

MILITANT SPEECH ABOUT TERRORISM IN A SMART MILITANT DEMOCRACY

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INTRODUCTION

One strong and persistent strand of analysis of the experiences of political extremism in the 1930s is that there were hard lessons to be drawn by liberal democracies. Those lessons were spelt out by some notable contemporary commentators, such as Karl Lowenstein, who warned forcefully, but largely in vain, about the need for democracies to become “militant” and to avoid “legalistic self-complacency and suicidal lethargy.”¹ This discourse was reinforced in the immediate post-war era by the likes of Clinton Rossiter,² who was even prepared to countenance “constitutional dictatorship,” with extensive emergency regulation powers in the hands of the executive, in order to defend against the renewed forms of totalitarianism which then assailed free societies.

These messages became more muted as time passed. But there has been a strong revival of the concept of “militant democracy” after the events of September 11, 2001 with several

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¹ Karl Lowenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI. REV. 417, 431-32 (1937).

² See CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP 38-39, 53, 60-62 (1948); see also JOHN EAVES, JR., EMERGENCY POWERS AND THE PARLIAMENTARY WATCHDOG: PARLIAMENT AND THE EXECUTIVE IN GREAT BRITAIN, 1939-51 (1957); Eugene A. Gilmore, *War Power—Executive Power and the Constitution*, 29 IOWA L. REV. 463 (1944); W. Ivor Jennings, *The Rule of Law in Total War*, 50 YALE L.J. 365 (1941); Arthur Berriedale Keith, *The War and the Constitution*, 4 MOD. L. REV. 1, 82 (1940); Bernard Schwartz, *The War Power in Britain and America*, 20 N.Y.U. L. REV. 325 (1945).

important academic commentaries appearing under that title.³ Indeed, in its current guise, the concept of militant democracy arguably suffers from the opposite failing to that encountered in Lowenstein's time. Rather than failing to heed the call, there are now warriors for militant democracy whose prescriptions appear more dramatic and dangerous than the threat of terrorism which they seek to address. Into this category may be placed the contemplators of torture,⁴ as well as theorists⁵ who are willing to overturn all constitutional niceties on a scale, on a hope, and a prayer of constitutional restitution, rather like the Reichspräsident's approval of the Reichstag Fire Decree of February 28, 1933.⁶ Even more extreme expressions of militancy are Agamben's "zone of anomie in which all legal determinations . . . are deactivated"⁷ and theories of "enemy criminal law" posited by Jakobs.⁸ These successors to Carl Schmitt⁹ seek to propagate notions that inevitably dehumanize and delegitimize state action.

Of course, "militant democracy" is a political construct rather than a legal term of art. As such, it can easily be manipulated for good or bad in its meanings and purposes. It is not claimed here that it bears an essential meaning, but the meaning adopted in this paper involves the endorsement that the state has a right and a duty to take action against significant forms of terrorism, such as the nationalist and highly organized terrorism of the likes of the Irish Republican Army or the

³ *E.g.*, MILITANT DEMOCRACY (András Sajó ed., 2004); THE 'MILITANT DEMOCRACY' PRINCIPLE IN MODERN DEMOCRACIES (Markus Thiel ed., 2009); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210 (2004).

⁴ *See, e.g.*, ALAN M. DERSHOWITZ, WHY TERRORISM WORKS (2002); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004).

⁵ *E.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

⁶ *See* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 46-47 (Harvard Univ. Press 1991) (1987).

⁷ GIORGIO AGAMBEN, STATE OF EXCEPTION 50 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003).

⁸ GUNTHER JAKOBS, DERECHO PENAL DEL ENEMIGO (2d ed. 2006).

⁹ CARL SCHMITT, POLITICAL THEOLOGY (George Schwab trans., Univ. of Chi. Press 2005) (1922); *see* DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006).

“new” terrorism¹⁰ propagated by more transnational and loosely based groupings, epitomized by Al-Qa’ida. In that sense, the state should indeed be “militant.” At the same time, state action must recognize that these forms of terrorism are endemic reactions to modernity and late modernity. Thus, contrary to the promise of the concept, the “war on terror,”¹¹ terrorism is not going to be wholly vanquished in this decade, in this generation, or probably in the next century, just as it did not vanish in the past decade, generation, or century. From this insight flows a reminder to the state that its purpose is the maintenance and triumph of its own values, such as democracy, individual rights, and the rule of law.¹² The “smart militant state” must therefore work out its own forms of militant reaction that become more or less permanent and must therefore adopt policies that can be accommodated within fundamental values rather than displacing them even during a temporary period of “emergency.”

The United Kingdom is not the smartest of “smart militant states.” There are many dark pages within its manual of militancy. They include the application of measures bordering on torture as applied to selected Irish terror suspects in 1971.¹³ Even the attempt to enjoin these techniques of “deep interrogation” were apparently forgotten by the British Army by the time of the invasion of Iraq in 2004, with shameful reminders of the dire consequences now played out in the Aitken Report¹⁴ and the Baha Mousa inquiry.¹⁵ Collusion with contras is not just exclusive to U.S. involvement in Nicaragua¹⁶ but also has

¹⁰ See BRYNJAR LIA, *GLOBALISATION AND THE FUTURE OF TERRORISM: PATTERNS AND PREDICTIONS* (2005); PETER R. NEUMANN, *OLD AND NEW TERRORISM* (2009).

¹¹ See President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

¹² See generally CLIVE WALKER, *TERRORISM AND THE LAW* ch. 1 (2011) (providing further elaboration).

¹³ *Ireland v. United Kingdom*, App. No. 5310/71, Ser. A 25, 2 E.H.R.R. 25 (1978).

¹⁴ MINISTRY OF DEFENSE, *THE AITKEN REPORT: AN INVESTIGATION INTO CASES OF DELIBERATE ABUSE AND UNLAWFUL KILLING IN IRAQ IN 2003 AND 2004* (2008).

¹⁵ *News From the Inquiry*, BAHAM MOUSA PUBLIC INQUIRY, <http://www.bahamousa.inquiry.org/> (last visited Feb. 10, 2011).

¹⁶ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

its counterpart in collusion with paramilitaries in Northern Ireland,¹⁷ now augmented by allegations of collusion with disreputable foreign regimes.¹⁸ The unnecessary or excessive use of lethal force has also formed a recurrent thread, from Bloody Sunday 1972¹⁹ to the shootings of the Gibraltar Three in 1988²⁰ and Jean de Menezes in 2005.²¹ The foregoing are perhaps the most egregious abuses, involving the most fundamental rights to life and freedom from torture, inhuman and degrading treatment. However, there are numerous other excessive and persistent state incursions into rights to life, liberty, privacy, and expression that could be recounted.

This negative record notwithstanding, the label, “smart militant state,” can at a stretch be fairly assigned to the United Kingdom state. Few would deny the label “militant.” The Unit-

¹⁷ See SIR JOHN STEVENS, METRO. POLICE SERV., STEVENS ENQUIRY 3: OVERVIEW & RECOMMENDATIONS (2003); HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: PATRICK FINUCANE, 2004, H.C. 470 (U.K.); HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: ROBERT HAMILL, 2004, H.C. 471 (U.K.); HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: BILLY WRIGHT, 2004, H.C. 472 (U.K.); HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: ROSEMARY NELSON, 2004, H.C. 473 (U.K.); Bill Rolston, *An Effective Mask for Terror: Democracy, Death Squads and Northern Ireland*, 44 CRIM. L. & SOC. CHANGE 181 (2005); POLICE OMBUDSMAN FOR NORTHERN IRELAND, STATEMENT BY THE POLICE OMBUDSMAN FOR NORTHERN IRELAND ON HER INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF RAYMOND MCCORD JUNIOR AND RELATED MATTERS (2007).

¹⁸ R (Mohamed) v. Sec’y of State for the Foreign & Commonwealth Affairs (No. 1), [2008] EWHC (Admin) 2048, [2009] 1 W.L.R. 2579 (Eng.); R (Mohamed) v. Sec’y of State for the Foreign & Commonwealth Affairs (No. 2), [2009] EWHC (Admin) 152, [2009] 1 W.L.R. 2653 (Eng.); R (Mohamed) v. Sec’y of State for the Foreign & Commonwealth Affairs (No. 2), [2010] EWCA (Civ) 65, [2010] 3 W.L.R. 554 (Eng.); see JOINT COMMITTEE ON HUMAN RIGHTS, ALLEGATIONS OF UK COMPLICITY IN TORTURE, 2008-09, H.L. 152, H.C. 230 (U.K.); HOME DEPARTMENT, THE GOVERNMENT REPLY TO THE TWENTY-THIRD REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS, 2009, Cm. 7714 (U.K.).

¹⁹ See LORD SAVILLE OF NEWDIGATE, WILLIAM HOYT & JOHN TOOHEY, HOUSE OF COMMONS, REPORT OF THE BLOODY SUNDAY INQUIRY, 2010, H.C. 29-I (U.K.).

²⁰ See *McCann v. United Kingdom*, App. No. 18984/91, Ser. A 324, 21 E.H.R.R. 97 (1996).

