1910).
[120] Kim (n.115) 39. The British had such views of Indian opium users as far back as the seventeenth century: Richard Newman, 'Early British Encounters with the Indian Opium Eater' in Mills and Barton (n.112) 59.
[121] HC Deb 10 June 1920, vol 130, cols 723, 725.
[122] Dikötter, Laaman and Zhou (n.112) 22–28.

and the development of 'world shrinking technologies' such as steamships and aeroplanes facilitated the smuggling of drugs and the escape of criminals across borders like never before, while undersea cables and telegraphs enabled 'deceitful financial transactions … and [criminals] to maintain a wide-scale trade in illegal merchandise'.[123] In this context, fears of foreign dangers bleeding (or flooding) into Britain were not wholly unfounded, and so acting on them cannot be regarded as being entirely unjustified or illegitimate.[124]

On the other hand, Coicaud develops a thicker conception of legitimacy which moves away from the concept's bearing on the 'stable' *process* of law-making, and relates instead to the concept's application where the law's *substance* is undergoing upheaval and change.[125] He posits two scenarios where substantive legal change occurs: one positive and legitimate, whereby justice is promoted by the consequent change; and one negative, where the opposite occurs. In summary:[126] for the positive scenario to unfold, problems or shortcomings must be identified which are then improved through the political process. This entails viewing as unacceptable actions which were previously regarded as non-problematic because they violate what is newly seen as right, and begins with recognising as victims those who were affected by the previous system's shortcomings. The legitimacy of the consequent change depends on empowering those victims in a way that provides them the means no longer to be defined by the previous injustice and to move forward. The negative scenario, by contrast, occurs when the true victim, i.e., those who were affected by the previous system's shortcomings, are presented through a 'twisted mechanism' as being the perpetrators. The *real* perpetrator in this scenario:

[123] Knepper, *International* (n.35) 1, 6.
[124] Reference was also made during the DDA 1920's passage to other dangers which could only be averted through international cooperation, including 'health problems as a whole. The microbe knows no frontier and disease is not limited to any kind of national flag': HC Deb 10 June 1920, vol 130, cols 724–25.
[125] Coicaud (n.77) 46.
[126] ibid 46–55.

> Far from presenting himself as an aggressor, he depicts himself, to himself and others, as acting out of self-defence, out of legitimate defence. This can go as far as arguing that the victim is … the author of his own demise. … The worst perpetrator will even push this logic … to the point of presenting his actions as a service rendered to humanity.[127]

Insofar as a primary rationale for extending the DDA 1920 beyond the Hague Convention's requirements was to secure Britain against perceived Chinese 'threats' and the associated fear of 'reverse colonisation', the enactment of those provisions conforms more to Coicaud's 'negative', illegitimate, scenario of legal change than the 'positive' one. The Convention did seek to 'empower' the Chinese government to control the opium problem which confronted it,[128] and there was genuine concern expressed in official British circles about the welfare of the Chinese population in the months leading up to the DDA 1920's enactment.[129] However, the recognition of Britain's 'shameful' colonial history in respect of the opium trade (i.e., the identified 'shortcoming' in Coicaud's terms) during the Act's parliamentary debates rings hollow given Britain maintained its Asian opium interests through its Hong Kong, Indian and other monopolies into the 1940s.[130] Additionally, the Commons' debates reveal that the Act's extended provisions *were* presented as a 'self-defence' measure against 'the disastrous … traffic which is being carried on with China'; and the fact that 'the opium offenders that appeared in the summaries of prosecutions [under the Act in the 1920s] almost always had Chinese names' (with some deported on conviction), and that opium offences constituted more than half of DDA prosecutions,[131] illustrates that this depiction of the Chinese as 'aggressors' victimising the territorial UK continued post-enactment.[132] Also, this legal change *was* presented as a 'service rendered

[127] ibid 54–55.

[128] cf Dikötter, Laaman and Zhou (n.112) 28–29, arguing that while opium use was widespread in China, the problems it caused were exaggerated or fabricated 'by political leaders and social elites in China … around which social unity could be asserted'.

[129] Stein (n.10) 114.

[130] British India 'officially exported its last chest of opium to China in 1913 [but] it continued to supply Southeast Asia' for decades after: Kim (n.115) 73–74; NJ Miners, 'The Hong Kong Government Opium Monopoly, 1914–1941' (1983) 11(3) *Journal of Imperial and Commonwealth History* 275.

[131] Parssinen (n.10) 171. See also: HB Spear, 'The Growth of Heroin Addiction in the United Kingdom' (1969) 64 *British Journal of Addiction* 245, 245–56.

[132] There are some discrepancies in how historians have counted DDA prosecutions, however; cp Davenport-Hines (n.10) 175.

to humanity', with the Dangerous Drugs Bill stated to be 'such a very humane Bill'[133] and the Hague Convention itself as a 'humanitarian endeavour'.[134]

3.2.2 The Paris Peace Conference and the League of Nations

Having considered one key outcome of the Paris Peace Conference relating to the criminalisation of drugs (the DDA 1920), this section discusses another outcome: the establishment of the LoN as the central organ of the transnational drug control system.

This section begins (at 3.2.2.1) with an outline of how the League gained control of the drug question, before chronologically setting out the drug Conventions created under its auspices, and those Conventions' central tenets.[135] It is then briefly considered (at 3.2.2.2) whether any principles and/or justifications underlying the expansion of transnational drug regulation during the League era can be identified, further to those already mentioned. This is to lay the groundwork for, and transition into, Chapter 4, which discusses the British interpretation of and approach to implementing these new transnational obligations.

In summary, this section identifies the tenets of the LoN's drug Conventions as: a primary focus on curtailing drug supply, with the curtailment of demand merely a function of this; increased bureaucratisation relating to drug control; the establishment of different frameworks for licit and illicit drugs, with the latter becoming increasingly penal and severe and based on scheduling according to addictive potential; and a conflation of drugs with other forms of vice. However, there are few concrete principles which can be identified at the supra-national level: state sovereignty often took precedence over transnational cooperation; the Conventions were created ad-hoc and inductively; and no clear 'legal consciousness' (liberal, illiberal, paternalistic, etc.)[136] is evident.

[133] HC Deb 10 June 1920, vol 130, col 716.
[134] Hague Convention (n.1) preamble.
[135] For detailed studies which have informed this section, see: William B McAllister, *Drug Diplomacy in the Twentieth Century: An International History* (2000); Collins (n.27) ch.1.
[136] Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (2014) 3.

3.2.2.1 The League of Nations' Drug Conventions

Lewis notes that in the long nineteenth century, '[t]he ideological tenet of state sovereignty was dominant in international relations': international institutions which sought to proclaim and apply shared legal principles in specific areas – let alone those aiming to promote collective security via generalised prosecutorial or enforcement powers – were often deemed 'premature or risky'.[137] However, after the establishment of the LoN at the Paris Peace Conference, the League took control of the international drug question, precipitating several Conventions creating obligations on states to enact expanding domestic drug laws.

US President Woodrow Wilson chaired the LoN Commission at the Peace Conference. He envisaged lasting peace would best be achieved not by 'one powerful group of nations set off against another, but a single overwhelming, powerful group of nations who shall be trustees of the world'.[138] Other leaders were less enthusiastic (some openly hostile) about the establishment of such an international organisation, but they eventually acquiesced to the Covenant of the League of Nations forming part of the final Peace Treaties. The League's precise functions were determined by various committees and commissions between January–March 1919, resulting inter alia in Article 23(c) of the Covenant which provided that the League would be entrusted 'with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs'.[139] Despite Wilson's efforts, however, the US Senate voted not to join the League in March 1920.

Only two of the Covenant's 23 Articles dealt with crime, with the management of drugs and human trafficking ancillary to the overall aim of securing global peace. However, crime prevention soon became the organisation's primary focus.[140] Various 'entities' were created to help discharge its responsibility for managing drugs, including the Opium Advisory Committee (OAC), the Opium and Social Questions Section, and the League Health

[137] ibid 14.
[138] Quoted in Stein (n.10) 117.
[139] Covenant of the League of Nations (signed 28 June 1919) 225 CTS 195. 'By virtue of its leading position in the promotion of social, medical, and humanitarian affairs, the League became the center of international efforts to resolve the drug dilemma': McAllister, *Drug* (n.135) 37.
[140] Knepper, *International* (n.35) 57.

Committee.[141] From its earliest stages the League focused on curtailing the supply (but not demand) side of the drug equation, by '[borrowing] eradication concepts … from epidemiology, which focused on eliminating specific disease vectors … eliminating excess quantities seemed analogous to killing mosquitos'.[142] The first task was of quantifying the global supply of drugs, which the OAC reported exceeded the world's requirements for medical and scientific purposes by a factor of 10–100.[143] These figures underscored the necessity of US participation, and although the Americans retained their 'almost fanatical belief in prohibition [stemming] from a supply-centric vision' which precluded cooperative compromise with the less hard-line League states,[144] American delegations began attending the OAC meetings as unofficial observers.

The responsibility for forging an international consensus fell to Malcolm Delevingne, who eventually convinced the League to hold two conferences in 1924: one focused on Far Eastern opium production and use, and the other at curbing manufactured drugs such as heroin and cocaine.[145] The first conference produced an Agreement on prepared opium,[146] but this '[u]ltimately … achieved little forward progress, owing to the instability in China'.[147] The second, to which the US was invited but later withdrew,[148] led to the International Opium Convention 1925.[149] This 'instituted the first significant bureaucratic mechanisms to implement the normative goals outlined in the 1912 [Hague] Convention'.[150] McAllister notes its main provisions included: establishing the Permanent Central Opium Board (PCOB), a supervisory organ to monitor drug production to which states were obliged to provide statistics; creating an import/export authorisation system to prevent the diversion of drugs in transit; various provisions for enhancing domestic control measures (e.g., requirements on states to enact laws limiting the manufacture, sale etc. of drugs exclusively to medical and scientific purposes, and to prohibit their unauthorised possession);[151] new

[141] McAllister, *Drug* (n.135) 44.
[142] ibid 49.
[143] ibid 47.
[144] Collins (n.27) 5.
[145] McAllister, *Drug* (n.135) 58–59.
[146] Agreement concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium (signed 11 February 1925) 51 LNTS 337.
[147] Collins (n.27) 21.
[148] Knepper, *International* (n.35) 121: 'the American delegation [refused to] sign any agreement short of outright prohibition'.
[149] International Opium Convention (signed 19 February 1925, entered into force 25 September 1928) 81 LNTS 319.
[150] Collins (n.27) 21–22.
[151] International Opium Convention (n.149) arts.5–7. These were given effect to in the UK by the DDA 1925.

restrictions on coca leaves and cannabis, as well as processed drugs including cocaine; and procedures to add new drugs to the list of controlled substances.[152] However, there were exemptions to the import/export controls when trading with non-signatory nations; no limitations on agricultural production, pharmaceutical manufacture, or consumption; and states retained discretion not to add drugs to their domestic controls.[153]

The International Opium Convention entered into force in September 1928, and by the end of 1929 it could boast some success. It had 36 ratifications and domestic enforcement was strengthened; the US cooperated in large measure; and the statistics received by the PCOB enabled greater understanding of global drug supply and demand.[154] However, the Convention was not able to curb the smuggling and over-production of drugs, partly due to Turkey's (a major opium producer) non-ratification.[155] The 1925 Convention's partial success engendered '[w]ithin the League a sense of collective responsibility to vindicate international cooperation',[156] and another plenipotentiary conference followed in 1931, attended by 57 states. The outcome of these negotiations was the Limitation Convention 1931.[157] Collins argues it was:

> [A] compromise treaty, but one that imbued the drug control system with a new coherence, and created a tangible distinction between the global licit and illicit traffic in manufactured drugs. It also … further enshrine[d] a supply-centric approach to drug control as the underlying principle of the international control framework, with little consideration given to demand issues'.[158]

This Convention included detailed provisions obliging states to provide accurate estimates of their annual requirements of controlled drugs for medical and scientific purposes to the

[152] McAllister, *Drug* (n.135) 76. For a short discussion of cannabis' inclusion, see: Bean, *The Social* (n.50) 38–39.
[153] McAllister, *Drug* (n.135) 77; Bean, *The Social* (n.50) 39.
[154] McAllister, *Drug* (n.135) 86.
[155] Bean, *The Social* (n.50) 40.
[156] Collins (n.27) 23.
[157] Limitation Convention (n.21). The corresponding UK legislation was the DDA 1932.
[158] Collins (n.27) 23.

PCOB.[159] Failing this, a Drug Supervisory Body would establish estimates – which it could also do for states not party to the Convention – and could initiate embargoes against states whose imports and exports exceeded those estimates.[160] The Convention also introduced drug scheduling based on a drug's addictive potential (as determined by the League Health Committee), although this was restricted to the licit drug market:[161] Group 1(a) drugs (including morphine and cocaine) were those 'capable of producing addiction'; and substances in Groups 1(b) and 2 (e.g., ecgonine and codeine, respectively) were those 'convertible into such a drug'.[162] Group 1 drugs were subject to the most stringent reporting/manufacturing requirements; the lower classes required only summary reports.

The 1925 and 1931 Conventions massively increased illicit traffic, which was conceded even by Malcolm Delevingne in 1935, and by Leonard Lyall (British chair of PCOB) in 1936.[163] The final League-backed drug treaty, therefore, was the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs.[164] It aimed to 'strengthen the measures intended to penalise offences' and 'to combat … the illicit traffic in the drugs … covered by the [preceding] Conventions'. Under Article 2 the Contracting Parties agreed:

> [T]o make the necessary legislative provisions for severely punishing, particularly by imprisonment or other penalties of deprivation of liberty … The manufacture, conversion, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokage, despatch, despatch in transit, transport, importation and exportation of narcotic drugs.

Provision was also made for extradition, and for the prosecution of returning nationals for the specified offences. Bewley-Taylor argues the 1936 Convention 'represented a turning point' insofar as it changed the focus from regulating 'legitimate' to punishing illegitimate

[159] Limitation Convention (n.21) arts.2–5. These requirements were intended to be binding, unlike the 1925 Convention: International Opium Convention (n.149), art.21.
[160] Limitation Convention (n.21) arts.14, 16; Bean, *The Social* (n.50) 42.
[161] McAllister, *Drug* (n.135) 97.
[162] Limitation Convention (n.21) arts.1, 11.
[163] McAllister, *Drug* (n.135) 120; Knepper, *International* (n.35) 129, 132.
[164] Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (signed 26 June 1936, entered into force 26 October 1939) 198 LNTS 301.

activities.[165] However, McAllister notes it 'ultimately represented a negligible advance against illicit trafficking. Its provisions proved too general for most pro-control governments and too specific for those wishing to avoid further obligations'.[166] Britain, for example, refused to ratify it as it wished to retain discretion to decide its own penalties.[167] It came into force in October 1939, but World War 2 halted further development, and the League was replaced by the United Nations in 1946.[168]

3.2.2.2 Tenets and Principles of the League of Nations' Drug Conventions

Each drug Convention Britain ratified necessitated the enactment of corresponding domestic legislation.[169] The League's direct impact on UK law thus introduces another dimension of criminalisation which will be considered in the following chapter, i.e., the extent to which Britain's national drug controls were in synergy with the tenets and principles underpinning the League's expansion of transnational criminal (drug) laws.[170] The prior question considered in the final part of this chapter, in preparation for Chapter 4, is whether any such principles can be identified, and if so, what they are.

McAllister argues that the 'international [drug] control … regime's principles, goals, and structural limitations changed little in the succeeding four decades' post-1931.[171] The licit and illicit had been delineated, and the concept of drug scheduling with differing standards for different classes of substances had been cemented.[172] The instrumental focus was on curtailing supply, with demand a mere function of this; and the 'norms and rules reflected larger international principles that favored state sovereignty and free trade. National authorities acted as the principal regulators while international bodies were relegated to

[165] David Bewley-Taylor, 'The Creation and Impact of Global Drug Prohibition' in Paul Gootenberg (ed), *The Oxford Handbook of Global Drug History* (2022) 308.
[166] McAllister, *Drug* (n.135) 123.
[167] Bean, *The Social* (n.50) 43.
[168] Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs (signed and entered into force 11 December 1946) 12 UNTS 179.
[169] See: nn.52, 151, 157 above.
[170] Pinpoints at n.1 in ch.4.
[171] McAllister, *Drug* (n.135) 80.
[172] William B McAllister, 'Foundations of the International Drug Control Regime: Nineteenth Century to the Second World War' in David R Bewley-Taylor and Khalid Tinasti (eds), *Research Handbook on International Drug Policy* (2020) 12–15.

exercising indirect, after the fact, control'.[173] Lewis has charted the debates of the 1920s and 1930s on the development of and connections between international organisations and criminal courts, and transnational criminal law.[174] Like McAllister, he notes an emphasis on 'collective policing … against transnational criminals',[175] but an overall reticence among states to surrender their sovereignty. Organisations such as the International Law Association and the Association Internationale de Droit Pénal,[176] for example, envisaged an International Criminal Court with jurisdiction over war crimes and also 'violations of international obligations of a penal character' or those which 'created a common danger', variously including human trafficking, piracy, drug trafficking, attacks on undersea cables, and obscene publications.[177] Neither the International Criminal Court vision nor the secondary strategy of the (limited) harmonisation of criminal laws gained traction. Treaty obligations were drafted to be malleable, with their interpretation and implementation firmly left to national lawmakers.[178]

Notwithstanding this wide margin of discretion, some conceptual and doctrinal underpinnings can be identified in the various multilateral 'suppression Conventions' created under the League's auspices in the 1920s and 1930s.[179] The concept of transnational crime itself was institutionalised as being a novel issue demanding international cooperation, as states had become 'so interconnected that a threat anywhere was a problem everywhere'.[180] The natural focus of such international cooperation was therefore on combatting cross-border trafficking: specifically of drugs, women and children,

[173] McAllister, *Drug* (n.135) 100. Indeed, the system 'incentivize[d] licit actors to seek comparative international regulatory advantage' as it sought to ensure the 'relatively low prices and sufficient abundance of licit substances': McAllister, 'Foundations' (n.172) 13–14.
[174] Lewis (n.136) ch.4.
[175] ibid 79.
[176] International Association of Penal Law.
[177] Lewis (n.136) 101. See, e.g.: José Luis de la Cuesta and Isidoro Blanco Cordero (eds), 'Third International Congress of Penal Law (Palmero, 3–8 April 1933)' (2015) 86(2) *International Review of Penal Law* 261, describing these as 'offences proper to admit universal competency'; Vespasian V Pella, 'Towards an International Criminal Court' (1950) 44(1) *American Journal of International Law* 37, 37–39, 54.
[178] Lewis (n.136) 113–16. Britain placed particular value on approaches which did not interfere with its legal traditions.
[179] Boister, 'The Growth' (n.35) 44–47: these 'suppression Conventions' included, inter alia, the 1925, 1931 and 1936 Drug Conventions (nn.149, 21, 164); the International Convention for the Suppression of the Traffic in Women and Children (signed 30 September 1921, entered into force 15 June 1922) 9 LNTS 415; the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications (signed 12 September 1923, entered into force 7 August 1924) 27 LNTS 214; and the International Convention for the Suppression of Counterfeiting Currency (signed 20 April 1929, entered into force 22 February 1931) 112 LNTS 371.
[180] Knepper, *International* (n.35) 72–73 (paraphrased).

obscene publications, counterfeit currency, and weapons.[181] In doing so, not only were certain issues – drugs, prostitution and pornography – elevated from being of primarily domestic to that of transnational concern,[182] but the threats posed by these newly-transnational problems were conflated.[183] Knepper notes that the traffic in women, drugs, and obscene publications were presented as being 'interlocking and self-reinforcing activities', and that all such traffic was under the control of the same criminal organisations.[184] Although the extent to which this presentation was true is unclear, drug control advocates including Delevingne certainly seized upon the advantages of drawing connections between the traffic in drugs and other forms of vice.[185] In the face of the League's failures as a political institution, inter-state cooperation was sought via treaties which tackled common-ground vicious social problems. Finally, with the gradual institutionalisation of transnational crime came increased bureaucratisation:

> As states incorporated the drug issue into the policy-making and policy implementation apparatus, the original groups advocating control retreated to the background. National bureaucracies, international organizations, and pharmaceutical companies supplanted missionary organizations, temperance workers, and anti-opium zealots at the center of the decision-making process.[186]

Beyond what has been noted above, little else can be identified by way of principles. Boister notes that 'the foundational notions of transnational criminal law [were] state sovereignty over the *ius puniendi* and the incompatibility of different legal traditions'; and writing after almost a century of legal development following the League's inception he adds that even now 'few principles can be identified either by empirical examination of transnational

[181] However, the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War (signed 17 June 1925) never achieved the requisite ratifications to enter into force: David R Stone, 'Imperialism and Sovereignty: The League of Nations' Drive to Control the Global Arms Trade' (2000) 35(2) *Journal of Contemporary History* 213.

[182] McAllister, *Drug* (n.135) 46–47. Some of these Conventions were based on pre-WW1 international agreements and drafts, so were arguably already so 'elevated', but it is their multilateral adoption during this time which is important here.

[183] Knepper, *International* (n.35) 71.

[184] ibid.

[185] ibid.

[186] McAllister, *Drug* (n.135) 101.

criminal law or from its goals'.[187] The League took a piecemeal and ad-hoc approach to specific problems and doctrinal development occurred inductively on the basis of earlier conventions.[188] This pattern of law-making continued throughout the rapid expansion of transnational criminal law in the twentieth century, with the result that this expansion 'has not been complemented (or complicated) by general discussion of coherent principles justifying or constraining criminalization, like individual autonomy, welfare, harm and minimalism'.[189] Similarly, while many of the suppression conventions were of a paternalistic nature,[190] as Lewis argues it is difficult to extrapolate a wider 'legal consciousness' from this which accurately captures the developments during this time: in short, some proponents of international law were liberal and some plans had illiberal consequences, but the same is true vice versa.[191] Two things can be taken from this analysis. First, notwithstanding this absence of principle, drug laws provide a valuable window into the early development of transnational criminal law, having been the precursor area for substantial later growth. Second, while this transnational framework was essential to the development of British drug laws – serving as the catalyst for change – its explanatory value in terms of domestic criminalisation is important but can only go so far.[192] It is to this relocated analytical focus, from the international to the domestic, that the following chapter turns.

[187] Boister, *An Introduction* (n.76) 422.
[188] Boister, 'The Growth' (n.35) 47.
[189] Neil Boister, '"Transnational Criminal Law"?' (2003) 14(5) *European Journal of International Law* 953, 957.
[190] Boister, 'The Growth' (n.35) 48.
[191] Lewis (n.136) 3.
[192] cp text to nn.71ff above.

Chapter 4: Domestic Drug Criminalisation, The First World War – c.1960

This chapter, the latter of Part Two, moves from considering the post-First World War (WW1) international aspects of British drug criminalisation to the domestic. The influence of the supra-national bureaucracies and legal instruments established under the auspices of the League of Nations (LoN) in the field of drug control, and the changes brought about by the crisis conditions of total war, necessitates paying due regard to those international dimensions; hence the extensive discussion in the preceding chapter. However, Chapter 3 concluded that few coherent principles of criminalisation can be identified through looking at the transnational frameworks alone; albeit there are some clear patterns.[1] Therefore, the interpretation and implementation of Britain's transnational obligations, which were deliberately framed to afford states wide discretion, must be analysed against contemporaneous domestic understandings of appropriate criminalisation.

This chapter begins (at 4.1) with a chronological summary of legal and policy developments from 1920 to the late 1950s. Included in this discussion are the provisions of, and rationales for, successive Dangerous Drugs Acts (DDA) and associated legislation; and the introduction of the so-called 'British System' of drug control whereby physicians were permitted, in limited circumstances, to prescribe indefinitely morphine and heroin to people addicted to those drugs. From this summary, and with reference to existing literature, several themes are thereafter extracted for analysis (at 4.2). Broadly speaking, these are: developments in legal doctrine; the rise of penal-welfarism; and the law's approach to vice.

On the 'doctrinal theme', it is argued that a shift can be made out in dangerous drugs legislation from being part of the regulatory criminal law in the early 1920s towards the 'real' criminal law by the 1950s. This is observable in, inter alia: the increasing offence penalties; the separation of the dangerous drugs and pharmaceutical frameworks; the legislative techniques employed; and the changing enforcement frameworks. For such a shift to occur at this time is central to the question of criminalisation, as during this period the very definition of (real) 'crime' was being debated and scrutinised by the era's most

[1] Text to nn.135–136 in ch.3. These patterns are compared with domestic law and policy at, e.g., text to nn.113–114, 117–122, 167, 177ff below.

influential writers on criminal law. While there is some superficial synergy between dangerous drugs legislation and all of these definitions, a closer reading of those definitions, and of their explicit and implicit requirements for criminal law-making, reveals that the DDAs and their associated regulations were in tension with those conceptions of legitimate criminalisation.

Penal-welfarist approaches have been identified as 'representative' of both drug and wider criminalisation during this era.[2] On this theme, it is argued (in short) that it was only in certain, tightly-framed contexts (of the 'British System') that a (limited) connection between penal and welfarist elements was in operation.

The 'vice theme' considers whether, how, and the extent to which the concept of vice was deployed as a justification for criminalisation during this period. If it could be shown that the control of vice legitimised criminalisation across several areas – and in similar ways to how it was deployed in the area of dangerous drugs – then this may reflect a synergy between drug laws and broader understandings of legitimate criminalisation. It is argued that while controlling vice was often given as a justification for intervention by legislators and policymakers – i.e., as something necessitating control via criminalising legislation – there are few (if any) clear principles underpinning this. Hence, there is some, but only limited synergy observable during this period between the law's approach to drugs and to other 'vicious' objects and behaviours. This latter discussion also serves as a transition into Chapter 5 (and Part Three), as throughout the 1960s the 'vicious' areas of drugs, prostitution, obscene publications, and several others would be subject to increasing scrutiny and legislative change.

[2] Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010) 74–75; Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 64, 89–90.

4.1 Chronological Summary

4.1.1 Dangerous Drugs Act 1920

The DDA 1920 introduced for the first time in primary legislation several drug-related offences. Many of these were carried over from secondary legislation (regulation 40B) made under the Defence of the Realm Act 1914 (DORA). These included the unlicensed import and export of raw opium, morphine and cocaine;[3] the import, export, manufacture, sale, possession and use of prepared opium; the possession of opium smoking-related paraphernalia; and the occupation or management of premises used for opium smoking.[4] In addition, the Act enabled regulations to be made for controlling the production, manufacture, possession, sale and distribution of raw and medicinal opium, morphine, cocaine, ecgonine, and heroin; as well as for regulating the prescribing and sale of those drugs by medical practitioners and pharmacists.[5] Preparations containing <0.2% morphine or <0.1% cocaine or heroin were exempt, but 'any other drug … likely to be productive, if improperly used, of ill effects substantially of the same character or nature [to] morphine or cocaine' could be controlled under further secondary legislation.[6] The offences were triable only summarily, with penalties of a £200 fine and/or six months' imprisonment (with or without hard labour) for a first offence, rising to a £500 fine and/or two years' imprisonment (with or without hard labour) for subsequent offences.

4.1.2 Dangerous Drugs Regulations 1921–1923

Detailed secondary legislation supplemented the 1920 Act in 1921.[7] Licit trade was extensively provided for. 'Authorised persons' such as doctors, veterinary surgeons and pharmacists were allowed to possess and supply dangerous drugs 'so far as is necessary for the practice of [their] profession' (with the caveat that such authorisation could be

[3] DDA 1920, ss.1, 2, 6.
[4] ibid ss.4–5.
[5] ibid ss.7–8.
[6] ibid s.8.
[7] Dangerous Drugs Regulations 1921, SR & O 1921/864; 1921/865.

withdrawn by the Home Secretary following a conviction under the Act); specific forms for recording purchases and sales were mandated; and prescription requirements set out. Otherwise, the regulations criminalised the possession, supply, etc. of the drugs listed in the DDA 1920.[8] 'Possession' was defined as having drugs in one's 'order or disposition', but a reverse-burden defence was available to persons who could prove that the drug was supplied for their own use by an authorised person in accordance with a prescription. The offences of supplying, procuring, or offering therewith had widened territorial ambits, i.e., 'to or for any person whether in the United Kingdom or elsewhere'.[9] Further regulations followed in 1922 and 1923.[10] These primarily dealt with record-keeping and prescriptions: they included requirements that chemists took 'reasonably sufficient steps' to ensure prescriptions were genuine;[11] and prescribers were firstly prevented from prescribing drugs from themselves,[12] but later permitted to do so.[13]

4.1.3 Dangerous Drugs and Poisons (Amendment) Act 1923

It is apparent from the Parliamentary debates of 1922 that answers to the question of how to respond to dangerous drugs soon acquired a severely penal complexion.[14] Concerns were repeatedly aired about the 'evil effects' of 'disreputable night clubs in London',[15] where 'undesirable aliens'[16] who might have connections with 'the white slave traffic'[17] were corrupting young men and women with 'menacing', 'deadly',[18] 'harmful and insidious'[19] drugs. These discussions were typically accompanied by calls to bring in harsher penalties for drug offences (including whipping);[20] and measures to facilitate convictions

[8] Text to n.5 above.
[9] Dangerous Drugs Regulations 1921, SR & O 1921/864 reg.1; SR & O 1921/865 reg.3.
[10] Summarised in Philip Bean, *The Social Control of Drugs* (1974) 178.
[11] Dangerous Drugs Regulations 1923, SR & O 1923/312 reg.3.
[12] Dangerous Drugs Regulations 1922, SR & O 1922/1087 reg.1.
[13] Dangerous Drugs (No 2) Regulations 1923, SR & O 1923/577.
[14] cp text to nn.55ff in ch.3.
[15] HC Deb 20 March 1922, vol 152, col 46.
[16] HC Deb 27 March 1922, vol 152, col 977.
[17] HC Deb 29 June 1922, vol 155, col 2338.
[18] ibid 2343–44.
[19] HC Deb 4 July 1922, vol 156, col 214.
[20] HC Debs 1 May 1922, vol 153, col 1014; 9 May 1922, vol 153, col 1988; 18 May 1922, vol 154, col 562; 4 July 1922, vol 156, col 214.

such as removing the requirement on the prosecution to prove forbidden drugs were found on the defendant's person, and giving police wider search powers.[21] To address these concerns, Parliament enacted the Dangerous Drugs and Poisons (Amendment) Act 1923. Section 1 allowed search warrants to be granted where a justice of the peace was 'satisfied by information on oath that there is reasonable ground for suspecting that [dangerous] drugs are … in the possession or under the control of any person in any premises', and this also extended to 'any document directly or indirectly relating to … any transaction or dealing' in dangerous drugs. Section 2 addressed, inter alia, the act of running a drug business outside the UK from within the UK: it further extended the widened territoriality provisions of the earlier regulations by creating an offence of aiding, abetting, counselling or procuring the commission in a foreign jurisdiction of a drug offence punishable in that jurisdiction, or any act preparatory to or in the furtherance of any act which would constitute an offence in the UK under the 1923 Act.[22] Section 2 also amended the penalties for drug offences by substituting the maximum penalty on summary conviction to a £250 fine and/or 12 months' imprisonment (with or without hard labour); introducing proceedings on indictment, with maximum penalties of a £1000 fine and/or 10 years' penal servitude; and reducing the maximum penalty for book-keeping and prescription-issuing or -dispensing offences to £50 where those were 'committed through inadvertence' and 'not preparatory to … in the course of, or in connection with' any other offence.[23] Additionally, the 1923 Act extended the offence of attempting to obtain possession of dangerous drugs (enacted in an earlier regulation)[24] to attempting or soliciting another to commit *any* offence under the Act; and it made company chairmen, directors and officers criminally liable where companies were convicted under the Act, unless such persons could prove the offence occurred without their knowledge or consent.[25]

During the 1923 Bill's passage through Parliament legislators were remarkably cognisant of questions of legitimate law-making and the appropriate limits of criminalisation and punishment. DORA and the DDA 1920 had largely been waved through Westminster, with

[21] HC Debs 9 May 1922, vol 153, col 1988; 28 November 1922, vol 159, col 494.
[22] See, e.g.: *Miyagawa* [1924] 1 KB 614. The sentence, for arranging in London the dispatch of 500lb of morphine hydrochloride from Switzerland to Japan, was 3 years' penal servitude and a recommendation for deportation. Hewart CJ (at 617): 'The Act of 1923 throws the net more widely than did the Act of 1920'.
[23] Dangerous Drugs and Poisons (Amendment) Act 1923, s.2(1) (DDA 1920, s.13(2A)).
[24] Dangerous Drugs Regulations 1922, SR & O 1922/1087 reg.2.
[25] Dangerous Drugs and Poisons (Amendment) Act 1923, s.2(1) (DDA 1920, s.13(2B)–(2C)).

the extensive regulations made under those Acts attracting little attention. By contrast, between February and May 1923 Members of both Houses suddenly became alive to the importance of examining in detail the policy and provisions of drug laws, of shaping them in accordance with established legal principles, and of highlighting areas of both legal novelty and concern. This tone was set immediately, during the Commons' second reading, when the Government's attempt to move the Bill straight to the Committee stage 'without a single word of explanation or comment from the responsible Minister' was branded as 'bringing democratic government into disrepute'.[26] In response, the Home Secretary explained the Bill's object was to 'increase facilities and powers for dealing with the illicit traffic in drugs';[27] and over the course of the ensuing lengthy debate MPs expressed their near-unanimous concurrence with the Bill's main justification of protecting the public against the vicious social evil of dangerous drugs.[28]

Notwithstanding the broad, cross-party alignment regarding the Bill's general aim, several aspects attracted criticism. The most vociferous disagreement related to the penalties on both summary conviction and indictment, which were variously described as 'very severe', 'drastic', 'extreme', 'astonishing', 'unusual', and 'extraordinary',[29] but also 'necessary' and 'not too severe'.[30] Specifically, these concerns turned on the risk that medical practitioners and pharmacists might be sentenced to 10 years' imprisonment for 'technical infringements' – with judicial discretion deemed an inappropriate safeguard in this respect – and on the (dis)utility of bluntly employing increased criminal penalties as a tool for addressing 'deeply seated' 'social evils'.[31] Other criticisms related to the lack of legal clarity and the piecemeal and unsystematic nature of British drug legislation more broadly. In particular, it was remarked: (i) that as the 1923 Act amended the 1920 Act it was impossible to identify which substances were proscribed from the former alone; (ii) that 'people should not be subjected to [and suffer under] any regulation which may be altered by a Government Department and may pass unobserved';[32] (iii) that the Bill was 'unintelligible'

[26] HC Deb 28 February 1923, vol 160, col 2040. Similarly, HL Deb 2 May 1923, vol 53, col 1054.
[27] HC Deb 28 February 1923, vol 160, col 2040.
[28] ibid 2045–46, 2050, 2054, 2061, 2069, 2074, 2077, 2082.
[29] ibid 2044, 2045, 2050, 2056, 2076. See also: HL Deb 10 May 1923, vol 54, cols 103, 107.
[30] HC Deb 28 February 1923, vol 160, cols 2041, 2046. The Speaker eventually disallowed Members from re-raising this issue: col 2082.
[31] See, e.g.: ibid 2050–56, 2069. This led to the provision for reduced penalties for technical infringements.
[32] ibid 2064.

and 'bewildering';[33] and (iv) that there were discrepancies between the Bill and the Pharmacy Act 1868 in terms of penalties and the lists of dangerous drugs and scheduled poisons, respectively.[34] Additionally, it was argued that the effect of the Bill's 'inadvisable' reverse-burden defences was 'to take away from the accused person the right to be regarded as innocent unless and until the prosecution can prove him guilty';[35] and there was discussion in the Lords as to whether it would be more equitable to impose liability on drug retailers or drug manufacturers.[36] Lastly, the desirability of enacting similar provisions and penalties to other LoN States, and the novelty of enacting extended territoriality offences, were acknowledged.[37]

4.1.4 Dangerous Drugs Act 1925

Whilst not all of the criticisms and concerns aired during the Parliamentary debates on the 1923 Bill led to amended provisions in the final Act,[38] the existence of such extensive discussion does demonstrate that the 1923 Act was the result of considered action on the part of democratically-elected legislators who had regard to established principles of (criminal) law-making; and was not merely an exercise in transposing the requirements mandated by LoN-backed drug treaties drafted by unelected diplomats. Notwithstanding this considered action, however, and the 1923 Act's apparently successful deterrent effect,[39] the momentum for change remained. From 1924 there were calls to extend the list

[33] ibid 2070, 2074–75.
[34] ibid 2076–77.
[35] ibid 2074. For a contemporary review of primary and secondary legal authorities on reverse burdens, see: *Woolmington* v *DPP* [1935] AC 462, 473ff. At 481 (Sankey LC's famous 'golden thread' speech): 'subject [to] any statutory exception … No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained'.
[36] HL Deb 10 May 1923, vol 54, cols 103–07.
[37] HC Deb 28 February 1923, vol 160, cols 2070, 2078–80.
[38] Text to n.23 for a notable exception.
[39] *Report of the Commissioner of Police of the Metropolis for the Year 1924* (Cmd 2480, 1925) 15: The 'remarkable decrease [in drug-related offences] is, without doubt, largely due to the deterrent effect of the heavy sentences, some of penal servitude, imposed in several cases during 1923, which were made possible by the [1923 Act]'; HC Deb 13 March 1924, vol 170, col 2577: 'The heavier penalties [have] had a deterrent effect'.

of dangerous drugs to include, inter alia, cannabis and codeine.[40] The former ('Indian hemp') was included in the DDA 1925, which also extended to coca leaves and abolished the exemption for preparations containing <0.1% heroin.[41] During the brief debates on the 1925 Bill its provisions were accepted as uncontroversial, having been created in order to give effect to the International Opium Convention 1925 and to protect children from the 'formidable evil' of 'this vice'.[42] 'It was on this casual basis', notes Davenport-Hines, 'that the criminalisation of cannabis in Britain was nodded through'.[43] The Act entered into force in September 1928.