²¹ See INDEP. POLICE COMPLAINTS COMM’N, STOCKWELL ONE: INVESTIGATION INTO THE SHOOTING OF JEAN CHARLES DE MENEZES AT STOCKWELL UNDERGROUND STATION ON 22 JULY 2005 (2007); INDEP. POLICE COMPLAINTS COMM’N, STOCKWELL TWO: AN INVESTIGATION INTO COMPLAINTS ABOUT THE METROPOLITAN POLICE SERVICE’S HANDLING OF PUBLIC STATEMENTS FOLLOWING THE SHOOTING OF JEAN CHARLES DE MENEZES ON 22 JULY 2005 (2007).

ed Kingdom can assuredly claim to have encountered more configurations and episodes of revolutionary terrorism than most other polities, and it has not been slow to devise special laws to deal with the situation.²² Experience has derived from the bygone era of British Empire, from the intermittent, irredentist campaigns of terrorism in Ireland against colonization and then incorporation within the British state over a period of more than three centuries, and now the advent in Britain of Al-Qa'ida has generated further legislation, which especially seeks to avert its threat of mass casualties on an anticipatory and precautionary basis.²³

Whether the current U.K. anti-terrorism laws can equally be designated as “smart,” in the sense of appreciating the need for prolonged and broad policies that maintain legitimacy, remains a matter of fierce debate. Many express disquiet, including the newly elected government which has promised to introduce further safeguards against abuse.²⁴ Yet, there may be three features that can be claimed to be redolent of “smart” militancy, even if none is entirely convincing.

First, there is recognition of permanence. In the current U.K. anti-terrorism legislation, only the measures relating to twenty-eight day pre-charge police detention,²⁵ and control orders,²⁶ and non-jury “Diplock” courts²⁷ are subject to any form of sunset clause. In fact, the sun need never set, since all these measures are endlessly renewable for further periods of years. For instance, the “Diplock” courts have persisted in one form or

²² See CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* ch. 4 (1992); WALKER, *supra* note 12, at ch. 1.

²³ See Clive Walker, *Terrorism and Criminal Justice: Past, Present and Future*, 2004 CRIM. L. REV. 311 (2004).

²⁴ CABINET OFFICE, *THE COALITION: OUR PROGRAMME FOR GOVERNMENT* (2010); see also JOINT COMMITTEE ON HUMAN RIGHTS, *COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (SEVENTEENTH REPORT): BRINGING HUMAN RIGHTS BACK IN*, 2010, H.L. Paper 86, H.C. 111 (U.K.).

²⁵ Terrorism Act 2006, c. 11, § 23 (U.K.).

²⁶ Prevention of Terrorism Act, 2005, c. 2, § 6 (U.K.).

²⁷ See SECRETARY OF STATE FOR NORTHERN IRELAND, *REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND*, 1972, Cm. 5185.

another since 1973.²⁸ However, this permanence has imparted a sense that the measures must be sustainable in terms of the narratives of legitimacy on which the United Kingdom state relies. The result has been a move away from measures that are labeled “Temporary Provisions” and that expressly derogate from rights. In this way, there occurred a very important transition when the Terrorism Act 2000 replaced the Prevention of Terrorism (Temporary Provisions) Act 1989 and Northern Ireland (Emergency Provisions) Act 1996, its very name signaling a claim to sustainability. In addition, the derogation under article 15 of the European Convention on Human Rights, which had existed in Northern Ireland since ratification in 1954 (with a break of four years between 1984 and 1988),²⁹ was removed in February 2001. It therefore represented a considerable reversal when a new derogation notice was lodged in December 2001 so as to permit detention without trial of foreign terror suspects under the Anti Terrorism, Crime and Security Act 2001. But that policy was reversed in March 2005,³⁰ when detention without trial was terminated following an adverse court decision on the compatibility of detention without trial with human rights requirements. Moreover, throughout the period since September 11, there has been a marked divergence from the rhetoric of the “war on terror,” as one would expect if policies are to be sustained and legitimate. British dalliance with a “war model” has been confined to military operations in Afghanistan and Iraq where the term “counter-insurgency” is

²⁸ See Justice and Security (Northern Ireland) Act, 2007, c. 6, § 1 (U.K.).

²⁹ See *Brogan v. United Kingdom*, 11 Eur. Ct. H.R. 117 (1989); *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89, 14554/89, Ser. A 258-B, 17 E.H.R.R. 539 (1994); Council of Europe, Convention for the Protection of Human Rights & Fundamental Freedoms, List of Declarations Made with Respect to Treaty No. 005, <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=0&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG> (last visited Feb. 10, 2011).

³⁰ *A v. Sec’y of State for the Home Dept.*, [2004] UKHL 56, [2005] A.C. 68 (appeal taken from Eng.); see Brice Dickson, *Law Versus Terrorism: Can Law Win?*, 2005 EUR. HUM. RTS. L. REV. 11; David Feldman, *Proportionality and Discrimination in Anti-Terrorism Legislation*, 64 CAMBRIDGE L.J. 271 (2005); Clive Walker, *Prisoners of “War All the Time”*, 2005 EUR. HUM. RTS. L. REV. 50. The House of Lords decision was largely confirmed by the European Court of Human Rights in *A v. United Kingdom*, App. No. 3455/05, 49 E.H.R.R. 29 (2009).

the preferred label for the foreign aspects of policy.³¹ Even in this sphere, the operative rules have remained the regular international humanitarian and human rights laws. In this way, there has emerged no British “legal black hole”³² equivalent to the regime at Guantánamo Bay.³³ Nor has there been any overt emulation of U.S. programs of executive domestic surveillance³⁴ or rendition for interrogation.³⁵ Instead the U.K. government has rejected even the terminology of the “war on terror” and claims instead that “prosecution is—first, second, and third—the government’s preferred approach when dealing with suspected terrorists.”³⁶ As the former Foreign Secretary, David Miliband, has declared, “[D]emocracies must respond to terrorism by championing the rule of law, not subordinating it, for it is the cornerstone of the democratic society.”³⁷ There is much room for dismay about the outcomes of the current legislation, but the disposition to constitutionalism at least makes a claim that the current legislation is “not a mask but the true image of

³¹ See CABINET OFFICE, THE NATIONAL SECURITY STRATEGY OF THE UNITED KINGDOM: UPDATE 2009 – SECURITY FOR THE NEXT GENERATION, 2009, Cm. 7590, at 81.

³² Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004); see also *R (Al-Skeini) v. Sec’y of State for Defence* [2007] UKHL 26, [2008] 1 A.C. 153 (appeal taken from Eng.).

³³ Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

³⁴ U.S. DEPT. OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006). But regular United Kingdom statutory powers are already very broad. See *Liberty v. United Kingdom*, App. No. 58243/00, 48 E.H.R.R. 1 (2009); Regulation of Investigatory Powers Act, 2000, c. 23, §§ 26-32 (U.K.).

³⁵ See INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, Cm. 7171 (U.K.); PRIME MINISTER’S OFFICE, GOVERNMENT RESPONSE TO THE INTELLIGENCE AND SECURITY’S REPORT ON RENDITION, 2007, Cm. 7172 (U.K.); ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION, EXTRAORDINARY RENDITION: CLOSING THE GAP – A PROPOSAL TO CRIMINALISE UK INVOLVEMENT (2009), available at www.extraordinaryrendition.org; Clive Walker, *The Treatment of Foreign Terror Suspects*, 70 MOD. L. REV. 427 (2007).

³⁶ 472 PARL. DEB., H.C. (6th ser.) (2008) 561.

³⁷ Julian Borger, *‘War on Terror’ Was a Mistake, Says Miliband*, GUARDIAN, Jan. 15, 2009, at A1.

our nation”³⁸ and offers real protection from naked state power.³⁹

A second feature of “smart” militancy is a growing acceptance of the need to accommodate rights.⁴⁰ There may be four aspects to this change, which has been very much encouraged by advent of the Human Rights Act 1998. The first is a framing perspective by which human rights rule in and rule out potential approaches to counter-terrorism—such as torture or rendition. At the same time, the suppression of terrorism can itself be founded on rights arguments (for example, about the right to life and democracy),⁴¹ and special laws are certainly not debarred *per se*. The second perspective is rights-specific and relates to the interpretation of individual rights in a way that does not wholly prioritize national security interests in a way that was common pre-2000 with doctrines such as non-justiciability.⁴² Activities that are seen as within the purview and expertise of courts—such as procedure—have been subjected to stricter standards than activities that rarely trouble the courts (such as surveillance). The third impact is temporal—that rights scrutiny gains traction as counter-terrorism campaigns mature. The fourth point is that the treatment of rights in counter-terrorism can have socially transformative impacts by affecting negatively or positively the mobilizing fac-

³⁸ MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 144 (Edinburgh Univ. Press 2005) (2004).

³⁹ See BARRY VAUGHAN & SHANE KILCOMMINS, *TERRORISM, RIGHTS AND THE RULE OF LAW: NEGOTIATING JUSTICE IN IRELAND* 13 (2008); Colm Campbell & Ita Connolly, *Making War on Terror? Global Lessons from Northern Ireland*, 69 *MOD. L. REV.* 935, 939 (2006); Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 *LEIDEN J. INT'L L.* 339 (2006).

⁴⁰ See Clive Walker, *The Threat of Terrorism and the Fate of Control Orders*, 2010 *PUB. L.* 4 (2010).

⁴¹ See *Klass v. Germany*, App. No. 5029/71, Ser. A 28, 2 *E.H.R.R.* 214, 232 (1978) (“Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats . . .”).

⁴² See *R v. Sec’y of State for the Home Department ex parte Adams*, [1995] *All E.R. (EC)* 177; *Adams & Benn v. United Kingdom*, App. Nos. 28979/95, 30343/96, 23 *E.H.R.R.* CD160 (1997); Clive Walker, *Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom’s Prevention of Terrorism Acts*, 35 *COLUM. J. TRANSNAT’L L.* 1 (1997).

tors for or against terrorism. Thus, anti-terrorism laws may create suspect or supportive communities, and the tempering process encourages an ultimate resolution of the emergency by ruling out grievous breaches of international law and maintaining the recognition of common humanity.⁴³

A third feature of “smart” militancy is the ability to conceive counter-terrorism approaches in broad terms and to avoid over-reaction to the latest event—the “politics of the last atrocity.” Such a stance has now emerged with the publication of a clear, clever, and comprehensive counter-terrorism strategy (“CONTEST”), as issued in 2006 and revised in 2009.⁴⁴ Delivery of the strategy continues to be organized around four principal work streams as follows: (1) Pursue: to stop terrorist attacks; (2) Prevent: to stop people from becoming terrorists or supporting violent extremism; (3) Protect: to strengthen our protection against terrorist attack; (4) Prepare: where an attack cannot be stopped, to mitigate its impact. Traditional criminal justice effort is focused around “Pursuit.” Out of these strands, “Prevent” has risen to the fore since the July 2005 bombings, which obliged the government and public to confront the unpalatable fact that the terrorism was not the work of alien foreigners but involved attacks by their erstwhile neighbors.⁴⁵ Therefore, efforts must be made to reduce this propensity, including efforts to nullify extreme narratives,⁴⁶ adding to the emphasis on anticipatory risk and pre-emption rather than

⁴³ See Brice Dickson, *The House of Lords and the Northern Ireland Conflict – A Sequel*, 69 MOD. L. REV. 383 (2006).

⁴⁴ HOME DEPARTMENT, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM’S STRATEGY, 2006, Cm. 6888 (U.K.); HOME DEPARTMENT, PURSUE, PREVENT, PROTECT, PREPARE: THE UNITED KINGDOM’S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, 2009, Cm. 7547, at 55 (U.K.); see Frank Gregory, *National Governance Structures to Manage the Response to Terrorist Threats and Attacks*, in *HOMELAND SECURITY IN THE UK: FUTURE PREPAREDNESS FOR TERRORIST ATTACK SINCE 9/11*, at 117 (Paul Wilkinson ed., 2007).

⁴⁵ See Clive Walker, ‘*Know Thine Enemy as Thyself: Discerning Friend from Foe under Anti-Terrorism Laws*, 32 MELB. U. L. REV. 275 (2008). The extent to which foreign influences continue remains unclear. *But see* ANDY HAYMAN & MARGARET GILMORE, *THE TERRORIST HUNTERS: THE DEFINITIVE INSIDE STORY OF BRITAIN’S FIGHT AGAINST TERROR* 286 (2009).

⁴⁶ See GILLES KEPEL, *THE WAR FOR MUSLIM MINDS: ISLAM AND THE WEST* (2004).

aftermath response,⁴⁷ as well as a resort to intelligence rather than evidence.⁴⁸

Having thus set the scene for action by a “smart militant democracy,” it is intended in this paper to consider the performance by the United Kingdom state in the context of a classical dilemma facing militant democracies and one which greatly exercised politics in the 1930s.⁴⁹ That context is the appropriate response to militant speech—speech which in some ways encourages extremist political behavior and even violence but which is delivered in a mode that avoids participation in violence or even the traditional inchoate crimes of incitement or solicitation. This divorce between militant speech and militant action may arise either because of the equivocal nature of the words being spouted or because of the distance in time, place, or both between speaker and intended audience. The problem therefore is to be militant against terrorism in all its guises but to be smart enough to uphold the value of freedom of expression and to recognize that political platforms of secession or the revolutionary establishment of a workers’ dictatorship or a Caliphate are all part of the rich tapestry of the marketplace of ideas. Unfortunately, there is no Manichean diving rod between the encouragement of terrorism and the encouragement of Millian good. There are plenty of reasons to doubt George W. Bush’s glib aphorism, voiced on September 20, 2001, that “either you are with us, or you are with the terrorists.”⁵⁰ Rather, the contemporary complexity is illustrated by the pronouncement in 1981 of Danny Morrison, a leader of Sinn Féin: “Who here really believes we can win the war through the ballot box? But will anyone here object if, with a ballot paper in one hand

⁴⁷ See ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* (2006); RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11* (2006).

⁴⁸ See Clive Walker, *Intelligence and Anti-Terrorism Legislation in the United Kingdom*, 44 CRIM. L. & SOC. CHANGE 387 (2005).

⁴⁹ Lowenstein also concentrated on this aspect and praised the Public Order Act 1936 as one appropriate response. Lowenstein, *supra* note 1, at 649, 652. Public Order Act, 1936, 8 & 1 Geo. 6, c. 6, §§ 2-5 (Eng., Wales, Scot.).

⁵⁰ Bush, *supra* note 11.

and the Armalite in the other, we take power in Ireland?”⁵¹ Morrison recognized more than anyone that he was “walking on eggshells” when treading the path between legality and illegality. As the Director of Publicity for Sinn Féin, he paid the price with several years of imprisonment for his proximity to the IRA’s punishment machinery.⁵²

Just two responsive state measures of militancy will be selected for discussion in this paper. Both were enacted by the Terrorism Act 2006, and both relate to indirect incitement and glorification of terrorism. They both reflect the “Prevent” element of the CONTEST strategy by allowing for criminalization of speech at a much earlier stage than previous measures, the point being to suppress it and to shape discourse rather than to seek a multitude of prosecutions.

Because of this focus, a number of other measures against militant speech will not be considered, even though the United Kingdom state has a very long record of action against militant speech about terrorism, and the chronology certainly did not commence after September 11, 2001. Perhaps the most venerable tools of the trade are the offenses against the state, such as treason and sedition. A modicum of interest has been shown in the United States for these offenses. In 2006, a Federal grand jury issued an indictment for treason, charging Adam Yahiyeh Gadahn with involvement in Al-Qa’ida videos.⁵³ Seditious conspiracy was charged in the United States against Sheikh Omar Abdel Rahman arising from the 1993 World Trade Center attack and other plans.⁵⁴ However, there is virtually no corresponding interest in the United Kingdom. The offenses are seen as complex and obscure, and the death penalty for treason, its foremost lure in the eyes of many proponents, was removed by

⁵¹ Ian McAllister, ‘*The Armalite and the Ballot Box: Sinn Féin’s Electoral Strategy in Northern Ireland*’, 23 *ELECTORAL STUD.* 123, 124 (2004).

⁵² His conviction for involvement in the IRA-false-imprisonment in 1990 of a suspected informant (Sandy Lynch) was later overturned because of the involvement of British informants, which the state had suppressed. *R v. Morrison* [2009] NICA 1 (Crim.) (N. Ir.).

⁵³ See Douglas A. Kash, *The United States v. Adam Gadahn: A Case for Treason*, 37 *CAP. U. L. REV.* 1 (2008).

⁵⁴ *United States v. Rahman*, 189 F.3d 88, 123-25 (2d Cir. 1999).

the Crime and Disorder Act 1998.⁵⁵ Likewise, offenses of sedition and seditious libel were abolished with virtually no public debate by the Coroners and Justice Act 2009.⁵⁶ The main approaches now comprise the proscription of organizations, which take part in violence under Part II of the Terrorism Act 2000 (explained further below): media restrictions, which became acute after 1988 in the form of a broadcasting ban on interviews with Sinn Féin representatives but which were lifted in 1994,⁵⁷ and restrictions on forms of political participation. These include, first, requiring declarations of non-violence as a condition of candidature, implemented by the Elected Authorities (Northern Ireland) Act 1989, sections 3 and 5.⁵⁸ Second, the candidature of prisoners in parliamentary elections, highlighted by election of Republican hunger-striker, Bobby Sands, in 1981 provoked furious state reaction.⁵⁹ The Repre-

⁵⁵ Crime and Disorder Act, 1998, c. 37, § 36 (U.K.) (abolishing the death penalty in the United Kingdom); Convention for the Protection of Human Rights and Fundamental Freedoms, States of the Council of Europe, Protocol 6, Art. 1-2, June 1, 2010 [hereinafter Convention], available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

⁵⁶ Coroners and Justice Act, 2009, c. 25, § 73 (U.K.) (abolishing sedition, seditious libel, defamatory libel, and obscene libel in England, Wales, and Northern Ireland).

⁵⁷ See Caroline Banwell, *The Courts' Treatment of the Broadcasting Bans in Britain and the Republic of Ireland*, 16 J. MEDIA L. & PRAC. 21 (1995); Gerard Hogan, *The Demise of the Irish Broadcasting Ban*, 1 EUR. PUB. L. 69 (1995). Challenges under article 10 to such restrictions were rejected at the time. See *Brind & Others v. United Kingdom*, App. Nos. 18714/91, 18759/91, 77-A DR 42, 18 E.H.R.R. CD76 (1994); *McLaughlin v. United Kingdom*, App. No. 18759/91, 77-A DR 42, 18 E.H.R.R. CD84 (1994); *Purcell v. Ireland*, App. No. 15404/89, 70 Eur. Comm'n H.R. Dec. & Rep. (1991); *Hogefeld v. Germany*, App. No. 35402/97 (2000), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>. But the Court has since indicated that it will not accept bans based on affiliation alone. See *Kanat and Bozan v. Turkey*, App. No. 13799/04, 46 E.H.R.R. 14 (2008). And it has applied a more stringent test to prior restraints on the press. See *Ürper v. Turkey*, App. No. 14526/07 (2009); *Ürper v. Turkey* (No. 2), App. No. 55036/07 (2010), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>; *Turgay v. Turkey*, App. No. 8306/08 (2010), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

⁵⁸ Election Authorities (Northern Ireland), 1989, c. 3, §§ 3, 5 (N. Ir.). See Clive Walker, *Political Violence and Democracy in Northern Ireland*, 51 MOD. L. REV. 605, 619 (1988).

⁵⁹ Clive Walker, *Prisoners in Parliament: Another View*, 1982 PUB. L. 389; John Finn, *Electoral Regimes and the Proscription of Anti-Democratic Parties*, 12 TERRORISM & POL. VIOLENCE 51, 72 (2000).

sentation of the People Act 1981 disqualifies from nomination for, and membership of, the House of Commons any person convicted of an offense and sentenced to more than twelve months' imprisonment either in the United Kingdom or in the Republic of Ireland.