4.1.5 Rolleston Report 1926

Whereas there had been 'a consistent Home Office attempt to impose a [drug] policy completely penal in direction' from 1921 to 1924, with 'the leaders of the [medical] profession … barely involved',[44] the Rolleston Committee's Report[45] in 1926 precipitated an altered approach. Appointed in 1924, and 'composed entirely of medical men',[46] the Committee's terms of reference were:

[40] HC Debs 21 February 1924, vol 169, cols 2028–29; 15 May 1924, vol 173, cols 1577–58; 7 May 1925, vol 183, col 1161; 10 December 1925, vol 189, col 715; see also: n.71 (and text to) below.
[41] DDA 1925, ss.1, 3.
[42] International Opium Convention (signed 19 February 1925, entered into force 25 September 1928) 81 LNTS 319; HL Deb 28 July 1925, vol 62, cols 457–62. The democratic legitimacy of creating legislation in Geneva 'instead of … in this House' was briefly remarked upon, but this point was not pushed: HC Deb 5 August 1925, vol 187, col 1492.
[43] Richard Davenport-Hines, *The Pursuit of Oblivion: A Social History of Drugs* (2002) 189–90. For further detail on cannabis, see: James H Mills, *Cannabis Britannica: Empire, Trade, and Prohibition 1800–1928* (2003); *Cannabis Nation: Control and Consumption in Britain, 1928–2008* (2012).
[44] Virginia Berridge, *Opium and the People: Opiate Use and Drug Control Policy in Nineteenth and Early Twentieth Century England* (rev edn, 1999) 263–64. In early 1920s, 'the Home Office had "successfully claimed the problem as a criminal and policing one"': Nicholas Dorn and Nigel South, 'The Power behind Practice: Drug Control and Harm Minimization in Inter-Agency and Criminal Law Contexts' in John Strang and Michael Gossop (eds), *Heroin Addiction and Drug Policy: The British System* (1994) 295, quoting Gerry V Stimson and Edna Oppenheimer, *Heroin Addiction: Treatment and Control in Britain* (1982) 25.
[45] *Report of the Departmental Committee on Morphine and Heroin Addiction* (1926) (Rolleston Report).
[46] Alan Glanz, 'The Fall and Rise of the General Practitioner' in Strang and Gossop (n.44) 152.

> [T]o consider and advise as to the circumstances, if any, in which the supply of morphine and heroin … to persons suffering from addiction to those drugs may be regarded as medically advisable, and as to the precautions which … medical practitioners administering or prescribing morphine or heroin should adopt for the avoidance of abuse, and to suggest any administrative measures … for securing observance of such precautions.[47]

The approach famously recommended by the Committee, later dubbed the 'British System',[48] was that provision should be made:

> [F]or the continued existence of two classes of persons, to whom the indefinitely prolonged administration of morphine or heroin may be necessary:
>
> (a) Those in whom a complete withdrawal of morphine or heroin produces serious symptoms which cannot be treated satisfactorily under the ordinary conditions of private practice; and
>
> (b) Those who are capable of leading a fairly normal and useful life so long as they take a certain quantity, usually small, of their drug of addiction, but not otherwise.[49]

There is debate as to whether such thing as a 'British System' actually existed, insofar as the practice was neither 'British', being geographically heterogeneous throughout the UK, nor systematic, being more 'a loose and shifting collection of ideas'[50] than a 'coherent and self-

[47] Rolleston Report (n.45) introduction. The Committee's terms of reference were extended in February 1925 to consider whether the exemptions in the DDAs for preparations containing small amounts of morphine or heroin ought to be abolished.

[48] This term was embraced by US commentators, e.g., Alfred R Lindesmith, 'The British System of Narcotics Control' (1957) 22(1) *Law and Contemporary Problems* 138. However, 'The term was coined by EW Adams, who had served as secretary to the Rolleston Committee and helped draft its report in 1926': Gerry V Stimson and Rachel Lart, 'The Relationship between the State and Local Practice in the Development of National Policy on Drugs between 1920 and 1990' in Strang and Gossop (n.44) 331.

[49] Rolleston Report (n.45) para 47.

[50] Stimson and Lart (n.48) 331; Geoffrey Pearson, 'Drug-Control Policies in Britain' (1991) 14 *Crime and Justice* 167.

contained policy'.[51] However, the Rolleston Report's influence on the law and medical practice, as well as future academic commentary and medical professional appraisal, is beyond doubt.[52] It is therefore essential to consider more closely the Committee's views and recommendations. This reveals a more nuanced picture than what is belied[53] by the Committee's often-cited[54] recommendation that the indefinite prescribing of opiates to addicts could be appropriate.

On one hand, a medical–scientific and welfarist focus *was* evident in the Report. The Committee's definition of addiction was based on the disease model,[55] and it was underscored that 'the prevention and control of addiction must now rest mainly in the hands of the medical profession'.[56] This desire for medical professional control extended to the regulation of prescribing doctors themselves: it was recommended that medical tribunals with disciplinary powers be established, as the issue of physicians who prescribed drugs in breach of the DDAs was 'essentially medical, namely, whether there was, or was not, justification for the administration of the drugs in question'.[57] The Report rejected the view of 'some eminent physicians, especially in the United States', that addiction 'could always be cured by sudden withdrawal',[58] recommending instead a method of gradual withdrawal according to a systematic plan under close medical supervision.[59] Quantitative and qualitative evidence was gathered from the Ministry of Health, prison medical officers, specialist consultant doctors, and GPs to understand the prevalence of addiction,

[51] Marcus Grant, 'Foreword' in Strang and Gossop (n.44) v. See also in the same edited collection: Bing Spear, 'The Early Years of the "British System" in Practice' 3; Dorn and South (n.44) 292; John Strang and Michael Gossop, 'The "British System": Visionary Anticipation or Masterly Inactivity?' 342. cf Christopher Hallam, 'Drug Consumers and the Formation of the International Drug Control Apparatus' in David R Bewley-Taylor and Khalid Tinasti (eds) *Research Handbook on International Drug Policy* (2020) 38, 49, suggesting the British System can coherently be described as a 'policy cluster', and juxtaposed with other countries' policies, such as the USA.

[52] Stimson and Lart (n.48) 332: 'The Rolleston Committee Report set the scene for the next 40 years, and remained the only point of reference for those seeking to understand the formal underpinnings of our approach. There was no other document to read'.

[53] Both historians and contemporary commentators have appraised the British System as a beacon of scientific rationality: Berridge, *Opium* (n.44) 277–78; Dorn and South (n.44) 295; Edwin M Schur, *Narcotic Addiction in Britain and America: The Impact of Public Policy* (1963) ch.3.

[54] See generally the chapters in Strang and Gossop (n.44); Bean (n.10) 63; Davenport-Hines (n.43) 182; Berridge, *Opium* (n.44) 275; Toby Seddon, 'Prescribing Heroin: John Marks, the Merseyside Clinics, and Lessons from History' (2020) 78(102730) *International Journal of Drug Policy* 2.

[55] Rolleston Report (n.45) para 27: '[Addiction] must be regarded as a manifestation of disease'.

[56] ibid 24.

[57] ibid 66–68. Lay magistrates were deemed unqualified for the investigation of such issues.

[58] ibid 12.

[59] ibid 38–40.

concluding that addiction to heroin and morphine was rare.[60] Lastly, the necessity of a joined-up welfarist approach to addiction was acknowledged: '[s]carcely less important than psychotherapy, and education of the will is the improvement of the social conditions of the patient'.[61]

On the other hand, the Report recapitulated much of the contemporaneous political rhetoric on drugs. The approach 'was class-based … designed for the respectable and deserving addict … whose addiction was an accidental side-effect of medical treatment'.[62] Otherwise, the Committee took aim at the 'underworld class' of people whose 'vicious indulgence' and drug habit was borne of 'vicious … curiosity … or search for pleasurable sensations'.[63] For these users, the answer was the criminal law: 'such cases', it was noted, 'may be expected to become even less prevalent through the operation of the restrictions on supply';[64] and the Committee 'emphasise[d] the importance in the prevention of addiction of the administrative measures which preclude the importation, manufacture, sale and distribution of dangerous drugs by unauthorised persons'.[65] Elsewhere, the Report repeatedly noted the desirability of ensuring only those medically authorised to possess dangerous drugs could do so; and a primary reason for recommending the establishment of medical tribunals was to ensure disciplinary action could be taken against transgressive doctors 'without recourse to … penalties of fines and imprisonment' and 'the public odium of a criminal trial and conviction'.[66] The Committee's recognition of such considerations necessarily implied that in other ('vicious') cases, criminal punishment and the resultant stigma were justified – and although the Report did not recommend that doctors should be obliged to report addicts to the Home Office,[67] it was argued that the DDAs, coupled with doctors' exercise of caution, could 'go a long way to extinguish the evil' of addicts obtaining

[60] ibid 22–23.
[61] ibid 42.
[62] Stimson and Lart (n.48) 332; cp discussion of the Habitual Drunkards/Inebriates Acts at nn.25ff in ch.2.
[63] Rolleston Report (n.45) paras 27, 34. This emphasis has sometimes been understated, e.g., Virginia Berridge, 'Morality and Medical Science: Concepts of Narcotic Addiction in Britain, 1820–1926' (1979) 36(1) *Annals of Science* 67, 84.
[64] Rolleston Report (n.45) para 34. The DDAs were regarded as being effective: para 24.
[65] ibid 62.
[66] ibid 67, 75.
[67] Due to concerns about doctor/patient confidentiality: Joy Mott, 'Notification and the Home Office' in Strang and Gossop (n.44) 270.

dangerous drugs in an unauthorised manner, such as 'from two or more doctors concurrently'.[68]

4.1.6 Dangerous Drugs Act 1932; Pharmacy and Poisons Act 1933; Home Office Drugs Branch (1934)

The Rolleston Report's recommendation of setting up a medical tribunal was adopted within months,[69] and it was made an offence to possess dangerous drugs where they had been obtained under two or more prescriptions from separate doctors.[70] Over the ensuing years there was comparatively little Parliamentary discussion regarding drugs, save for the occasional questions about adding new substances to the proscribed list[71] or regarding the numbers of prosecutions;[72] comments linking drugs with other 'vice', e.g., the 'white slave' traffic;[73] and one suggestion that drug trafficking offences should be capital.[74]

In February 1932 another Dangerous Drugs Bill was introduced in the Lords, amending the previous DDAs to enable the ratification of the 1931 Limitation Convention.[75] Once again there was little Parliamentary discussion save for expressions of consensus,[76] and it received Royal Assent six weeks later. The Limitation Convention was geared to addressing licit trade, which was reflected in the DDA 1932: its few provisions related to the legal trade and manufacture of an extended range of controlled drugs, including codeine and precursor substances (i.e., those 'capable of being converted into dangerous drugs').[77] Perhaps due

[68] Rolleston Report (n.45) paras 80–82.
[69] Dangerous Drugs Regulations 1926, SR & O 1926/996 reg.4, sch. However, Berridge, *Opium* (n.44) 281 notes it was seldom, if ever, used.
[70] Dangerous Drugs Regulations 1926, SR & O 1926/996 reg.2.
[71] HC Debs 8 March 1928, vol 214, col 1250; 19 July 1928, vol 220, cols 581–82; 13 March 1929, vol 226, cols 1125–26; 19 December 1930, vol 246, cols 1629–30.
[72] e.g., HC Deb 18 February 1929, vol 225, cols 797–98.
[73] HC Debs 13 December 1927, vol 211, col 2197; 23 December 1929, vol 233, cols 2034–35.
[74] HC Deb 4 February 1930, vol 234, col 1708. This was summarily dismissed by the Home Secretary.
[75] Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (signed 13 July 1931, entered into force 9 July 1933) 139 LNTS 303 (Limitation Convention); text to nn.157ff in ch.3; HL Deb 17 February 1932, vol 83, cols 613–14.
[76] 'The House will know that this country has always been to the front in attempting to regulate the traffic in dangerous drugs'; '[I]n view of the fact we have received no representations [from the veterinary, medical, or pharmaceutical professions] against it … we can conclude the Bill is agreed to': HC Deb 14 March 1932, vol 263, cols 109, 112.
[77] DDA 1932, preamble, ss.1–2.

to the Act reintroducing dangerous drugs into Parliamentary focus, in the latter half of 1932 questions were once again asked about the trade in cocaine in the West End of London.[78] Additionally, drugs were distinguished in the Commons from betting – another 'undesirable' 'vice', but one which was not deemed worthy of outright criminalisation[79] – and in the Lords the dangers 'to human prosperity and human civilisation' of the private ownership of licit dangerous drugs manufacturing was likened to that of 'arms and implements of war'.[80]

Thereafter, the Pharmacy and Poisons Act 1933 was enacted, replacing the Pharmacy Acts of 1852, 1868 and 1908. The importance of this Act for my purposes lies in its transfer of responsibility for the 'enforcement of the law and the control of the sale of poisons' from the Royal Pharmaceutical Society, 'a non-official association with insufficient resources', to the Home Secretary.[81] This institutional shift was accompanied by the permanent establishment of the Home Office Drugs Branch in 1933–1934.[82] As already noted, the Home Office had exercised some control over drugs since DORA 1914[83] – and it had 'successfully claimed the problem as a criminal and policing one' in the early 1920s[84] – but various factors coalesced to ensure its entrenchment as the government department with overall responsibility for the dangerous drugs issue at this time. These included, inter alia: the DDAs' steadily increasing complexity and reach; the 'administrative wrangles'[85] between the police and the medical profession regarding certain aspects of drug regulation; and Britain's new transnational obligations which required heightened bureaucratic oversight of the drug trade.[86] As Hallam notes, the '[Drugs] Branch emerged from these transformations as a properly-staffed and funded formal unit … with important domestic and international mandates'.[87] The Branch's inspectors 'were charged with visiting all [police] forces periodically and systematically' to ensure that the police were properly

[78] HC Deb 5 July 1932, vol 268, col 237.
[79] HC Deb 2 December 1932, vol 272, cols 1163–65; see also: 10 June 1926, vol 196, cols 1728–29.
[80] HL Deb 8 December 1932, vol 86, col 331.
[81] HL Deb 7 March 1933, vol 86, col 1038; Pharmacy and Poisons Act 1933, s.23; text to nn.236ff in ch.1.
[82] For its origins and early-years activities, see: Christopher Hallam, 'Script Doctors and Vicious Addicts: Subcultures, Drugs, and Regulation under the "British System", c.1917 to c.1960' (PhD thesis, London School of Hygiene and Tropical Medicine 2016) ch.5; *White Drug Cultures and Regulation in London, 1916–1960* (2018) ch.5. For later years, see: Sarah G Mars, *The Politics of Addiction: Medical Conflict and Drug Dependence in England since the 1960s* (2012) ch.5. The Branch was disbanded in 2007.
[83] And its precursor, the Privy Council, since the 1868 Act: text to n.211 in ch.1.
[84] Above at n.44 (and text to).
[85] Hallam, 'Script' (n.82) 146, quoting Mills, *Cannabis Nation* (n.43) 24.
[86] Limitation Convention (n.75). See generally: Hallam, *White* (n.82) 105–11.
[87] Hallam, *White* (n.82) 105.

examining pharmacists' dangerous drugs records and enforcing the DDAs.[88] Additionally, an informal 'Addicts Index' comprising the names of known addicts, their prescribing doctors, and persons convicted of drug offences, was held by the Branch from 1933, with information gleaned from doctors' voluntary reports 'in order to safeguard themselves'.[89] In these ways, the Branch's 'institutional culture [tended] to be backward looking … routinely locating the crisis of nonmedical drug use in the past, in the days before the [DDAs] had been enacted and enforced'.[90]

4.1.7 Further Developments, 1935–c.1960

There is relatively little to say about the period between the mid-1930s to c.1960. This is perhaps most clearly evidenced by the fact that the only dangerous drugs-related statutes passed during this time – the Dangerous Drugs (Amendment) Act 1950 and the DDA 1951 – were purely consolidatory measures.[91] In June 1958 an Interdepartmental Committee on Drug Addiction, chaired by Sir Russell Brain, was appointed 'to review, in light of more recent developments, the advice given by the [Rolleston Committee] in 1926'.[92] Bean notes that what these 'recent developments' were was unclear, but postulates that the 'unprecedented [80%] increase in known addicts' from 1953 to 1959, and a perception of increased cannabis and amphetamine use during this time, might have prompted the Brain Committee's establishment.[93] Its 1961 Report, Bean argues, was a '[mere] bouquet to the British system', deeming 'that everyone concerned with its administration was doing a grand job'.[94] The Report concluded, inter alia: that 'due to the attitude of the public and to the systematic enforcement of the [DDAs]', 'the incidence of addiction to [dangerous drugs] is still very small, and traffic in illicit supplies is almost negligible, cannabis excepted'; that a

[88] Spear (n.51) 6. Hallam, *White* (n.82) 113. The RPS retained powers to inspect pharmacies in relation to poisons, but not dangerous drugs, under the 1933 Act.
[89] Mott (n.67) 271, 276–77; Hallam, *White* (n.82) 111.
[90] Hallam, *White* (n.82) 106.
[91] The 1950 Act was a 'preparatory' Act which enabled the 1951 Act to extend to Northern Ireland following the creation of the Northern Irish Parliament.
[92] *Drug Addiction: Report of the Interdepartmental Committee* (1961) (Brain Report).
[93] Bean (n.10) 74. See also: Mott (n.67) 271.
[94] Bean (n.10) 75. See also: Henry Matthew, 'The Second Report of the Interdepartmental Committee on Drug Addiction' (1966) 61 *British Journal of Addiction* 169, 171.

formal 'system of registration of addicts would not be desirable or helpful' (the informal 'Addicts Index' remained until a formal notification procedure was introduced in 1968);[95] and that further legislative intervention was not necessary in any respect.[96] The only recommended change to the Rolleston System was that 'the Home Secretary should not establish medical tribunals to investigate the grounds for recommending him to withdraw a doctor's authority to possess and supply dangerous drugs',[97] as there were too few 'irregularities to justify … and too many difficulties to overcome to implement them.[98] The medical tribunals established in 1927 following the Rolleston Report's recommendations were, in any event, seldom if ever used.[99] 'The result was that Britain entered the 1960s with a system which allowed any doctor to prescribe as many dangerous drugs as he wished, justified on the grounds of treatment, but with few legal sanctions or requirements'.[100]

4.2 Themes for Analysis

Several themes emerge from the foregoing chronological summary. This section identifies these themes and analyses them with reference to the corresponding literature, both old and new, with a view to answering the overall question of whether British drug laws and associated policies in place from 1920–c.1960 were in tension or synergy with contemporaneous conceptions of legitimate criminalisation. These themes are not entirely discrete, there being significant overlap between each. However, it is useful to briefly outline them separately here to draw out specific research questions.

First, there were major doctrinal developments in drug laws during this period. The DDA 1920 was largely an extension into peacetime of the emergency wartime measures of DORA regulation 40B, which I have argued[101] was conceptually akin to the pharmaceutical and

[95] Text to nn.41–51 in ch.5.
[96] Brain Report (n.92) para 67.
[97] ibid 67(12).
[98] Bean (n.10) 77.
[99] Above at n.69 (and text to).
[100] Bean (n.10) 78.
[101] Text to nn.19ff in ch.3.

poisons legislation of the nineteenth century. By contrast, following a 20-year process of piecemeal and inductive reforms via primary and secondary legislation, there was by the mid-1950s an entrenched statutory criminal law framework for the control of dangerous drugs under the consolidatory DDA 1951. This framework was wholly separate from the system of pharmaceutical and poisons regulation, and included: a complex and ever-expanding array of controlled drugs; changes to the institutions responsible for managing the drugs question; extended territoriality and strict liability provisions; reverse-burden defences and corporate and directors' liability; and punishments on conviction ranging from a <£50 fine to 10 years' penal servitude with hard labour. The research question here is whether such doctrinal developments and offence-drafting techniques aligned with contemporary legal thought and legislative practice in the wider criminal law.

Second, there were major policy developments. These related to the purpose of drug laws, and the differing ways in which the law was aimed at controlling different groups of people associated with dangerous drugs. The 'British System' established following the Rolleston Report is of particular relevance here; and both the British System and wider developments in the criminal law have been examined in existing literature as part of the penal-welfarist mode of governance during this period. The research question here is whether, and if so to what extent, the concept of penal-welfarism can be regarded as underpinning these policy developments.

Third, a recurrent theme (related to the themes of doctrinal development and penal-welfarism) is the way in which dangerous drugs and their users were perceived and rationalised as being objects necessitating control, specifically oftentimes as a form of vice. However, there is much slippage in how the term 'vice' was applied and understood in this context: as an unparalleled social evil; as a permeating harm to individuals' moral fabric; and/or merely as a form of hedonistic indulgence or even curiosity. The research questions here are whether and how other 'vices' were targeted and controlled during this period, what rationales were at play, and the extent to which drug laws were coherent or dissonant with the law's wider approach to vice.

4.2.1 Doctrinal

The most significant and overarching doctrinal development in UK drug laws between 1920 and c.1960 was the shift from drugs offences forming part of the 'regulatory' criminal law at the time of the DDA 1920, to constituting something far more closely resembling 'real' crimes by the passage of the DDA 1951. It is within the context of this overarching change that the DDAs' specific doctrinal developments and innovations will be discussed.

I recognise that to speak of such a shift, from regulatory towards 'real', is not without problems, not least in terms of definition.[102] For example, regulatory offences may have differing and contextually-dependant symbolic functions which speak in different 'registers'.[103] These can range from signalling that a regulated act should not be done in a particular way simply because it is more practicable to do it another way,[104] to communicating that a regulated act must not be done because it violates moral standards or norms.[105] This latter register may be similar or identical to that of 'real' criminal laws (depending on the definition of 'real' employed), blurring any regulatory/real distinction. Similarly, it would be intuitively jarring to categorise drug offences alongside crimes universally deemed 'real' offences, such as murder, regardless of what criteria are used to identify 'real' crimes (for the avoidance of doubt, I do not aim to do this). Moreover, since the nineteenth century judicial precedent had rejected the existence of a regulatory/real distinction: 'regulatory offences, even strict liability offences or those involving a fine as punishment, were criminal offences'.[106]

These issues notwithstanding, I think that, first, such a shift can be made out; and second, that doing so is useful because during the period under consideration the very 'definition of a crime', including the distinction between regulatory and real crimes, 'was an important

[102] The *malum in se*/*mala prohibita* distinction, for example, had been subject to criticism long before the period under consideration: 'The Distinction between "Mala Prohibita" and "Mala in se" in Criminal Law' (1930) 30(1) *Columbia Law Review* 74.

[103] Roger Brownsword, 'Criminal Law, Regulatory Frameworks and Public Health' in AM Viens, John Coggon and Anthony S Kessel (eds), *Criminal Law, Philosophy and Public Health Practice* (2013) 27–28.

[104] e.g., the Corn Sales Act 1921, s.1 required the sale of certain quantities of corn to be by weight only.

[105] e.g., the Road Safety Act 1967, s.1 introduced prescribed blood alcohol limits for drink-driving and drunk in charge offences.

[106] Jeremy Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (2014) 105.

theme in writings on criminal law'.[107] The existence of such a shift, and the doctrinal developments which occurred against this backdrop, is thus of direct relevance to the question of the degree to which drug laws aligned with contemporaneous understandings of legitimate criminalisation. Rather than attempting to pre-define abstract criteria for 'real' criminal offences at the outset, I will instead sketch out the various ways in which this shift occurred, beginning with the DDA 1920. It is worth stating here, though, by way of analytical criteria, that to say there was a shift from regulatory towards real post-1920 is (using Farmer's terminology) to make a claim about a shifting criminal jurisdiction – and that making sense of this requires mapping changes across a diverse network of practices including 'the types of behaviour that are censured, the types of punishment and the relationship between the two: who is subject to the law and under what circumstances; the apparatus that is capable of enforcing … the law; the boundaries of the permissible …; and the way in which institutions [were] distributed across the legal space'.[108]

I have already suggested that the DDA 1920 was both an extension of wartime regulatory measures in substance, and an extension of Victorian poisons and pharmaceutical regulatory criminalisation in spirit.[109] Going further, Horder categorises the DDA 1920 alongside other legislation passed in the same year (such as the Firearms Act, the Census Act, and the Employment of Women, Young Persons and Children Act) as being paradigmatic of the era's regulatory mode of '[criminal law based] governance in the promotion of safety and public welfare in an ever-widening variety of contexts'.[110] Indeed, a 'consequentialist, forward-looking', utilitarian agenda of promoting safety is often regarded in legal scholarship as a distinctive characteristic of regulatory criminalisation, in contrast to the primarily 'backward-looking, retributive aims' of the 'core' criminal law.[111] More specifically, Horder argues that the features of the DDA 1920 which lend to this categorisation were the medical profession's inclusion in the governance of drugs (i.e., in

[107] Farmer, *Making* (n.2) 96.
[108] Lindsay Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5(1) *Social and Legal Studies* 57, 68.
[109] This is a simplification for the current analysis: Chapter 1 argued that Victorian poisons/pharmaceutical regulation was more aligned with the substantive criminal law than has previously been recognised; and Chapter 3 argued that the DDA 1920 went beyond what was required by the Hague Convention and so was, in some respects, different from what came before.
[110] Horder (n.106) 113.
[111] Rebecca Williams, 'Criminal Law in England and Wales: Just Another Form of Regulatory Tool?' in Matt Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law: Anglo-German Concepts and Principles* (2020) 209–10; AM Viens, John Coggon and Anthony S Kessel, 'Introduction' in Viens, Coggon and Kessel (n.103) 7.

terms of enforcement and licensing);[112] and the Act's mode of creation being that of 'quintessentially white collar, civil service-led criminal law', i.e., 'the product of international agreements … rather than of some peculiarly English taste for "the teasing vigilance of the perpetual superintendence of law"'.[113] Horder also draws an analogy to modern European Union (EU) legislation-based regulatory criminalisation in this respect. Although his analysis is focused on 'bureaucratic criminal law' generally, and thus necessarily glosses over the intricacies of and differences between EU law-making and the Hague Convention/LoN-backed drug control treaties, it still coheres with my argument. In 1920 expectations were still that the League could be a successful political institution for the advancement of peace, economic prosperity, and inter-state relations – similar to the stated aims[114] of the EU today – with the control of drugs just one aspect of a far larger system.

The first major doctrinal change evidencing a jurisdictional shift was the introduction of proceedings on indictment and the enormous increase in the severity of maximum sentences (up to 10 years' imprisonment) under the DDA 1923. The enactment of such penalties, and the associated Parliamentary debates – which were very much in the register of moral opprobrium – are demonstrative of a retributive, backward-looking focus typically reserved for serious criminal offending.[115] Additionally, such penalties were not mirrored in the development of the other 'regulatory' laws of 1920 identified by Horder. For example, until 1968 the maximum sentence for unauthorised simple possession of firearms was 3 months' imprisonment and/or a £50 fine, and this was triable only summarily – in contrast to the 6 months' imprisonment and a £250 fine for unauthorised simple possession of drugs on summary conviction.[116] It was only where firearms were used to avoid arrest or with intent to injure that the maximum sentence (14 years' imprisonment) was greater than for drug offences.[117]

[112] Similar to the role Chief Police Officers and the Registrar-General played in the Firearms Act 1920 and Census Act 1920, respectively.
[113] Similar to the Employment of Women, Young Persons and Children Act 1920, which 'sought to give effect to International Labour Organisation standards': Horder (n.106) 114, quoting 'an early nineteenth-century MP's phrase to describe the evils of codification' in HC Deb 29 March 1811, vol 19, col 647. Note, however, that the DDA 1920 went further than the Hague Convention's requirements: text to nn.105ff in ch.3.
[114] Consolidated Version of the Treaty on European Union [2016] OJ C202/1 art.3 (ex art.2 TEU).
[115] Text to nn.14–37 above.
[116] Firearms Acts 1920, s.1(8); 1937, s.1; the 1968 Act, sch.1 increased the penalties to 6 months' imprisonment and a £200 fine; still less than for DDA offences.
[117] Firearms and Imitation Firearms (Criminal Use) Act 1933, s.1; Firearms Act 1937, s.22.

Another doctrinal change was the enactment of separate statutes for dangerous drugs, on the one hand, and therapeutic/pharmaceutical substances and poisons, on the other.[118] This not only expressly categorised specific substances into separate regulatory spheres – one distinctly criminal, one not – but it also entailed, in Farmer's terms, separate apparatus for enforcement and the redistribution of institutions across the legal space. First, the police replaced the RPS as the organisation responsible for the enforcement of drug laws, continuing a trend of growing police responsibility in this area since DORA regulation 40B. Second, whereas Horder notes that the regulatory DDA 1920 gave the medical profession a significant role in the governance of drugs, by the mid-1930s the Home Office – the law-and-order Ministry – had taken charge as the institution responsible for the drugs question,[119] with the Ministry of Health and the medical and pharmaceutical professions accorded minor, watered-down, consultative roles. The permanent establishment of the Home Office Drugs Branch, moreover, entailed a particularly criminal law-focused (as opposed to regulatory) response, even by Home Office standards. Stein notes that other Home Office agencies such as the Factory Inspectorate:

> [P]referred … the use of formal administrative procedures, rather than … invok[ing] the criminal law. They did not 'see themselves as members of an industrial police force primarily concerned with the apprehension and subsequent punishment of offenders [but with] securing compliance with the standards of safety, health and welfare required [by legislation]'.[120]

Third, the creation of separate regimes for licit and illicit drugs was influenced by, and reflected in, the LoN drug control framework. This framework was itself reciprocally influenced by the spearheading efforts of the Home Office's Malcolm Delevingne, and by the time of Delevingne's retirement in 1932 the League's failure as a political institution

[118] This process was completed with the enactment of the Poisons and Pharmacy Act 1933, but see also, e.g.: Therapeutic Substances Act 1925.
[119] Text to nn.81–90 above.
[120] SD Stein, *International Diplomacy, State Administrators, and Narcotics Control: The Origins of a Social Problem* (1985) 177–78, quoting WG Carson, 'White-Collar Crime and the Enforcement of Factory Legislation' in WG Carson and Paul Wiles (eds), *Crime and Delinquency in Britain: Sociological Readings* (1971) 201.

meant that the League had become focused almost exclusively on combatting crime.[121] Such a penal institutional focus is far removed from the analogy Horder draws between the DDA 1920 and modern EU regulatory legislation.

The jurisdictional shift from regulatory towards real is also observable in doctrinal developments which relate to, in Farmer's words: the types of censured behaviour; who was subject to the law and in what circumstances; and the boundaries of what was deemed permissible. A first point to note here, following on from the end of the previous paragraph, is that these doctrinal developments were not the product of 'white collar, civil service-led criminal law', which Horder argues the DDA 1920 was by virtue of the 1920 Act giving effect to the early Hague Convention/LoN framework, and which was a marker of its regulatory nature. Rather, these were doctrinal innovations enacted by and on the initiative of British legislators, with the aim of enabling the (severe) punishment of a specific class of persons, and for conduct which was increasingly deemed to be seriously morally blameworthy. The types of censured behaviour grew to include not only dangerous drug possession and supply, but extended to company directors' liability for drugs offences committed by corporations, and to offences with a widened territorial ambit. Extraterritorial jurisdiction, at this time, was rare in English criminal law, and tended to be reserved only for 'real' criminal offences: murder, treason, breaches of the Official Secrets Act 1911, and bigamy.[122] In terms of who was subject to the law and in what circumstances, the DDA 1923's provision that technical infringements by professionals were punishable only by minor penalties (of a fine up to £50) created a graded system of blameworthiness and wrongdoing: that is, an express regulatory/real distinction in terms of offending under the legislation. Similarly, although not strictly a doctrinal development, the two-track system created following the Rolleston Report for respectable, medically-complaint addicts on the one hand, and the 'vicious class' of addicts and users on the other, demonstrates the existence of an aim to respond to particular persons in specific circumstances with the full force of the criminal sanction. Lastly, the boundaries of what was deemed permissible were steadily tightened as the list of proscribed substances expanded, and the successive DDAs were eventually consolidated (and thereby entrenched) by the 1951 Act.