In summary, it is intended in this paper to explain and analyze the measures taken in 2006 against militant speech about terrorism in the U.K.'s special anti-terrorism laws. These sources comprise, first, the proscription of organizations that advocate and encourage terrorism, and secondly the prosecution of individuals who engage in such conduct. These two strands are selected as the most direct serious incursions into speech rights in connection with terrorism. Are these provisions "smart" enough to sit well within the armory of a "smart militant democracy"?

PROSCRIPTION ON GROUNDS OF ENCOURAGEMENT

Part II of the Terrorism Act 2000 responds not so much to militant expressions as to militant associations. It permits the proscription of selected organizations and, on the back of that device, then criminalizes membership and specified activities. These are time-honored devices—the IRA has been proscribed since 1918 and Al-Qa'ida since February 2001.⁶⁰ Nowadays, many more foreign-based *jihadi* groups are proscribed than Irish groups, though there is still a reluctance to extend the measure to Fascists and racists,⁶¹ Welsh and Scottish extremists, or animal rights and environmental militants, since all lack sophistication and strength. In its paper on animal rights extremism, the Home Office expressed itself as not persuaded

⁶⁰ For a pre-2000 history, see WALKER, *supra* note 22, at ch. 5. For a post-2000 history, see CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION ch. 1 (2009).

⁶¹ HANSARD (H.C.) STANDING COMMITTEE D (25 Jan. 2000), David Maclean; 656 PARL. DEB., H.L. (5th ser.) (2004) 169, Lord Greaves.

that proscription would assist⁶² and recommended alternatives.⁶³

In many ways, proscription of terrorist groups has become a British tradition, which is so much a fixture of the legal and political environment that it barely sparks any public debate or criticism. That lax stance is not endorsed here, but this traditional form of proscription is not the prime focus of this paper not only because it is not novel but, more pertinently, because it is relatively easy to justify in principle the curtailment of expressive and associational rights for those who wish to invoke them in order to destroy the lives and rights of others and, in the case of some groups, the very existence of a liberal democracy. Thus, the smart militant democracy's objectives of the protection of life and the preservation of democratic discourse unsullied by threats appear compelling. Challenges under European Convention standards will be answered either under Article 17,⁶⁴ or under the limitations to Articles 10 and 11.⁶⁵ Any association with violent methods will produce condemnation under one or both of these provisions, even if its ultimate policy goals are acceptable.⁶⁶ Conversely, those with peaceful ambitions to change constitutional foundations should not be debarred.⁶⁷ But if the proposed new constitutional model is in-

⁶² HOME OFFICE COMM'N DIRECTORATE, ANIMAL WELFARE – HUMAN RIGHTS: PROTECTING PEOPLE FROM ANIMAL RIGHTS EXTREMISTS 18 (2004).

⁶³ *Id.* at 16-17.

⁶⁴ Convention, *supra* note 55, at 7 (“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”).

⁶⁵ *Id.* at 6 (“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime . . .”).

⁶⁶ *See also* *Gündüz v. Turkey*, App. No. 59745/00, 2003-XI, 41 E.H.R.R. 5 (2003); *Herri Batasuna & Batasuna v. Spain*, App. Nos. 25803/04, 25817/04, (2009), *available at* <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

⁶⁷ *See* *United Communist Party of Turkey v. Turkey*, App. No. 19392/92, 1998-I, 26 E.H.R.R. 121, 154 (1998); *Socialist Party v. Turkey*, App. No. 21237/93, 1998-III (1998), *available at* <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>; *Partidul Comunistilor (Nepeceristi) & Ungureanu v. Romania*, App. No. 46626/99, 2005-I, 44 E.H.R.R. 17, 352-58 (2005).

herently inimical to the rights of others, then restrictions can again bite. Thus, the banning of bodies that seek to impose *Sharia* law has been sustained on the basis that *Sharia* law would inherently discriminate against women.⁶⁸ In contrast to the more absolutist U.S. constitutional position, expressive and associational rights are depicted as being instrumental to democracy and pluralism rather than goods in themselves.⁶⁹ In this way, a rather dismissive response to disquiet about proscription is easier to maintain under the relativist approach of the European Convention on Human Rights 1950 (as adopted for the U.K. Bill of Rights, The Human Rights Act 1998)⁷⁰ than it would be under U.S. First Amendment jurisprudence.⁷¹

It is not intended to describe in detail the implementation of this tradition of proscription. It is sufficient to understand for present purposes that much of the purpose of proscription is symbolic⁷²—to express society’s revulsion at violence as a political strategy as well as its determination to stop to it. It is also important to underline its executive basis. The process of proscription begins with section 3(3), by which the Secretary of State may by order add an organization to those already listed on the face of the Act in Schedule 2. The criteria for action under section 3(3) are subjectively worded—by section 3(4), orders

⁶⁸ The level of political support is no longer treated as crucial, and there is the counter-balance that *jihadi* groups unequivocally espouse violence: *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, 2003-II, 37 E.H.R.R. (2003); *Sahin v. Turkey*, App. No. 44774/98, 2005-XI, 44 E.H.R.R. 5 (2005); *Kalifatstaat v. Germany*, App. No. 13828/04 (2006), available at <http://www.echr.coe.int/EC HR/EN/Header/Case-Law/HUDOC/HUDOC+database/>. Compare the variant view of IAN CRAM, *TERROR AND THE WAR ON DISSENT: FREEDOM OF EXPRESSION IN THE AGE OF AL-QAEDA* 61 (2009).

⁶⁹ *German Communist Party v. Germany*, App. No. 350/57, 1 Y.B. Eur. Conv. on H.R. 222; *Retimag v. Germany*, App. No. 712/60, 4 Y.B. Eur. Conv. on H.R. 384; *Norwood v. United Kingdom*, App. No. 23131/03, 2004-XI, 40 E.H.R.R. SE11 (2005); see Eva Brems, *Freedom of Political Association and the Question of Party Closures*, in *POLITICAL RIGHTS UNDER STRESS IN 21ST CENTURY EUROPE* 120 (Wojciech Sadurski, ed. 2006).

⁷⁰ See Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J.L. REFORM 497 (2000).

⁷¹ See STEFAN SOTTIAUX, *TERRORISM AND THE LIMITATION OF RIGHTS: THE ECHR AND THE US CONSTITUTION* (2008).

⁷² See the view of Home Secretary Roy Jenkins, *IRA Terrorism in Great Britain* (C(74)139, National Archives, London, 1974) para. 3.

can be made against a group if “he believes that it is concerned in terrorism,” a belief which may be derived under section 3(5) if an organization (a) commits or participates in acts of terrorism; (b) prepares for terrorism; (c) promotes or encourages terrorism; or (d) is otherwise concerned in terrorism. While subjective on paper, in *Lord Alton of Liverpool (In the Matter of The People’s Mojahadeen Organization of Iran) v. Secretary of State for the Home Department* (hereinafter the “Alton case”),⁷³ the test in section 3(4) has been interpreted as applying in two stages. The first stage is whether the Secretary of State has an honest belief on reasonable grounds to satisfy the statutory test in section 3(4). Then a second stage addresses whether discretion should be used to apply proscription on policy grounds. An honest belief on reasonable grounds can only be formed through materials known to the decision-maker—the decision is personal and cannot be delegated.⁷⁴ That case also demanded “current, active steps” by way of proof of being “concerned in” terrorism; the mere contemplation of the possibility of some future violence is not enough.⁷⁵ Thus, the Court of Appeal distinguished between one group that has temporarily ceased terrorism “for tactical reasons” with another that has decided to resile from violence, “even if the possibility exists that it might decide to revert to terrorism in the future.”⁷⁶

There is little doubt that the vast majority of the fifty or so listed organizations have in fact engaged in terrorism and are still capable of doing so. Few have ever challenged their banning orders, and only one, the People’s Mojahadeen Organization of Iran, has been successful. Many of the same groups are banned by other countries, and some appear in terrorism

⁷³ Sec’y of State for the Home Dep’t v. Lord Alton of Liverpool, [2007] PC/02/2006 at ¶¶ 67, 68, available at <http://www.siac.tribunals.gov.uk/poac/Documents/outcomes/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf>; Sec’y of State for the Home Dep’t v. Lord Alton of Liverpool [2008] EWCA (Civ) 443 [22], [2008] 1 W.L.R. 2341 [2350] (U.K.).

⁷⁴ *Alton case*, [2007] PC/02/2006 at ¶ 130.

⁷⁵ *Id.* at ¶¶ 124, 128.

⁷⁶ *Alton case*, [2008] EWCA (Civ) 443 [38], [2008] 1 W.L.R. 2341 [2355] (U.K.).

finance lists issued by either the United Nations or the European Union.⁷⁷

However, the same degree of complacency does not exist in relation to the second tranche of proscription powers, as granted by the Terrorism Act 2006. The Act essentially extends the basis for militant responses from deeds to words. It represents one of a number of policies⁷⁸ which reflect the stark warning from the Prime Minister, Tony Blair, issued in the aftermath of the July 2005 bombings in London on August 5, 2005: “Let no one be in any doubt, the rules of the game are changing.”⁷⁹

Commitment to legislation on glorification had been promised in the Labour Party’s May 2005 election manifesto,⁸⁰ but the perceived need for action became acute after the London bombings of July 7, 2005.⁸¹ Fear of the radicalization of young Muslim men by foreign extremists who were seen as poisoning vulnerable minds, drew from the Prime Minister a 12-point plan which included the banning of organizations that encourage extremism.⁸² In the background, the intolerance of foreign dissidents was marked after September 11, 2001 at an international level by UNSC Resolution 1373, which calls for action against asylum-seekers involved in terrorism.⁸³ International law took more definite shape, with Article 5 of the Council of Europe Convention on the Prevention of Terrorism of 2005 demanding domestic offenses to outlaw the public provocation of terrorism offenses.⁸⁴ Further impetus for action was provided

⁷⁷ See S.C. Res. 1267, ¶ 1(c)-(d) U.N. Doc. S/RES/1267 (Oct. 15, 1999).