[121] Text to nn.137ff in ch.3.

[122] Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (2003) ch.5. See also extensive discussion throughout *DPP* v *Doot* [1973] AC 807.

If, as I have argued, a shift from regulatory towards real can be made out, what does this entail in terms of the broader question of criminalisation? As noted, during the first half of the twentieth century, 'the definition of crime was an important theme in writings on criminal law'.[123] There were various approaches to this definitional question, and each presupposed a range of requirements for criminalisation. At one end, with the growth of regulatory offences in the twentieth century,[124] some 'commentators began to worry about the impact on the moral legitimacy of the criminal law',[125] and whether 'criminal law could still be given a central-case analysis in terms of serious wrongdoing'.[126] Kenny's *Outlines of Criminal Law*[127] and Allen's 'The Nature of a Crime',[128] which Farmer states were 'two of the most important contributions' to this debate in the first third of the twentieth century,[129] were along these lines. Kenny's definition of crime was 'process-driven … focused on the state's power to halt prosecutions or pardon offenders in criminal (but not in civil) cases'; but it was also focused on 'wrongs' and reflected 'that self-confidence in the proper scope of the criminal law' as propounded by Stephen, who 'felt able to shrug off the need for even a cursory analysis of [regulatory] offences because … "they have so very faint and slight a connection with the [properly so-called] criminal law"'.[130] Allen's definition was based on a conception of crimes as being serious public harms:[131] 'crime … consists in wrongdoing which directly and in serious degree threatens the security or well-being of society'.[132] Hall, like Allen, similarly sought 'to re-establish some moral or public basis for the definition of crimes'.[133] At the other end of the spectrum was Williams, who 'did not object to the

[123] Above at n.107 (and text to).
[124] The 'so rapid and so continual … growth of administrative justice … Ambitious but inexpert reformers turn first of all to penal legislation …': Roscoe Pound, 'The Future of the Criminal Law' (1921) 21(1) *Columbia Law Review* 1, 2, 13.
[125] Farmer, *Making* (n.2) 95.
[126] Horder (n.106) 103.
[127] CS Kenny, *Outlines of Criminal Law* (1902).
[128] Carleton Kemp Allen, 'The Nature of a Crime' (1931) 13(1) *Journal of Comparative Legislation and International Law* 1.
[129] Farmer, *Making* (n.2) 96, fn.186.
[130] Horder (n.106) 103–04, quoting James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 3 (first published 1883, Cambridge University Press 2014) 264. See also: David Ormerod, Karl Laird and Matthew Gibson, *Smith, Hogan and Ormerod's Criminal Law* (17th edn, 2024) 12–13; Winnie Chan and AP Simester, 'Four Functions of Mens Rea' (2011) 70(2) *Cambridge Law Journal* 381, fn.1, noting Kenny's commitment to *mens rea* in the criminal law. Allen similarly cited with approval Stephen's argument that 'it would be a violation of the common use of language to describe [regulatory offences] as branches of criminal law': Allen (n.128) 16, quoting James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 1 (first published 1883, Cambridge University Press 2014) 2.
[131] Ormerod, Laird and Gibson (n.130) 5.
[132] Allen (n.128) 11.
[133] Farmer, 'The Obsession' (n.108) 63–64.

inclusion of regulatory crimes in the criminal law'.[134] Regulatory offences unquestionably fell within his famous procedural definition of crime, i.e., 'a crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or outcome is criminal if it has certain characteristics which mark it as criminal'.[135] Additionally, there also existed a middle ground. Radzinowicz recognised the 'vast changes' which had occurred in English criminal justice in the 50 years to 1945, including the increase in administrative offences while '*criminalata naturale*, … serious criminality remain[ed] more or less unchanged'.[136] However, in contrast to Allen and Hall, he did not regard regulatory offences as a threat to the wider criminal law's legitimacy, as the 'stabilised and well-defined line between the allowed and the prohibited' (whether in the context of regulatory or real offences) still served to promote a collective sense of security. In certain contexts, such as road traffic offences, a more pragmatic, rather than principled, middle-ground approach was also observable: 'the problem of criminalization was minimized to that of defining the distinction between the negligent and the reckless driver, so as to avoid the inadvertent criminalization of respectable members of the community'.[137]

Having undergone a shift from regulatory towards real, the DDAs could, prima facie, accord with the entire spectrum of these definitional approaches. The framing of dangerous drugs as a seriously harmful social evil arguably brought the DDAs in line with Kenny, Allen and Hall's conception of properly so-called crimes. The pragmatic middle-ground approach of drawing a distinction between negligent and reckless drivers, so as not to criminalise respectable persons, was mirrored in the 1923 Act's system of minor punishments for technical infractions by medical and pharmaceutical professionals. At the same time, in concurrence with Radzinowicz's view that all offences, regulatory or real, were legitimised where they promoted feelings of public security, the DDAs gave effect to the broad contemporary public sentiment that the (perceived homogenous group of) organised criminals responsible for drug, as well as human, trafficking could be properly dealt with.[138] And Williams' procedural definition, which 'came to influence a generation of post-war

[134] Farmer, *Making* (n.2) 98.
[135] Glanville Williams, 'The Definition of Crime' (1955) 8(1) *Current Legal Problems* 107, 130.
[136] Leon Radzinowicz, 'Present Trends of English Criminal Policy: An Attempt at Interpretation' in Leon Radzinowicz and JWC Turner (eds), *The Modern Approach to Criminal Law* (1945) 28, 33.
[137] Farmer, *Making* (n.2) 94.
[138] e.g., text to nn.175ff in ch.3.

lawyers and theorists',[139] might be regarded as rendering any question of the DDAs' offences' legitimacy – in either regulatory or real terms – moot in any event.

Such a cursory analysis, however, does not stand up to scrutiny. First, while drug offences were plainly regarded as serious and the discourses surrounding them were strongly couched in moral terms, there remained a degree of unease (sometimes approaching contradiction) about how they could be categorised. These were not mere regulatory offences, but nor could they be characterised as properly so-called crimes (i.e., in Stephen and others' sense of the term). In one of the few reported DDA cases during this period, for example, Lord Anderson stated that, '[t]he purpose of these Acts [is] to regulate the traffic in drugs, and to deal specifically with what is a great evil in this and other countries – the cocaine habit'.[140] Yet, despite the connotations of 'great evil', his Lordship also noted that '[t]his is a class of case in which the criminal element of felonious intention is not essential. That intention, which one must have in a case where there is *malum in se*, is not requisite in regard to an offence which is *malum quia prohibitum*'.[141] Thus, notwithstanding the shift from regulatory towards real, DDA offences did not align with the definitions of writers such as Allen and Hall, who aimed to rescue a conception of the 'core' criminal law. Allen not only defended the *malum in se* and *mala prohibita* distinction as being 'entitled to more respect that it has received'; but also explicitly categorised the DDAs as 'public health' offences and argued that (other) public health offences were not '"criminal" in the true sense of the word'.[142] Hall similarly argued that 'whatever sort of liability "strict liability" may be, it is not criminal liability'; and that the application of strict liability to crimes attracting 'heavy penalties' including 'the sale of narcotics' was a 'branch of [law] so thoroughly disorganised, rest[ed] so largely on conjecture and dubious psychology, and effect[ed] such gross injustice as to require major reform'.[143]

[139] Horder (n.106) 103.
[140] *Strathern* v *Ross* 1927 JC 70, 77.
[141] ibid 76.
[142] Allen (n.128) 14–16. At 18 he also expressed concern about 'heavily punishable offences … which it is impossible to regard as intrinsically flagitious [and] are dictated solely by considerations of social expediency'. Allen explicitly listed the DDAs as 'public health' offences in his *Legal Duties and Other Essays in Jurisprudence* (1931) 309.
[143] Jerome Hall, *General Principles of Criminal Law* (2nd edn, 1960) 326, 374–75. At 330 he noted that drug offences were difficult to categorise as regulatory offences, and at 340 he noted that alcohol possession offences did not deal with 'intrinsically wrong' conduct. (The first edition was published in 1947).

Second, unlike road traffic offences which could 'be seen as a neutral problem of co-ordination'[144] – i.e., an uncontroversial, pragmatic exception to the problem of definition – the DDAs were never seen in such straightforwardly neutral terms, even for professionals' technical infringements.[145] Third, and perhaps most importantly, commentators such as Radzinowicz and Williams, who did not take issue with the inclusion of regulatory offences in the criminal law, nevertheless expounded, explicitly or implicitly, certain corollaries to criminal law-making which flowed from their conceptions of 'crime'. Radzinowicz, for example, placed an emphasis on the desirability of anti-authoritarianism in English criminal law. To illustrate this, he contrasted then-new developments in English criminal law with that of the German Reich. In the former there had begun to exist a 'guiding principle [of] the avoidance, wherever possible, of deprivation of liberty'; a recognition that crime was a complex social phenomenon and that its repression required more than blunt criminal sanctions; an aim that punishment was 'strictly proportional to the gravity of the offence'; and clearly defined and understandable offences.[146] By contrast, he argued that in Germany crime was regarded as 'the expression of the anti-social will of the individual'; the 'very essence' of criminal justice was 'punitive'; criminal legislation was vague and inaccessible; and the 'central all-powerful authority [was] the source of law and decide[d] its own criminal policy'.[147] Without drawing any spurious analogies between the DDAs and the criminal law of the German Reich, many aspects of the DDAs between 1920–1951 did align more closely with Radzinowicz's conception of authoritarian criminal law than the anti-authoritarian trend occurring in England at the time. These included: the DDAs' severe penalties; the policy aim of controlling the vicious and anti-social class of drug users, whose use was motivated by hedonistic indulgence; criminalisation achieved primarily through a raft of obscure secondary legislation, which was regularly amended and extended by executive fiat; and, on the whole, viewing the drugs question as addressable through exclusive recourse to the criminal sanction, save for the limited exception of the respectable, medically-compliant addict post-Rolleston.

[144] Farmer, *Making* (n.2) 94, fn.174. See also: Hall (n.143) 339.
[145] See, e.g.: discussion in Hallam, *White* (n.82) 33–34.
[146] Radzinowicz (n.136) 32–38.
[147] ibid.

Similarly, Farmer argues that Williams' procedural definition of crime implicitly entailed certain requirements for criminalisation, which could be identified from *within* the criminal law:

> The central feature of Williams' account is the commitment to legal values, and the constraints that they bring, as these had evolved with the institution … [H]e … identif[ied] the principle of *mens rea* as the source of legal values and the commitment to legality that followed from this. This was not motivated by an appeal to a political value of liberty, but by the aim of making the law more effective: if the law was adopted as the mode of regulation then it had to conform to certain principles which were specific to the institution of law.[148]

Hence, whilst the DDAs were unquestionably 'criminal' laws according to Williams' procedural definition, their obscurity and employment of doctrinal techniques including strict liability were at odds with the criminal law's underlying purpose as he perceived it. There are several passages in Williams' writings which expressly criticise the doctrinal techniques found in the DDAs, due to their dissonance with general criminal law principles. In one passage – the import of which is equally applicable to the DDA regulations concerning the manufacture, prescribing, and sale of dangerous drugs per licensing and record-keeping requirements – he argued that:

> Particular objection attaches to regarding as criminals those who are found guilty … without *mens rea* … If it is necessary to inflict penalties on such people, at all events they should not be criminals. Perhaps the worst example is under Food and Drugs legislation, where a respectable manufacturer or retailer is charged with selling an article not of the nature, substance, or quality demanded by the purchaser.[149]

[148] Farmer, *Making* (n.2) 100–01.
[149] Williams, 'The Definition' (n.135) 114.

In another – equally applicable to the DDA possession offences which provided a reverse-burden defence 'that the drug was supplied for his use … in accordance with … a prescription'[150] – he takes aim at similarly-drafted larceny offences:

> [Under] legislation creating an creating an offence of unlawful possession … the burden of giving an explanation is cast upon the accused, and the practical effect of this is to deprive him of the submission of no case [and] to alter … the ordinary law of larceny, procedure and burden of proof … Put in this way, the legislation is clearly objectionable in form, whatever may be thought of its general purpose.[151]

Similarly, in a rare passage specifically mentioning dangerous drugs legislation, he criticises legislation which 'shifts the burden to the officer [of a corporation] to disprove his complicity':

> The lineage of this can be traced to the Official Secrets Act 1920, s.8(5). This provision was perhaps justified by the supreme importance of the Act for the safety of the State. But the section having received the approval of Parliament, it was not long before the precedent became adopted in legislation of lesser moment. Thus it was incorporated into the Dangerous Drugs and Poisons (Amendment) Act 1923, s.2(2C) …[152]

In sum, this section has argued that a shift can be made out in dangerous drugs legislation from being part of the regulatory criminal law towards the 'real' criminal law. This is observable in the increasing penalties for drug offences; the separation of the dangerous drugs and pharmaceutical frameworks; the role and practice of the Home Office and police

[150] Text to nn.8–9 above.
[151] Glanville Williams, 'Statutory Powers of Search and Arrest on the Ground of Unlawful Possession' [1960] *Criminal Law Review* 598, 608.
[152] Glanville Williams, *Criminal Law: The General Part* (2nd edn, 1961) 867–68.

in the oversight and enforcement of drugs legislation; the mirroring of an explicitly penal focus in the transnational control framework; the entrenchment of successive domestic drug control statutes over a period of more than 30 years; and even in the use of legislative techniques such as strict liability, reverse burdens, and extended territoriality provisions which were designed to broaden the ambit of criminal liability to combat the evil of drugs. For such a shift to occur at this time is important to the question of criminalisation, as during this period the very definition of (real) 'crime' was being debated and scrutinised by the era's most influential writers on criminal law. While there is some superficial synergy between dangerous drugs legislation and all of these definitions, I have argued that a closer reading of those definitions, and of their explicit and implicit requirements for criminal law-making, reveals that the DDAs and their associated regulations were in tension with those conceptions of legitimate criminalisation. Nevertheless, having cut across so many proposed definitions to varying degrees, it is evident that drug laws are a valuable case study into the era's changing conceptions of criminalisation.

The next two sections broadly consider the contemporaneous policy surrounding dangerous drugs (with particular reference to the post-Rolleston 'British System' and the concept of penal-welfarism) and the law's approach to vice. As noted earlier, there is overlap between the above doctrinal section and those which follow; hence, these sections should not be considered as being conceptually discrete.

4.2.2 Drug Policy and Penal-Welfarism

Farmer argues that Williams not only 'develop[ed] an, often implicit, account of how legal principles might act as an institutional constraint' on criminalisation, but that his writings were, more broadly, 'representative' of the penal-welfarist mode of criminalisation during this period.[153] Garland's term 'penal-welfarism'[154] denotes a post-Victorian 'reconstruction' of 'the state, the offender, and the relationship of censure which holds between them':

[153] Farmer, *Making* (n.2) 64, 103.
[154] Already discussed at text to nn.45ff in ch.2; nn.39ff in ch.3.

> The relationship between state and offender is no longer presented as a contractual obligation to punish, but as a positive attempt to produce reform and normalisation for the benefit of the individual as well as the state … The new state [is] a benefactor … rescuing its subjects from vice and crime.[155]

Thus, if British drug policy – i.e., the philosophy behind, and the procedures in place for the implementation of, the legislative framework – aligned with this penal-welfarist approach, a strong argument could be made out that the DDAs were in synergy with the prevailing trend and philosophy of criminalisation. The issue here is a question of degree. Employing Garland's thesis, Seddon argues that the post-Rolleston 'British System' was a:

> Distinctive 'medico-legal alliance' of British heroin regulation … *to some extent* structured by the wider strategic pattern of liaison between penal and welfare elements within the new social realm … [This] analysis … suggests that welfarist and penal approaches in this field, rather than being antithetical or contradictory tendencies engaged in an ongoing 'tug of war', are actually involved in a *liaison*.[156]

To what extent was British drug policy in the Rolleston era structured by penal-welfarism? There is force to Seddon's argument of a welfarist and penal liaison operating in drug policy. He argues that, like 'the new positivist criminology underpinning penal-welfarism', which resolved the conflict between determinism and free will 'using the notion of character', the post-Rolleston 'new addict-subject resulted from a compromise between determinist and voluntarist perspectives on habitual drug use'.[157] As noted in the chronological summary above, a medical–scientific and welfarist focus *was* evident in the Rolleston Report, framed by reference to the good character of the respectable, medically-complaint addict.

[155] David Garland, *Punishment and Welfare: A History of Penal Strategies* (rev edn, 2018) 29–30. See also: Radzinowicz (n.136) 29–31.
[156] Toby Seddon, 'The Regulation of Heroin: Drug Policy and Social Change in Early Twentieth-Century Britain' (2007) 35(3) *International Journal of the Sociology of Law* 143, 149 (emphasis added).
[157] ibid 150.

Moreover, Hallam's recent research into the 'white drug cultures'[158] of 'vicious' users in the 1930s notes that where such users were convicted, they rarely received the harsh penalties provided for under the DDAs. Usual sentences were fines and/or short prison sentences, and sometimes with conditions of entering treatment attached.[159] The penal-welfarist approach of reformatory-based treatment under the nineteenth century Habitual Drunkards and Inebriates Acts was enabled for drug users post-1925 when the definition of a 'habitual drunkard' was extended to include those using dangerous drugs.[160] This also accords with Bean's observation that 'the majority of drug offenders [were] fined', and that 'it was unusual for [a sentence of imprisonment] to be more than 6 months'.[161] There is therefore some evidence of 'a positive attempt to produce reform and normalisation for the benefit of the individual as well as the state' in the practical application of the DDAs; even for the 'vicious' user.[162] In Lacey's terms, it is arguable that the contemporaneous 'broad social attitudes and power relations [i.e., of penal-welfarism] conduce[d] to … the realization of idea(l)s of responsibility in the enforcement … of criminal law'.[163]

On the other hand, it is arguable that such a penal-welfarist liaison was limited in scope; that the operation of that liaison was materially different to the operation of other approaches often deemed representative of penal-welfarism; and that drug policy overall remained more closely aligned with the 'old idea of penal discipline … to crush and break'.[164] The medical and pharmaceutical professions had a heavily watered-down role, with the drugs question essentially a police and Home Office matter.[165] Returning to Seddon's argument, the existence of a 'liaison' here, in the form it took, was due to the 'penal approaches in this field' already having won the 'tug of war'. Additionally, the post-Rolleston

[158] '[A] contemporary term referring primarily to heroin, morphine and cocaine … The main "brown drugs" were opium and … Indian hemp … [T]his nomenclature was highly complex; its main operation lay in the division between … the natural and the processed, and their related racial and colonial themes': Hallam, *White* (n.82) 49.
[159] ibid 59, 72, 79, 85, 99.
[160] Summary Jurisdiction (Separation and Maintenance) Act 1925, s.3; thus bringing drug users into an aspect of the penal-welfarist fold which they had previously been outwith: text to nn.45ff in ch.2
[161] Bean (n.10) 101; note this includes *all* drug offenders, including for professionals' technical infringements.
[162] Text to n.155 above.
[163] Nicola Lacey, 'Character, Capacity, Outcome: Toward a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law' in Markus D Dubber and Lindsay Farmer (eds), *Modern Histories of Crime and Punishment* (2007) 25.
[164] Garland (n.155) 228, quoting Helen Blagg and Charlotte Wilson, 'Women and Prisons' (Fabian Tract No 163, 1912) 5.
[165] Text to nn.81–90 above.

'British System' was, as noted previously, a misnomer:[166] it was rather a geographically heterogenous and discretionary collection of practices whereby 'it was a matter for the individual medical practitioner to decide on what was the appropriate treatment in each case, and views on addiction and its treatment varied considerably'.[167] In other words, the drug policy emphasis was *firstly and primarily* on criminal justice,[168] tempered only by exceptions for respectable users; exceptions which themselves often hinged on chance. This stands in sharp contrast to other initiatives characteristic of penal-welfarism, such as special courts for child offenders, probation orders, and Borstal training.[169] These focused firstly and primarily on the aim of social rehabilitation, seeking to *ensure* that *all* offenders would receive appropriately individualised punishments, and that these punishments were integrated into a holistic system of normalisation and correction. Social rehabilitation in these contexts was progressively combined with the criminal law's repressive function only where necessary; and penal segregation from the rest of society was a last resort.[170]

That the 'British System' was more penal than welfarist (or, indeed, penal-welfarist)[171] is further evidenced by the absence in drug policy discourse of the 'new language of reform, correction, and normalisation – supporting the inadequate, protecting the irresponsible, and restoring the morally deficient to the fullness of good citizenship'.[172] Instead, the 'vicious' user (i.e., *any* drug user who did not conform to the tightly-defined 'respectable' Rolleston addict) was represented in the language of the old complex 'as wicked or worthless – punishable because of the moral choices for which he was responsible'.[173] This element of choice – of the vicious user's presumed capacity not to engage in such hedonistic indulgence (as well as their character) – is what separated them from the 'good' addicts envisaged in the Rolleston Report.[174] This is perhaps why, for example, the rehabilitation of such users was not a feature of the extensive Parliamentary debates on the dangerous drugs question, which focused instead on hard-line criminal justice solutions.

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[166] Above at n.51 (and text to).
[167] Hallam, *White* (n.82) 63.
[168] This aligns with the transnational pattern: n.41 in ch.3.
[169] See, e.g.: Radzinowicz (n.136) 29–33; Garland (n.155) 227–28, 247–48.
[170] ibid.
[171] For an exposition of this point, albeit not using Garland's language of penal-welfarism, see: Dorn and South (n.44) esp 295–96.
[172] Garland (n.155) 241.
[173] ibid.
[174] This also has parallels with the old Victorian belief in free will and the rational agent, cf the new penal philosophy. For discussion of how character/capacity conceptions of criminal responsibility shift over time and are not dichotomous, see: Lacey (n.163).

As noted, requirements to undergo treatment in inebriate reformatories did occasionally accompany sentences for drugs offences post-1925, and reformatory treatment for inebriates was (in Garland's terms) part of the 'correctional sector' of the penal-welfarist approach. However, these (occasional) treatment conditions on conviction for drugs offences were less aligned with the penal-welfarist philosophy than they might appear: such interventions were not intended to be 'triggered [by] offence behaviour', but were instead to be 'justified on [the] quite other grounds [of] a failure to meet one's social obligations or else an inability to do so'.[175] Hence, as noted in Chapter 2, '[p]eople could get drunk as often as they pleased, without risking being labelled "habitual drunkard" and without being subjected to "legislative interference", provided their drunkenness didn't interfere with their ability to perform their duties'.[176] By contrast, the criminalisation of dangerous drugs under the DDAs did not afford a similar liberty. 'Vicious' users were therefore criminals deserving punishment first. They were 'those persons whose offences [did not] warrant correction or normalisation' and were placed in the 'segregative sector'; those who were represented in negative terms of requiring punishment; and for whom treatment was coupled into their punishment only as an occasional afterthought.[177]

In sum, it was only in the tightly-framed context of the respectable, medically-compliant addict that a real liaison between penal and welfarist elements was in operation. There is some continuity in this conclusion with the discussion in Part One of the penal-welfarist approach observable in the nineteenth century Habitual Drunkards and Inebriates Acts, namely that drugs and their users were never fully integrated into the rubric, instead occupying a unique legal space which defies easy categorisation. There is also continuity with the preceding section's conclusion: drug legislation once again is an area in some ways representative of, but on the whole a useful case study into, changing patterns and understandings of criminalisation across time.

[175] Garland (n.155) 229.
[176] Gerry Johnstone, 'From Vice to Disease? The Concepts of Dipsomania and Inebriety, 1860–1908' (1996) 5 *Social and Legal Studies* 37, 42; text to n.29 in ch.2.
[177] Garland (n.155) 236.

4.2.3 Vice

The concept of vice has repeatedly surfaced in the context of drug controls in both chapters of Part Two of this thesis. This section briefly considers whether, how, and the extent to which the concept of vice was deployed as a justification for criminalisation during this period. This discussion is confined to drugs, prostitution, and obscenity,[178] as those were the 'vicious' targets of the LoN Conventions, and because charting the precise application of 'vice' across every possible area of the law, both transnational and domestic, across an over 40-year period is beyond the scope of this thesis. Nevertheless, if it could be shown that the control of vice legitimised criminalisation in these different areas – and in similar ways to how it was deployed in the area of dangerous drugs – then this may reflect a synergy between drug laws and broader understandings of legitimate criminalisation. In short, it is argued that – during this period – the concept of vice has limited explanatory value in terms of criminalisation. However, this conclusion provides a natural transition into this thesis' Part Three, as from the end of the 1950s and throughout the 1960s all of these 'vicious' areas (and several more) would be revisited by legislators and theorists with renewed focus and approaches.

The use of the term 'vice' regarding intoxicants, and in criminal law generally, considerably pre-dates WW1,[179] and has long been subject to shifting understandings.[180] There is, however, an escalating severity observable in the term's usage and meaning in the context of drugs from this time. Whereas during WW1 the government was wary of regulating 'vice', by 1918 the British press were constantly using the term in the context of anti-drug campaigns, which also drew various links with youth, sexual activity, foolishness, and feloniousness.[181] By the mid-1920s, parliamentarians began to talk of the 'formidable evil' of (drug) vice; and even the Rolleston Committee, who were charged with making medically- and scientifically-based decisions regarding drug addiction (and did not find themselves in the cut-and-thrust of Parliamentary debates) found themselves quick to make judgements about the 'vicious class' of users who deserved criminal punishment.

[178] On gambling, text to n.79 above.
[179] e.g., text to nn.22, 75 in ch.2.
[180] Jerome H Skolnick, 'The Social Transformation of Vice' (1988) 51(1) *Law and Contemporary Problems* 9.
[181] Text to nn.58–64 in ch.3.

Malcolm Delevingne, in charge of both the drugs question at the Home Office and of leading Britain's drug delegation to the LoN in the 1920s and early 1930s, seized upon the advantages of drawing connections between the traffic in drugs and other forms of vice.[182] At the LoN, the traffic in women, drugs, and obscene publications were presented as being 'interlocking and self-reinforcing activities', and that all such traffic was under the control of the same criminal organisations.[183] This led to the several 'Suppression Conventions' targeting these various areas,[184] which Courtwright argues was part of a wider 'global anti-vice activism' which 'reached the peak of its influence in the first third of the twentieth century'.[185]

Domestically, there were several legislative and policy measures aimed at various (other) forms of vice during this period. Prostitution was a particularly hot topic. In 1912 whipping was reinstated as a punishment for 'living off immoral earnings'.[186] In 1927, a Committee was appointed to 'enquire into the law and practice regarding offences … in connection with prostitution and solicitation for immoral purposes in streets and public places'.[187] Interestingly, the resulting Macmillan Report did not use the term 'vice' at all. It stated that 'it will be universally accepted that the law is not concerned with private morals or with ethical sanctions', but that 'the law is undoubtedly concerned with such immorality as gives rise to indecency'.[188] The Committee reviewed various strategies, ranging from abolishing all solicitation-related offences to making all 'solicitation in the streets, however unobtrusive … an offence [per se]',[189] as well as several proposed Bills and existing legislation, and the practice of the police. It concluded that the existing law did 'not constitute a satisfactory code'.[190] Recommendations included: abolishing the term 'common prostitute'; replacing all existing legislation with a 'simple', gender-neutral offence of importuning (defined as 'acts of molestation by offensive words or behaviour') and an offence of frequenting any public place for the purpose of prostitution or solicitation so as to constitute a nuisance; and ensuring imprisonment was only applicable for repeat

[182] Text to n.185 in ch.3.
[183] Paul Knepper, *International Crime in the 20th Century: The League of Nations Era, 1919–1939* (2011) 71.
[184] Text to nn.179ff in ch.3.
[185] David T Courtwright, 'Global Anti-Vice Activism: A Postmortem' in Jessica R Pliley, Robert Kramm and Harald Fischer-Tiné (eds), *Global Anti-Vice Activism, 1890–1950: Fighting Drink, Drugs, and 'Immorality'* (2016) 313.
[186] Criminal Law Amendment Act 1912, s.2; cp text to n.20 above.
[187] Home Office, *Report of the Street Offences Committee* (Cmd 3231, 1928) 3 (Macmillan Report).
[188] ibid 11.
[189] ibid 13.
[190] ibid 20.

offences.[191] It also recommended that the police regard their duty 'more to prevent loitering and importuning than to detect it'; show 'considerable forbearance in dealing with these unfortunate women'; and that 'arrests should only be made as disagreeable necessities reluctantly performed because the warning has been disregarded'.[192]

However, 'these proposals were not enacted [and] the interwar years did not see the emergence of any consensus or even clarity about how to manage prostitution on the streets'.[193] In the 1930s, a dedicated 'vice squad'[194] of the Metropolitan Police was formed, primarily targeting 'commercial sex transactions, night clubs, bottle parties and licensing infringements'.[195] These operated throughout the 1950s and beyond (when 'it was feared London was becoming the "vice capital of the World"'),[196] retaining their main focus on prostitution.[197] Enforcement against prostitution 'depend[ed] on the enthusiasm of local police … The arrests [bore] little or no relation to the question whether the woman concerned did in fact annoy anyone'.[198] Eventually, the 1957 Wolfenden Report – discussed in detail in the next chapter – recommended 'that the law relating to street offences be reformulated so as to eliminate the requirement to establish annoyance' in order to facilitate convictions.[199] These recommendations were quickly enacted in the Street Offences Act 1959, which also increased the maximum penalties for prostitution-related offences.

The regulation of obscenity – as well as being caught up in LoN Conventions – was another vice targeted domestically, and has an extensive pedigree in English criminal law.[200] Post-WW1, however, 'social-purity institutions could no longer generate mass movements'.[201] As with prostitution, the result was an often contradictory or paradoxical approach. For

[191] ibid 28.
[192] ibid 24.
[193] Samantha Caslin and Julia Laite, *Wolfenden's Women: Prostitution in Postwar Britain* (2020) 6.
[194] Otherwise known as the 'C Section' or 'Clubs and Vice Unit'.
[195] Hallam, 'Script' (n.82) 165.
[196] Tim Newburn, *Permission and Regulation: Law and Morals in Post-War Britain* (1992) 51.
[197] Paul Rock, *The Official History of Criminal Justice in England and Wales: The 'Liberal Hour'*, vol 1 (2019) 411.
[198] Jean Graham Hall, 'The Prostitute and the Law' (1959) 9(3) *British Journal of Delinquency* 174.
[199] Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) para 256 (Wolfenden Report).
[200] Edward J Bristow, *Vice and Vigilance: Purity Movements in Britain since 1700* (1977) chs.2, 9. In the nineteenth century, the Lord Chief Justice stated that sales of obscene publications were more dangerous than the sale of poisons: MJD Roberts, 'Morals, Art, and the Law: The Passing of the Obscene Publications Act, 1857' (1985) 28(4) *Victorian Studies* 609, 609.
[201] Bristow (n.200) 222.

example, a 1923 Bill[202] sought to empower 'police searches for the simple possession of obscene literature [but it] was thrown out by parliament as a threat to civil liberties'.[203] Even so, prosecutions and destruction orders did continue to be used against 'obscene' publishers and publications in the interwar years under existing legislation,[204] and there were perennial calls in political circles to stamp out obscenity.[205] After the Second World War, a 1949 Bill[206] seeking to abolish theatre censorship – which the Lord Chamberlain had exercised exclusive powers over since around the turn of the eighteenth century – passed its second reading, but was timed-out. The case for retaining censorship was 'the fear that to remove control [would] be … to encourage indecency and vice',[207] as well as that the Lord Chamberlain system was 'quick, simple and cheap'.[208] The particular issue of theatre censorship would not be revisited for two decades. In the meantime, the police, Home Secretary and the DPP began 'an "anti-vice" drive' against obscenity.[209] The Children and Young Persons (Harmful Publications) Act 1955 'censored horror comics out of existence'[210] by criminalising the printing, publishing, selling or letting on hire 'any book or magazine … likely to fall into the hands of children or young persons … portraying (a) the commission of crimes; or (b) acts of violence or cruelty; or (c) incidents of a repulsive or horrible nature [which] would tend to corrupt a child or young person'.[211] This repressive and moralising statute was followed by the Obscene Publications Act 1959: 'a package deal intended to please both [those] who wanted to free noteworthy literature from censorship and those who wished to see pornography vigorously suppressed'.[212] The 1959 Act's criminalisation of publishing 'obscene articles', i.e., those which had a 'tend[ency] to deprave and corrupt',

[202] Criminal Justice HL Bill (1923) 62, cl.19.
[203] Bristow (n.200) 224.
[204] Obscene Publications Act 1857.
[205] Christopher Hilliard, *A Matter of Obscenity: The Politics of Censorship in Modern England* (2021) ch.2.
[206] Censorship of Plays (Repeal) HC Bill (1948–49) [56].
[207] Peter G Richards, *Parliament and Conscience* (1970) 123.
[208] Andrew James Holden, 'Letting the Wolf through the Door: Public Morality, Politics and "Permissive" Reform under the Wilson Governments, 1964–1970' (PhD thesis, Queen Mary, University of London 2000) 222, quoting *Report of the Joint Committee on Censorship of the Theatre* (1967, HL 255, HC 503) para 18.
[209] Newburn (n.196) 73.
[210] Christie Davies, 'How Our Rulers Argue about Censorship' in Rajeev Dhavan and Christie Davies (eds), *Censorship and Obscenity* (1978) 10.
[211] Children and Young Persons (Harmful Publications) Act 1955, ss.1–2.
[212] Davies (n.210) 11.

was thus subject to a defence of 'public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern'.[213]

Thus, in all of these areas (drugs, prostitution, and obscenity) the concept of vice was one which was consistently aired as a justification for legislation and policy at this time. However, there is much slippage in how the term 'vice', and the objects or behaviour categorised as vicious, were construed and targeted: as an unparalleled and damaging social evil; as a permeating harm to individuals' moral fabric; as a public nuisance; as a form of mere hedonistic indulgence or foolish curiosity; and even (as with the Macmillan Report) as something necessitating an empathetic approach. There is also slippage in the conflation of separate 'vices' with one another; in the 'wickedness' associated with each; and in the interplay between (and the muddying of) viciousness with other rationales justifying action. This meant that the legislative, policy, and enforcement responses varied considerably, and were a series of piecemeal and contextually-dependent measures subsumed under a very loose concept.