⁷⁸ See Walker, *supra* note 35, at 428-33.

⁷⁹ Rosemary Bennett & Richard Ford, *Row Over Tougher Rules on Preachers of Hate*, *TIMES* (London), Aug. 6, 2005, at p. 1.

⁸⁰ LABOUR PARTY, *BRITAIN FORWARD NOT BACK* 53 (2005).

⁸¹ See HOME OFFICE, *REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON THE 7TH JULY 2005*, 2005-6, H.C. 1087 (U.K.).

⁸² Bennett & Ford, *supra* note 79, at p. 1; Alan Cowell, *Blair Vows New Laws to End Sanctuary for Muslim Extremists*, *N.Y. TIMES*, Aug. 6, 2005, at A1.

⁸³ S.C. Res. 1373, ¶ 3(f), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

⁸⁴ CONVENTION ON THE PREVENTION OF TERRORISM, May 16, 2005, COUNCIL OF EUROPE, C.E.T.S. 196, art. 5; see also COMMITTEE OF EXPERTS ON TERRORISM, *COLLECTION OF RELEVANT CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATED TO “APOLOGIE DU TERRORISME” AND “INCITEMENT TO TERRORISM”* (2004);

by the United Nations Security Council Resolution 1624 of September 14, 2005. The Resolution “[c]alls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: (a) Prohibit by law incitement to commit a terrorist act or acts.” Having proposed new domestic legislation, in the shape of what became the Terrorism Act 2006, including its section 1 offense, Prime Minister Blair found himself the following month in New York as a principal mover of this resolution. From his position of power, he was able to lay the text of the resolution and speak forcefully for action against “poisonous propaganda.”⁸⁵ As a neat trick, the passage of the UN Security Council Resolution was then cited in aid as one justification for the suppression of speech under what became section 1 of the Terrorism Act 2006.⁸⁶

The first relevant measure in the 2006 Act extends proscription to groups engaging in glorification. Although section 3(5)(c) of the 2000 Act already allows proscription where an organization promotes or encourages terrorism, the link to action is even less direct under the 2006 Act. Its emphasis is on speech and not deeds. Furthermore, the thrust of the power is aimed for the first time against domestic-based non-Irish groups.

Powers to proscribe organizations that glorify terrorism are inserted by section 21 of the Terrorism Act 2006. A new section 3(5A) to the Terrorism Act 2000 specifies that the power to proscribe under section 3(5)(c) shall encompass the “unlawful glorification of the commission or preparation (whether in the past, in the future, or generally) of acts of terrorism.” “Glorification” requires the reasonable expectation that the audience will emulate terrorism in present circumstances (section 3(5B)), and it comprises any form of praise or celebration

JOINT COMMITTEE ON HUMAN RIGHTS, THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM, REPORT, 2006-07, H.L. 26, H.C. 247 (U.K.); Adrian Hunt, *The Council of Europe Convention on the Prevention of Terrorism*, 4 EUR. PUB. L. 603 (2006); Walker, *supra* note 35.

⁸⁵ S.C. Res. 5261, p. 9, U.N. Doc. S/PV.5261 (Sept. 14, 2005).

⁸⁶ 438 PARL. DEB., H.C. (6th ser.) (2005) 329; see Ben Saul, *Speaking of Terror: Criminalising Incitement to Violence*, 28 U.N.S.W.L.J. 868 (2005).

(section 3(5C)). The boundaries of glorification are uncertain and threatening to free speech since they exceed the encouragement of crime,⁸⁷ but changes made in the drafting to Part I of the 2006 Act were reflected here too. As a result, the sponsoring government minister was sure that the final formula would distinguish “cultural events or those that celebrate a part of our collective memory, such as Guy Fawkes and bonfire night, and people who glorify acts of terror to try to encourage similar acts here and now in existing circumstances.”⁸⁸ The same distinction would apply to Irish celebrations of the past deeds of Michael Collins or William of Orange, depending on whether the praise relates to a heroic history or future emulation.

A potential problem with the focus on speech might be the ascription of responsibility to an organization. Must every remark by every member be taken as “official” policy, or must impugned statements emanate from prominent or multiple members?⁸⁹ The same point could arise with unsanctioned activities, but violent acts probably require joint planning and often evince formal claims of responsibility. It is easier to make a wayward impulsive remark than to carry out an impromptu bombing.

Two groups (Al-Ghurabaa and The Saved Sect) were banned in July 2006, fairly soon after the passage of the legislation on March 30, 2006.⁹⁰ Five more groups were listed in January 2010.⁹¹ These were claimed by the Home Office to be variant names of the two groups banned in 2006,⁹² though in terms of organizational history, the founding body was al Mujiroun.

⁸⁷ 438 PARL. DEB., H.C. (6th ser.) 985 (2005).

⁸⁸ 438 PARL. DEB., H.C. (6th ser.) 994 (2005).

⁸⁹ Saul, *supra* note 86, at 880.

⁹⁰ 449 PARL. DEB., H.C. (6th ser.) 490 (2006); *see* QUINTAN WIKTOROWICZ, *RADICAL ISLAM RISING: MUSLIM EXTREMESIM IN THE WEST* (2005).

⁹¹ Prevention and Suppression of Terrorism: The Proscribed Organisations (Name Changes) Order, 2010, SI 2010/34 (U.K.).

⁹² The proscription power to deal with variant names is in the Terrorism Act 2006, § 22. It allows for a statutory instrument without the scrutiny of the affirmative procedure, i.e., a positive vote for the order which in turn requires a debate. *Id.*

Table 1: Proscription of group glorification

Al-Ghurabaa	Al-Ghurabaa (“The Strangers”) is an Islamist group. It succeeded Al-Muhajiroun.
Al-Muhajiroun	Al-Muhajiroun (“The Emigrants”) was founded by Omar Bakri Muhammad and others in Saudi Arabia in 1983. It was disbanded in 2004 but relaunched in 2009.
Call to Submission	A variant name of the other groups here listed.
Islam 4 UK	This Islamist group was led by Anjem Choudary and became prominent for its involvement in public protests.
Islamic Path	A variant name of the other groups here listed.
London School of Sharia	A variant name of the other groups here listed. Anjem Choudary adopted the title of “Judge of the Shariah Court” of the U.K.
The Saved Sect	The Saved Sect (formerly the Saviour Sect) pursues the mission of speaking out for proper standards for Muslims living in Western countries so as to ensure their salvation.

A minimal amount of detail was divulged by way of justification for the selections in 2006. One element of evidence against Al-Ghurabaa concerned the following comments by a representative about the London bombings of 2005: “What I would say about those who do suicide operations or martyrdom operations is that they’re completely praiseworthy. I have no allegiance to the Queen whatsoever or to British society; in fact

if I see mujahideen attack the UK I am always standing with the Muslims.”⁹³

The 2010 proscriptions were much more openly argued. These bans were provoked by the announcement by Islam 4 UK of a protest march through Wootton Bassett, the location where the corteges of service personnel killed in Afghanistan are informally honored by the public after the bodies have been flown to nearby RAF Lyneham. The protest was not intended to coincide with any funeral processions, but it was condemned by Prime Minister Gordon Brown as “abhorrent and offensive.”⁹⁴ The Home Secretary, Alan Johnson, initially indicated there might be a ban on any procession under the Public Order Act 1986, section 13.⁹⁵ Section 13 is regularly used against the marches of the far-right and their Muslim opponents or by Muslim groups and their far-right opponents.⁹⁶ However, Islam 4 UK gave no advance notice of any procession (required under section 11) and then announced it was cancelling any plans before the proscription order came into force. Thus, its action

⁹³ 449 PARL. DEB., H.L. (5th ser.) (2006) 493.

⁹⁴ Riazat Butt, *Brown Condemns ‘Abhorrent’ Islamist Wootton Bassett Protest Plan*, GUARDIAN, Jan. 5, 2010, available at <http://www.guardian.co.uk/world/2010/jan/04/wootton-bassett-islam4uk-parade-troops#>.

⁹⁵ Public Order Act, 1986, c. 64, § 13 (U.K.). Section 13 states in pertinent part that:

(1) If at any time the chief officer of police reasonably believes that, because of particular circumstances existing in any district or part of a district, the powers under section 12 will not be sufficient to prevent the holding of public processions in that district or part from resulting in serious public disorder, he shall apply to the council of the district for an order prohibiting for such period not exceeding 3 months as may be specified in the application the holding of all public processions (or of any class of public procession so specified) in the district or part concerned.

(2) On receiving such an application, a council may with the consent of the Secretary of State make an order either in the terms of the application or with such modifications as may be approved by the Secretary of State.

⁹⁶ Recent examples have occurred in Burnley in June 2001. See JOINT STATEMENT ON BEHALF OF BURNLEY BOROUGH COUNCIL AND LANCASHIRE CONSTABULARY, PROHIBITION ORDER GRANTED IN BURNLEY (2001), available at http://www.burnley.gov.uk/site/scripts/news_article.php?newsID=11584. They have also occurred in Luton in August 2009. See LUTON BOROUGH COUNCIL, BANNING ORDER APPROVED TO PREVENT ‘UNOFFICIAL’ MARCH IN LUTON (2009), available at <http://www.luton.gov.uk/0xc0a80123%20x0e6fb2a6>.

might be interpreted as primarily a provocation, designed to achieve publicity about itself and its views and to focus public attention on the legitimacy of British military action in Afghanistan. It was markedly successful in achieving its aims. Thus, the key figure in Islam 4 UK, Anjem Choudary, appeared in the mainstream media and thereby gained a degree of public exposure beyond his wildest dreams.⁹⁷

The officially appointed independent reviewer of anti-terrorism legislation, Lord Carlile, predicted in 2005 that there could be “a significant number of additional proscriptions” through “reducing the opportunity for disaffected young people to become radicalized towards terrorism.”⁹⁸ In response, the government has shown restraint at most times in relation to potential candidates.⁹⁹ Most notably, Hizb ut-Tahrir,¹⁰⁰ a transnational movement established in 1953 which advocates the establishment of a Caliphate and *Sharia* laws in Arab countries, has not been banned in the United Kingdom, unlike, for example, in Germany.¹⁰¹ Nevertheless, it “remains an or-

⁹⁷ See Press Release, Quilliam, Quilliam Director Challenges Islam 4 UK Leader on Newsnight, Jan. 13 2010, <http://www.quilliamfoundation.org/index.php/component/content/article/612>.

⁹⁸ Compare HOME DEPARTMENT, GOVERNMENT REPLY TO LORD CARLILE OF BERRIEW Q.C.: REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 AND PART 1 OF THE TERRORISM ACT 2006, REPORT, 2008, Cm. 7429, at ¶ 50 [hereinafter 2007 REPORT], with Lord Carlile, In Full: Lord Carlile Report on Terrorism Bill, TIMES (London), Oct. 12, 2005, at ¶ 51-52, available at <http://www.timesonline.co.uk/tol/news/uk/article577744.ece> [hereinafter Carlile Report].

⁹⁹ For example, Ahlus Sunnah wal Jamaah, the Muballigh, the Islamic Thinkers Society, the Society of Muslim Lawyers, the Supporters of Sharia, and Tablighi Jama' are listed in: 449 PARL. DEB., H.C. (6th ser.) 496 (2006).

¹⁰⁰ See Emmanuel Karajiannis & Clark McCauley, *Hizb ut Tahir al-Islami: Evaluating the Threat Posed by a Radical Islamic Group that Remains Nonviolent*, 18 TERRORISM & POL. VIOLENCE 315 (2006); HOURIYA AHMED & HANNAH STUART, THE CENTRE FOR SOCIAL COHESION, HIZB UT-TAHRIR: IDEOLOGY AND STRATEGY (2009).

¹⁰¹ On January 10, 2003 the German *Bundesministerium des Innern* issued a decision under the Law on Associations (*Vereinsgesetz*) by which it proscribed the group's activities and ordered the confiscation of assets. Having failed to overturn the order in the German courts, the group is now challenging the ban before the European Court of Human Rights: *Hizb ut Tahrir v Germany*, App. No. 31098/08. It is also banned in several countries with a Muslim majority population, especially within the Middle East.

ganization of concern and is kept under close review.”¹⁰² It was mentioned in the 2010 election manifesto of the Conservative Party as a candidate for proscription.¹⁰³ Whether that course of action will prove to be a worthwhile venture may be doubted. The profusion of organizational names ensnared in the 2010 order points to an endemic weakness in the mechanism of proscription as applied to many *jihadi* movements. These groups are far removed from the historically defined and geographically confined proponents of Irish political violence or other nationalist groups whose names are the legends in songs and on gravestones. Thus, little social or political capital is invested in names such as Islam 4 UK, and their adherents have no compunction about inventing new variants as replacements if necessitated by proscription.

The idea of further restraints on militant speech about terrorism has gathered further international pace since 2006. Aside from the United Nation resolution and the Council of Europe Convention already mentioned, the European Union Council Framework Decision on Combating Terrorism was amended in 2008 so as to require the national implementation of offenses against public provocation, recruitment, and training, subject to “fundamental principles relating to freedom of expression.”¹⁰⁴ Few European countries have adopted proscription based on the British model. However, some comparable jurisdictions beyond Europe are now banning organizations on the basis of advocacy, such as the (Australian) Anti-Terrorism Act (No. 2) 2005. The Act allows listing by the Attorney-General and prosecutions for activities where the organization

¹⁰² 472 PARL. DEB., H.C. (6th ser.) 588W (2008). The position was confirmed at 716 PARL. DEB., H.L. (5th ser.) 86wa (2010).

¹⁰³ THE CONSERVATIVE PARTY, INVITATION TO JOIN THE GOVERNMENT OF BRITAIN 105 (2010).

¹⁰⁴ Council Framework Decision 919/JHA, art. 2, 2008 O.J. (L 330) 21, 22 (EU) (Amending Framework Decision on Combating Terrorism 475/JHA, art. 3, 2002 O.J. (L 164) 3 (EU)); see HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE: SEVENTEENTH REPORT OF SESSION 2007-08, 2008, H.C. 16-xv, at ¶ 8.14 (U.K.); Shawn Marie Boyne, *Free Speech, Terrorism, and European Security: Defining and Defending the Political Community*, 30 PACE L. REV. 417 (2010).

advocates a terrorist act contrary to section 102(1A) of the Criminal Code.

A fuller assessment of the worth of these measures will be offered once the second part of the Terrorism Act 2006 response to militant speech has been described.

OFFENSES OF INCITEMENT OF TERRORISM

(a) Provisions

The principal and highly controversial changes brought about by the Terrorism Act 2006 in relation to extremist speech are set out in offenses in sections 1 and 2. The core offense in section 1(1) relates to the publication of statements that are “likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism” or specified offenses (referred to as “Convention offences” and listed in schedule 1, subject to change by affirmative order under section 20(9)).¹⁰⁵ Publication of one’s statement is the core of the *actus reus*.¹⁰⁶ The “statement” may take many formats under section 20(6), including words, sounds, or images, and, by section 20(4), can be published “in any manner” such as through an electronic service.¹⁰⁷ A “statement” may be part of a wider message and need not be confined to terrorism or offenses in, or with respect to, the United Kingdom.¹⁰⁸ But section 1(4) demands that account be taken of the contents as a whole and the circumstances and manner of publication. For instance, “there is a difference in how an academic thesis on an issue and a radical and inflammatory pamphlet are likely to be understood.”¹⁰⁹

¹⁰⁵ Terrorism Act 2006, c. 11, § 1 (U.K.).

¹⁰⁶ *Id.* § 1(2)(a).

¹⁰⁷ *Id.* § 20. By section 20(5), providing a service includes making a facility available.

¹⁰⁸ L.H. Leigh, *The Terrorism Act 2006: A Brief Analysis*, 170 *JUST. OF THE PEACE* 364 (2006).

¹⁰⁹ Terrorism Act 2006, c. 11, § 1 (U.K.).

The statement must be made to “members of the public,” who must be in the multiple and are distinct from “persons” in a private conversation.¹¹⁰ If the statement is made at a meeting, it must be a meeting that is open to the public.¹¹¹ By section 20(3), the “public” can include the public (or any section of it) of any part of the United Kingdom or of a country or territory outside the United Kingdom.¹¹² Furthermore, in so far as it relates to “Convention offences,” section 1 is within the parameters of section 17 of the Act (discussed below), which means that the offense could be committed by Palestinians in Gaza and Pakistanis in Peshawar.¹¹³ The offense does not require that all targeted members of the public are likely to be affected; the influenced subset must comprise “some” which could mean one or more affected recipients.¹¹⁴ In applying the impact test, juries may face challenging calculations where the statement is confined to a section of the public consisting of “small cohesive congregations.”¹¹⁵ The limit in the offense to a public context is odd, given the mischief of radicalization.¹¹⁶

As for the *mens rea*, in section 1(2)(b), the publisher must either “intend members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare, or instigate acts of terrorism or Convention offences,” or be subjectively “reckless as to whether members of the public will be so directly or indirectly encouraged” by the statement.¹¹⁷ The original draft of the offense lacked this element of subjective specific intent—it was sufficient that there was in-

¹¹⁰ 676 PARL. DEB., H.L. (5th ser.) (2005) 435.

¹¹¹ *Compare* Terrorism Act 2006, c. 11, § 20(3), *with* Public Order Act, 1986, c. 64, § 16 (U.K.).

¹¹² Terrorism Act 2006, c. 11, § 20(3) (U.K.).

¹¹³ *See* ALUN JONES, RUPERT BOWERS, & HUGO D. LODGE, BLACKSTONE’S GUIDE TO THE TERRORISM ACT 2006 2 (2006). Prosecution is subject to section 19(2). Terrorism Act 2006, c. 11, § 19(2) (U.K.).

¹¹⁴ It has been suggested that “some” requires more than a single person. Terrorism Act 2006, c. 11, § 2(6) (U.K.). *See also* JONES ET AL, *supra* note 113, at ¶ 2.18. *But see* Terrorism Act 2006, c. 11, § 1(2)(b) (U.K.).

¹¹⁵ *See* JONES et al, *supra* note 113, at ¶ 2.35.

¹¹⁶ *But see* Public Order Act, 1986, c. 64, § 18 (U.K.); HOME OFFICE, REVIEW OF PUBLIC ORDER LAW, 1985, Cm. 9510, at ¶ 6.7 (U.K.).

¹¹⁷ Terrorism Act 2006, c. 11, § 1(2)(b)(i-ii) (U.K.).

tent as to publication and reasonable belief as to encouragement.¹¹⁸ There was prolonged opposition to that version,¹¹⁹ which was seen as reviving the version of inadvertent recklessness in *Metropolitan Police Commissioner v. Caldwell*¹²⁰ despite its reversal in by *R v. G*.¹²¹ The other notable aspect of the *mens rea* is that the defendant must seek to affect multiple members of the public,¹²² so some of the queries about the extent of publication may become irrelevant. The requirement points again to a strong public order element.