While this section can only provide an abridged discussion, it is included for two main reasons. First, to argue that while controlling vice was often given as a justification for intervention by legislators and policymakers – i.e., as something necessitating control via criminalising legislation – there are few (if any) clear principles underpinning this. This is because, inter alia, several basic definitional aspects of 'vice' were never clearly articulated, with confusion and inconsistency in the term's use. There is therefore some, but only limited synergy observable during this period between the law's approach to drugs and to other 'vicious' objects and behaviours. This conclusion is reminiscent of that given at the end of Chapter 3 regarding the development of transnational law during the LoN era, which had 'not been complemented (or complicated) by general discussion of coherent principles justifying or constraining criminalization',[214] making it difficult to extrapolate a wider 'legal consciousness' from this which accurately captures the developments during this time.[215] The second reason for including this section, following on from the first, is because (inter alia) broad-brush appeals to controlling 'vice' as a (powerful but half-baked) justification for

[213] Obscene Publications Act 1959, ss.1, 4. The Act was most famously used to prosecute the publishers of DH Lawrence, *Lady Chatterley's Lover* (1928): *Penguin Books* [1961] Crim LR 176.
[214] Neil Boister, '"Transnational Criminal Law"?' (2003) 14(5) *European Journal of International Law* 953, 957.
[215] Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (2014) 3.

criminalisation had, by the late 1950s, left several areas of the law ripe for (re)consideration and (re)rationalisation. As it happens, in the late 1950s and throughout the 1960s, all of these areas (drugs, prostitution, and obscene publications) and several more would be central targets of scrutiny and legislative change which would have broader repercussions across the criminal law.

Part Three: c.1960–c.2000

Overview of Part Three

This Part covers the period c.1960 to the turn of the twenty-first century. What ties this period together, at a high level, is that this was when the present system of British drug control was created. Chapter 5 focuses on the 1960s and 1970s, and Chapter 6 discusses the 1980s and 1990s. Although the four decades covered in this Part can be grouped together under the banner of the 'modern' era, the subdivision of this period into two separate chapters reflects the very different means by which drug laws and policies have been developed, and the differing rationales for criminalisation, since c.1960.

The drug law developments covered in Chapter 5 include the passing of the final Dangerous Drugs Acts (which, inter alia, ended the 'British System' of drug prescribing which had been established in 1926) and the landmark Misuse of Drugs Act 1971 (MDA). These changes occurred in 'an era when the fundamental principles of the criminal law [were] widely re-examined, and in many cases powerfully attacked in the name of social defence or social welfare'.[1] Perhaps the most famous illustration of this is the 1957 Wolfenden Report – which recommended strengthening measures against prostitution and the partial decriminalisation of homosexuality – and the ensuing Hart/Devlin debate on the enforcement of morals. Both the Report and the debate had a major influence, directly and indirectly, on the development of substantive criminal law and on criminal law theorising. Legislation enacted in the wake of the Report covered areas including, inter alia, prostitution, homosexual offences, abortion, obscene publications, and divorce; these legal changes are often labelled 'permissive' reforms, suggesting the long 1960s was a period of (unidirectional) increased liberalisation on morally-contentious issues. Meanwhile, this era also saw developments regarding the process of law reform itself, such as with the creation of the Law Commissions in 1965 which sought to take a holistic and modernising approach to law reform, rather than focusing only on black-letter 'lawyers' law'.[2]

[1] Gerald H Gordon, 'Book Review' 1968 *Scots Law Times (News)* 96, 96.
[2] Leslie Scarman, *Law Reform: The New Pattern* (1968) 28.

The knowledge gap that Chapter 5 seeks to address is the extent to which the MDA and other drug law developments aligned with the contemporaneous legal landscape just sketched. Much has been (and continues to be) written about the Hart/Devlin debate, the 'permissive' reforms, and the processes of law reform established in the 1960s. Separately, the MDA has been subject to extensive academic, political, and popular consideration across its over 50-year history. However, it has been rare for the MDA to be situated in the historical legal context of the time of its enactment; where such analyses exist, either the full extent of 1960s and 1970s drug law developments have not been fully considered, or the contemporaneous legal landscape has been given an abridged discussion. The thesis advanced here is that while there are several points of conceptual tension, there is a far greater degree of synergy between the era's drug laws and the broader understandings and practices of criminalisation. British drug legislation post-1964 had a strong affinity with the Wolfenden philosophy; was in line with leading scholarly thought, political viewpoints, and public perceptions; sought to be more scientifically rational and less hysterically moralising; was closely related to the 'double taxonomy' of liberalisation and repression which underpinned the era's 'permissive' reforms;[3] and was intended to be just one part of a flexible and modern solution to a rapidly-developing social issue.

During the 1980s and 1990s (covered in Chapter 6), the MDA remained the primary legislative framework for drug control, but it was augmented by a range of statutes which, inter alia: amended pre- and post-trial practices relating to the arrest, sentencing, and probation of drug offenders; strengthened measures against drug traffickers; and sought to adapt to new patterns of drug use such as heroin and solvent abuse. However, it is primarily wide-ranging policy changes which distinguish this period to that covered in Chapter 5. Commentators differ on the precise nature of these policy changes (and why they occurred), so the first section of Chapter 6 chronologically maps the developments in relation to both (on one hand) drugs and (on the other) wider criminal law/justice-related issues. It is argued that the legislative developments, policy underpinnings, and political discourses surrounding drugs and wider criminal law/justice-related issues were remarkably in step with one another throughout the period under examination. The latter section of Chapter 6 discusses the period's drug criminalisation from a more conceptual

[3] Stuart Hall, 'Reformism and the Legislation of Consent' in National Deviancy Conference (ed), *Permissiveness and Control: The Fate of the Sixties Legislation* (1980) 17–18.

standpoint with reference to the work of contemporaneous and current theorists. It is argued here that there is a cyclical pattern observable in drug law and policy developments, with several aspects of late twentieth century drug law and policy having strong antecedents going back over a century. This leads into the observation that despite drug laws being prima facie natural targets of contemporaneous criminal law theorists' criticisms, there was little direct engagement with drug legislation and policy. Chapter 6 ends with a discussion expanding on how (and why) several of the main targets of contemporaneous criminal law theorising, which had extensive and existing precedents in the area of drugs, only became problematised objects of attention, and in primarily non-drug related areas, in the 1990s and into the twenty-first century. From this, and ahead of this thesis' Conclusion, it is again noted that drug laws are more central to the criminal law in terms of having exerted an influence over a long period of time than has been fully recognised, and are a window into seeing and understanding patterns and processes of criminalisation.

Chapter 5: Drugs and Criminalisation in the 1960s and 1970s

This chapter focuses on the 1960s and 1970s, albeit there is some overlap with the previous Part.[1] This period saw major reforms in the criminal law's approach to drugs, most notably with the enactment of the Misuse of Drugs Act 1971 (MDA) which remains the primary legislative framework for the control of drugs in the UK today. This period also saw lively academic debate as to the limits and aims of criminal law; wide-ranging reforms in other areas of the criminal law; and new approaches to the process of law reform itself. All of these latter aspects have attracted much scholarly attention, and are essential to evaluating the degree of tension or synergy between British drug laws and contemporaneous understandings of legitimate criminalisation, but the place of drugs legislation in this broader context has been (perhaps surprisingly) under-theorised. In brief, it is this gap which this chapter seeks to address.

The first section of this chapter (5.1) is a chronological summary of the drugs legislation passed during this time. Section 5.2 discusses that drug legislation against the broader context just mentioned. Specific aspects of that broader context include (at section 5.2.1) the 1957 publication of the Wolfenden Report on homosexual offences and prostitution which precipitated the famous Hart/Devlin debate on the enforcement of morals; (at 5.2.2) the wide-ranging 'permissive' reforms of the 1960s, which covered, inter alia, homosexual offences, abortion, and censorship; and (at 5.2.3) the novel institutions and processes of law reform created at this time, most notably the passing of the Law Commissions Act 1965, as well as significant case law developments such as those relating to strict liability.

It would be reductive, if not impossible, to construct an elegant account of criminalisation during this period: legal developments were always the product of compromise and were not created according to an overarching plan. However, it is argued that, overall, there are more areas of conceptual synergy than there are tension between the MDA and other drug

[1] The First Brain Report (*Drug Addiction: Report of the Interdepartmental Committee* (1961)) was considered in Chapter 4, while the Wolfenden Report (Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957)) is considered here.

control statutes and the wider contemporaneous understandings and practices of criminalisation.

5.1 Chronological Summary

5.1.1 Single Convention 1961 and the Dangerous Drugs Acts 1964 and 1965

The UN Single Convention on Narcotic Drugs 1961 (which is still in force) was created 'to replace by a single instrument the existing multilateral treaties in the field, to reduce the number of international treaty organs exclusively concerned with control of narcotic drugs, and to make provision for the control of the production of raw materials of narcotic drugs'.[2] It retained several of the preceding transnational treaties' key tenets,[3] while modifying others. The retained tenets included: framing the transnational control of drugs as a humanitarian endeavour; ensuring the medical use of drugs was protected; focusing *primarily* on curtailing supply rather than demand; utilising an indirect approach whereby national legislatures retained control over domestic laws and were required only to report estimated supply requirements, actual usage statistics, and import/export figures of drugs to an international organisation with no police powers; and scheduling drugs according to their perceived addictive potential.[4] It was not, however, purely consolidatory. Describing the Single Convention as a 'shift towards a more prohibitive outlook that … can be regarded as a change of regime' and 'a "watershed" event', Bewley-Taylor and Jelsma note a number of important departures from previous treaties.[5] Transnational drug control was no longer merely a 'humanitarian endeavour',[6] and 'concerned with the health and welfare of mankind';[7] State Parties were now under a 'duty to prevent and combat' the 'serious evil'

[2] Single Convention on Narcotic Drugs, 1961 (signed 30 March 1961, entered into force 13 December 1964) 520 UNTS 151 preamble. This chapter's scope precludes a detailed analysis of the Convention's 51 Articles.
[3] Text to nn.135–136, 169ff in ch.3.
[4] David Bewley-Taylor and Martin Jelsma, 'Regime Change: Re-visiting the 1961 Single Convention on Narcotic Drugs' (2012) 23(1) *International Journal of Drug Policy* 72, 74.
[5] ibid 72–73.
[6] International Opium Convention (signed 23 January 1912, entered into force 28 June 1919) 8 LNTS 187 (Hague Convention) preamble.
[7] Single Convention (n.2) preamble.

of 'addiction to narcotic drugs'.[8] This 'represented a move away from reliance upon simply "drying up" excess capacity', with a greater focus on individual drug users than previously.[9] Article 36 included an expanded version of Article 2 of the Suppression Convention 1936 (which Britain had not ratified),[10] providing that, 'subject to its constitutional limitations', State Parties would:

> [E]nsure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention … shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

While the *use* of drugs was not included, the Convention was 'clearly intended to prevent/deter the non-medical and non-scientific use of listed substances on the basis that consumption is impossible without possession'.[11] The listed substances were another development from earlier treaties. The Convention did not criminalise directly and it included a built-in degree of flexibility in its interpretation and implementation;[12] 'provided always that [national laws] thereby do not establish a less "strict" or "severe" control system than that required by the Convention'.[13] However, there was an expectation that State Parties would follow the new scheduling system which extended controls to the cultivation

[8] ibid. This is the 'only [UN] treaty characterising the activity it seeks to regulate, control or prohibit as being "evil"': Rick Lines, '"Deliver Us From Evil"? The Single Convention on Narcotic Drugs, 50 Years On' (2010) 1 *International Journal on Human Rights and Drug Policy* 3, 7.
[9] Bewley-Taylor and Jelsma (n.4) 75.
[10] Text to nn.164–168 in ch.3.
[11] Bewley-Taylor and Jelsma (n.4) 76.
[12] For a strong view of this flexibility, see: John Collins, 'Rethinking "Flexibilities" in the International Drug Control System – Potential, Precedents and Models for Reforms' (2018) 60 *International Journal of Drug Policy* 107; Emily Crick and Adam Holland, 'How States have Adapted their Drug Laws' in Ilana Crome, David Nutt and Alex Stevens (eds), *Drug Science and British Drug Policy: Critical Analysis of the Misuse of Drugs Act 1971* (2022).
[13] United Nations Secretary-General, *Commentary on the Single Convention on Narcotic Drugs 1961* (1973) 51.

of plants including coca, cannabis, and poppies, as well as the quasi-medical use of those plants.[14] Schedule I drugs became subject to the strictest controls i.e., all those envisaged by the Convention; Schedule II drugs are subject to similar controls, except they do not need to be supplied in accordance with a medical prescription; and Schedule III substances are subject to the least control, with State Parties not required, for example, to report annual estimates.[15] Finally, Schedule IV drugs – which included heroin and cannabis – are those Schedule I drugs deemed to be 'particularly dangerous'; a State Party 'shall adopt any special measures which in its opinion are necessary' with regards to substances under this 'composite classification', including prohibitions on their use.[16]

Ahead of the Single Convention coming into force in December 1964, Westminster passed the Dangerous Drugs Act (DDA) 1964 to enable the Convention's ratification.[17] This was the last DDA directly enacted to give effect to an international agreement. To align with the provisions of the Single Convention, the DDA 1964 extended the controls in Part 1 of the DDA 1951 to poppy-straw, and created new offences (under the DDA 1951) of intentionally cultivating cannabis and of permitting premises to be used for smoking cannabis.[18] There was essentially no Parliamentary debate during the passage of this Act. Hansard records that only during the Bill's second reading in the Lords was a brief outline of the Bill's provisions given, and its purposes of enabling ratification of the Single Convention ('to deal with this extremely sordid traffic') and of countering teenagers' use of cannabis explained.[19] The Act was consolidated the following year into the DDA 1965.

[14] Single Convention (n.2) arts.2, 49.
[15] ibid art.2; Bewley-Taylor and Jelsma (n.4) 76–78; Philip Bean, *The Social Control of Drugs* (1974) 50–51.
[16] Single Convention (n.2) art.2; Bewley-Taylor and Jelsma (n.4) 76.
[17] HL Deb 7 April 1964, vol 257, col 11.
[18] DDA 1964, ss.4, 9, 10. Previously such provisions had applied only to opium.
[19] HL Deb 7 April 1964, vol 257, cols 14, 17–18; cf other readings: HC Debs 31 January 1964, vol 688, col 778; 13 March 1964, vol 691, col 950; HL Deb 28 April 1964, vol 257, col 893.

5.1.2 Drugs (Prevention of Misuse) Act 1964

The Drugs (Prevention of Misuse) Act 1964 (DPMA) followed a few months after the DDA 1964. Due to concerns surrounding young people abusing amphetamines ('pep pills'),[20] this Act placed generic[21] controls over that class of substances and was 'a radical departure from previous legislation as … it controlled drugs not related to international treaties'.[22] Intended to be 'a suitable type of control … stricter than that provided for under the poisons law, but not so severe as the control over dangerous drugs',[23] the Act created offences of possession and importation, but not supply, and provided that the Home Secretary could order the addition or removal of drugs from the Act's schedule. The maximum penalties were, on summary conviction, 6 months' imprisonment and/or a £200 fine, and on indictment, 2 years' imprisonment and/or a fine.[24] In contrast to the DDA 1964, the DPMA was subject to extensive Parliamentary discussion. The Home Secretary began by stating the Bill's purpose was to protect the young from the 'manifestly growing' 'evil' and 'serious social damage arising from the growing misuse of drugs'; a motif which constantly surfaced throughout the debates.[25] Although there was no unequivocal opposition to the Bill,[26] several themes of discussion emerged. These included: the risks of over-reaching paternalistic legislation (as well as its necessity);[27] the Bill's lack of distinction between those who 'peddle large quantities … of those drugs, and … the person who is found with a few … in his possession';[28] the need for caution when creating 'purely repressive legislation … because prohibition so frequently has completely unforeseen and unexpected results';[29] recognition of the

[20] HC Deb 30 April 1964, vol 694, cols 600–01, 617; these concerns were paternalistic and were also driven by perceptions of delinquency.
[21] Where 'a group of substances are defined by their chemical structure'; however, the generic definitions in the DPMA 'included many drugs that were not stimulants', and were repealed by the DPMA Modification Order 1970, SI 1970/1796: Leslie A King, 'A Forensic Science Perspective' in Crome, Nutt and Stevens (n.12) 39–40; HL Deb 27 October 1970, vol 312, col 46.
[22] Bean, *The Social* (n.15) 87. See also: Harvey Teff, *Drugs, Society and the Law* (1975) 22; DPMA, ss.1, 5, sch.1.
[23] HL Deb 7 July 1964, vol 259, col 945.
[24] DPMA, s.1(1).
[25] HC Debs 30 April 1964, vol 694, cols 600–01, 620, 624, 627, 638, 655–59, 662–63; 1 May 1964, vol 694, col 804; 22 June 1964, vol 697, cols 181–82.
[26] cf HC Deb 30 April 1964, vol 694, col 643: 'I find myself, not with great confidence but definitely of the opinion that we have not yet reached a point at which a Measure of this repressive character is justified'.
[27] ibid 607–08; HL Deb 7 July 1964, vol 259, col 949. A paternalistic outlook on drugs was also aired during a debate on obscene publications: HL Deb 21 July 1964, vol 260, cols 591–92.
[28] HC Debs 30 April 1964, vol 694, cols 609, 632, 653; 22 June 1964, vol 697, cols 173, 180–81; HL Deb 7 July 1964, vol 259, col 946.
[29] HC Deb 30 April 1964, vol 694, cols 613, 616–17, 647–50.

criminal law's bluntness as a tool for solving social ills;[30] the arbitrariness of the alcohol/drugs distinction;[31] and that further controls should be imposed on manufacturers.[32]

The DMPA remained in force, alongside the consolidatory DDA 1965, until the passing of the MDA. Whereas the list of proscribed substances under the DDA 1965 was tied to the schedules of the Single Convention,[33] the DPMA was regarded by legislators as a useful tool for controlling drugs which were not internationally scheduled:[34] the hallucinogens LSD and DMT and some synthetic forms of cannabis were later added to the DPMA by statutory instruments.[35]

5.1.3 Dangerous Drugs Act 1967

The Second Brain Report[36] was published in 1965. The First Report, published in 1961, had concluded that the problem of drug addiction in the UK was small, the 'British System' of GPs prescribing drugs to addicts as established by the Rolleston Committee in 1926 was working well, and that there was no need for any substantive legislative change.[37] However, the Committee was reconvened in 1964 'to consider whether, in the light of recent experience, the advice they gave in 1961 in relation to the prescribing of addictive drugs by doctors needs revising, and if so to make recommendations'.[38] The 'recent experience' was a five-fold growth in the number of heroin addicts known to the Home Office between 1959 and 1964, driven by a much younger demographic whose addiction was of a 'non-therapeutic origin'.[39] The Committee put this down to 'the activity of a very few doctors

[30] ibid 640, 647, 671.
[31] ibid 645–46, 678.
[32] ibid 635, 677; HC Deb 22 June 1964, vol 697, cols 165–68.
[33] DDA 1965, s.12.
[34] HL Deb 11 May 1966, vol 274, cols 660–61; HC Deb 5 August 1966, vol 733, col 888.
[35] DPMA Modification Order 1966, SI 1966/1001; DPMA Modification Order 1970, SI 1970/1796.
[36] *Drug Addiction: The Second Report of the Interdepartmental Committee* (1965) (Second Brain Report).
[37] First Brain Report (n.1) para 67; text to nn.92ff in ch.4. For a concise critical discussion and comparison of the two Reports, see: Kenneth Leech, 'The Junkies' Doctors and the London Drug Scene in the 1960s: Some Remembered Fragments' in David K Whynes and Philip T Bean (eds), *Policing and Prescribing: The British System of Drug Control* (1991).
[38] Second Brain Report (n.36) para 4.
[39] From 68 to 342: Henry Matthew, 'The Second Report of the Interdepartmental Committee on Drug Addiction' (1966) 61 *British Journal of Addiction* 169, 172–73. See also: Alan Glanz, 'The Fall and Rise of the

who have prescribed excessively for adults' rather than any organised illicit traffic.[40] It recommended a formal system of notification of addicts; the provision of advice to doctors on addiction; the provision of treatment centres; and restriction of doctors' supplies to addicts.[41] The Report prompted the establishment of the Advisory Committee on Drug Dependence, the precursor to the Advisory Council on the Misuse of Drugs. Its composition included a medical professor, MP, policeman, prison governor, psychiatrist, pharmacist, and a researcher on student problems;[42] and its terms of reference were '[t]o keep under review the misuse of narcotic and other drugs which are likely to produce dependence, and to advise on remedial measures that might be taken or on any other related matters which the Ministers may refer to it'.[43] The Report also generated an enormous amount of Parliamentary debate on drugs, with the general issue seemingly under constant discussion throughout 1966–1967. As will be discussed later in this chapter,[44] these debates were notably measured and rational, with little of the moralising language of 'evil' and 'vice' which had been a staple of drug debates in preceding decades. In addition to these general discussions on drug-related issues, the statute enacted in the wake of the Report, the DDA 1967, received extensive (but similarly measured and rational) scrutiny.[45] The Act enabled regulations to be made restricting doctors' supply of drugs to addicts, thereby ending the 40-year Rolleston system.[46] These regulations, made in 1968, provided that medical practitioners:

General Practitioner' in John Strang and Michael Gossop (eds), *Heroin Addiction and Drug Policy: The British System* (1994) 153; Joy Mott, 'Crime and Heroin Use' in Whynes and Bean (n.37) 80; Horace Freeland Judson, *Heroin Addiction in Britain* (1973) ch.1.

[40] Second Brain Report (n.36) para 11.

[41] ibid 43.

[42] James H Mills, *Cannabis Nation: Control and Consumption in Britain, 1928–2008* (2012) 141.

[43] HC Deb 31 October 1966, vol 735, col 17.

[44] At nn.152–161 below.

[45] ibid.

[46] DDA 1967, s.1.

> [S]hall not administer, supply, or authorise the administration or supply to persons addicted[47] to any drug [in Part 1 of the schedule to the DDA 1965], or to prescribe for such persons, any [cocaine or diamorphine] except (a) for the purpose of relieving pain due to organic disease or injury; or (b) under the authority and in accordance with a [Home Office] licence.[48]

The effect of this was to remove GPs from addiction treatment and replace them with a 'new addiction treatment centre, located within a hospital framework and staffed by a multidisciplinary team headed by a consultant psychiatrist'.[49] Separate regulations were passed requiring doctors to notify the Home Office of the 'name, address, sex, date of birth and [NHS] number' of addicts, as well as their date of attendance and the drug(s) concerned.[50] The aim here was to 'achieve better control over doctors' prescribing "dangerous drugs", [reduce] addicts' opportunities to obtain … drugs from more than one doctor [and to collect] national epidemiological and statistical information about addiction'.[51] Additionally, the DDA 1967 provided for the setting up of medical tribunals to take action against doctors who flouted the regulations,[52] and gave police constables widened (and controversial)[53] powers of arrest and search of persons and vehicles without warrant where they had 'reasonable grounds to suspect [a] person is in possession of a drug in contravention of the [DDA 1965 or DMPA]'[54] – powers which went 'well beyond those applicable in other areas of the law'.[55]

[47] Defined as 'if, as a result of repeated administration, he has become so dependent upon the drug that he has an overpowering desire for the administration of it to be continued'.
[48] Dangerous Drugs (Supply to Addicts) Regulations 1968, SI 1968/416 reg.1.
[49] Glanz (n.39) 154; Sarah G Mars, *The Politics of Addiction: Medical Conflict and Drug Dependence in England since the 1960s* (2012) ch.1.
[50] Dangerous Drugs (Notification of Addicts) Regulations 1968, SI 1968/136 reg.1.
[51] Joy Mott, 'Notification and the Home Office' in Strang and Gossop (n.39) 287.
[52] DDA 1967, s.2. HC Deb 6 April 1967, vol 744, col 478: 'A doctor would be liable to conviction before a court only if, after withdrawal of his authority, he supplied or prescribed prohibited drugs'.
[53] Bean, *The Social* (n.15) 162–63; Mills (n.42) 157–59.
[54] DDA 1967, s.6. This was not found in the original Dangerous Drugs HC Bill (1966–67) [222], having been inserted by the Lords: Dangerous Drugs HC Bill (1966–67) [315].
[55] JA Andrews, 'Law in the Permissive Society' (1971) 2 *Cambrian Law Review* 13, 13.

5.1.4 Misuse of Drugs Act 1971

Against the backdrop of, inter alia, 'new patterns of drug use' and public dissatisfaction with the alignment of cannabis with opiates in both UK and international law,[56] a sub-committee of the Advisory Committee on Drug Dependence, chaired by Baroness Wootton, was convened in April 1967 to review:

> [E]vidence on LSD and Cannabis with reference to pharmacological, clinico-pathological, social and legal aspects, … express an informed opinion about medical and dependence dangers of LSD and cannabis, [and] suggest accordingly the type of control which should be established to limit such dangers.[57]

After 17 meetings across 18 months of carefully analysing a wide range of evidence, the Wootton Report was submitted in November 1968 and published in January 1969.[58] It concluded that it was 'necessary to maintain [criminal law] restrictions on the availability and use of [cannabis]',[59] but that 'the association of cannabis in legislation with heroin and the other opiates is entirely inappropriate and … the present penalties for possession and supply are altogether too high'.[60] The Report recommended, inter alia, that the maximum sentences for cannabis offences should be significantly reduced, in particular possession offences;[61] that further research should be undertaken; and that the cannabis issue be kept under ongoing review by the Advisory Committee.[62] Although the Report 'was disowned by

[56] Advisory Committee on Drug Dependence, *Cannabis: Report* (1968) para 7 (Wootton Report).
[57] Quoted from Mills (n.42) 142.
[58] For a detailed account of the sub-committee's work, see: ibid 142–53.
[59] Wootton Report (n.56) para 71.
[60] ibid 81.
[61] ibid 87: in the 'hope that juvenile experiments in taking cannabis would be recognised for what they are, and not treated as antisocial acts or evidence of unsatisfactory moral character'.
[62] ibid 73–75, 89, 90.

the government that had sponsored it'[63] and was met with much 'reactionary hot-air' from politicians in the immediate aftermath, 'most of it was incorporated into the [MDA]'.[64]

The Misuse of Drugs Bill was first introduced in March 1970.[65] Following Labour's defeat in the general election a few months later, it was immediately reintroduced in identical form by the new Conservative Government.[66] The Parliamentary debates, as Seddon notes, were (once again) remarkably measured.[67] Following Royal Assent on 27 May 1971, the MDA came into force in stages between 1972 and 1973.[68] The MDA repealed the DPMA and the DDAs 1965 and 1967,[69] and placed the Advisory Committee, now recast as the Advisory Council on the Misuse of Drugs (ACMD), on a permanent footing.[70] The duty of the ACMD was to 'keep under review the situation in the [UK] with respect to drugs which are [or are] likely to be misused' where such misuse could have 'harmful effects sufficient to constitute a social problem', and to advise the Government on measures which ought to be taken, 'whether or not involving alteration of the law'.[71] The ACMD was to focus on, inter alia, restricting or supervising the supply of drugs; the provision of treatment, rehabilitation and after-care; promoting cooperation between professional and community groups regarding drugs; public education; and promoting research;[72] and it was to be comprised of not less than 20 members, including those with 'wide and recent experience' of the practice of medicine, dentistry, veterinary medicine, pharmacy, and chemistry, as well as persons with 'wide and recent experience of social problems connected with the misuse of drugs'.[73]

The MDA introduced a new A/B/C drug classification system.[74] This was similar to, but neither identical nor linked to, the scheduling system under the Single Convention. A key aim of the Act was to decouple national from international legislation to ensure flexibility

[63] Ann Oakley, 'The Strange Case of the Two Wootton Reports: What can we Learn about the Evidence–Policy Relationship?' (2012) 8(3) *Evidence and Policy* 267, 268.
[64] Mills (n.42) 151–52.
[65] Misuse of Drugs HC Bill (1969–70) [121].
[66] Misuse of Drugs HC Bill (1970–71) [15].
[67] Toby Seddon, 'The Sixties, Barbara Wootton and the Counterculture: Revisiting the Origins of the MDA 1971' in Crome, Nutt and Stevens (n.12) 185–87.
[68] MDA (Commencement No 1) Order 1971, SI 1971/2120; MDA (Commencement No 2) Order 1973, SI 1973/795. The bulk of the Act, including offences, entered into force on 1 July 1973.
[69] MDA, sch.6. All references in this chapter are to the Act as originally enacted.
[70] ibid s.1(1).
[71] ibid s.1(2).
[72] ibid s.1(2)(a)–(e).
[73] ibid sch.1.
[74] ibid sch.2.

in drug control.[75] Thus, for example, cannabis was placed in the middle, Class B category, even though it was in the most stringent Schedule IV under the Single Convention. This was a compromise position: while some legislators deemed the long term and severe 'prohibition [and] condemnation' of cannabis was justified,[76] others thought 'the present allocation of cannabis to Class B is wholly misplaced' and advocated for 'the creation of a new class, Class D, or … to down-grade cannabis from Class B to Class C'.[77] In addition to separate categories, the MDA introduced discrete offences of importation/exportation; production; supply; possession; possession with intent to supply; cannabis cultivation; and other miscellaneous offences.[78] These latter offences included knowingly permitting or suffering, while being an occupier or manager of a premises, the production and supply of controlled drugs, the preparation of opium for smoking, and the smoking of cannabis or opium; as well as a range of opium-related offences first introduced under the Defence of the Realm Act 1914, regulation 40B and the DDA 1920.[79] Maximum penalties were set out in Schedule 4, broken down by the A/B/C drug class and by each discrete offence. The overall effect of this was 'to increase the penalties for some drugs and decrease them for others'.[80] Thus, whereas the DDA 1965 had prescribed a maximum sentence of 10 years' imprisonment for the sale, possession, etc., of cannabis, heroin, cocaine, etc., under the MDA the maximum penalty for cannabis possession became 5 years', heroin possession 7 years', cocaine supply 14 years', and cannabis cultivation 14 years' imprisonment.[81] Similarly, whereas possession of LSD under the DPMA was punishable by 2 years' imprisonment , the MDA increased this to 7 years; possession of other drugs, such as the newly-Class C amphetamine chlorphentermine, remained subject to the same (2-year) sentences as in the DPMA.[82]

The MDA also made extensive provision for the regulation of doctors, pharmacists and other professionals involved in the supply and use of controlled drugs; for substances to be

[75] Bean, *The Social* (n.15) 88.
[76] HC Deb 16 July 1970, vol 803, col 1837.
[77] HL Deb 4 February 1971, vol 314, col 1395.
[78] MDA, ss.3–6, 8–9.
[79] ibid ss.8–9; text to nn.3ff in ch.3; DDA 1920, s.5.
[80] Bean, *The Social* (n.15) 89; cf the assertion by Alex Mold, 'Framing Drug and Alcohol Use as a Public Health Problem in Britain: Past and Present' (2018) 35(2) *Nordic Studies on Alcohol and Drugs* 93, 97: 'As the consumption of all drugs increased over this period, the legal penalties attached to their use, sale and distribution became more severe'.
[81] DDA 1965, s.16; MDA, sch.4.
[82] Text to nn.24, 35 above; MDA, schs.2, 4.

added or removed by Orders in Council;[83] for the Home Secretary to 'by regulations make such provision as appears to him necessary or expedient for preventing the misuse of controlled drugs';[84] and for police powers of arrest and evidence-gathering (which were carried over from the DDA 1967).[85] Lastly, reverse-burden defences were provided to those charged with certain offences. These included the defence of possessing controlled drugs in order to deliver them to the authorities,[86] as well as the section 28 defence that the accused 'neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove'.[87] This section 28 defence (which applied to the offences of production, supply, possession, possession with intent to supply, cannabis cultivation, and some opium-related offences) was enacted to remove an injustice created by previous legislation, namely the absolute liability imposed on someone who was unaware they were supplying, possessing, etc. a controlled drug.[88]

5.1.5 Psychotropic Convention 1971 and the 1972 Protocol to the Single Convention

A final point worth noting is that Westminster chose not to wait until the 1971 Psychotropic Convention[89] was agreed before passing the MDA. The Convention's main purpose was to bring under international control (mainly synthetic) drugs not included in the Single Convention, including amphetamines, barbiturates, benzodiazepines, and psychedelics. It also included a provision in Article 22 that State Parties 'may provide, either as an alternative to conviction or punishment or in addition to punishment, that such abusers

[83] MDA, s.2(2).
[84] ibid s.10.
[85] ibid ss.23–24. See further, e.g.: Teff, *Drugs* (n.22) 23; Bean, *The Social* (n.15) 90.
[86] MDA, s.5(4).
[87] ibid s.28(2).
[88] The defence was devised by the Law Commission, following *Warner* v *Metropolitan Police Commissioner* [1969] 2 AC 256 and *Sweet* v *Parsley* [1970] AC 132: Law Commission, *Codification of the Criminal Law: General Principles: The Mental Element in Crime* (Law Com CP No 31, 1970) 2 (fn.4), 37; *Fifth Annual Report* (Law Com No 36, 1970) para 47; Teff, *Drugs* (n.22) 37; Wootton Report (n.56) para 82; cf, e.g.: *Lockyer* v *Gibb* [1967] 2 QB 243. Discussed further below at nn.200, 233–240 (and text to).
[89] Convention on Psychotropic Substances (signed 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175.

undergo measures of treatment, education, after-care, rehabilitation and social reintegration'. This novel provision for treatment and alternative (non-penal) disposals of drug offenders was replicated in the 1972 Protocol to the Single Convention.[90]

5.2 British Drug Laws and Criminalisation in the Long 1960s

Having set out the developments in British drug legislation during the 1960s and 1970s in the foregoing chronological summary, this section considers those developments against the wider context of British criminal law and criminalisation over the same period. As noted in this chapter's introduction, this period saw lively and influential academic debate as to the criminal law's limits and aims; developments in case law; and new approaches to the process of law reform itself.