By section 1(5), it is irrelevant whether the encouragement relates to one or more particular acts of terrorism or specified offenses, or of a particular description, or generally.¹²³ This provision should not, however, excuse the prosecution from specifying the one or more acts or offenses that were relevant.¹²⁴ It is also no defense under section 1(5)(b) to show that the dissemination fell on deaf ears—in other words, that no person was in fact encouraged or induced by the statement.¹²⁵ The offense considers the objective tendency of the publication. However, where the allegation is of a recklessly made statement, it is a defense under section 1(6) to show that the statement neither expressed the originator's views nor had his endorsement and that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (unless in receipt of a notice under section 3(3)) did not have his endorsement.¹²⁶ Thus, the government intended a legal rather than an evidential burden to be placed on the defense,¹²⁷ though the precedent of the *Attorney General's Reference (No.*

¹¹⁸ See 438 PARL. DEB., H.C. 834 (6th ser.) (2005).

¹¹⁹ 676 Parl. Deb., H.L. (5th ser.) 430 (2005).

¹²⁰ [1982] A.C. 341 (U.K.).

¹²¹ [2003] UKHL 50 [45], [2004] 1 A.C. 1034.

¹²² 676 PARL. DEB., H.L. (5th ser.) (2005) 435.

¹²³ Terrorism Act 2006, c. 11, § 1(5) (U.K.).

¹²⁴ Compare *id.*, with Adrian Hunt, *Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism*, 2007 CRIM. L. REV. 441, 441-58.

¹²⁵ Terrorism Act 2006, c. 11, § 1(5)(b) (U.K.).

¹²⁶ *Id.* § 1(6).

¹²⁷ 676 PARL. DEB., H.L. (5th ser.) (2005) 455; 678 PARL. DEB., H.L. (5th ser.) (2006) 217.

4 of 2002)¹²⁸ strongly suggests that the courts might take another view.

The most controversial aspect of the offense is indirect encouragement, and so Parliament sought to apply further clarifications and limits.¹²⁹ By section 1(3), the indirect encouragement of terrorism includes a statement that “glorifies” the commission or preparation of acts of terrorism or specified offenses (either in their actual commission or in principle) but only if members of the public could reasonably be expected to infer that the glorified conduct that should be “emulated by them in existing circumstances.”¹³⁰ The continued mention of “glorification” reflects a vestige of the pre-parliamentary draft of the Bill, which included an offense of glorification distinct from the offense of encouragement.¹³¹ The impact is on members of the public at large and not a particular audience, as under section 1(1). In this way, a predictive application of “likely impact” is replaced by a wholly objective test where the jury can put themselves in the shoes of an audience.¹³² It follows that it is no defense to show that an actual audience did not believe there was glorification, though this circumstance can be pleaded to direct incitement or other indirect incitements.

The notion of “emulation” ensures that the words uttered should be understood as more than rhetorical. Consequently, praise for historical violence, such as the armed occupation of the General Post Office, Dublin, in 1916, is not an offense, unless the statements can be understood to resonate with the present and to guide future action. The position may be clearer where the speaker glorifies ongoing or future (but not futuristic) acts of terrorism since the possibility of replication is then more palpable and practicable. Thus, a declaration that most

¹²⁸ [2004] UKHL 43, [2003] 3 W.L.R. 1153 (U.K.), *rev'd*, *Sheldrake v. Dir. of Pub. Prosecutions*, [2004] UKHL 43, [2005] 1 A.C. 264 (U.K.); *see also* JONES ET AL, *supra* note 113, at ¶ 2.52.

¹²⁹ *See* 679 PARL. DEB., H.L. (5th ser.) (2006) 136; 680 PARL. DEB., H.L. (5th ser.) (2006) 241.

¹³⁰ Terrorism Act 2006, c. 11, § 1(3) (U.K.).

¹³¹ *See* Carlile Report, *supra* note 98; Eric Barendt, *Threats to Freedom of Speech in the United Kingdom?*, 28 U.N.S.W.L.J. 895, 897 (2005).

¹³² *See* JONES ET AL, *supra* note 113, at ¶ 2.41.

devout British Muslims were “over the moon” about the September 11, 2001 attacks refers to an historical act when uttered in 2005, but must sail close to section 1(3) when allied to the statement that “[u]ltimately, if your brothers and sisters were being killed in any part of the world, you would make your utmost effort to try to help them.”¹³³

“Glorify” is partly defined in section 20(2) as including “praise or celebration.”¹³⁴ An all-embracing working (non-legal) definition was proffered by a Home Office Minister as follows: “To glorify is to describe or represent as admirable, especially unjustifiably or undeservedly.”¹³⁵ Section 20(7) clarifies that references to conduct to be “emulated in existing circumstances” include references to conduct that is illustrative of a type of conduct that should be so emulated.¹³⁶ For example, a statement glorifying the bombing of a bus at Tavistock Square on July 7, 2005 and encouraging repeat performances may be interpreted as an encouragement to emulate attacks on the transport network in general. The government’s advice for speakers wishing to avoid glorification is that they should “pre-face their remarks with the statement that they do not condone or endorse acts of terrorism or encouraging people to kill others. They could express sympathy and even support for the activity, but not in a way that encourages people to commit acts of terrorism.”¹³⁷ This “love-hate” formula—love the cause but hate violent means—is not a magic incantation that wards off all iniquity. Juries may consider the context of words and the sincerity of speakers, as made clear by section 1(4).¹³⁸

¹³³ These words were spoken by Hassan Butt. Aatish Taseer, *A British Jihadist*, PROSPECT, Aug. 2005, available at <http://www.prospect-magazine.co.uk/pdfarticle.php?id=6992>.

¹³⁴ Terrorism Act 2006, c. 11, § 20(2) (U.K.).

¹³⁵ 677 PARL. DEB., H.L. (5th ser.) (2006) 583.

¹³⁶ Terrorism Act 2006, c. 11, § 20(7) (U.K.).

¹³⁷ 439 PARL. DEB., H.L. (5th ser.) (2005) 429; see also 676 PARL. DEB., H.L. (5th ser.) (2005) 458.

¹³⁸ Terrorism Act 2006, c. 11, § 1(4) (U.K.).

There is no illumination of the meaning of “indirect incitement” beyond the concept of glorification.¹³⁹ Presumably, an incitement is not direct when it is less than an explicit stimulus but still predictably steering towards an outcome. Within this residue of indirect incitement, any requirement of emulation is absent.

The overall impact is to criminalize generalized and public encouragements—that terrorism would be a good thing, without stating where or when or against whom. In comparison, the “normal” law of criminal encouragement in Part II of the Serious Crime Act 2007 requires the encouragement of an act that would amount to one or more offenses and at least with the belief that one or more offenses would be committed as a consequence.¹⁴⁰ Section 1 of the Terrorism Act 2006 advances these normal boundaries, in the case of direct incitement, by specifying that it is an offense “to incite people to engage in terrorist activities generally” and extra-territorially.¹⁴¹ In the case of indirect incitement, it is arguably an offense “to incite them obliquely by creating the climate in which they may come to believe that terrorist acts are acceptable.”¹⁴² How this differs from “normal” incitement remains uncertain. The “normal” law does not use the terms “direct” and “indirect” but does occasionally accord a wide meaning to “encourage,” such as in cases of speed trap detection machines or books giving advice on the production of cannabis.¹⁴³ Perhaps the absence of any requirement of intended emulation outside of the realm of glorification

¹³⁹ See Hunt, *supra* note 124, at 452 (2007); Tufyal Choudhury, *The Terrorism Act 2006: Discouraging Terrorism*, in *EXTREME SPEECH AND DEMOCRACY* 468 (Ivan Hare & James Weinstein, eds., 2009).

¹⁴⁰ Serious Crime Act 2007, c. 27, §§ 44-49 (U.K.).

¹⁴¹ *Id.* § 1 (U.K.). *But see* Criminal Justice (Terrorism and Conspiracy) Act, 1998, c. 40 (U.K.).

¹⁴² 676 PARL. DEB., H.L. (5th ser.) (2005) 432-3, Baroness Scotland. *Compare with* Leigh, *supra* note 108, and Raphael Cohen-Amalgor, *Boundaries of Freedom of Expression Before and After Prime Minister Rabin’s Assassination*, in *LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE: ESSAYS IN HONOR AND MEMORY OF YITZHAK RABIN* 80, 83 (2000).

¹⁴³ *Invicta Plastics Ltd. v. Clare*, [1976] R.T.R. 251 (Eng.); *R v. Marlow*, [1998] 1 Crim. App. (S.) 273, 275 (Eng.); Hunt, *supra* note 124, at 453-55.

could be one key difference, though the absence of actual audience reaction is less of a distinction under the 2007 Act.¹⁴⁴

Having dealt with the originators of statements in section 1, section 2(1) seeks to put a stop to the secondary dissemination of terrorist publications with intent or recklessness as to direct or indirect encouragement to acts of terrorism.¹⁴⁵ Closely parallel to section 1(3), the meaning of indirect encouragement is explained in section 2(4). The activity involved in a “terrorist publication” is distribution, circulation, giving, selling, lending, offering for sale or loan, provision of a service to others that enables them to access or acquire,¹⁴⁶ transmitting electronically, or possessing “with a view” to the foregoing activities.¹⁴⁷ Possession was added at the last stage of the Bill and reflects race hatred legislation.¹⁴⁸ It is sufficient that possession is one of the defendant’s purposes and not necessarily the prime purpose. The publication may take many formats—it means an article or record¹⁴⁹ that may be read, listened to, looked at, or watched.¹⁵⁰

In content, a “terrorist publication” is defined in section 2(3) as containing matter of two distinct types.¹⁵¹ First, it covers matter likely to be understood, by some or all of the persons to whom it is or may become available as a consequence of publication, as a direct or indirect encouragement or other inducement to them for the commission, preparation, or instigation of acts of terrorism. Second, it covers matter likely to be useful in

¹⁴⁴ See LAW COMMISSION, INCHOATE LIABILITY FOR ASSISTING AND ENCOURAGING CRIME, 2006, Cm. 6878, at ¶ 1.3 (U.K.).