The long 1960s also saw an enormous number of reforms to the criminal law. Here, the label 'permissive legislation' is one which 'cannot be avoided',[91] and refers to a wide range of statutes enacted between 1957–1970, which, in some ways, provided for a greater degree of individual liberty on morally-contentious issues.[92] As an adjective, 'permissive' has been heavily criticised, but as a collective noun, 'permissive legislation' has stuck as a shorthand for reforms which included: the limitation of capital punishment;[93] limiting censorship of 'obscene' literature, television and theatre;[94] the decriminalisation of suicide;[95] abortion law;[96] homosexual offences;[97] and gambling regulation.[98] In addition to these criminal law reforms, other legal changes coupled to the concept of permissiveness

[90] Protocol amending the Single Convention on Narcotic Drugs, 1961 (signed 25 March 1972, entered into force 8 August 1975) 976 UNTS 3 art.14 inserted into the Single Convention (n.2) art.36(1)(b).
[91] Stuart Hall, 'Reformism and the Legislation of Consent' in National Deviancy Conference (ed), *Permissiveness and Control: The Fate of the Sixties Legislation* (1980) 2; Marcus Collins, *The Beatles and Sixties Britain* (2020) 27.
[92] For one (extensive) list, see: Collins (n.91) 27, table 1.2.
[93] Homicide Act 1957, pt.2; Murder (Abolition of Death Penalty) Act 1965.
[94] Obscene Publications Acts 1959 and 1964; Theatres Act 1968.
[95] Suicide Act 1961.
[96] Abortion Act 1967.
[97] Sexual Offences Act 1967.
[98] Betting and Gaming Act 1960; Betting, Gaming and Lotteries Act 1963; Gaming Act 1968. '[T]he aim of the [1960 Act] was to liberalise the law on gaming … The [1968 Act] was passed to restore order': Social and Economic Impact of the Gambling Industry Committee, *Gambling Harm – Time for Action* (HL 2019–21, 79) paras 38, 40.

related to divorce;[99] contraception;[100] equal pay;[101] Sunday entertainments;[102] and race relations.[103] Taken at face value, these reforms have sometimes been used as an index of social change and have generated a fabled image of the 1960s as being a period of pure liberalisation, with the direction of travel being one-way towards a narrowing use of the criminal sanction.[104] Such assessments are by no means exclusively retrospective, with an extended Commons debate on the supposed rising tide of permissiveness having taken place in 1970.[105] Other accounts are strongly critical, with a 'determination to portray the 1960s as failing to complete the liberation of women, homosexuals and other traditionally subservient or deviant groups in society'.[106]

Yet, surprisingly rarely is this broader context holistically applied to analysing the contemporaneous changes in British drug controls.[107] Often, where previous literature does discuss drug laws in such contextual perspective, the primary objects of inquiry are other (i.e., non-drug-related) legal reforms.[108] Thus, these works' brief considerations of drug controls within a wider analysis are not, without more articulation, fully convincing. Other scholarly works, by contrast, are focused firmly on British drug policies and controls in the 1960s, but have a narrower overall scope so necessarily do not take full account of the broader context.[109]

The result of this is that important and valuable contributions have reached very different conclusions. Two examples may be briefly noted here as illustrations. Hall argues that 'the

[99] Divorce Reform Act 1969.
[100] National Health Service (Family Planning) Act 1967.
[101] Equal Pay Act 1970.
[102] e.g., Statute Law (Repeals) Act 1969, which repealed several enactments relating to Sunday observances. For a detailed account, see: Andrew James Holden, 'Letting the Wolf through the Door: Public Morality, Politics and "Permissive" Reform under the Wilson Governments, 1964–1970' (PhD thesis, Queen Mary, University of London 2000) ch.7.
[103] Race Relations Acts 1965 and 1968. See, e.g.: John Lea, 'The Contradictions of the Sixties Race Relations Legislation' in National Deviancy Conference (n.91).
[104] For discussion, see, e.g.: Tim Newburn, *Permission and Regulation: Law and Morals in Post-War Britain* (1992) ch.1.
[105] HC Deb 4 May 1970, vol 801, cols 38–104. See also: HC Deb 23 July 1969, vol 787, cols 1901–12.
[106] Holden (n.102) 26.
[107] One notable (and early) example is the work of Harvey Teff, 'Drugs and the Law: The Development of Control' (1972) 35(3) *Modern Law Review* 225; *Drugs* (n.22).
[108] Andrews (n.55); Holden (n.102); Newburn (n.104) 168–73; Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800* (4th edn, 2018) 302.
[109] See, e.g.: Seddon, 'The Sixties' (n.67); 'Immoral in Principle, Unworkable in Practice: Cannabis Law Reform, The Beatles and the Wootton Report' (2020) 60(6) *British Journal of Criminology* 1567; Oakley (n.63). Or, they may discuss aspects of the broader context, but not specifically in relation to *British* drug laws: David Elkins, 'Drug Legalization: Cost Effective and Morally Permissible' (1991) 32(3) *Boston College Law Review* 575, 592–97.

Wootton Report on drugs … belongs to [the 'permissive'] phase, though the [MDA] legislated in a thoroughly reactionary direction, and may well be regarded as bringing the period of Home Office [permissive] "reformism" to an end'.[110] By contrast, Seddon argues that the MDA 'has a distinctly more mixed and complex genesis and character. It lies squarely in the prohibition template *but* was also shaped [via the Wootton Report] by the radical countercultural calls for cannabis law reform';[111] i.e., a counterculture embracing a:

> [N]ew ethic of individual freedom [which] underpinned the various strands of the emerging 'permissive society' in the late 1960s – relating to homosexuality, abortion, divorce and so on – which all centred on turning behaviour that had previously been a question of public morality into private matters for free individuals.[112]

The thesis advanced here is that Hall and Seddon are both (partly) right. The MDA (and other drug legislation of the era) was reactionary in some respects; but was also 'protean and polymorphous'[113] and part of a shift towards rationality and dissociation from moral judgement in others. It should not be seen as the death-knell of 'reformism', as argued by Hall (and others);[114] but to situate the MDA alongside homosexuality, abortion, divorce ('and so on') reforms within a general rubric of countercultural 'permissiveness' and individual freedom – without a more detailed analysis of those reforms and their underpinning principles – paints in too broad brushstrokes.

Moreover, due to their stated focus, both Hall and Seddon's accounts necessarily have not considered the full range of 1960s drug legislation and/or other developments. The following discussion seeks to close this gap, and will consider the degree to which the drug legislation previously outlined was in tension or synergy with the contemporaneous conceptions of legitimate criminalisation as the discussion progresses. Subsection 5.2.1

[110] Hall (n.91) 1–2. Similarly, see: Newburn (n.104) 5, 8; Collins (n.91) 33, table 1.4; Weeks (n.108) 302.
[111] Seddon, 'The Sixties' (n.67) 189–90.
[112] Seddon, 'Immoral' (n.109) 1579.
[113] Seddon, 'The Sixties' (n.67) 190.
[114] Above at n.110.

considers the Wolfenden Report and the ensuing academic debates; section 5.2.2 discusses the principles underpinning 'permissive' reforms; and section 5.2.3 comments on other changes including the establishment of the Law Commissions as a new way of approaching the task of law reform itself.

5.2.1 The Wolfenden Report and Resulting Legal–Academic Debates

The Wolfenden Report,[115] and the legal–academic debates which followed its publication, are often the starting point, a recurring theme, and/or a primary focus of discussion of 1960s British criminal law reforms and theory.[116] The Committee was set up in 1954 with terms of reference 'to consider (a) the law and practice relating to homosexual offences and the treatment of persons convicted of such offences … and (b) the law and practice relating to offences … in connection with prostitution and solicitation for immoral purposes'.[117] Ryan notes the Home Office's reasons for establishing the Committee were that the offence of 'gross indecency' between two men under the Criminal Law (Amendment) Act 1885, section 11, had become 'a blackmailer's charter, and a standing temptation to the police to engage in entrapment', and that 'street-based prostitution had got out of hand, especially in central London'.[118] The Committee's stated approach was to recognise the importance of morality in the criminal law and that a legitimate function of the law is to protect the public, particularly the young or otherwise vulnerable, from what is offensive, injurious, exploitative or corrupting; but that crime should not be equated with sin and 'there must remain a realm of private morality and immorality which is … not the law's business'.[119]

[115] Wolfenden Report (n.1).

[116] e.g., (by date of publication): HLA Hart, *Law, Liberty and Morality* (1963) i; Patrick Devlin, *The Enforcement of Morals* (1965) v; Herbert L Packer, *The Limits of the Criminal Sanction* (1968) 301; Hall (n.91) 1; Newburn (n.104); Holden (n.102); Malcolm Thorburn, 'The Radical Orthodoxy of Hart's *Punishment and Responsibility*' in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (2014) 279, 281; Paul Rock, *The Official History of Criminal Justice in England and Wales: The 'Liberal Hour'*, vol 1 (2019); Aniceto Masferrer, 'Criminal Law and Morality Revisited: Interdisciplinary Perspectives' in Aniceto Masferrer (ed), *Criminal Law and Morality in the Age of Consent: Interdisciplinary Perspectives* (2020) 1; Nicola Lacey, 'Patrick Devlin, The Enforcement of Morals (1965)' in Chloë Kennedy and Lindsay Farmer (eds), *Leading Works in Criminal Law* (2024) 82, 83.

[117] Wolfenden Report (n.1) para 1.

[118] Alan Ryan, 'Hart and the Liberalism of Fear' in Matthew H Kramer (ed), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (2008) 317–18; Wolfenden Report (n.1) paras 109, 229.

[119] Wolfenden Report (n.1) paras 13–14, 61.

Published in 1957, the Report's headline recommendations – based primarily[120] on the Committee's private/public morality distinction – were 'that homosexual behaviour between consenting adults in private be no longer a criminal offence', and 'that the law relating to street offences [i.e., prostitution] be reformulated so as to eliminate the requirement to establish annoyance' in order to facilitate convictions.[121] The Report immediately attracted attention. Its recommendations for homosexual offences reforms were variously welcomed by some[122] while being criticised by others for not going far enough,[123] but it was the views of those who thought the Report's recommendations went too far[124] that won out for a decade until homosexual conduct was partially decriminalised in England and Wales by the Sexual Offences Act 1967. Its recommendations for prostitution law reform, by contrast, had been quickly enacted in the Street Offences Act 1959, which also increased the maximum penalties for prostitution-related offences.[125]

The most famous legal discussion prompted by the Wolfenden Report was the 'Hart/Devlin debate'. The contours of this debate are well-known so will only briefly be summarised here, and only insofar as they are relevant to this chapter's discussion.[126] In 1959 the judge Patrick Devlin, who had given evidence to the Wolfenden Committee, delivered the Maccabaean Lecture in Jurisprudence and gave his overall approval to the Committee's findings insofar as its authors 'were evolving a working formula to use for reaching a number of practical conclusions'.[127] However, he objected 'that a complete separation of crime from sin would not be good for the moral law and might be disastrous for the criminal',[128] and that 'it is wrong in principle' that 'notwithstanding … the right of society to condemn homosexuality and prostitution as immoral … special circumstances [are

[120] As well as, e.g., a quasi-medicalised conception of homosexuality as a 'condition' or 'deviation': ibid 27–37; Lacey (n.116) 96.
[121] Wolfenden Report (n.1) paras 62, 256.
[122] Including the National Assembly and the Moral Welfare Council of the Church of England: Matthew Grimley, 'Law, Morality and Secularisation: The Church of England and the Wolfenden Report, 1954–1967' (2009) 60(4) *Journal of Ecclesiastical History* 725; Laura Monica Ramsay, 'The Church of England, Homosexual Law Reform, and the Shaping of the Permissive Society, 1957–1979' (2018) 57(1) *Journal of British Studies* 108; Peter G Richards, *Parliament and Conscience* (1970) 68–72.
[123] François Lafitte, 'Homosexuality and the Law: The Wolfenden Report in Historical Perspective' (1958) 9(1) *British Journal of Delinquency* 8.
[124] Ryan (n.118) 319: the 'Home Secretary immediately rejected the proposals'.
[125] Street Offences Act 1959, s.4; text to nn.186–200 in ch.4.
[126] Hart, *Law* (n.116); Devlin (n.116); Lacey (n.116); Thorburn (n.116); Newburn (n.104) 64–70; Teff, *Drugs* (n.22) 107–12.
[127] Devlin (n.116) v–vi, 2.
[128] ibid 4.

required] to justify intervention of the law'.[129] Arguing that 'societies disintegrate … when no common morality is observed',[130] Devlin stated that the applicable benchmark of immorality 'for the purpose of the [criminal] law' was that of the 'reasonable' – and Christian – man.[131] The criminalisation of vices and corrupting addictions were, in short, akin to the criminalisation of treason insofar as all were essential to society's survival.[132]

'Devlin's trenchant position swiftly elicited an equally sharply drawn riposte' from HLA Hart.[133] Taking a liberal, utilitarian, 'harm to others'-based approach, Hart argued (per Lacey's concise summary) that 'social morality was not … a seamless web, damage to which could be equated to treason. Rather, it should be viewed as a number of parts, and the question of whether legal enforcement was compatible with liberal principles assessed in relation to each separate part';[134] and he posited that the effect of Devlin's position would be to, inter alia, permit 'the cruel persecution of a racial or religious minority' if that aligned with popular morals.[135] Yet, in a 'middle-of-the-road' manner,[136] Hart rejected JS Mill's hard-line stance against paternalism, arguing that legal paternalism might be justified in some limited circumstances (e.g., 'the supply of drugs or narcotics, even to adults')[137] on utilitarian principles; and he similarly rejected the classical libertarian/Benthamite utilitarian viewpoint that the only function of punishment was deterrence,[138] arguing that 'a partial determinant of the severity of punishment' was the 'relative moral wickedness' of criminal actions; that is, that retribution had a place in sentencing.[139]

Lacey notes that the generally accepted view was that Hart 'had the better of the argument',[140] notwithstanding Devlin's rebuttal of Hart and his extended defence of his position in 1965.[141] Certainly, Williams and others criticised Devlin along similar utilitarian lines as Hart, and accepted similar utilitarian bases for limited paternalism, such as in the

[129] ibid 11.
[130] ibid 13.
[131] ibid 15, 23.
[132] ibid 14.
[133] Lacey (n.116) 85.
[134] ibid.
[135] Hart, *Law* (n.116) 19.
[136] Thorburn (n.116) 279.
[137] Hart, *Law* (n.116) 32.
[138] Text to nn.93–119 in ch.1
[139] Hart, *Law* (n.116) 37; Lacey (n.116) 91.
[140] Lacey (n.116) 101.
[141] Devlin (n.116) ch.7.

case of drug laws.[142] There were, however, other opponents to Hart's views, including 'radical challenges from Barbara Wootton' – who had chaired the Wootton Committee on drug dependence and was highly respected[143] as an academic critic of the law – on criminal responsibility and the function of punishment.[144] Wootton, who was 'ostensibly in the utilitarian camp',[145] had, for example, argued[146] for the abolition of the requirement for *mens rea* in the criminal law; the across-the-board substitution of indeterminate sentences for determinate ones (i.e., as long as would be necessary until the offender was reformed); and a dissolution of the distinction between punishment and therapeutic treatment in the management of offenders – all of which Hart rallied against.[147]

What does this mean for this thesis' question of drug criminalisation? The first and simplest – but arguably most important – observation is that despite the radical differences between (and the radicalism of) the positions adopted by some of the most celebrated and/or influential writers of the era (Devlin, Hart, Williams, Wootton, etc.) on the proper aims and limits of the criminal law, all of them were in favour (albeit for different reasons) of using the criminal law to control drugs.[148] Even against the backdrop of overall agreement that Hart had won the (ideologically polarised) debate with Devlin, criminal law scholarship in the 1960s was lively and engaged from all sides, and it was rare to find total consensus even amongst those who were broadly in the same 'camp'. This general view on drug control was also shared by the medical profession,[149] politicians of all political colours,[150] and the wider public.[151] In principle, therefore, the development of British drug legislation outlined in the first section of this chapter, up to and including the MDA, was firmly aligned with

[142] Glanville Williams, 'Authoritarian Morals and the Criminal Law' [1966] *Criminal Law Review* 132, 137–38; *Textbook of Criminal Law* (1978) 549.
[143] HLA Hart, 'Book Review' (1965) 74(7) *Yale Law Journal* 1325; Gerald H Gordon, 'Subjective and Objective Mens Rea' (1974–75) 17(4) *Criminal Law Quarterly* 355, 366; Philip Bean, *Barbara Wootton and the Legacy of a Pioneering Public Criminologist* (2020).
[144] Thorburn (n.116) 279. See also: Gerald H Gordon, 'The Mental Element in Crime' (1971) 16 *Journal of the Law Society of Scotland* 282, 284.
[145] Thorburn (n.116) 282.
[146] Barbara Wootton, *Crime and the Criminal Law: Reflections of a Magistrate and a Social Scientist* (1963) chs.2–4.
[147] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) esp 194–209. Other influential writers such as Gerald H Gordon expressed similar reservations; see, e.g., his book reviews in: 1967 *Scots Law Times (News)* 72; 1967 *Juridical Review* 300, 303; 1968 *Scots Law Times (News)* 96.
[148] Gordon makes few explicit statements on the appropriateness of drug laws, but his approving comments on, e.g., the pragmatism of the MDA, s.28 defence provides some clues: Gordon, 'Subjective' (n.143) 365–66.
[149] Glanz (n.39) 153–54; Nicholas Dorn and Nigel South, 'The Power Behind Practice: Drug Control and Harm Minimization in Inter-Agency and Criminal Law Contexts' in Strang and Gossop (n.39) 296–97.
[150] Text to n.66 above.
[151] Collins (n.91) 30, 36

contemporaneous conceptions (both professional and popular) of legitimate criminalisation.

There is also a significantly greater degree of alignment than there is tension between the Wolfenden philosophy and the drugs legislation of the 1960s and 1970s. Compared to other reforms (such as those relating to homosexual offences), the Wolfenden philosophy of making a distinction in the criminal law between public and private morality; of removing sin from the ambit of the criminal law; and of taking a disinterested and utilitarian (and often (quasi-)medicalised) stance on thorny issues is not as obviously applicable to drug law developments. However, the philosophy is sometimes explicitly and often impliedly apparent in the Parliamentary debates which led up to the successive drug statutes of the 1960s and 1970s, as well as in the form and letter of the enactments themselves.

As already noted, the Parliamentary debates on what became the MDA in 1970–1971 were 'surprisingly reasonable and measured', with 'little reference to the stereotypical tropes of prohibitionists – the "evils" of drugs, the immorality of drug-taking', and legislators recognised that criminal sanctions were only one part of the solution.[152] Seddon's point can equally be applied to the Westminster debates on drugs during the mid-1960s which were outlined in the preceding section. The absence of debate on the Single Convention-ratifying DDA 1964, save for mention of dealing with the 'sordid traffic', was quickly substituted by extended discussions about the limits of the criminal law when the DPMA was in the Commons.[153] While these did not act as a brake on criminalisation, such talk of the risks of overreaching punitive legislation aimed at dealing with social problems evidences a focus on the instrumental effectiveness of the criminal law, and not only its opprobrious symbolic function (which had often been a primary focus in previous decades).[154] This trend continued following the publication of the Second Brain Report, when the general issue of drugs was under near-constant Parliamentary discussion throughout 1966–1967.[155] A repeatedly-stated aim was to ensure the availability of appropriate and effective treatment for addicts ('we are here dealing not with criminals but with sick people');[156] and it was

[152] Seddon, 'The Sixties' (n.67) 185–87.
[153] Text to nn.25–32 above.
[154] e.g., text to nn.14ff in ch.4.
[155] Mentioned at text to n.44 above.
[156] HC Deb 30 January 1967, vol 740, col 163. See also: HC Debs 3 August 1966, vol 733, cols 643–54; 26 June 1967, vol 749, cols 76–77; 3 July 1967, vol 749, cols 1237–39; 20 July 1967, vol 750, cols 2464–65; 25 July

recognised that the potentially-intractable issue of drugs was a social problem necessitating broad, multifaceted interventions, and not just increased penalisation ('perhaps we can contain [addiction], if we properly use the help of social workers, teachers, police, doctors, church and other services').[157] Legislators were remarkably cognisant of their own ignorance in this field, stressing the importance of further social and scientific research, and of proceeding cautiously and only according to the best available evidence.[158] Novel distinctions were drawn between protecting users and punishing suppliers of drugs, as well as between 'hard' and 'soft' drugs; and the evidence base for the popularly-held 'gateway' theory of addiction (and the drugs/alcohol distinction) was challenged.[159] Furthermore, as well as these extensive generalised discussions on drug-related issues, the DDA 1967 itself (which gave effect to the Second Brain Report's recommendations on the treatment of addicts and GP prescribing) was heavily scrutinised during its passage through Parliament. In short, the Hansard record of those debates is almost 80,000 words long, yet 'evil' appears only 10 times, and 'vice' just once.[160] There was, in other words, little of the moralising hysteria and the militant calls for tighter criminal laws and harsher penalties which had marked earlier debates. Naturally, this did occur occasionally, and tight criminal laws and harsh penalties were already on the statute book, but where such views did arise they were usually quickly countered by appeals to rationality.[161]

The Wolfenden-esque philosophy observable in the debates was reflected in the enacted legislation. The semantic break from 'dangerous drugs' to 'controlled drugs' is illustrative here. So too is the post-1964 unlinking of British drug legislation from the international system which was perceived as too inflexible: the DPMA was enacted to control substances not internationally scheduled, and Westminster chose neither to wait until the 1971 Convention was worked out before passing the MDA, nor to link the MDA's A/B/C classification system to that of the Single Convention (which had also characterised drugs

1967, vol 751, cols 623–40; HL Debs 16 March 1967, vol 281, cols 516–22; 12 July 1967, vol 284, cols 1130–34.

[157] HC Deb 30 January 1967, vol 740, col 132. See also: HL Debs 30 June 1966, vol 275, cols 813–37; 16 March 1967, vol 281, cols 516–22.

[158] HC Debs 30 January 1967, vol 740, cols 121–75; 28 July 1967, vol 751, cols 1148–65; HL Deb 30 June 1966 vol 275, cols 813–37.

[159] HC Deb 28 July 1967, vol 751, cols 1148–65.

[160] HC Debs 6 April 1967, vol 744, cols 472–536; 8 May 1967, vol 746, cols 985–1009; 23 October 1967, vol 751, cols 1368–90; HL Debs 20 June 1967, vol 283, cols 1269–317; 5 July 1967, vol 284, cols 720–53; 21 July 1967, vol 285, cols 556–68.

[161] HC Debs 9 March 1967, vol 742, cols 1725–29; 1 May 1967, vol 746, cols 269–78; HL Deb 2 March 1967, vol 280, cols 1174–75.

as a 'serious evil'). But the synergy with the contemporaneous conceptions of legitimate criminalisation becomes even more clear when the parallels with the era's 'permissive' reforms are considered. Key here is that none of the reforms were squarely 'permissive' insofar as tending one-way towards increased individual liberty.[162] Rather, these reforms embodied a 'double taxonomy' of 'increased regulation by the state … in the field of moral conduct … often taking a more punitive and repressive form than previously [while] at the same time, other areas of conduct [were] exempted from legal regulation'.[163] The following subsection briefly sketches this out, taking the law on homosexual offences and abortion as its main representative examples,[164] before discussing the specific topic of drug regulation against this context.

5.2.2 'Permissive' Reforms of the 1960s

The Wolfenden Committee had recommended the partial decriminalisation of homosexuality in 1957, but the pressure for reform over the following decade – whether it came from the Wolfenden Committee itself, the Church of England,[165] reformist MPs, or outside pressure groups – was not the manifestation of libertarian ideals. Rather (as already noted), it was framed around removing sin from the ambit of the criminal law; public (particularly youth) protection against moral corruption and supposedly-predatory gay men;[166] and putting an end to the blackmail and undesirable police enforcement practices precipitated by the blanket criminalisation of male[167] homosexual conduct. Wolfenden's approach was not intended to destigmatise homosexuality: 'it consisted of an alteration to the relationship between law and morality that allowed the Committee to recommend a partial decriminalisation of homosexuality, rather than a defence of homosexuality itself'.[168]

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[162] cf n.112 (and text to) above.
[163] Hall (n.91) 17–18. For a similar analysis re alcohol regulation, see, e.g.: Henry Yeomans, *Alcohol and Moral Regulation: Public Attitudes, Spirited Measures and Victorian Hangovers* (2014) ch.5.
[164] Legal reforms relating to contraception, divorce, obscene publications, capital punishment and suicide are also referred to. Re gambling, see: n.98 above.
[165] Above at n.122 (and text to).
[166] 'With the law as it is there may be some men who would prefer an adult partner, but who at present turn their attention to boys': Wolfenden Report (n.1) paras 57, 97.
[167] cf Caroline Derry, *Lesbianism and the Criminal Law: Three Centuries of Legal Regulation in England and Wales* (2020) ch.6.
[168] Newburn (n.104) 56.

Tied into this was the Committee's quasi-medicalisation of homosexuality as a 'condition', i.e., another way in which the issue was framed so as to enable the Committee's recommendation of measures which 'undoubtedly a national referendum would never have supported'.[169] Similarly, Holden notes that 'very few [reformers] were aiming to arrive at a position where [homosexuals] could act as they pleased [and/or] behave as they liked' (or at least publicly expressed this), and there were few parallels with the gay liberation movement of the 1970s.[170] Pressure groups such as the Homosexual Law Reform Society (HLRS) 'clung to a cautious, liberal utilitarianism and the Wolfenden philosophy',[171] rather than making emotional arguments or stressing the symbolic importance of reform. Semiotic and emotionally-charged analyses of homosexual offences reform were, at the time, the province of those against any liberalisation.[172]

Hence, the Sexual Offences Act 1967 was a compromise position which was 'permissive' in some respects while being non-permissive in others. The Act, which extended only to England and Wales, did (partly) decriminalise homosexual conduct, but only in private where no more than two persons were involved. The age of consent was set at 21 years (compared to 16 for heterosexual sexual activity);[173] the maximum penalty for a man over 21 committing an act of gross indecency with someone under 21 was increased from two to five years' imprisonment; the offence of buggery was retained, albeit with reduced maximum penalties; and it was expressly provided that any homosexual acts on merchant ships remained a criminal offence. One effect of the Act was that the policing and prosecutions of public homosexual conduct markedly increased in the decade post-enactment.[174] In these respects, then, the 1967 Act was a different form of state regulation, rather than a simple example of 'permissive' deregulation or decriminalisation.[175]

The reform of abortion law bears many similarities to that of homosexual offences. Also a Private Member's Bill which was passed in 1967, the Abortion Act, section 1, allowed the

[169] Andrews (n.55) 14. Although 'one could point to polls producing wildly different results': Holden (n.102) 113.
[170] Holden (n.102) 22, 111–16. See also: Ryan (n.118) 318. For a comparison of 1960s and 1970s homosexual offences/rights campaigns, see: Weeks (n.108) chs.13–14.
[171] Holden (n.102) 111.
[172] ibid 108ff; Richards (n.122) ch.5, esp 81.
[173] Originally set by the Criminal Law Amendment Act 1885, s.5.
[174] Newburn (n.104) 62.
[175] ibid; Hall (n.91) 16–17.

termination of pregnancies where two medical practitioners had formed a good-faith opinion that:

> [T]he continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to [her] physical or mental health … or any existing children of her family, greater than if the pregnancy were terminated; or (b) that there is a substantial risk that … the child … would suffer such physical or mental abnormalities as to be seriously handicapped.

An organised and concerted movement for reform, comprised of individual campaigners and pressure groups such as the Abortion Law Reform Association (ALRA), had gained traction from the 1930s.[176] In 1938 the law had been judicially interpreted to allow medical terminations where 'the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck', and not only to preserve the life of the mother.[177] However, without legislative change, until 1967 'abortions in Britain were surreptitious and expensive or illegal and dangerous'.[178] Some doctors chose to conduct abortions privately – a 'service which neither society nor the medical profession as a whole was willing to provide' – but women who could not afford the high fees had to resort to untrained 'backstreet' abortionists.[179] These issues of dangerousness and the law's unclear, arbitrary and unequal application, as well as that of the suffering of unwanted and/or handicapped children, were the focus of the reformist campaigners. Their strategy was deliberately utilitarian, underplaying feminist arguments and steering away from emotional appeals.[180] There was no argument made for permissiveness for the sake of permissiveness, and 'even … ALRA never considered, nor wanted, "abortion on demand"'.[181] As with

[176] For discussion, see: Keith Hindell and Madeleine Simms, *Abortion Law Reformed* (1971); Lorna JF Smith, 'The Abortion Controversy 1936–77: A Case Study in "Emergence of Law"' (PhD thesis, University of Edinburgh 1979), noting at v–vi some of the gaps in Hindell and Simms' work.
[177] *Bourne* [1939] 1 KB 687, 694; Offences against the Person Act 1861, s.58; Infant Life (Preservation) Act 1929, s.1(1); Hindell and Simms (n.176) esp 67–72.
[178] Hindell and Simms (n.176) 13.
[179] ibid 41–42.
[180] Holden (n.102) 125–26; Richards (n.122) 89.
[181] Newburn (n.104) 148; John Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (1988) 128.

opposition to homosexual law reform, it was those who were against any liberalisation that resorted to emotive tactics and were at pains to stress the moral–symbolic importance of the criminal law.[182] These moralistic and sometimes hysterical arguments, led largely by the Catholic Church and some members of the medical profession,[183] '[brought] starkly to bear the Wolfenden strategy' of separating sin from the criminal law, with Glanville Williams (at one point president of ALRA and the drafter of four reformist Bills)[184] mounting an extended utilitarian case for change along Wolfenden lines.[185]

The effect of this strategy was that the text of the Abortion Act 1967 was both partly 'permissive' and partly paternalistic, and is also best considered as a new form of regulation. It enabled wider access to safe abortions, but did so by giving 'few rights or powers' directly to women.[186] The issue was entrusted to the discretion of the medical profession, and it is primarily clinical policy, as opposed to the black-letter law or the intentions of those who pressed for change, that has enabled women to access abortions to the extent which occurs today. It is also worth noting that the reforms to contraception and divorce law, when situated in historical context, were enacted on similar bases.[187] Contraception was made available on the NHS in 1961, but only married women were given access to it until 1967;[188] and it was largely due to 'an ideological emphasis on the family', and not to empower women's sexuality (i.e., in a 'permissive' sense), that this was achieved.[189] As Weeks notes,[190] access to contraception played a pivotal role to the feminism of the 1970s, but suspicion of the pill, poor provision of family planning advice to unmarried girls, and an ideological focus on the family unit were many of the hallmarks in this area throughout the 1960s and well into the 1970s. Similarly, while the passing of the Divorce Reform Act 1969 removed some barriers to divorce, most notably by replacing the concept of 'matrimonial offence' with 'breakdown of marriage', 'permissiveness was not an end in itself'.[191] Rather, the 1969 Act was 'Wolfenden-style utilitarianism in family law', with

[182] Hindell and Simms (n.176) chs.4, 9.
[183] Some Protestants came out cautiously in favour of reform in the mid-1960s: Hindell and Simms (n.176) 90–94; Richards (n.122) 105–07.
[184] Peter Glazebrook, 'Glanville Llewelyn Williams 1911–1997: A Biographical Note' in Dennis J Baker and Jeremy Horder (eds), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (2013) 21.
[185] Glanville Williams, *The Sanctity of the Life and the Criminal Law* (1958).
[186] Newburn (n.104) 157.
[187] Only a cursory overview is provided here as these do not strictly relate to the criminal law.
[188] National Health Service (Family Planning) Act 1967.
[189] Newburn (n.104) 165; Richards (n.122) 95.
[190] Weeks (n.108) 281–85.
[191] Holden (n.102) 226.

a decades-long campaign for reform mounted on the basis that it would 'bolster the institution of the family rather than undermine it' in the face of Church and other moralistic resistance to change.[192]

Hence, as already noted, the 'permissive' reforms embodied a 'double taxonomy' of 'increased regulation by the state … in the field of moral conduct … often taking a more punitive and repressive form than previously [while] at the same time, other areas of conduct [were] exempted from legal regulation'.[193] But how does this relate to drug criminalisation?

A major part of this new form of regulation was the creation of new criminal offences while abolishing or reducing the reach of other (often related) offences. Newly-enacted offences related to, e.g., prostitution; presentation of obscene plays and provoking breach of the peace through a play;[194] assisting suicide,[195] and the myriad discrete MDA offences which had previously been, for the most part, lumped together as a single offence. Simultaneously, offences related to homosexual acts in private, Sunday entertainments,[196] and suicide[197] were abolished; while the offence of publishing 'obscene articles' was made subject to a defence of 'public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern'.[198] Stripping back of the ambit of the criminal law also occurred in the field of drugs. The defence created under section 28 of the MDA 'represent[ed] a slightly more liberal approach than was the case with the corresponding offences under previous legislation which were either interpreted as offences of strict liability or were open to such an interpretation':[199] in the same vein that reform of homosexual offences sought to remove the injustices of blackmail and police entrapment, the MDA removed the injustice of absolute liability for those unaware they were possessing controlled drugs.[200] Additionally, the A/B/C classification system placed cannabis in a lesser category to heroin for the first time, and there also appears to have

[192] ibid; Richards (n.122) ch.7. See also, e.g.: Andrews (n.55) 15–17; Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Law Com No 6, 1966) paras 15, 120.
[193] Above at n.163 (and text to).
[194] Theatres Act 1968, ss.2, 6.
[195] Suicide Act 1961, s.2.
[196] Above at n.102.
[197] Suicide Act 1961, s.1.
[198] Obscene Publications Act 1959, ss.1, 4; cp text to n.207 below; nn.200–213 in ch.4.
[199] RIE Card, 'The Misuse of Drugs Act 1971' [1972] *Criminal Law Review* 744, 760; cf Teff, *Drugs* (n.22) 37.
[200] MDA, s.28; above at n.88 (and text to) and below at nn.233–240 (and text to).

been a reluctance to convict for trivial drugs offences, such as possessing minute quantities, immediately post-MDA.[201] It is also worth noting that using drugs was not prohibited by the MDA – with the exception of opium, which was a legacy provision carried over from the DDA 1920. This may appear a fine point given that use is impossible without possession, but in some European and US States in the long 1960s, using or being addicted to drugs was, at certain points, either a standalone offence or fell within the statutory definition of vagrancy.[202] That such an approach was not legislatively or judicially countenanced[203] does speak to some degree of liberalism in British drug legislation.

Furthermore, related to the creation and abolition of offences was the reordering of punishment in existing offences, and changes to the way the state's police power was exercised. Thus, for example, the penalties for certain existing homosexual offences and drugs offences were increased; 'public' homosexual conduct was increasingly policed post-1967; extensive powers of arrest and stop and search were introduced for drugs offences; and a formal system of notification (and surveillance) of addicts to the Home Office was created. Meanwhile, the penalties for other homosexual and drugs offences, as well as killing in pursuance of a suicide pact, were reduced and the death penalty was abolished.[204] Additionally, the A/B/C system sought to remove the unsatisfactory 'soft/hard' drugs distinction hitherto arbitrarily used for sentencing purposes.[205] Combined with the provisions of the Criminal Law Act 1977 reducing the maximum penalty on summary conviction for certain drugs offences from 6 to 3 months,[206] it is clear that British drug legislation in the later 1960s and the 1970s was, in some respects, less repressive and aimed to be more utilitarian than the previous law.

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[201] *Colyer* [1974] Crim LR 243; *Hieorowski* [1978] Crim LR 563; cf *Marriott* [1971] 1 WLR 187; *Searle* v *Randolph* [1972] Crim LR 779; *Bocking v Roberts* [1974] QB 307. See also: Robert Sinclair Shiels, 'Criminal Responsibility and the Misuse of Drugs Act 1971' (LLM thesis, University of Glasgow 1982) paras 2.5–2.56; Keith S Bovey, *Misuse of Drugs: A Handbook for Lawyers* (1986) 55–62.

[202] Teff, *Drugs* (n.22) 86. See also, e.g.; *Robinson* v *California* 370 US 660 (1962), holding that a California statute hitherto criminalising addiction was unconstitutional; European Monitoring Centre for Drugs and Drug Addiction, 'Penalties for Drug Law Offences in Europe at a Glance' (*EMCDDA*, 4 September 2024) s.5, setting out the European countries in which using drugs is criminalised <https://www.euda.europa.eu/publications/topic-overviews/content/drug-law-penalties-at-a-glance_en#section5> accessed 8 May 2025.

[203] Robert Sinclair Shiels, 'Sentencing Policy and the Misuse of Drugs Act 1971' (PhD thesis, University of Glasgow 1987) 227–46.

[204] Homicide Act 1957, s.4; Murder (Abolition of Death Penalty) Act 1965.

[205] Alec Samuels, 'Sentencing Drug Offenders' [1968] *Criminal Law Review* 434. The 'soft/hard' distinction, however, continued to be judicially used: Shiels, 'Sentencing' (n.203) 264.

[206] Criminal Law Act 1977, s.28, sch.5; Mills (n.42) 156–62.

The reordering of professional discretion was also an important aspect shared by both the 'permissive' reforms and drug laws. This can be seen in the wide discretion afforded to the medical profession under the Abortion Act 1967, as well as in other areas such as the abolition of the Lord Chamberlain's theatre censorship role.[207] The dismantling of the 'British System' of GP prescribing in favour of permanent addiction treatment centres under the DDA 1967 fits into this, and links particularly closely to the abortion law reforms: both were passed in the same year; both involved the medical profession; and both can be seen as opposite sides of the same regulatory coin insofar as the Abortion Act sought to relocate backstreet abortions into the medical clinic, while the DDA 1967 sought to stem the flow of controlled drugs from the medical clinic to the streets.

Across all these legislative changes to the criminal law (both 'permissive' and drug-related) there were particular rationales which tended in favour of, and against, reform. The protection of youth, for example, was a common denominator. Importantly, what drove successful reform of homosexual offences and abortion – as well as obscenity, capital punishment,[208] and suicide[209] – was cautiously reasoned, empirical, and utilitarian argument made by concerted groups over long periods of time (often decades). Similarly-framed arguments about drugs resulted in reforms including the establishment of the Advisory Committee on Drug Dependence and later the ACMD; the expansion of addiction treatment provision;[210] the removal of absolute liability from drug offences;[211] and the reclassification of drugs in the A/B/C system. By contrast, principled appeals to the symbolic and moral import of the criminal law, as I have tried to show, tended towards greater restrictiveness and were the province of those opposed to change.[212] Such arguments were not relied on by successful reformers in the 1960s because, first, they would have been unsuccessful, and second, because there was no desire for permissiveness for the sake of

[207] Theatres Act 1968, s.1; text to nn.200–213 in ch.4.
[208] Richards (n.122) ch.3; James B Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945–57* (1962) 189.
[209] Sheila Moore, 'The Decriminalisation of Suicide' (PhD thesis, London School of Economics and Political Science 2000) 13.
[210] Text to nn.155–157 above; Philip Connell and John Strang, 'The Creation of the Clinics: Clinical Demand and the Formation of Policy' in Strang and Gossop (n.39) esp 170–71.
[211] Above at n.88 (and text to) and below at nn.233–240 (and text to).
[212] See also: David E Morrison and Michael Tracey, 'American Theory and British Practice: The Case of Mrs Mary Whitehouse and the National Viewers and Listeners Association' in Rajeev Dhavan and Christie Davies (eds), *Censorship and Obscenity* (1978) 37, 43.

permissiveness. Permissiveness for its own sake was not, in other words, a contemporary conception of legitimate *decriminalisation*.

Yet, it was precisely these kinds of arguments which coloured the debate in favour of loosening drug laws. By the later 1960s, argues Mills, 'consuming [cannabis] became a political act to be staged publicly':[213] drug use rapidly became a symbol of an ephemeral counterculture. Shortly after the establishment of the Wootton Committee a full-page advertisement appeared in *The Times*.[214] Paid for by The Beatles and endorsed by two MPs and two Nobel Prize-winners, among others, it declared that cannabis laws were 'immoral in principle and unworkable in practice'.[215] The Wootton Report states that the advert's resulting 'wave of debate about these issues in Parliament, the Press and elsewhere, and reports of enquiries e.g. by the National Council for Civil Liberties … defined more clearly some of the main issues in our study; and led us to give greater attention to the legal aspects of the problem'.[216]

Hallam questions the 'canonical narrative' of whether drug users in the 1960s were in reality all that 'public and explicit', whose use 'included an important performative element', and who 'were vocally critical of medical norms surrounding drugs'.[217] In any event, it certainly *appeared* (to the Wootton Committee, the press, etc.) that drug use and the wider issue of drug law reform were the pursuits of an anti-authority counterculture seeking individual freedom. And as a symbol is only that what it *appears* to be, arguments for permissiveness for its own sake, and those couched in terms of morality (i.e., that drug laws were 'immoral in principle'), thereby became representative of the drive to reform drug laws – arguments which in other areas either had no reformist purchase, or tended to be the preserve of those favouring greater restrictions. Additionally, unlike the HLRS and ALRA, the countercultural drive for reform was neither well-organised nor long-lasting; and its (perhaps ostensibly) performative tactics created a public air around drug-taking which stood in contrast (and acted in opposition) to the Wolfenden philosophy of limited

[213] Mills (n.42) 118.
[214] SOMA, 'The Law against Marijuana is Immoral in Principle and Unworkable in Practice' *The Times* (24 July 1967) 5.
[215] ibid; Seddon, 'Immoral' (n.109) esp 1574–75.
[216] Wootton Report (n.56) para 2.
[217] Christopher Hallam, 'Script Doctors and Vicious Addicts: Subcultures, Drugs, and Regulation under the "British System", c.1917 to c.1960' (PhD thesis, London School of Hygiene and Tropical Medicine 2016) 29–30.

decriminalisation in the private sphere while 'the "public" margins [were] increasingly policed'.[218] It is therefore, I think, in synergy with the contemporary conceptions of legitimate (de)criminalisation that the MDA took the prohibitionist form it did during a time of 'permissive' reformism. It is telling that for all that the Wootton Report referenced JS Mill,[219] its final recommendation of continued drug criminalisation, but with significantly lower penalties for cannabis offences – a recommendation successfully incorporated into legislation – was based not on libertarian ideals and/or an aspiration towards legislative symbolism, but (to go full circle and return to the Hart/Devlin debate) on grounds far more akin to Hart's utilitarianism tempered with paternalism.[220]

5.2.3 Broader Approaches to Law Reform: The Law Commissions and Case Law Developments

My overall argument is that the drug legislation of the 1960s and 1970s was in greater synergy than tension with the criminal law's conceptual direction of travel. However, some further points merit drawing out with reference to another legal reform which is in many ways representative of the era: the establishment and work of the Law Commissions.

The Law Commissions were established in 1965, which Mitchell notes occurred within the 'prevailing political landscape' of regulatory modernisation.[221] Dissatisfaction with judicial law-making was high in the 1960s. Gordon, for example, noted 'the unsuitability of dealing with such matters [as homosexual offences law reform] by judicial decision';[222] the *Shaw* v *DPP* decision which had revived the common law offence of 'corrupting public morals' had been heavily criticised;[223] and Devlin 'express[ed] scepticism on judicial law-making in the

[218] Newburn (n.104) 62.
[219] Wootton Report (n.56) para 14.
[220] ibid 15–18.
[221] Paul Mitchell, 'Strategies of the Early Law Commission' in Matthew Dyson, James Lee and Shona Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (2016) 33; Holden (n.102) 237.
[222] Gerald H Gordon, *The Criminal Law of Scotland* (1967) 32.
[223] *Shaw* v *DPP* [1962] AC 220, later approved by the House of Lords in *Knuller* v *DPP* [1973] AC 435; Richards (n.122) 17–18; Gordon, *The Criminal* (n.222) 23, 39. This led to the Law Commission recommending the discontinuation of bringing common law obscenity charges: John Trevelyan, 'Film Censorship and the Law' in Dhavan and Davies (n.212) 103.

modern age'.[224] While organisations such as the part-time Criminal Law Revision Committee (set up in 1959) were highly regarded and relatively prolific,[225] the proposal to set up permanent, independent[226] Commissions with full-time expert legal staff quickly passed through Parliament.[227] The Law Commissions Act 1965, section 3, outlined the Commissions' functions as keeping the law 'under review … with a view to its systematic development and reform, including … codification … the elimination of anomalies, the repeal of obsolete and unnecessary enactments … and generally the simplification and modernisation of the law'. Lord Scarman, the first Chairman of the Law Commission, deemed that law reform was 'not exclusively a legal topic' related to an 'esoteric and technical discipline'.[228] He argued that to prevent it becoming 'a barren exercise' it was essential to grapple with social and moral problems, a corollary of which was 'hav[ing] the liberty to smash and replace' outmoded laws.[229] Scarman's views were not universally embraced,[230] but the Law Commission's First Programme is demonstrative of his spirit not to 'be confined by the unreal boundaries of a so-called lawyers' law':[231] its 17 topics included contract, civil liability for dangerous things, personal injury, matrimonial (including divorce) law, criminal intent, damages for adultery, and the interpretation of statutes.[232]

In addition, some of the most controversial case law developments of the mid-twentieth century, and which were 'of fundamental importance in criminal law as a whole',[233] related to drug laws and were remedied, in part, by the Law Commission. The harsh sentencing of drug offenders according to arbitrary criteria was one aspect of this controversy;[234] but the absolute liability offences under the pre-MDA drugs legislation were the primary issue. The detail of these cases cannot be canvassed here due to limitations of space, and in any event are well-known[235] and have been extensively analysed elsewhere.[236] In short, the provisions

[224] John H Farrar, *Law Reform and the Law Commission* (1974) 20, citing Patrick Devlin, *Samples of Lawmaking* (1962).
[225] Leslie Scarman, *Law Reform: The New Pattern* (1968) 14.
[226] cf RT Oerton, *A Lament for the Law Commission* (1987) ch.9.
[227] Farrar (n.224) 14, 23.
[228] Scarman (n.225) 7.
[229] ibid 7–8. Similarly, see generally: Edwin Tangley, *New Law for a New World?* (1965).
[230] Geoffrey Sawer, 'The Legal Theory of Law Reform' (1970) 20(2) *University of Toronto Law Journal* 183, 192.
[231] Scarman (n.225) 28.
[232] Law Commission, *Law Commissions Act 1965: First Programme of the Law Commission* (Law Com No 1, 1965) 5.
[233] Teff, *Drugs* (n.22) 24.
[234] Samuels (n.205).
[235] e.g., *Sweet* (n.88) is taught across multiple first-year LLB courses.
[236] See, e.g.: Teff, *Drugs* (n.22) 23–33; Bean, *The Social* (n.15) 158–61.

of the DDA 1965 and the DPMA had precipitated extensive judicial debate and confusion as to whether drugs offences required the prosecution to prove *mens rea* or were offences of absolute liability. This had led to convictions at first instance for: illegal possession in the absence of proof that the defendant knew they were possessing controlled drugs;[237] an absentee landlady being (unknowingly) concerned in the management of a premises used for cannabis smoking;[238] and the possession of minute quantities of drugs.[239] In the end, it was the recommendations of the Law Commission, having reviewed the extensive prior case law, which led to the inclusion of the section 28 defence in the MDA that removed the injustice of absolute liability for (most) drug offences.[240] That the section 28 defence was devised by the Law Commission, which had a modernising and rationalist outlook, is a further example of the MDA's alignment with the legal/reformist zeitgeist.

However, there are several clear points of conceptual tension. The MDA's A/B/C classification system, while intended to be a more scientific and rational (and utilitarian) system based on harmfulness,[241] was not so in many respects. There was no clarification of the classificatory criteria used in the Explanatory Memoranda to the Bills,[242] nor in the Parliamentary debates;[243] and the absence of control over barbiturates, the placement of cannabis as Class B instead of Class C, and LSD's classification as a Class A drug, were immediately criticised.[244] The maximum sentences were enormously severe and so the problem of wide judicial discretion remained.[245] The section 28 defence (arbitrarily)[246] did not extend to the offences of importation or those relating to the occupiers/managers of premises;[247] and proving that one had 'no reason to suspect' a possessed substance was a controlled drug is a high hurdle and suggests drug offences could be committed negligently.[248] Additionally, if the protection of youth and the treatment of addicts was a key, Wolfenden-esque driver, it is unclear why diversions to treatment were not expressly

[237] *Lockyer* (n.88); *Warner* (n.88); *Irving* [1970] Crim LR 642.
[238] *Sweet* (n.88).
[239] Above at n.201.
[240] Above at n.88 (and text to); cf text to n.246 below.
[241] HC Deb 25 March 1970, vol 798, col 1453.
[242] An Explanatory and Financial Memorandum prefaced both Bills (as introduced): nn.65–66 above.
[243] The ACMD attempted to devise criteria post hoc in 1979: Police Foundation, *Drugs and the Law: Report of the Independent Inquiry into the Misuse of Drugs Act 1971* (2000) 40.
[244] Teff, *Drugs* (n.22) 35–36.
[245] Shiels, 'Sentencing' (n.203) 6, 46–47, 256.
[246] Teff, *Drugs* (n.22) 37. The reasons for this are unclear.
[247] Although the occupiers/managers offences were required to have been committed 'knowingly'.
[248] Police Foundation (n.243) 18; Teff, *Drugs* (n.22) 37.

listed as alternatives to prosecution, as they were in the 1971 Psychotropic Convention and the 1972 Protocol amending the Single Convention,[249] or why no statutory provisions were enacted creating rights and obligations surrounding access to treatment.[250]

The promise of a joined-up and flexible approach to drug-related issues was intended to be delivered by the ACMD. The recasting of the Advisory Committee as the ACMD under the MDA shares a strong affinity with the establishment of the Law Commissions. These were permanent, independent, expert advisory bodies which could develop policy and recommend changes to the law, and both aimed to take a head-on approach to social problems in keeping with the era's spirit of regulatory modernisation. However, for all these similarities, there is more tension than there is synergy here. It is difficult and probably arbitrary to measure comparative success, but as a rudimentary illustration, by 1980 – i.e., the end of the period under examination in this chapter – 35 of the Scottish Law Commission's proposals had been converted into statutory provisions.[251] By contrast, despite a key point of the MDA being 'a regulatory mechanism that could be adjusted' with the classifications not 'set in stone',[252] as well as the special status of the ACMD's proposals in the law-making process which was not given to the Law Commissions,[253] the ACMD had little success in amending the law. Nicodicodine was reduced to Class B in 1973, and methaqualone elevated to class B in 1984;[254] but the ACMD's recommendation to reclassify cannabis as Class C in 1979 was not implemented,[255] and very few (by one account from 2007, only two)[256] substances have been permanently removed.[257] This is less a criticism of the ACMD than it is an observation that by the end of the 1970s, the MDA's prohibitive and

[249] Above at nn.89–90 (and text to).
[250] See, e.g.: Wootton Report (n.56) paras 12, 78; MDA, s.25; text to n.41 above.
[251] Scottish Law Commission, *Fifteenth Annual Report: 1979–1980* (Scot Law Com No 61, 1980) app.III.
[252] Rudi Fortson, 'The MDA 1971: Missteps and Misunderstandings' in Crome, Nutt and Stevens (n.12) 264–65.
[253] MDA, s.2(5) provided that alterations to the law had to be made 'after consultation with or on the recommendation of the [ACMD]'; cf Mitchell (n.221) 31: 'there was … no intention to give the Commission's proposals any special status in the Parliamentary process'.
[254] MDA (Modification) Orders 1973, SI 1973/771; 1984, SI 1984/859. Several drugs were also added to the list from the mid-1970s: MDA (Modification) Orders 1975, SI 1975/421; 1977, SI 1977/1243; 1979, SI 1979/299; 1983, SI 1983/765.
[255] Police Foundation (n.243) 40.
[256] Leonard Jason-Lloyd, *Misuse of Drugs: A Straightforward Guide to the Law* (2007) 13, app.2.
[257] Excepting those inadvertently banned by generic definitions, e.g., MDA (Amendment) Order 2019, SI 2019/1323.

repressive aspects had become the dominant normative focus. As Teff predicted, the original classifications became immediately 'entrenched'.[258]

Therein lies the concluding point. Modern analyses of the MDA (rightly) centre on its prohibitive nature and long-term (in)effectiveness. Debate of its suitability 50 years on, though, has masked that in historical perspective, British drug legislation post-1964 represented a major break from the past and was overall in synergy with the contemporaneous conceptions of legitimate criminalisation. There was a strong affinity with the Wolfenden philosophy; it was in line with leading scholarly thought, political viewpoints, and public perceptions; it sought to be more scientifically rational and less hysterically moralising; it was closely related to the 'double taxonomy' of liberalisation and repression which underpinned the era's 'permissive' reforms; and it was intended to be just one part of a flexible and modern solution to a rapidly-developing social issue. The knee-jerk and reactionary side – the areas of conceptual tension – are in Seddon's words 'actually more to do with how it has been implemented in a wider policy context than the form, structure or intent of the legislation itself'.[259]

[258] Teff, *Drugs* (n.22) 35.
[259] Seddon 'The Sixties' (n.67) 190.

Chapter 6: Drugs, Policy and Criminalisation, c.1980–c.2000

This final chapter considers the period c.1980 to the turn of the century. Relative to previous eras, there was little by way of major reform to British drug laws during this time. The Misuse of Drugs Act 1971 (MDA) remained the overarching legislative framework, but was modified and augmented by a series of Acts which, inter alia, amended pre- and post-trial practices relating to the arrest, sentencing, and probation of drug offenders; strengthened sentencing and proceeds of crime measures against drug traffickers; and sought to adapt to novel patterns of drug use, such as the rapid UK-wide increase in heroin prevalence, solvent/glue-sniffing, and newly-used synthetic substances such as ecstasy/MDMA. There were also some international law developments during this period, including the 1988 UN Trafficking Convention,[1] and some European/Schengen-based attempts to improve international cooperation on drug-related issues.

However, it is primarily the wide-ranging policy changes (rather than black-letter law reforms) which distinguish this period to that covered in the preceding chapter. This is, in Lacey's terms, an 'informal' mode of criminalisation; the 'substantive, "in action"' 'implementation of formal [legislative, judicial, etc.] norms'.[2] Commentators differ on the precise nature of these policy changes (and why they occurred), but there is a common view that the balance between health- and criminal justice-based approaches to drugs swung from the former to the latter. For example, Davenport-Hines argues that 'the Conservative Governments of 1979–97 … instituted penal policies on drugs modelled on the US war on drugs',[3] and Alldridge notes that by the end of the twentieth century drugs had become 'absolutely central' to 'the activity at every level of the criminal justice system'.[4] Seddon, by contrast, argues that there is less of a policy swing, but rather a 'strategic fit and coherence between harm-reduction measures [and] coercive crime-focused interventions' in late twentieth century drug policy;[5] the common thread being the rise of neoliberal

[1] Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (signed 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95.
[2] Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72(6) *Modern Law Review* 936, 943.
[3] Richard Davenport-Hines, *The Pursuit of Oblivion: A Social History of Drugs* (2002) 367.
[4] Peter Alldridge, *Relocating Criminal Law* (2000) xxii.
[5] Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010) 92.

governance, i.e., 'a revival of certain elements of nineteenth century liberal capitalism' operating alongside an emphasis on regulating risk.[6] In contemporaneous accounts, Pearson argued that 'in the 1980s … British drug policies are in a state of transformation … [A] more active role is being played by central government, the debate on drugs is becoming politicised, and there is a new emphasis on law enforcement';[7] while Berridge noted that 'the relationship between drug use and crime has become a major policy issue', with an increased focus on penal responses.[8]

More broadly, there is an overall view among legal and sociological scholars that the 1980s and 1990s saw increased resort to criminalising legislation in general, which was variously underpinned at different times by retributivist and/or preventive, risk-based government policies. Farrall, Burke and Hay note that the 'portrayal of the early Thatcher governments as "heavily" punitive is a common refrain among academic commentators',[9] and Farmer frames this period as being characterised by 'the increased prominence of crime as a political issue' and 'a change in the social role of criminal law and justice … as successive governments have competed to show themselves ever more "tough on crime"'.[10]

This chapter builds on this existing scholarship. The first section 6.1 of this chapter is a chronological discussion of key legal and policy developments in relation to both (on one hand) drugs and (on the other) wider criminal law/justice-related issues. It is argued that the legislative developments, policy underpinnings, and political discourses surrounding drugs and wider criminal law/justice-related issues were remarkably in step with one another throughout the period under examination. From 1979–1983 (section 6.1.1) 'toughening' and anti-welfarist rhetoric on criminal justice issues (including drugs) was increasingly deployed, but this (contradictorily) found little legislative or policy expression. The response on the ground was not overtly penal, instead being largely a continuation of earlier welfarist initiatives. During 1983–1987 (section 6.1.2) discourses surrounding dangerousness, risk and 'toughness' intensified and started to translate into legislative and

[6] ibid 79–80.
[7] Geoffrey Pearson, 'Social Deprivation, Unemployment and Patterns of Heroin Use' in Nicholas Dorn and Nigel South (eds), *A Land Fit for Heroin? Drug Policies, Prevention and Practice* (1987) 38.
[8] Virginia Berridge, 'Drug Research in Britain: The Relation between Research and Policy' in Virginia Berridge (ed), *Drugs Research and Policy in Britain: A Review of the 1980s* (1990) 5.
[9] Stephen Farrall, Naomi Burke and Colin Hay, 'Revisiting Margaret Thatcher's Law and Order Agenda: The Slow-Burning Fuse of Punitiveness' (2016) 11(2) *British Politics* 205, 208.
[10] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 104–05.

policy developments. Yet, the theme of contradiction (or as others have argued in varying contexts, 'paradox')[11] remained. Inter alia: police powers were expanded and enforcement priorities were geared further towards drug offences, whilst several protections for defendants were enacted and local drug services' funding increased; and maximum sentences of life imprisonment were enacted for several offences (including drugs), while 'welfarist' harm minimisation and epidemiological approaches to drug use were expanded. The relatively neglected Intoxicating Substances (Supply) Act 1985 (ISSA) – which created a new offence targeting the supply of solvents – was in some ways a microcosm of broader developments during this period, bridging the gap between the increasingly punitive responses mid-decade and the welfarist approach of the early 1980s. From 1987–c.2000 (section 6.1.3), law and policy relating to drugs and criminal law/justice were perhaps even more aligned than previously. For example, when the Criminal Justice Act (CJA) 1991 was enacted to reevaluate sentencing policy along desert-based principles in a '"high watermark" of informed, liberal sentencing policy',[12] the Act also opened the door to diverting drug offenders away from prison and into treatment. However, over the remaining decade the CJA 1991's measures were reversed and the law was developed in relation to drugs and other criminal justice-related issues in much the same way. Statutes were enacted to, inter alia: remove criminal trespassers and ecstasy ravers; strengthen measures against financial crime (both drug-related and otherwise); mandate minimum sentences for drugs and other offences; and give sentencers a broader range of options at their disposal to prevent and alleviate the social risks associated with offending. Finally, section 6.1.4 summarises the preceding chronological discussion to reiterate and make clear the key arguments.

Section 6.2 discusses the period's drug criminalisation from a more conceptual standpoint with reference to the work of contemporaneous and current theorists. Building first on Seddon's analysis,[13] I argue at 6.2.1 that there is a cyclical pattern observable in drug law

[11] Alan Norrie and Sammy Adelman, '"Consensual Authoritarianism" and Criminal Justice in Thatcher's Britain' in Andrew Gamble and Celia Wells (eds), *Thatcher's Law* (1989) 112; Alex Mold and Virginia Berridge, 'Crisis and Opportunity in Drug Policy: Changing the Direction of British Drug Services in the 1980s' (2007) 19(1) *Journal of Policy History* 29, 30, 42; Nicholas Dorn and Nigel South, 'Reconciling Policy and Practice' in Dorn and South (n.7) 148; Stephen P Savage, 'A War on Crime? Law and Order Policies in the 1980s' in Stephen P Savage and Lynton Robins (eds), *Public Policy under Thatcher* (1990) 97.

[12] Farrall, Burke and Hay (n.9) 216, quoting Mick Cavadino and James Dignan, *The Penal System: An Introduction* (4th edn, 2007) 55.

[13] Seddon, *A History* (n.5) ch.5.

and policy developments, with several aspects of late twentieth century drug law and policy developments having strong antecedents going back over a century. Section 6.2.2 then considers Farmer's work which frames criminal law theorising in the latter part of the twentieth century as 'neo-classical criminal law'.[14] From a brief overview of some the era's leading criminal law theorists' works it is apparent that, despite drug laws being prima facie obvious targets of a neo-classical criminal lawyer's criticisms, there was a paucity of direct engagement with drug laws. Lastly, at 6.2.3, I expand on how (and why) several of the main targets of neo-classical criminal law theorising, which had extensive existing precedents in the area of drugs, only became problematised objects of attention, and in primarily non-drug related areas, in the 1990s and into the twenty-first century. From this, and ahead of this thesis' Conclusion, it is argued that drug laws are more central to the criminal law in terms of exerting an influence than has been fully recognised.

6.1 Chronological Discussion of Legal and Policy Developments

6.1.1 First Thatcher Ministry: 1979–1983

Throughout the 1960s and into the mid-1970s, the focus of both political drug discourse and substantive drug legislation and policy had been on treating and rehabilitating addicts, e.g., in Drug Dependency Units,[15] whilst penalising non-medically-authorised possession and supply. This 'bifurcated policy'[16] endured (overall) throughout the 1980s, but was revised in several respects. By 1982, as relatively cheap and high-purity heroin became widely available across the UK,[17] 'a new wave of heroin addiction swept over the country and reinstated older notions of epidemic and danger', and 'politicians and the public demanded that doctors should "do something" about this pernicious evil'.[18] It was also at this time that the 'addict' was recast in official discourse as the 'problem drug taker', i.e.,

[14] Farmer, *Making* (n.10) 103–14.
[15] Text to n.49 in ch.5.
[16] Karen Duke, *Drugs, Prisons and Policy-Making* (2003) 60.
[17] Nicholas Dorn and Nigel South, 'Introduction' in Dorn and South (n.7) 1; Toby Seddon, 'Drugs, Crime and Social Exclusion: Social Context and Social Theory in British Drugs–Crime Research' (2006) 46(4) *British Journal of Criminology* 680, 683–87.
[18] Susanne MacGregor and Betsy Ettorre, 'From Treatment to Rehabilitation – Aspects of the Evolution of British Policy on the Care of Drug-Takers' in Dorn and South (n.7) 136.

'Any person who experiences social, psychological, physical or legal problems related to intoxication and/or regular excessive consumption and/or dependence as a consequence of his own use of drugs or other chemical substances'.[19] As Seddon notes:

> [T]his [deliberately wide] definition … cover[ed] anyone from the teenage cannabis user … to the heroin injector with multiple problems [and] signalled a move away from a narrowly conceived medical model … In viewing drug users as potential sources of harm to themselves but especially to the wider community … the notion of risk [became] a key organising principle in the field.[20]

At this stage, however, the new discourse of dangerousness and risk was not matched by increasingly punitive legislation or repressive policy: the first responses to the early-1980s heroin issue were welfarist and community based.[21] In 1982 the Central Funding Initiative (CFI) was announced, which 'operated by setting aside "earmarked" funds exclusively for drug services that local authorities and voluntary groups could bid for', and which aimed to gather local-level data, raise awareness of drug problems, and foster (cost) effective cooperation between health service and community provision.[22] In line with the Advisory Council on the Misuse of Drugs' (ACMD) 1982 recommendation that 'There should be no changes at national level … prime responsibility for the provision and development of services should remain at local level',[23] these years also saw the expanding use of 'drugs workers, predominantly community psychiatric nurses, social workers, probation officers, outreach workers, counsellors, and ex-users' on hand to provide support,[24] as well as the setting up of dedicated telephone lines and official needle exchanges a few years later.[25] Drug users were conceived of as dangerous but 'rational actors' who were expected 'to

[19] Department of Health and Social Security (DHSS), *Treatment and Rehabilitation: Report of the Advisory Council on the Misuse of Drugs* (1982) 34.
[20] Seddon, *A History* (n.5) 83–85. Similarly, see: Gerry V Stimson, 'British Drug Policies in the 1980s: A Preliminary Analysis and Suggestions for Research' (1987) 82(5) *British Journal of Addiction* 477, 481–82.
[21] Berridge (n.8) 10.
[22] Mold and Berridge (n.11) 37–38.
[23] DHSS, *Treatment* (n.19) 83.
[24] Howard Parker, 'Unbelievable? The UK's Drugs Present' in Howard Parker, Judith Aldridge and Roy Egginton (eds), *UK Drugs Unlimited: New Research and Policy Lessons on Illicit Drug Use* (2001) 6.
[25] Mike Collinson, 'Punishing Drugs: Criminal Justice and Drug Use' (1993) 33(3) *British Journal of Criminology* 382, 383.

utilise available knowledge' and take individual responsibility;[26] and whose behaviour was to be addressed (but not necessarily punished) in the community, instead of under the close supervision of the state-provided Drug Dependency Units and their provision of heroin maintenance supplies.[27]

Similar shifts were observable in broader criminal justice policy. Against a background of rising crime and political, public, and industrial unrest, in 1979 Margaret Thatcher's stated aim was to row back on the 'consensus politics of the post-War period' – i.e., 'the "welfarist" and "treatment" approaches' to crime as 'based on the assumption that most offenders were victims of social deprivation' – and her declared stance was one of 'less tax and more law and order'.[28] To begin with, however, there was a 'communicative dissonance … between rhetorical radicalism and substantive policy'.[29] Rather than the systemic changes belied by Thatcher's asserted ideological framework, reform centred on specific issues such as increases to police and prison spending, driven by anxieties revolving around 'street crimes [and] populations who were perceived to be dangerous, including black youth, "welfare scroungers", drug addicts, and football hooligans'.[30] The first significant legislative reform, the CJA 1982, had a similarly contradictory dissonance between discourse and reality. On one hand, the Act was accompanied by 'toughening' and reformist rhetoric, and moved from rehabilitative towards retributive sentencing: it replaced borstal training with brief sentences in youth custody (a 'short, sharp, shock'), and shorter, but stronger, post-custodial supervision.[31] On the other hand, the Act was not 'a wholesale recasting of the criminal justice system along radically more punitive lines':[32] it generally (and successfully)[33] restricted the use of imprisonment for those under 21, and required that pre-sentencing social inquiry reports were obtained for offenders under 21 or those who had never previously been imprisoned 'for the purpose of determining whether there is any

[26] Seddon, *A History* (n.5) 85.
[27] Institute for the Study of Drug Dependence (ISDD) Research and Development Unit, 'Heroin Today: Commodity, Consumption, Control and Care' in Dorn and South (n.7) 29.
[28] Savage (n.11) 89–90.
[29] Farrall, Burke and Hay (n.9) 223.
[30] Duke (n.16) 22, 32; Savage (n.11) 90–91. Systemic changes at the time were confined to health and education reforms.
[31] CJA 1982, ss.1(3), 15, 20; Stephen Jones, 'The Criminal Justice Act 1982' (1983) 23(2) *British Journal of Criminology* 173.
[32] Farrall, Burke and Hay (n.9) 222.
[33] Stephen Farrall, 'What is the Legacy of Thatcherism for the Criminal Justice System in England and Wales?' in Mary Bosworth, Carolyn Hoyle and Lucia Zedner (eds), *Changing Contours of Criminal Justice* (2016) 20.

appropriate method of dealing with a person other than [imprisonment]'.[34] These alternative methods included suspended sentences, Community Service Orders, and probation with special conditions (including attendance at 'day training centres').[35] Such disposals placed an emphasis on offenders (like drug users) taking individual responsibility for their actions and having their behaviour addressed (but not necessarily *punished*) in the community instead of under the close state supervision of the prison setting; and were set against a political background of 'making community disposals … sound sufficiently tough'.[36]

6.1.2 Second Thatcher Ministry: 1983–1987

During Thatcher's second term, wide-scale criminal justice system reform was on the agenda. These years also saw several legislative and policy developments regarding drugs, beginning with the Home Secretary 'profess[ing] a strategy of eradication';[37] something not dissimilar to the US 'war on drugs' rhetoric. Across both the drugs and wider criminal justice spheres, these policy and legislative developments were very much in synergy with one another. This section 6.1.2 is divided into six (chronological) subsections covering: (i) the systemic changes brought about by the Police and Criminal Evidence Act 1984 (PACE) and the establishment of the Crown Prosecution Service (CPS); (ii) the introduction of the first national drugs strategy in 1985 and its amendment in 1986; (iii) the passing of the ISSA in 1985 (iv) the Controlled Drugs (Penalties) Act 1985 (CDPA); (v) the Drug Trafficking Offences Act 1986 (DTOA); and (vi) the responses to the spread of HIV/AIDS among injecting drug users.

[34] CJA 1982, ss.1–2, 62.
[35] ibid sch.11, para 3; Anthony E Bottoms, 'Limiting Prison Use: Experience in England and Wales' (1987) 26(3) *Howard Journal of Criminal Justice* 177.
[36] Farrall, Burke and Hay (n.9) 225.
[37] Duke (n.16) 35; Home Office, *Tackling Drug Misuse: A Summary of the Government's Strategy* (1985) 3, quoting Home Secretary, December 1983: 'Drug abuse is a disease … stamping it out will be slow and painful'.

6.1.2.1 Systemic Criminal Justice Reforms: The Police and Criminal Evidence Act 1985 and the Crown Prosecution Service

PACE was passed to 'rebalance' the positions of the prosecution and defence.[38] The Act gave police extended powers of stop and search (akin to those which were introduced under the Dangerous Drugs Act (DDA) 1967);[39] authorised 'intimate searches' of bodily orifices for physically injurious articles in police stations (which had already been carried out for drugs under the MDA, section 23(2));[40] extended the definition of 'arrestable offence' to several offences which were not previously arrestable;[41] and introduced the category of 'serious arrestable offence'. This latter category included terrorism, homicide offences, treason, and rape; as well as any offence the consequences of which were serious harm to state security, interference with the administration of justice, death or serious injury, or substantial financial gain or loss.[42] In relation to these offences, the Act allowed: the setting up of road checks; the authorisation of search warrants by JPs; detention without charge up to 96 hours; delays to informing friends and relatives about the arrest; delays to accessing a solicitor; the taking of intimate samples (blood, semen, urine, etc.) with the person's consent; and the drawing of adverse inferences where consent was not given to the taking of intimate samples.[43]

However, while the Act was 'controversial' and seen as 'policing by coercion' by civil liberties groups,[44] it also created several safeguards for defendants, including the tape recording of police interviews, restrictions on the use of confession evidence, and the creation of a Police Code of Practice governing the exercise of police powers.[45]

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[38] For the Act's development, see: Michael Zander, 'PACE (The Police and Criminal Evidence) Act 1984: Past, Present and Future' (2011) 23(1) *National Law School of India Review* 47.
[39] PACE, s.1; text to nn.53–55 in ch.5.
[40] PACE, s.55; Stephen Jones, 'The Police and Criminal Evidence Act 1984' (1985) 48(6) *Modern Law Review* 679, 689.
[41] PACE, s.24.
[42] ibid s.116, sch.5.
[43] ibid ss.4(4)(a)(i), 8(1)(a), 42–44, 56(2)(a), 58(6)(a), 62(2)(a) and (10), 65.
[44] Farrall, Burke and Hay (n.9) 213; Savage (n.11) 91; Jones, 'The Police' (n.40) 679.
[45] PACE, ss.60, 66, 76–77. For a summary of the Code's development and purposes, see: HL Deb 9 December 1985, vol 469, cols 10–13.

Another major change was the establishment of the CPS in 1985.[46] It was created because 'it was undesirable for the police to continue both to investigate and to prosecute crime, and … the wide differences in prosecution practice … required a major change in the prosecution process'.[47] Like parts of PACE, the CPS was intended to enhance checks and balances on the police, with independent 'crown prosecutors [given] complete freedom to veto, or to modify, the initial decision of the police to prosecute'.[48] Also like PACE, a Code for Crown Prosecutors,[49] based on the Attorney General's preceding criteria for prosecution, was created in order 'to provide a basis for efficient and consistent decision-making'.[50] The Code, inter alia, codified a national two-step sufficiency and public interest test; 'unequivocally adopt[ed] and endorse[d] the spirit of the Home Office Cautioning Guidelines' in respect of juveniles, recognising that 'The stigma of a conviction can cause irreparable harm to the future prospects of a young adult'; required prosecutors to give 'anxious consideration' to defendants with mental illness; and allowed prosecutors, when exercising their discretion, to 'throw into the scales the attitude of the local community and any information about the prevalence of the particular offence in the area or nationally'.[51] A full review of the CPS' decision-making at this time could be a thesis in its own right,[52] but it appears that the CPS enthusiastically prosecuted low-level drug offences from the beginning, with figures from *Transform* showing the number of possession convictions rising from c.4,000 in 1984 to 17,963 in 1990.[53] Over the following decade, the number of people cautioned for or found guilty of unlawful possession doubled.[54]

The enactment of PACE and the establishment of the CPS provide high-level context to the drug and criminal justice reforms of the second Thatcher ministry. There was now a willingness to enact systemic reform, with priorities rebalanced and the means of enforcement amended. As in the early 1980s, this entailed both punitive and non-punitive

[46] Prosecution of Offences Act 1985.
[47] *The Review of the Crown Prosecution Service: Summary of the Main Report with the Conclusions and Recommendations* (Cm 3972, 1998) para 1.
[48] Andrew Sanders, 'Arrest, Charge and Prosecution' (1986) 6(3) *Legal Studies* 257, 257.
[49] Printed in: DPP, *Crown Prosecution Service: Annual Report 1986–87* (1987) annex B.
[50] ibid 32.
[51] ibid 32, 38, 40–43.
[52] e.g., Ben Widdicombe, 'Decision-Making in the Crown Prosecution Service: How do Prosecutors Make Decisions?' (PhD thesis, University of Cambridge 2021).
[53] Transform, 'Timeline' (*Transform*) <https://transformdrugs.org/timeline> accessed 27 June 2025. In 1990, almost the same number of those convicted were cautioned: Home Office, *Criminal Statistics: England and Wales* (Cm 5312, 2000) 107.
[54] Home Office, *Criminal* (n.53) 98.

elements, but legislative provisions regarding drugs and the practice of enforcing them were strengthened.

6.1.2.2 UK Drugs Strategy 1985–1986

The first national drugs strategy, *Tackling Drug Misuse*, was published in 1985.[55] This followed the Home Secretary's 'eradication' policy statement and 'marked an important shift in emphasis as enforcement measures were given much more prominence'.[56] To illustrate, 'total health and welfare drugs-related expenditure was estimated at £25–45 million per annum in the mid to late 1980s, compared to … £100 million for drugs-related enforcement',[57] and around 4,300 new patients were seen in addiction out-patient clinics, while 26,000 were convicted or cautioned for drug offences.[58] The five key aims of the 1985 strategy were: (i) reducing supplies from abroad; (ii) tightening controls on drugs produced and prescribed here; (iii) making policing even more effective; (iv) strengthening deterrence; and (v) improving prevention, treatment and rehabilitation.[59]

In 1986 a second edition was published, with stronger language and reordering enforcement up the hierarchy, i.e.: (i) reducing supplies from abroad; (ii) *making enforcement even more effective*; (iii) strengthening deterrence *and tightening domestic controls*; (iv) developing prevention; and (v) improving treatment and rehabilitation.[60] The revised edition also noted 'a whole range of further initiatives' relating to international enforcement funding, more customs personnel, the addition of dedicated drugs wings to Regional Crime Squads, prevention and awareness campaigns, and funding for local services.[61]

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[55] Home Office, *Tackling* (1985) (n.37).
[56] Duke (n.16) 36.
[57] ibid.
[58] Gerry Stimson, 'The War on Heroin: British Policy and the International Trade in Illicit Drugs' in Dorn and South (n.7) 38.
[59] Home Office, *Tackling* (1985) (n.37) 2.
[60] Home Office, *Tackling Drug Misuse: A Summary of the Government's Strategy* (2nd edn, 1986) 2 (emphasis added).
[61] ibid.

The research base for these strategies was criticised: 'the "war on drugs" had not been accompanied by an accompanying investment … to see if the war was indeed being won'.[62] There was an '[e]asy confidence in the effectiveness of penal measures and policing', but a 'neglect of research into law enforcement aspects of drug problems and drug policies in Britain'.[63] While the number of people imprisoned for drug offences increased from 1,676 in 1980 to 4,535 in 1985,[64] there was 'no systematic research conducted on the development of prison drugs policy in Britain' and researchers' access to prisons was restricted until the 1990s.[65] The ACMD and others had warned anti-heroin media campaigns (and TV adverts which 'emphasis[ed] drug use as a cause of crime')[66] were counter-productive, but market research companies were preferred over academic researchers 'to legitimise policy decisions' as they 'produced quicker and more congenial results'.[67] This resulted in 'a further £2 million [being] made available for the development of the [media] campaign in 1986/87'.[68] In terms of addressing drug users, the 1980s saw 'considerable investment of public funds … yet no investigation, at that stage, of whether the money had been spent effectively or wisely'.[69]

6.1.2.3 Intoxicating Substances (Supply) Act 1985

The ISSA is rarely mentioned in the literature on 1980s drug criminalisation, but a brief analysis of the Act is revealing. It was enacted to close a 'glaring loophole in the law' of 'great concern', i.e., the supply of glue/solvents to young people for inhalation.[70] It was introduced after the case of *Khaliq*[71] had extended the Scottish common law offence of reckless endangerment/injury to the supply of potentially toxic substances to children (i.e.,

[62] Berridge (n.8) 4.
[63] Geoffrey Pearson, 'Drugs, Law Enforcement and Criminology' in Berridge, *Drugs* (n.8) 148, 155.
[64] Duke (n.16) app.A2; Stimson, 'The War' (n.58) 38.
[65] Duke (n.16) 3.
[66] ISDD (n.27) 33.
[67] Berridge (n.8) 5, 12; John B Davies and Niall Coggans, 'Media- and School-Based Approaches to Drug Education' in John Strang and Michael Gossop (eds), *Heroin Addiction and Drug Policy: The British System* (1994) 311–14.
[68] Home Office, *Tackling* (1986) (n.60) 17.
[69] Berridge (n.8) 3.
[70] HC Deb 18 January 1985, vol 71, col 643.
[71] *Khaliq* v *HM Advocate* 1984 JC 23.

'glue-sniffing kits' composed of bags into which glue could be poured and then inhaled from). The ISSA (which did not extend to Scotland) made it an offence punishable by 6 months' imprisonment for a person over 18, while acting in the course of a business:

> [T]o supply or offer to supply a substance other than a [drug controlled by the MDA] to a person under the age of eighteen … if he knows or has reasonable cause to believe that the substance is, or its fumes are, likely to be inhaled by the person under the age of eighteen for the purpose of causing intoxication.[72]

The Act was presented as a 'modest little measure'[73] to protect young people from acute toxicity arising from solvent abuse – deliberately drafted not to criminalise solvent abuse per se so as not to make criminals out of young people 'over what is basically foolish behaviour' and disincentivise parents from seeking help.[74] However, a closer reading of the Parliamentary debates shows that legislators had far broader and abstract conceptions of dangerousness and risk in their contemplation: 'Other people are also at risk ... [T]hose who are … high on solvents are likely to commit offences'.[75] These offences were said to include: general 'crimes and outrages'; anti-social behaviour; starting fires; theft; assaults on the public; knife assaults on policemen; violent rape; and double murder.[76] In one speech, explicit links were drawn between legitimate criminalisation and the management of such abstract risks:

[72] ISSA, s.1.
[73] HC Deb 18 January 1985, vol 71, col 649.
[74] ibid 645.
[75] ibid 675.
[76] ibid 644, 651, 663, 666, 676, 678.

> [T]he Bill … is consistent with the general principles of the law. Any person supplying solvents in the circumstances described in the Bill would clearly be displaying a degree of recklessness as there is manifestly a real risk that the person to whom the substance is supplied will end up either committing a criminal offence or indulging in some anti-social activity sufficiently grave as to compel the criminal law to intervene in the way specified in the Bill.[77]

The intended mode of the Act's operation in managing these abstract risks was to prompt local shopkeepers to take individual responsibility for their actions and to promote community self-regulation:

> Some may say that ['knows or has reasonable cause to believe'] will give the lawyers a field day, but those who will form the majority of suppliers are responsible people. I believe that the measure will be a deterrent and that they will not wish to test the matter in the courts. If the Bill is passed, I believe that it will encourage them to exercise greater care over supplying solvents to young people.[78]

Indeed, throughout the Bill's second reading, the concept of community – of the full range of people and organisations in a locality coming together to tackle the issue – was a common refrain, and the notion of heightened state regulation (e.g., of solvent manufacturers) summarily dismissed. Notwithstanding the criminalising provisions of the legislation, it was parents who were stressed as being on the 'front line', as well as teachers, social workers, doctors, local authorities, police officers, and shopkeepers; and commendatory examples were given of several local newspapers and radio stations which had run awareness campaigns.[79] However, despite these appeals to community strength, the undertone was consistently one of risk to communities and their vulnerability: it was said that 'the scourge [of glue-sniffing] has not just reached council estates in the inner city

[77] ibid 664.
[78] ibid 671; see also: 650, 654, 686.
[79] ibid 644, 648, 653, 667–68, 684.

but has permeated the leafy suburbs and also the towns and villages of the county … No family in the land can afford to think that it will not be affected',[80] and that (conversely) glue-sniffers were 'under-educated and inarticulate' 'truants … from deprived backgrounds'.[81]

In sum, the principles and justificatory rationales underpinning the ISSA were similar to the early-1980s approach to heroin and young/low-level offenders in general. The rhetoric on drug use(rs) (in this case, solvent abusers) stressed their dangerousness by reference to a broad range of potential (but not necessarily probable), loosely-specified, collective-level harms, just as the recasting of the 'addict' as being the 'problem drug taker' had done. This was not, however, accompanied by far-reaching or draconian 'clamping down' legislation or policy regarding solvents. Nor was the Act intended to be particularly retributive, with custodial sentences rendered unlikely by the 6-month maximum sentence. The primary intention was to foster individual responsibility among (potential) offenders for their actions – underpinned by a willingness to intervene/criminalise where this was absent – and the mobilisation of community approaches to tackle local problems instead of centralised government management.

6.1.2.4 Controlled Drugs (Penalties) Act 1985

Shortly after the ISSA received Royal Assent, the CDPA was passed, raising the maximum sentence for the MDA offences of production, supply, and possession with intent to supply of Class A drugs from 14 years' to life imprisonment; and the Customs and Excise Management Act 1979 offences of importation/exportation of Class A drugs to life imprisonment and Class B drugs to 14 years' imprisonment.[82] This was part of a general trend of enacting maximum sentences of life imprisonment for various offences.[83] During its passage, legislators in both Houses and of all political affiliations were keen to join the

[80] ibid 663.
[81] ibid 674.
[82] For discussion of the interplay between offences under the MDA and the Customs and Excise Management Act 1979, see: Rudi Fortson, *The Law on the Misuse of Drugs and Drug Trafficking Offences* (2nd edn, 1992) ch.2.
[83] HL Deb 27 June 1985, vol 465, col 836: 'there are now about 20 crimes for which life imprisonment can be imposed'.

chorus of unanimous[84] views on the measure – views which bore little resemblance to the reasoned and rational drugs debates of the 1960s[85] and harked back to those of the c.1920s.[86] Justifying the potential imposition of life imprisonment, Class A drug dealing was repeatedly likened to murder: '[these offenders] deserve to be faced with precisely the same punishment as we accord to those who are guilty of murder';[87] 'this maximum sentence would … reflect the revulsion society has for these parasites who trade in human misery and who by many people are classed alongside murderers and rapists';[88] 'there is absolutely no difference between murder by shotgun in the course of armed robbery and murder by heroin for financial gain'.[89] Drugs (including cannabis), their dealers, and (to a lesser extent) their users were variously described as 'a terrible plague', 'foul', 'evil', 'vicious', 'wicked', 'terribly heinous', 'destructive', 'filthy', 'pernicious', 'dirty and despicable', 'callous', 'greedy', 'manipulative', and 'insidious'.[90] The analogy of going to 'war' against 'merchants of death' was carried over from the Commons to the Lords,[91] and this was an area in which basic principles of justice, and general principles of criminal law, could apparently be swept aside: 'There should be automatic deportation of anyone from another country who is convicted of the supply and distribution of class A drugs, and *there should be no right of appeal*';[92] 'there might be some utility in reversing the burden of proof'.[93]

As had occurred in the ISSA debates, and (again) in line with the terminology of the 'problem drug taker', the harms of drugs were portrayed as being extremely broad, causing: intolerable risks to users' health; 'enormous social pressures and family difficulties'; 'a great increase in ordinary crime, which affects innocent, law-abiding citizens' because 'addicts … need the wherewithal to purchase drugs'; money laundering by 'Mafia-style' 'big boys'; and 'a massive increase in cost to the Health Service'.[94] While the CDPA related only to sentencing, it was argued that the 'drugs menace' necessitated a wide range of

[84] HC Deb 19 April 1985, vol 77, col 562: 'This is not a partisan measure. It … commands support from every corner of the House and I am proud to say that the 11 sponsors include representatives of every political grouping and every shade and faction within those groupings in the House'.
[85] Text to nn.152–161 in ch.5.
[86] Text to nn.55ff in ch.3; nn.14ff in ch.4.
[87] HL Deb 27 June 1985, vol 465, col 837.
[88] ibid 838.
[89] HC Deb 19 April 1985, vol 77, col 562.
[90] ibid 571–574; HL Debs 12 June 1985, vol 464, cols 1334–36; 27 June 1985, vol 465, cols 837, 844.
[91] HC Deb 19 April 1985, vol 77, cols 573, 578; HL Deb 12 June 1985, vol 464, cols 1338, 1340.
[92] HC Deb 19 April 1985, vol 77, col 572 (emphasis added).
[93] ibid 580 (regarding confiscation of traffickers' assets).
[94] ibid 562, 568.

interventions, including 'the energies of the whole community', heightened surveillance in the form of databases and 'experienced analysts able to analyse what is happening', and further legislation to enable the confiscation of traffickers' assets.[95]

6.1.2.5 Drug Trafficking Offences Act 1986

From 1986, '[t]he bifurcated policy of control endured with punitive enforcement measures targeted towards drug dealers and traffickers and harm and demand reduction measures for drug users',[96] and the 'war on drugs' rhetoric was increasingly deployed.[97]

The DTOA made drug trafficking a 'serious arrestable offence' alongside murder, treason, etc.,[98] and allowed 'utterly draconian'[99] pre-sentencing confiscation orders to be made requiring persons who had, by 'receiv[ing] any payment or other reward … benefited from drug trafficking' to pay their gains to the state.[100] There was a rebuttable presumption 'that any property … held by him at any time since his conviction, or … to have been transferred to him at any time … six years [prior to the institution of] proceedings … was … a payment or reward in connection with drug trafficking',[101] and the defendant's acceptance 'to any extent any allegation' in a prosecutorial statement that they benefited from drug trafficking could be treated 'as conclusive'.[102] Equivalent confiscation provisions were enacted for Scotland under the Criminal Justice (Scotland) Act 1987 (CJSA).

Additionally, new offences were created. The DTOA inserted into the MDA (in section 9A) offences similar to those originally enacted under the Defence of the Realm Act 1914, regulation 40B (and thereafter re-enacted)[103] in respect of opium, namely: of supplying or offering to supply any article which may be used to prepare, or (excepting hypodermic syringes) used or adapted to be used in the administration of, a controlled drug, in the belief

[95] ibid 568, 572, 576, 580.
[96] Duke (n.16) 60.
[97] Stimson, 'The War' (n.58) 43–44.
[98] DTOA, s.36; text to nn.41–42 above.
[99] Fortson (n.82) v, 201–02.
[100] DTOA, s.1.
[101] ibid s.2.
[102] ibid s.3(1).
[103] DDA 1920, s.5; MDA, s.9.

the article will be so used.[104] Fortson notes that the breadth of this offence made it an offence to sell 'a perfectly innocent mirror [or box of straws] in the belief it will be used in connection with the unlawful snorting of heroin or cocaine'.[105] The DTOA also created the offence of assisting another to retain the benefit of drug trafficking, i.e., where a person who knows or suspects another (A) to be involved in drug trafficking and 'enters into … an arrangement whereby the retention or control … of A's proceeds of drug trafficking is facilitated'; or those proceeds 'are used to secure that funds are placed at A's disposal, or are used for A's benefit to acquire property by way of investment'.[106] Again, an equivalent Scottish offence was created under the CJSA, section 43.

6.1.2.6 Responses to HIV/AIDS among Injecting Drug Users

At this point, HIV/AIDS among injecting drug users 'developed into a serious policy issue',[107] and prompted a 'fundamental re-examination of drug policy and … treatment' and a suite of sudden responses.[108] The previously-mentioned[109] CFI was expanded from the original £6 million to £17.5 million.[110] This enabled the establishment of more local and autonomous non-medical 'drugs agencies [which were] responsive to new ideas' regarding the prioritisation of harm-minimisation over abstinence.[111] A 1986 Scottish Home and Health Department Report recommended the provision of sterile needles which was soon adopted by the ACMD, and antecedent gay discourses and responses surrounding safer sex in the face of HIV were applied to injecting drug users.[112] The ACMD produced three reports on *AIDS and Drug Misuse* in 1988, 1989 and 1993. These reports declared that 'HIV is a greater threat to public and individual health than drug misuse';[113] encouraged an

[104] DTOA, s.34.
[105] Fortson (n.82) 134.
[106] DTOA, s.24.
[107] Berridge (n.8) 8; Roy Robertson, 'The Arrival of HIV' in Strang and Gossop (n.67) esp 96–97.
[108] John Strang and others, 'Prescribing Heroin and Other Injectable Drugs' in Strang and Gossop (n.67) 200.
[109] Text to n.22 above.
[110] Home Office, *Tackling* (1985) (n.37) 20; *Tackling* (1986) (n.60) 23; Mold and Berridge (n.11) 37.
[111] Gerry V Stimson, 'Minimizing Harm from Drug Use' in Strang and Gossop (n.67) 249–50.
[112] ibid 253–54.
[113] DHSS, *AIDS and Drug Misuse: Report by the Advisory Council on the Misuse of Drugs* (1988) 1. See further: Steve Cranfield and others, 'HIV and Drugs Services – The Challenge of Change' in Strang and Gossop (n.67).

expansion of local services;[114] and reappraised[115] the prescribing of injectable drugs in order 'to attract sero-positive drug misusers into regular contact with services; to promote behaviour change away from [HIV transmission risk] practices …; to … maximise personal health and stability; [and] to encourage compliance with medical treatment'.[116]

None of these were new concepts,[117] but rather a bolstering of already- or previously-existing harm-reduction approaches. Likewise, the discovery of HIV/AIDS among injecting users amplified the already-prevalent discourses surrounding drugs. As noted above, the early- to mid-1980s rhetoric of the 'disease' of drugs had 'reinstated older notions of epidemic and danger';[118] and the 'key organising principle' 'of risk'[119] had stressed the importance of rapid and (ostensibly) enforcement-heavy policy developments, epidemiological approaches to data collection and surveillance, and a focus on users' individual responsibility.[120] In the second half of the decade, this rhetoric took on an elevated complexion,[121] as 'The prevalence of HIV among drug-users was crucial to … presenting the virus as a threat to the general population'.[122] Hence, criminal justice measures continued to be increasingly deployed for drugs (and homosexual) offences[123] alongside the harm-reduction initiatives; both of which necessitated increased central government management of the problem.

6.1.3 To the Turn of the Century: 1987–c.2000

Arguably the most significant criminal justice developments from 1987–c.2000 related to procedure and sentencing (including ancillary orders and disposals). Much has been written

[114] Robertson (n.107) 97.
[115] The post-1926 Rolleston prescribing system was dismantled following the DDA 1967.
[116] John Strang and Michael Gossop, 'The "British System": Visionary Anticipation or Masterly Inactivity?' in Strang and Gossop (n.67) 347–48, citing DHSS, *AIDS* (n.113).
[117] Duke (n.16) 60; Seddon, *A History* (n.5) 86–87; Toby Seddon, Robert Ralphs and Lisa Williams, 'Risk, Security and the "Criminalization" of British Drug Policy' (2008) 48(6) *British Journal of Criminology* 818, 824–26.
[118] Above at n.18 (and text to).
[119] Text to n.20 above.
[120] See generally sections 6.1.1–6.1.2 above.
[121] Albeit this was mixed, with certain demographics being more sympathetic than others: Matt Cook, 'AIDS, Mass Observation, and the Fate of the Permissive Turn' (2017) 26(2) *Journal of the History of Sexuality* 239; Davenport-Hines (n.3) 377.
[122] Davenport-Hines (n.3) 377.
[123] Duke (n.16) app.A2; Cook (n.121) 269.

about this,[124] so a relatively concise outline will be given here, but it is clear that during this period there is significant synergy between drug and wider criminal law and policy.

The CJA 1988 made myriad changes broadly focused on strengthening enforcement, ease of prosecution, and sentencing. These included: enabling the Attorney-General to appeal against unduly lenient sentences;[125] making common assault and battery summary offences;[126] increasing the penalties for several offences;[127] extending confiscation orders to all indictable offences, those relating to sex establishments, and others;[128] extending provisions relating to the forfeiture and destruction of 'anything … related to' a drugs-related offence;[129] and extending police powers to search detained persons.[130] In the same year, drugs offences sentencing was developed by the courts. The 1983 case of *Aramah*[131] had laid down extensive guideline sentences for drugs offences, but revision was required following the increases to maximum sentences enacted under the CDPA.[132] Thus, in *Bilinski*[133] the guideline tariff for Class A drugs offences was increased.[134] The Court of Appeal made additional authoritative statements in *Lawrence*,[135] further reinforcing the official linkage between drugs and acquisitive crime: 'Let this appeal henceforth stand as authority if in truth it be needed. We cannot make too plain the principle to be followed. It is no mitigation whatever that the crime is committed to feed an addiction'.[136]

By contrast, the CJA 1991 was in several ways an arrestment, or at least a toning-down, of the 'tough' rhetoric and legislative provisions of the preceding few years. It is widely regarded as an effort to make sentencing (for most offences) based on giving offenders their

[124] e.g., (by date of publication): Norrie, '"Consensual"' (n.11); Andrew Ashworth, *Sentencing and Criminal Justice* (1st edn, 1992–5th edn, 2010); Andrew von Hirsch, *Censure and Sanctions* (1993); Ian Dunbar and Anthony Langdon, *Tough Justice: Sentencing and Penal Policies in the 1990s* (1998); Tim Newburn, '"Tough on Crime": Penal Policy in England and Wales' (2007) 36(1) *Crime and Justice* 425; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, 2014) ch.12; Farrall, Burke and Hay (n.9); David Downes and Tim Newburn, *The Official History of Criminal Justice in England and Wales: The Politics of Law and Order*, vol 4 (2023) chs.4–5.
[125] CJA 1988, s.36.
[126] ibid s.39.
[127] ibid ss.44–48.
[128] ibid s.71, sch.4.
[129] ibid s.70.
[130] ibid s.147.
[131] *Aramah* (1983) 76 Cr App R 190.
[132] Fortson (n.82) 302.
[133] *Bilinski* (1988) 86 Cr App R 146.
[134] For a full account, see: Fortson (n.82) 302ff.
[135] *Lawrence* (1988) 10 Cr App R (S) 463.
[136] ibid 464. See also: Patrick Bucknell and Hamid Ghodse, *Bucknell and Ghodse on Misuse of Drugs* (3rd edn, 1996) para 19-014.

'just deserts',[137] and a '"high watermark" of informed, liberal sentencing policy'.[138] It was enacted following a 1988 Green Paper and a 1990 White Paper which stressed that deterrent sentencing was unlikely to be successful; that punishment in the community (with strict restrictions on freedom) was preferable to custody; and that imprisonment was likely to increase recidivism.[139] These publications, argues Savage, were:

> [C]onsistent with other areas of policy. The common thread is individual responsibility: responsibility for one's own property (crime prevention); responsibility towards the wider community (Neighbourhood Watch); responsibility for the consequences of one's criminal actions … and so on.[140]

The Act provided that custody, or community sentences,[141] were only to be imposed where the offence was 'serious' enough,[142] and that prison sentences were required to be 'commensurate with the seriousness of the offence, or where the offence is a violent or sexual offence, for such longer term … is necessary to protect the public from serious harm from the offender'.[143] Previous convictions no longer constituted an aggravating factor for sentencing purposes.[144] Additionally, the Act not only provided an opportunity to divert drug offenders and users engaged in acquisitive crime away from prison (i.e., going 'some way to reducing the severity of the doctrine that a need to obtain drugs is no mitigation'),[145] but it '[held] out the promise that [drug and drug-using] offenders [would] be more likely to receive treatment than simple punishment'.[146] This was by virtue of how the criteria for probation orders were reframed. Courts were explicitly allowed to make such orders in the

[137] Ian Loader, 'Changing Climates of Control: The Rise and Fall of Police Authority in England and Wales' in Bosworth, Hoyle and Zedner (n.33) 5; Andrew Ashworth, 'Rationales for Sentencing in England and Wales over Five Decades – Ratatouille Without a Recipe?' in Bosworth, Hoyle and Zedner (n.33) 112–17; Newburn (n.124) 436–37; Norrie, *Crime* (n.124) 346; Dunbar and Langdon (n.124) ch.8; Collinson (n.25) 382.
[138] Above at n.12.
[139] Newburn (n.124) 436–37; Savage (n.11) 99–100.
[140] Savage (n.11) 100.
[141] CJA 1991, s.6.
[142] ibid s.1(2).
[143] ibid s.2(2).
[144] ibid s.29.
[145] Bucknell and Ghodse (n.136) para 19-015.
[146] Collinson (n.25) 382; Duke (n.16) 63–64.

interests of the offender's rehabilitation and of 'protecting the public from harm from him or preventing the commission by him of further offences';[147] and could require those who had 'a propensity towards the misuse of drugs or alcohol', and whose such propensity 'caused or contributed to the offence', to undergo treatment during their probation.[148]

However, 'The institutionalization of proportionality or desert [was] poorly accomplished',[149] 'very few conditions of drug treatment were made',[150] and 'there was an extraordinarily swift retreat from the 1991 Act'.[151] The CJA 1993 reinstated the taking into account of previous convictions;[152] provided that confiscation orders under the DTOA would be decided on the balance of probabilities;[153] and created new offences of acquiring, possessing, or using the proceeds of drug trafficking,[154] as well as other finance-related offences.[155] More broadly, the new policy was of increasing resort to custodial sentences over the next decade (especially for drugs), as the Conservatives and Labour sought to compete on 'toughness' against crime.[156] An extensive Home Office study of sentencing in the mid-1990s identified the first criterion for custody as being 'if the offender was seen to pose a risk to the public',[157] rather than on 'just deserts' grounds.

Successive Acts continued this trend, which became what is described by Carvalho as 'an unprecedented expansion of the boundaries of the criminal law and its framework of criminal liability, manifested through the proliferation of criminal offences and of far-reaching powers of surveillance and crime control'.[158] Drugs became increasingly integrated into this broader rubric. The Criminal Justice and Public Order Act 1994 (CJPOA) introduced:[159] the drawing of adverse inferences from a defendant's silence;[160] stop and

[147] CJA 1991, s.8; cf Powers of Criminal Courts Act 1973, s.2 (as enacted).
[148] CJA 1991, sch.1, pt.II, para 6 (inserting sch.1A into Powers of Criminal Courts Act 1973).
[149] Ashworth, 'Rationales' (n.137) 115.
[150] Duke (n.16) 64–65. cf *Elder and Pyle* (1994) 15 Cr App R (S) 514 where, with reference to the CJA 1991, s.5, suspended sentences for cannabis offences were reduced to community service.
[151] Newburn (n.124) 437.
[152] CJA 1993, s.66(6).
[153] ibid ss.7(2), 9.
[154] ibid s.16.
[155] ibid s.52.
[156] Newburn (n.124) 439–45.
[157] Home Office, *Sentencing Practice: An Examination of Decisions in Magistrates' Courts and the Crown Court in the Mid-1990s* (HO Research Study 180, 1998) ix.
[158] Henrique Carvalho, *The Preventive Turn in Criminal Law* (2017) 2.
[159] For a fuller summary, see: Andrew Ashworth, 'Coping with the Criminal Justice and Public Order Act' [1995] *Criminal Law Review* 1.
[160] CJPOA, ss.34–39.

search powers in the absence of suspicion;[161] powers to remove trespassers, squatters, and those attending or preparing for a rave (i.e., in response to the ecstasy/MDMA-driven 'rave culture' of the 1990s);[162] a wide range of new offences;[163] increases in penalties for several offences;[164] and drug testing of prisoners.[165] In the same year, the Drug Trafficking Act 1994 replaced the DTOA, generally strengthening provisions against trafficking (including asset confiscation) and creating an offence of 'tipping off', i.e., disclosing information which is likely to prejudice investigations into drug money laundering.[166] Thereafter, in 1997, mandatory minimum sentencing was introduced (including for certain drug offences),[167] and a system of sex offender registration was created.[168] Finally, in 1998, civil preventative orders and Drug Treatment and Testing Orders (DTTO) were introduced.[169] The former was the ASBO: a civil order imposable on conviction or on application by a specific authority, made on the balance of probabilities, setting conditions such as curfews and/or geographical restrictions, and breach of which was a criminal offence.[170] DTTOs could be made on conviction, requiring offenders to submit to drug testing and treatment for a specific period 'with a view to the reduction or elimination of the offender's dependency on or propensity to misuse drugs'.[171]

6.1.4 Summary of Above Chronological Discussion

The above discussion aimed to investigate the degree of synergy between the legislative developments, policy underpinnings, and political discourses surrounding both drugs and wider criminal law/justice-related issues. As I have tried to show – and will summarise here

[161] ibid s.60.
[162] ibid pt.V; Fiona Measham, Judith Aldridge and Howard Parker, 'Unstoppable? Dance Drug Use in the UK Club Scene' in Parker, Aldridge and Egginton (n.24) ch.5. Yet, ecstasy offences were sentenced more leniently than other Class A drug offences: Philip Bean, *Drugs and Crime* (3rd edn, 2008) 70.
[163] e.g., CJPOA, ss.51, 84, 154, 161.
[164] ibid ss.88, 157.
[165] ibid s.151.
[166] Drug Trafficking Act 1994, s.53.
[167] Crime (Sentences) Act 1997, pt.I.
[168] Sex Offenders Act 1997, s.1.
[169] Crime and Disorder Act 1998, ss.1, 61–64.
[170] For discussion of such orders, see: Rory James Kelly, 'Behaviour Orders: Preventive and/or Punitive Measures?' (PhD thesis, University of Oxford 2019).
[171] Crime and Disorder Act 1998, ss.61(1), 62(1).

– these were overall remarkably in step with one another throughout the period under examination.

First, during the period 1979–1983, the political discourse on criminal justice issues, including drugs, related to rowing back welfarist approaches and 'toughening' rhetoric. However, this found little legislative or policy expression. The CJA 1982 made few major or systemic changes. While it did introduce brief youth custody sentences and strengthened post-custodial supervision, it generally restricted youth imprisonment and introduced pre-sentencing social inquiry reports aimed at directing offenders towards community sentences which sought to rehabilitate and engender individual responsibility. Similarly, while the recasting of 'addicts' as 'problem drug takers' stressed users' dangerousness and risks, and officially cemented the drugs/property crime nexus,[172] the response on the ground at this time was (contradictorily) not overtly penal. Instead, money was pumped into local/community level, rehabilitative, and welfarist initiatives, and 'problem drug takers' were expected to exercise agency and take up these opportunities.

Second, during the period 1983–1987, the discourse surrounding dangerousness, risk, and 'toughness' continued with an upward trajectory, but now started to translate into legislative and policy developments in both the drugs and the wider criminal law/justice fields. However, the theme of contradiction (or 'paradox')[173] remained. PACE, the newly-established CPS, and the 1985–1986 Drugs Strategies rebalanced and reordered police, prosecution, and enforcement priorities in their respective areas – with the expansion of police powers of arrest and search and increasing enforcement action taken against drug offences – whilst several protections for defendants were brought in and local drug services' funding increased. The (relatively neglected) ISSA was a microcosm of broader developments during this period, and can be seen as bridging the gap between the increasingly punitive responses mid-decade and the welfarist approach of the early 1980s. It was an Act which created a new criminal offence in response to the (sometimes outlandish) perceived risks of solvent abuse(rs) to individuals and the wider community, but which imposed modest maximum penalties and aimed to foster individual responsibility among both would-be offenders (mainly shopkeepers) and a broad range of people in affected communities (similarly to neighbourhood watch schemes). The CDPA, which was

[172] For discussion of the development of abstracted risk re property offences, see: Farmer, *Making* (n.10) ch.7.
[173] Above at n.11 (and text to).

enacted on the heels of the ISSA and after particularly rabid Parliamentary debate, increased the maximum sentences for certain drugs offences to life imprisonment – something which was mirrored in relation to several other offences. Lastly, the confiscation orders and offences created under the DTOA were a high point of punitiveness in drugs legislation, enacted during a period of strong political posturing regarding crime control, and shortly before a raft of broader criminal justice reforms. Yet, the discovery of HIV/AIDS among injecting users at the same time meant that harm minimisation and epidemiological approaches were expanded through the CFI, which itself created an additional paradox: a government committed to rolling back the state (i.e., to become 'the facilitator rather than provider'),[174] was brought closer in through the funding and oversight of voluntary organisations.[175]

Third, and finally, during the period 1987–c.2000, law and policy relating to drugs and criminal law were perhaps even more aligned than previously. The CJA 1988 inter alia extended confiscation orders from drugs trafficking to all indictable offences, and increased maximum sentences for various offences at the same time new, tougher sentencing guidelines were laid down for drugs offences. When the CJA 1991 was enacted to reevaluate sentencing policy along desert-based principles in a '"high watermark" of informed, liberal sentencing policy',[176] the Act also opened the door to diverting drug offenders away from prison and into treatment. However, the CJA 1991's measures were soon reversed and the law was developed in relation to drugs and other criminal justice-related issues in much the same way. Multiple statutes were enacted to, inter alia: remove criminal trespassers and ecstasy ravers; strengthen measures against financial crime (both drug-related and otherwise); mandate minimum sentences for drugs and other offences; and give sentencers a broader range of options at their disposal to prevent and alleviate the social risks associated with offending, such as ASBOs and DTTOs. If moments of legal reform are when principles are articulated and limits are tested, then the short lifespan of the CJA 1991 and the following rapid backtracking show that the drivers operating at this period of time, across both drug laws and the wider criminal law, were the same; namely, criminalisation

[174] Duke (n.16) 57.
[175] Mold and Berridge (n.11) 30. Newburn (n.124) 440 and Duke (n.16) 22 note a similar, broader 'systemic managerialism' in the criminal justice system.
[176] Above at n.12.

was based on forward looking conceptions of dangerousness and abstract risks, at the expense of just deserts, harm done, and proportionality of sentencing.

6.2 Conceptual Considerations

The preceding discussion was largely doctrinal, examining the relationship between drug and wider criminal law/justice legislation and policy from c.1980–c.2000. This section considers drug criminalisation from a conceptual standpoint with reference to the work of contemporaneous and current theorists. There are two main reasons for including this section. First is consistency of methodology: it has been the approach throughout this thesis to examine not only doctrinal legal developments, but also, inter alia, the historical understandings of what the purposes of criminal law and criminalisation were deemed by authoritative figures to be at the time, and the modes of governance in operation. Second is to end the last chapter of this thesis with some observations geared towards its Conclusion.

This section is structured as follows. 6.2.1 considers Seddon's argument locating late twentieth century 'developments in the drugs field in the wider context of … the rise of neoliberalism'.[177] Building on Seddon's framework, I argue that there is a cyclical pattern observable in drug law and policy developments, with several aspects of late twentieth century drug law and policy developments having strong antecedents going back over a century. 6.2.2 then considers Farmer's work, which is in a similar vein to Seddon's and frames criminal law theorising in the latter part of the twentieth century as 'neo-classical criminal law': a reaction to neoliberal crime policies, distinct from mid-twentieth century penal-welfarism, and characterised by 'a new kind of approach based around the identification or restoration of a "classical idea" of [retributivist] criminal law'.[178] From a brief overview of some the era's leading criminal law theorists' works it is apparent that, despite drug laws being prima facie obvious targets of a neo-classical criminal lawyer's criticisms, there was a paucity of direct engagement with drug laws. Lastly, at 6.2.3, I expand

[177] Seddon, *A History* (n.5) 78.
[178] Farmer, *Making* (n.10) 64, 104.

on how (and why) several of the main targets of neo-classical criminal law theorising, which had extensive and existing precedents in the area of drugs, only became problematised objects of attention, and in primarily non-drug related areas, in the 1990s and into the twenty-first century. From this, it is argued that drug laws are more central to the criminal law in terms of exerting an influence than has been fully recognised, having directly and indirectly shaped and encouraged further growth and development across criminal law, criminal justice, and (derivatively) even the modern state.[179]

6.2.1 Neo-Liberalism

As noted, Seddon locates late twentieth century 'developments in the drugs field in the wider context of … the rise of neoliberalism',[180] with the key dimensions of neoliberalism including, inter alia: a focus on consumption whereby 'individuals … "understand and enact their lives in terms of choice"' (a corollary of which is individual responsibility); 'a revival of certain elements of nineteenth-century liberal capitalism'; and whereby risk is 'a central organising principle for life'.[181]

I will not restate Seddon's analysis,[182] but instead augment it and advance my own observations. The focus on individual choice and responsibility is apparent across such diverse areas as: drug users accessing and engaging with treatment and exercising agency in harm-minimisation;[183] offenders taking up the 'opportunity' of community sentencing; and the encouragement of people and communities affected by drugs and crime to address those issues themselves, through (for example) local anti-drug initiatives and the expansion of neighbourhood watch schemes.

Seddon's identification of 'a revival of certain elements of nineteenth-century liberal capitalism' (and the transformation of laissez-faire) in the drugs field is particularly

[179] Michael Shiner, 'British Drug Policy and the Modern State: Reconsidering the Criminalisation Thesis' (2013) 42(3) *Journal of Social Policy* 623, 626.
[180] Seddon, *A History* (n.5) 78.
[181] ibid 79–80.
[182] ibid ch.5; which has at its main focus the Drugs Act 2005 – outwith the temporal scope of this thesis.
[183] ibid 85.

interesting as it can be taken further and reformulated to the following: in drugs legislation and policy during the 1980s and 1990s there was a revival of *several* elements of nineteenth *and early twentieth* century *drug regulation and criminalisation*. In other words, something of a cyclical pattern unfolded.[184]

First, the offence under the ISSA is reminiscent of those created under the Pharmacy Act 1868.[185] Both applied only to those acting in the course of a business, carried modest penalties, and were new offences relating to the supply of common and useful substances (solvents and opium) which had the potential for abuse, but which were never mooted as requiring outright bans. Especially similar here is the justificatory rationale for these offences, as both the 1868 and 1985 Acts sought to foster individual responsibility among retailers, i.e., to make them 'prudent men', and were part of an agenda which '[acted] through (and on occasion [contradicted]) an overt philosophy of laissez-faire and non-paternalism'.[186] Further links to nineteenth and early twentieth century law-making can also be made. The 1980s focus on voluntary drug services giving way to mandatory drug testing and court-ordered DTTOs in the 1990s followed a progression similar to the voluntary 'retreats' countenanced by the Habitual Drunkards Act 1879 giving way to the forced detention courts could impose post-conviction in an inebriate reformatory under the Inebriates Act 1898 in addition to any other sentence.[187] The criminalisation of drug paraphernalia under the DTOA was first done during the First World War,[188] and the extension of police powers of search for drugs had been ongoing since the early twentieth century.[189] In terms of judicial law-making, it was held in the early 1980s that those who supplied drugs which were voluntarily consumed by adults and resulted in death could not be guilty of manslaughter.[190] However, such charges were revived in the 1990s,[191] in a similarly novel and legally-questionable way (i.e., 'unlawful act manslaughter') to that in the case following Billie Carleton's death in 1918/1919.[192] Additionally, a key feature of the

[184] There were also several key differences, which both Seddon and the preceding section 6.1 outline.
[185] Text to nn.199ff in ch.1.
[186] Martin J Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830–1914* (1990) 71, 82; text to nn.256 in ch.1.
[187] See also: Seddon, *A History* (n.5) 86–98, citing Virginia Berridge, 'Punishment or Treatment? Inebriety, Drink, and Drugs, 1860–2004' (2004) 364 *Lancet* 4, and drawing links between the response to HIV/AIDS and the Inebriates Act 1898.
[188] Above at n.103 (and text to).
[189] Text to n.22 in ch.3; nn.14ff in ch.4.
[190] *Dalby* [1982] 1 WLR 425.
[191] See history of *Kennedy (No 2)* [2007] UKHL 38 at [3]–[4].
[192] Text to nn.55ff in ch.3.

Victorian legislative state was the centralised bureaucratic oversight of local agencies, which has parallels with the operation of the CFI in the 1980s.

Second, and relatedly, the rhetoric and policy surrounding drugs harked back to nineteenth century precedents. These included basing policy around 'dangerous classes' – the 'problem drug taker' – and character-based attributions of criminal responsibility;[193] and the concept of the 'disease' of drug addiction and its links to public health.[194] Third, the Parliamentary debates and official discourse during the passage of the CDPA and DTOA – which stressed the 'evil' of drugs, were focused on raising sentences to the highest possible levels, and were concerned with international traffic – were very much akin to those of the early twentieth century, and were a departure from those of the 1960s and 1970s.[195] Fourth, just as had occurred at the end of the nineteenth century and the beginning of the twentieth century,[196] the 1980s and 1990s saw a sudden flurry of activity on drugs at the international level. This included: the 1988 Trafficking Convention;[197] an April 1990 London World Ministerial Summit to Reduce the Demand for Drugs;[198] the Criminal Justice (International Co-operation) Act 1990's enactment;[199] the establishment of the European Drug Monitoring Centre in 1991 (recast as the European Monitoring Centre for Drugs and Drug Addiction in 1993) and several other institutions and groups throughout the 1990s;[200] Schengen-based measures aimed at improving cooperation against drug trafficking in 1993;[201] and a European Joint Action on new synthetic drugs in 1997.[202]

[193] e.g., n.45 (and text to) in ch.2; text to nn.14ff, 62ff in ch.4.
[194] '[T]he nineteenth-century ghost of Edwin Chadwick': Seddon, *A History* (n.5) 98.
[195] cp text to nn.14ff in ch.4; nn.152–161 in ch.5
[196] Text to nn.107ff in ch.2; see generally ch.3.
[197] Trafficking Convention (n.1).
[198] Loren Cain, 'The United Kingdom' in Scott B MacDonald and Bruce Zagaris (eds), *The International Handbook on Drug Control* (1992) 290–91.
[199] See further: Fortson (n.82) 274–76.
[200] Paul Cook, 'European Drug Policy on Supply and Demand Reduction' in Cameron Stark, Brian A Kidd and Roger AD Sykes (eds), *Illegal Drug Use in the United Kingdom: Prevention, Treatment and Enforcement* (1999) esp 6–12.
[201] Decision (EC) (SCH/Com-Ex (93)14) of 14 December 1993, OJ L239/427.
[202] Joint Action 97/396/JHA of 16 June 1997, OJ L167/1.

6.2.2 'Neo-Classical' Criminal Law

It is in relation to the cyclical features just described, and to the concept of risk becoming an organising principle in the field, that Farmer's account comes into play. In contrast to Seddon's conception of neo-liberalism as way to explain the developments in drug laws, Farmer's account of neo-classical criminal law is an articulation of 'a new kind of approach [amongst many contemporary criminal lawyers] based around the identification or restoration of a "classical" idea of criminal law'.[203] This was generally in reaction to 'neoliberal' increased resort to criminal law, and specifically in relation to 'two related phenomena', i.e.:

> '[O]ver-criminalization' … the claim that there has been an increase in the overall number of criminal offences … for conduct where there is no underlying wrong' [and the] 'preventive turn' … used to describe what is seen as a decisive shift … towards the use of a range of … measures which are primarily directed at the prevention of future wrongdoing rather than punishment for past wrongdoing.[204]

Therefore, it might be expected that late twentieth century neoliberal drug law and policy would be an obvious target of neo-classical criminal lawyers' criticisms; especially given the heightened profile and role drugs were by then playing in the criminal justice system.[205] Indeed, this is true to a certain level. To take concerns surrounding the phenomenon of overcriminalisation first, Cornford argues that Husak's 2008 book *Overcriminalization*[206] is the 'most important work' in that sub-field.[207] There is no space here to recite Husak's (or others') arguments in any great detail, but in *Overcriminalization* the primary 'complaints

[203] Farmer, *Making* (n.10) 104.
[204] ibid 105–06.
[205] Text to nn.2–8 above.
[206] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008).
[207] Andrew Cornford, 'Andrew Ashworth, Principles of Criminal Law (1991)' in Chloë Kennedy and Lindsay Farmer (eds), *Leading Works in Criminal Law* (2024) 200.

about too much crime and too much punishment' relate to 'the crime of illicit drug possession', while Husak's earlier works take aim at drugs offences more broadly.[208]

Cornford (like Farmer) also takes Ashworth's work as a starting point for analysis of late-twentieth century criminal law theorising, noting that Ashworth's work is 'grounded in [his] overarching concerns with autonomy and retributive justice and *are in tension with* arguments from policy, most notably, policies of social defence', i.e., those which 'treat criminal liability as a way of controlling dangerous persons, or of symbolically "doing something about" conduct that creates social concern'.[209] Such policies, it should be clear, were the primary underpinnings of 1980s and 1990s drugs legislation. Additionally, Ashworth had since the early 1980s advanced a desert theory of punishment,[210] arguing over the following decades (alongside the 'leading proponent of desert', Andrew von Hirsch)[211] against '"deterrent" rationales and sentence levels … drug trafficking being [a] prime example'.[212]

There is therefore certainly some clear tension between neo-classical criminal law theorising and the era's drug law and policy. But putting Husak and (to a lesser extent) Ashworth's (earlier) work aside, drug criminalisation was not a prominent feature in much of the influential contemporaneous legal scholarship. Another 'leading work', Fletcher's 1978 *Rethinking Criminal Law*, did criticise 'preventive concepts such as dangerousness … which focused on the character of, and threat posed by, the individual rather than their conduct'[213] (and he elsewhere criticised possession offences),[214] but did not take aim at drug legislation beyond relatively passing/oblique references.[215] Feinberg, whose formulation of a range of 'liberty limiting principles' in 1984 have become classic reference points,[216] expressed little on drug criminalisation beyond categorising drug laws as examples of legal paternalism.[217] Like Fletcher, Feinberg's account of criminalisation does

[208] Husak, *Overcriminalization* (n.206) 16; 'Recreational Drugs and Paternalism' (1989) 8(3) *Law and Philosophy* 353; *Drugs and Rights* (1992)
[209] Cornford (n.207) 195, 214 (emphasis added).
[210] Rupert Cross and Andrew Ashworth, *The English Sentencing System* (3rd edn, 1981) ch.3.
[211] Ashworth, *Sentencing* (4th edn, 2005) (n.124) 84.
[212] ibid 78.
[213] Lindsay Farmer, 'George Fletcher, Rethinking Criminal Law (1978)' in Kennedy and Farmer (n.207) 143.
[214] GP Fletcher, *Basic Concepts of Criminal Law* (1998) 176.
[215] e.g., George P Fletcher, *Rethinking Criminal Law* (1978) 200, 427, 578, 700, 852.
[216] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, vol 1 (1984) 26–27; Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, 2016) 74.
[217] Feinberg (n.216) 13; Stuart P Green, 'Introduction: Feinberg's *Moral Limits* and Beyond' (2001) 5(1) *Buffalo Criminal Law Review* 1, 8–9.

include certain implicit criticisms which could be levelled at drug laws. Drug offences (potentially excepting generalised 'smuggling') did not appear on his list of 'crimes that have an unquestioned place in our penal codes'.[218] Additionally, his most influential liberty limiting principle – his harm principle – deemed that 'It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor and there is probably no other means that is equally effective at no greater cost to other values'.[219] Whether this test would be met in the context of 1980s and 1990s British drug criminalisation is doubtful, not least because a corollary of 'probably be effective' is a baseline understanding of (in)effective strategies,[220] and there was a paucity of research at this time into whether 'the war [on drugs] was indeed being won', as well as evidence that certain approaches were counter-productive.[221] Nonetheless, in Feinberg's work there is very little by way of explicit, substantive, and/or sustained engagement with drug controls.

The brevity of this section is not intended to mis-recognise or gloss over important differences in thought.[222] The purpose is to outline a range of the most influential works of the period to demonstrate that the prima facie obvious target of (neoliberal) drug laws were relatively neglected by (neo-classical) criminal law theorists in the 1980s and 1990s. In the next section I will show that this relative neglect continued into the twenty-first century,[223] even as the problematisation of the issues of overcriminalisation and preventive offences accelerated.[224] I will also consider why, having regard to the cyclic pattern I outlined at 6.2.1 above, this was the case. The research question, in other words, is why did several of the main targets of neo-classical criminal law theorising, which had extensive and existing

[218] Feinberg (n.216) 10–11.
[219] ibid 26.
[220] Nicholas Burgess, 'An Evaluation of the Psychoactive Substances Act 2016' (LLM thesis, University of Glasgow 2021) 36–37.
[221] Above at nn.62–69 (and text to).
[222] See, e.g.: essays in AP Simester and ATH Smith (eds), *Harm and Culpability* (1996); Mark H Moore, 'Drugs, the Criminal Law, and the Administration of Justice' (1991) 69(4) *The Milbank Quarterly* 529, applying Feinberg's framework to support drug criminalisation in principle.
[223] Excepting, most notably, Husak, *Overcriminalization* (n.206).
[224] See, e.g.: Bernadette McSherry, Alan Norrie and Simon Bronitt, 'Introduction' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (2009); RA Duff and others, 'Introduction' in RA Duff and others (eds), *The Boundaries of the Criminal Law* (2010); GR Sullivan and Ian Dennis, 'Introduction' in GR Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Empting the Commission of Criminal Harms* (2012); Andrew Ashworth, Lucia Zedner and Patrick Tomlin, 'Introduction' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (2013); Carvalho (n.158).

precedents in the area of drugs, only became problematised objects of attention, and in primarily non-drug related areas, in the 1990s and into the twenty-first century?

To answer this question fully would require further chapters in this thesis examining in detail the criminal law scholarship of the twenty-first century, which is beyond this thesis' temporal scope and limitations of space. Instead, the following final section offers some observations and thoughts, and brings together several points which have been covered throughout this thesis, ahead of its Conclusion.

6.2.3 Concluding Observations

Concerns about overcriminalisation centre on the criminal law being overbroad, expanding at an alarming rate to capture conduct which is not harmful or wrongful per se; vaguely-drafted offences which capture objectively innocent conduct; and the duplication of criminal offences.[225] Concerns about the 'preventive turn' relate to risk-based criminal law policies which focus on future harm rather than past harm; expand inchoate liability; bolster state/police powers of investigation and enforcement up-stream; and bring character-based assessments into the criminal law by requiring 'proof of a subjectively dangerous actor [rather than] an objectively dangerous act'.[226] The paradigmatic examples of overcriminalisation and preventive criminalisation are terrorism offences; inchoate offences and civil preventive orders such as ASBOs; extended police powers of search and surveillance; the expansion of strict liability and reverse-burden defences; and the proliferation of offences created under delegated legislation.[227]

It is in drugs legislation that numerous examples of what is now often deemed overcriminalisation and/or inappropriately preventive criminalisation were first trialled. Moreover, when this occurred, it was often with comparatively little controversy or fanfare; but when expanded to other areas it has attracted far more criticism. I am not arguing that what theorists often deem to be egregious examples of criminalisation were exclusively

[225] Farmer, *Making* (n.10) 105–06.
[226] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (2012) 176–77.
[227] See essays in: McSherry, Norrie and Bronitt (n.224).

modelled on drug laws, or that their application in drug laws was entirely unprecedented, or that there was never any pushback when so applied. But this does seem to be at its clearest during the period under examination in this thesis' Part 3 (i.e., c.1960–c.2000).

As a very generalised example, Farmer observes that there has been 'extensive use of the metaphor of "war"'.[228] The 'war on drugs' was the first of these, declared by US President Richard Nixon in 1971.[229] This was the same year that the MDA was passed in the UK. As noted in Chapter 5, this aroused little controversy: it had public and cross-party support, and all the major legal academic writers of the time supported (albeit for different reasons) the criminalisation of drugs. By contrast, when the 'war on terror' was declared at the beginning of the twenty-first century, and various anti-terrorism statutes were passed in Britain, immediate public and academic criticism was levelled.[230] There are, of course, myriad reasons for the different responses: the MDA was not related to the 'war on drugs' in the same way terrorism legislation was to the 'war on terror'; criminal law theorists were operating under different principles and philosophies; the ambit and provisions of drug and terrorism laws are materially different; and the development of drug laws had occurred over a long period of time in comparison to the rapid enactment of early twenty-first century terrorism legislation.

More specific examples correlate with generalised example just given. Novel and extensive powers of stop and search were introduced under the DDA 1967, and intimate searches of bodily orifices had been conducted for drugs under the MDA.[231] There was some unease about these provisions at the time,[232] but when these were expanded to other offences under PACE and later legislation far greater controversy ensued.[233] 1980s confiscation proceedings for drug trafficking offences were hailed as essential, pragmatic and legitimate by politicians and largely flew under the radar of scholarly writing[234] – but when expanded

[228] Farmer, *Making* (n.10) 105.
[229] Transform (n.53).
[230] McSherry, Norrie and Bronitt (n.224) 3.
[231] Above at n.40 (and text to).
[232] JA Andrews, 'Law in the Permissive Society' (1971) 2 *Cambrian Law Review* 13, 13.
[233] See, e.g.: HC Deb 25 October 1984, vol 65, col 868ff.
[234] cf n.99 (and text to) above.

to other forms of crime in the 1990s, and the underlying principles judicially challenged, these became targets of sustained criticism.[235]

Taking a longer view, criminalisation through delegated legislation is now a commonly-cited area of concern.[236] However, skeleton primary Acts enabling detailed regulations to be made were, from the 1920s to the 1960s, the main mode of statutory regulation regarding drugs, and save for a few comments during parliamentary debates this method of lawmaking went by unremarked upon.[237] The same may be said of duplicate criminalisation,[238] and particularly the surveillance of would-be criminals. A system of drug addict notification and surveillance had been in operation since 1933, and was formalised and extensively expanded over the following half-century with few-to-no concerns about privacy or state intrusion.[239] Surveillance powers introduced in the past 30 years (regarding terrorism, sex offender registration, and most recently online activity) attract varying levels of, but sustained, critical attention from civil liberties groups and legal theorists.[240] Drugs and psychoactive substances offences have also historically been a very easy area in which to impose reverse burdens of proof and severe maximum sentences, as well as being among the first areas in which absolute, strict, and vicarious liability attached.[241] There has rarely been any real pushback against the imposition of liability for remote harms – particularly possession or preparatory conduct offences – in the field of drugs (i.e., possessing drugs or their precursors, or offences relating to preparing drugs for use);[242] such criminalisation is now often deemed problematic, but (again) often first and foremost in other, non-drug-related areas.[243] And even where novel approaches which appeared draconian were used across several areas of the criminal law – such as the introduction of mandatory sentences,

[235] See, e.g.: Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization' in Duff and others (n.224) 76–77.
[236] James Chalmers, '"Frenzied Law Making": Overcriminalization by Numbers' (2014) 67(1) *Current Legal Problems* 483.
[237] e.g., text to nn.32, 146ff in ch.4.
[238] Above at n.82.
[239] Text to n.89 in ch.4; nn.41–51 in ch.5.
[240] e.g., Malcolm Thorburn, 'Identification, Surveillance and Profiling: On the Use and Abuse of Citizen Data' in Sullivan and Dennis (n.224).
[241] Text to nn.171, 256 in ch.1; nn.23, 152 in ch.4; n.88 in ch.5.
[242] Above at nn.103–105 (and text to).
[243] e.g.: AP Simester and Andrew von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (2009) 28(1) *Criminal Justice Ethics* 89; Victor Tadros, 'Justice and Terrorism' (2007) 10(4) *New Criminal Law Review* 658.

the expansion of life sentences beyond 'core' common law offences, or the expansion of civil preventive orders – these were often coterminously applied to drugs-related issues.[244]

Lastly, it is worth noting some other legal changes which were first trialled in the area of drugs, but which are not necessarily deemed controversial or inappropriate today. Criminal law and justice developments in the first half of the 1980s based on the linkage between drugs and systemic risks to property (i.e., the drugs/acquisitive crime nexus and in relation to drug trafficking proceeds and money laundering) were antecedent to conceptually similar developments in the way systemic risks to property have been responded to by the criminal law.[245] Similarly, as noted in Chapter 3, the DDA 1920 was 'the first act of domestic and social legislation to be passed as a result of an international agreement';[246] today, this happens all the time.

Like the general example of the War on Drugs/War on Terror, each of these specific examples has a range of explanatory factors. These include, inter alia: (i) the way arguments for (de)criminalisation have been formulated and have gained and lost purchase over time;[247] (ii) the way our understandings of what constitutes a 'drug', 'addict' and 'criminal' have changed; (iii) the outside influence of international legislation, e.g., mandating drug criminalisation and (perhaps especially) the European Convention on Human Rights;[248] (iv) how changing patterns of crime and drug use have influenced policies (and vice versa); and (v) how the criminal law has been required to react to wholly new visions of interests, values, and properties to be protected. Nonetheless, there is an aggregate pattern here which has arguably continued well into the twenty-first century[249] and is difficult to dismiss: that since their inception in the nineteenth century drugs offences have often been the precursor area where new approaches to crime control and criminalisation are uncontroversially first applied, before being expanded to other areas and only then receiving critical attention.

[244] Above at nn.83, 167–171 (and text to).
[245] Above at n.172.
[246] Philip Bean, *The Social Control of Drugs* (1974) 23; text to n.83 in ch.3.
[247] In the 1980s/1990s context, the most obvious might be Feinberg's reformulation of the 'harm principle' and the principle's 'collapse', to the point where the 'harm principle' acts in opposition to the 'principle of harm reduction': Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90(1) *The Journal of Criminal Law and Criminology* 109; Collinson (n.25) 397.
[248] Ashworth and Zedner (n.235) 76–77.
[249] Seddon, *A History* (n.5) ch.5.

The simplest answer might be that in earlier periods, academic criminal law theory was not (as) established, so the lack of organised and vocal critical attention relates more to the state of legal studies than the legislation and policies themselves. However, I think this answer only carries most of its weight up to the mid-twentieth century, and has far less explanatory value during the period examined in this Part 3 and beyond. Another slightly cynical, but I think in many ways accurate, explanatory view (of Brunhöber) is that 'most legal academics ignore drug offenses … think[ing] of drug offenses as the "dirty corner" in criminal law' which precludes 'principled academic considerations' amongst an 'embittered, dramatized, and even "furious" [public debate]'.[250] It is only where the dirty corner spreads to become a dirty room, maybe, that commentators take notice. And another, perhaps more profound or holistic explanatory view, is that 'The history of drug control is, in many ways, the history of the modern state',[251] suggesting that there is more of an alignment, synergy, and natural progression – even principled progression – going on, with drug laws being more central to the criminal law in terms of exerting an influence than has been recognised. I have argued throughout this thesis that drug laws are a window into patterns of criminalisation; drug controls may take root in an already-fertile soil,[252] as no regulation exists in a vacuum, but this taking root has substantively shaped and encouraged further growth and development across criminal law and justice on similar lines.

[250] Beatrice Brunhöber, 'Drug Offenses' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014) 789–90.
[251] Shiner (n.179) 626.
[252] Norrie, '"Consensual"' (n.11) 120.

Conclusion

This thesis has systematically analysed the relationship between British drug laws and conceptions of legitimate criminalisation from c.1815–c.2000. It explored the extent to which historical understandings of what and who can be treated as criminal or requiring regulation, how this should be done, and how this can be justified,[1] were in synergy or tension with the contemporaneous legislation variously regulating, by way of punitive sanctions, substances used for their psychoactive effects. In so doing, each chapter has engaged in novel analysis and/or drawn new connections.

Part One examined the period from the early nineteenth century to around the outbreak of the First World War (WW1). Chapter 1 explored lines of development up to and including the Pharmacy Act 1868. This included the role of criminal poisoning in Victorian Britain; professional pharmaceutical groups' interests and the industry's regulation; and the growth of the Victorian legislative state during which time (criminal) law was used in novel ways to address social problems. Aims of nineteenth century law-making were identified (i.e., rationality, being systematic, clarity, improving health and morals via regulatory expansion, centralisation, and libertarianism), and it was argued that while the 1868 Act was in many ways a microcosm of Victorian legislative expansion and legislation generally, a closer reading reveals it was simultaneously in tension with many of the principles underpinning contemporary (criminal) law reforms. Chapter 2 then turned to the approximately 45-year period of legislative inertia whereby the statutory regime established by the 1868 Act remained largely unaltered, but there existed several prima facie normative grounds for change. These included the instrumental deficiencies of the pharmaceutical regulatory regime; the rise of 'disease' theories of addiction; the passing of habitual drunkards/inebriates' statutes, which were the closest Britain came to enacting further drugs legislation; and the opium suppression movement at the turn of the century. The conclusion here was nuanced, noting areas of both tension and synergy, but that on balance there was more alignment than dissonance between drug regulation and conceptions of legitimate criminalisation. Taking the conclusions of Chapters 1 and 2 together, the overall conclusion of Part One was that at the time of their inception, laws placing punitive

[1] To paraphrase Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 1.

sanctions on the sale of substances used for their psychoactive effects (and which today are controlled drugs) provide a fruitful lens for understanding and analysing broader developments in criminal law and criminalisation.

Part Two explored the period from WW1 to c.1960. Whereas Part One employed a chronological structure, the multiple and overlapping yet discrete developments covered here made a linear analysis impossible. Hence, the Part's chapters were split thematically, according to international and domestic developments. Chapter 3 first considered the emergency measures enacted during WW1, arguing that these regulations amounted to justifiable criminalisation, and that while they shared many apparent similarities with modern drug laws (such as possession offences), these regulations were more conceptually and substantively similar to the nineteenth century system of pharmaceutical/poisons regulation than what came later; even though they did latently introduce several key institutional, legislative, and conceptual features of post-War British drug criminalisation. The consequences of the Paris Peace Conference were then considered. First, it was argued that the Dangerous Drugs Act 1920, which was enacted due to the Hague Opium Convention's incorporation into the WW1 peace settlement, did conform to a 'thin' conception of procedural/democratic legitimacy; but that its extended scope beyond the Hague Convention's requirements did not conform to a 'thick' conception of substantive/normative legitimate criminalisation. Second, the expansion of the drug (and other) Conventions under the League of Nations' auspices was analysed with a view to extracting the underlying principles of the new transnational framework. It was concluded that while the emergence of this framework was a catalyst for domestic drug law reform, few concrete principles and instances of true inter-state harmonisation were identifiable. Notwithstanding this absence of principle, drug laws nonetheless provide a valuable window into the early development of transnational criminal law, having been the precursor area for substantial later growth; and a corollary of this is that domestic British drug criminalisation must have developed according to separate, or at least parallel, conceptual bases and/or justificatory rationales.

Chapter 4 began with a chronology of domestic drug law and policy developments from 1920–c.1960. From that summary and with reference to existing literature, three broad themes of doctrinal shifts, the rise of penal-welfarism, and the law's approach to vice were extracted. On the doctrinal theme, it was argued that during this period drug controls

underwent a shift from regulatory towards 'real' criminal offences. This shift is important, as during this period the very definition of (real) 'crime' was a key debate among leading criminal law theorists. Despite some superficial synergy between drugs legislation and all of these theorists' definitions of crime, a closer reading of them, and of their explicit and implicit requirements for criminal law-making, revealed that drugs legislation was in tension with those conceptions of legitimate criminalisation. Even so, drug legislation provides a useful case study into changing patterns and understandings of criminalisation during this period. On the penal-welfarist theme, it was argued that it was only in the tightly-framed context of the respectable, medically-compliant addict that a real liaison between penal and welfarist elements was in operation, and continuities with the nineteenth century habitual drunkards/inebriates' legislation were observed. Lastly, on the vice theme, it was argued that while controlling vice was often given as a justification for intervention by legislators and policymakers – i.e., as something necessitating control via criminalising legislation – there were few (if any) clear principles underpinning this. Hence, there is some, but only limited synergy observable between the law's approach to drugs and to other 'vicious' objects and behaviours during this period.

Part Three's focus was the period c.1960–c.2000, which is when the present system of British drug control was created and (re)shaped. Chapter 5, covering the 1960s and 1970s, opened with a summary of key drug law developments. Then, the broader context of contemporaneous (criminal) law reform was set out. This included the 1957 publication of the Wolfenden Report, which precipitated the famous Hart/Devlin debate; the wide-ranging 'permissive' reforms of the 1960s; and the era's novel, modernising approaches to law reform itself, most notably the establishment of the Law Commissions. It was argued that British drug legislation post-1964 was overall in synergy with the contemporaneous conceptions of legitimate criminalisation. There was a strong affinity with the Wolfenden philosophy; it was in line with leading scholarly thought, political viewpoints, and public perceptions; it sought to be more scientifically rational and less hysterically moralising; it was closely related to the 'double taxonomy' of liberalisation and repression which underpinned the era's 'permissive' reforms; and it was intended to be just one part of a flexible and modern solution to a rapidly-developing social issue. Where conceptual tension existed, it was primarily due to policy implementation rather than legislation.

Chapter 6 discussed the 1980s and 1990s. While the Misuse of Drugs Act 1971 remained the primary statutory framework, it was augmented by several legislative and policy developments. A review of those developments revealed that drug and wider criminal law and policy were remarkably in step during this period. Following this, and drawing on Seddon's analysis of neoliberalism,[2] it was argued that numerous drug law and policy developments of the 1980s and 1990s had antecedents going back as far as the nineteenth century, and that this observation of cyclical features holds true taking a longer view across the whole twentieth century. Then, employing Farmer's analysis[3] of 'neo-classical' late-twentieth century criminal law theorising – which was a reaction to neoliberal criminal justice policies – it was observed that few neo-classical criminal lawyers directly engaged with the prima facie obvious target of late-twentieth century drug law and policy. Expanding further on this idea prompted some concluding observations that since their inception in the nineteenth century, drugs offences have often been the precursor area where new approaches to crime control and criminalisation are uncontroversially first applied, before being expanded to other areas and only then receiving critical attention.

The hypothesis (if pressed) when beginning this project was that there might have been a relatively linear progression, with drug laws pulling ever-further away from the conceptual boundaries of the criminal law. That is clearly not the case: drugs and criminalisation have had a symbiotic relationship,[4] and if anything, there is in several respects *more synergy* as time has progressed. That is by no means to make any claim that drug laws, or the criminal law, are (in)appropriate or (un)justified today.[5] Given that further research must be done to complete the story to the present day, it is probably wise to reserve judgement on drawing long-view connections beyond the observations given throughout this thesis (and particularly at the end of Chapter 6). It does appear, however, that a claim *can* be made that drug laws have been more central to the development of the criminal law than has been recognised. The influence of drug legislation on the criminal law is arguably similar to that vice versa, and it may be that the two are now so heavily intertwined that a close(er) conceptual alignment is inevitable. At the very least, drug legislation offers a valuable

[2] Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (2010) ch.5.
[3] Farmer, *Making* (n.1) 104–06.
[4] Which may variously involve mutualism, commensalism, and/or parasitism: Encyclopaedia Britannica, 'Symbiosis' (*Brittanica*, 5 June 2025) <https://www.britannica.com/science/symbiosis> accessed 4 July 2025.
[5] I have self-consciously sought to avoid discussion of prohibition/legalisation/decriminalisation, etc. debates.

window into understanding patterns and processes of criminalisation across time; and it is not clear that we would have the same criminal law we have today but for drug legislation.

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