¹⁴⁵ Subjective recklessness was inserted in line with section 1. 677 PARL. DEB., H.L. (5th ser.) (2006) 551.

¹⁴⁶ Terrorism Act 2006, c. 11, § 2(2) (U.K.). An example might be the running of a market stall. See Leigh, *supra* note 108.

¹⁴⁷ Terrorism Act 2006, c. 11, § 2(2) (U.K.). This definition is exclusive to section 2, so section 20(4) does not apply.

¹⁴⁸ See 678 PARL. DEB., H.L. (5th ser.) (2006) 197; Public Order Act, 1986, c. 64, § 23 (U.K.). Lord Carlile also suggested an analogy with pedophile offenses as in Criminal Justice Act, 1988, § 160 (U.K.), Carlile Report, *supra* note 98, at ¶ 25, but possession *per se* is not an offense under section 2.

¹⁴⁹ See also Public Order Act, 1986, c. 64, §§ 20(2), (8) (U.K.).

¹⁵⁰ Terrorism Act 2006, c. 11, § 2(13) (U.K.).

¹⁵¹ *Id.* § 2(3).

the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them. This second leg compensates for the fact that “Convention offences” (as in Schedule 1) are not mentioned under section 2(1). The explanation for this distinction is that section 1 is tied more closely to the terms in Article 5 of the Council of Europe Convention, namely, “public provocations,” whereas section 2 is more an artifact of British legislative design.¹⁵² As a result, there is no application of extra-territorial effect under section 17 of the Terrorism Act 2006.

The effect of a terrorist publication can be judged by reference to one or more persons to whom it is or may become available as a consequence.¹⁵³ The possibility of affecting a single person contrasts with the position under section 1. In contrast too is the possibility of judging likely impact not only on persons who were exposed but also may be exposed to the materials. In this way, the audience may in part be determined by the designs of the defendant, but it might also be affected by the choice of medium. For example, it will be difficult to delimit the audience for an internet posting. It is also notable that the offense mentions “persons” and not members of the public as in section 1, which means that private circulations of public statements can be prohibited. An explanation for the distinction is again that section 2 does not directly derive Article 5 of the 2005 Convention.

The concept of “terrorist publication” is explained further by section 2(5). The nature of the publications must be determined at the time of the conduct in section 2(2) and with regard both to the entire contents of the publication and to the circumstances in which that conduct occurs. It is irrelevant whether the dissemination relates to particular, generic, or general acts of terrorism.¹⁵⁴

¹⁵² Hunt, *supra* note 124, at 444-45.

¹⁵³ Terrorism Act 2006, c. 11, § 2(6) (U.K.).

¹⁵⁴ *Id.* § 2(7).

The *mens rea* of section 2 presumably requires intention as to the forms of dissemination in sections 2(2)(a) to (e), while, for the possession offense under section 2(2)(f), there must be an intent to possess with future intent to disseminate. In addition, it is specified in section 2(1) that the person must intend or be reckless that an effect of his conduct (not necessarily the sole or prime effect) amounts to a direct or indirect encouragement or other inducement to the commission, preparation, or instigation of acts of terrorism or assistance in the commission or preparation of such acts.

Parallel to section 1(6), it is a defense under section 2(9) to show that the statement neither expressed the publisher's views nor had his endorsement and that this position was clear in all the circumstances (unless in receipt of a notice under section 3(3)).¹⁵⁵ By section 2(10), the defense is again confined to reckless and not intentional actions, and is also confined to encouragement offenses and not offenses relating to useful materials. Of course, it is conceivable that materials will be prosecuted as relating to both types of offense in section 2(3), and if the defense is raised in those circumstances, the jury might find it difficult to disentangle liability.¹⁵⁶ The defense can benefit "all legitimate librarians, academics and booksellers" (and the same applies to news broadcasters) who may have examined the article but still do not endorse the contents.¹⁵⁷ Nevertheless, where, for example, an academic officer suspects or believes that a student intends to use the available materials for terrorist purposes rather than scholastic endeavor, she should "as a good citizen" inform the security authorities.¹⁵⁸

This injunction was taken to heart by the University of Nottingham when a student, Rizwaan Sabir, was arrested in 2008 for downloading materials in connection with his postgra-

¹⁵⁵ The government intended that the defendant carries a legal burden of proof. Compare 678 PARL. DEB., H.L. (5th ser.) (2006) 218, with Carlile Report, *supra* note 98, at ¶ 25. The courts are likely to impose an evidential burden. *Sheldrake v. Dir. of Pub. Prosecutions*, [2004] UKHL 43, [2005] 1 A.C. 264.

¹⁵⁶ See JONES ET AL., *supra* note 113, at ¶ 2.87.

¹⁵⁷ 676 PARL. DEB., H.L. (5th ser.) (2005) 465; see also 677 PARL. DEB., H.L. (5th ser.) (2006) 554; Terrorism Act 2006, Explanatory Notes, 2006, c. 11, § 1(6) (Eng.).

¹⁵⁸ 676 PARL. DEB., H.L. (5th ser.) (2005) 629.

duate research, together with his friend and ex-student, Hicham Yezza, to whom he had passed the materials.¹⁵⁹ The offending materials were an Al-Qa'ida training manual which had been published in redacted form on the U.S. Department of Justice website.¹⁶⁰ The Vice Chancellor, Sir Colin Campbell, warned, without much regard for the defenses in sections 1 and 2, that it is illegitimate to study the operational or tactical aspects of terrorism, as opposed to its political dimensions.¹⁶¹ Lord Carlile had rightly cautioned before enactment that there was a danger that academic research into terrorism might be “turned into samizdat activity.”¹⁶²

As with section 1, it is no defense that the dissemination fell on deaf ears. By section 2(8), it is irrelevant whether any person is in fact encouraged or induced or makes use of the materials. Where under section 2(10), however, the offense is one of direct or indirect encouragement only (so this is not applicable to material useful to terrorists) and the person was not acting intentionally within section 2(1)(a), there is a defense of unauthorized dissemination under section 1(9) by which it is a defense to show that the publication neither expressed the defendant's views nor had his endorsement and that this position was clear in all the circumstances (subject to receiving a notice under section 3(3)).

Section 2 exceeds the “normal” law of incitement in many respects, though much of its potential impact on third party publishers is moderated by section 2(9). Thus, the important impact is upon sympathetic disseminators or possessors of materials, where the accused is one step away from the original incitement and where it might be difficult to prove the sharing of the same *mens rea* as the author.¹⁶³

¹⁵⁹ See Polly Curtis & Martin Hodgson, *Student Researching Al-Qaida Tactics Held for Six Days*, GUARDIAN, May 24, 2008, <http://www.guardian.co.uk/education/2008/may/24/highereducation.uk>.

¹⁶⁰ THE AL QAEDA MANUAL, http://www.usdoj.gov/ag/manualpart1_1.pdf.

¹⁶¹ Sally Hunt, *Feeding Culture of Fear Won't Defend Freedom*, TIMES HIGHER EDUC., July 24, 2008, <http://www.timeshighereducation.co.uk/story.asp?storyCode=402956§ioncode=26>.

¹⁶² Carlile Report, *supra* note 98, at ¶ 28.

¹⁶³ See also Hunt, *supra* note 124, at 445.

These measures are applied to cyber-terrorism¹⁶⁴ via section 3 of the Terrorism Act 2006, which applies the section 1 and 2 offenses to electronically produced or delivered “unlawfully terrorism-related” articles or records¹⁶⁵ on the internet and devises a short-circuit enforcement power. “Unlawfully terrorism-related” means, under section 3(7), either: material that constitutes either a direct or indirect encouragement or inducement to terrorism or Convention offenses; or information that is likely to be useful to the commission or preparation of such acts.¹⁶⁶ As in sections 1 and 2, indirect encouragement is refined in section 3(8) to include glorification, provided that there is a suggestion of emulation in existing circumstances.

The short-circuit process is that, under section 3(3), where a constable forms the opinion that a statement, article, or record held on the system of the service provider is “unlawfully terrorism-related,” a notice¹⁶⁷ can be issued, which requires the provider to arrange for the material to become unavailable to the public and also warns that a failure to comply within two working days¹⁶⁸ will result in the matter being regarded, under section 3(2), as having his endorsement, and explains the possible liability under section 3(4). A failure to comply under section 3(4) can equally arise where a person initially complies with the notice but subsequently publishes or causes to be published a statement to the same effect (known as a “repeat statement”).

¹⁶⁴ See generally JAMES BRANDON, CENTRE FOR SOCIAL COHESION, VIRTUAL CALIPHATE: ISLAMIC EXTREMISTS AND THEIR WEBSITES (2008); GARY R. BUNT, ISLAM IN THE DIGITAL AGE (2003); MARTIN CHARLES GOLUMBIC, FIGHTING TERROR ONLINE (2008); GABRIEL WEIMANN, TERROR ON THE INTERNET (U.S. Inst. of Peace ed., 2006); Timothy L. Thomas, *Al Qaeda and the Internet: The Danger of “Cyberplanning”*, XXXIII PARAMATERS 112 (2003); Clive Walker, *Cyber-Terrorism: Legal Principle and Law in the United Kingdom*, 110 PENN ST. L. REV. 625 (2006).

¹⁶⁵ Terrorism Act 2006, c. 11, § 3(7) (U.K.). The meaning is by reference to the two categories of matter within section 2(3), with the usual definition of “indirect encouragement” in section 3(8). *Id.* §§ 2(3), 3(8).

¹⁶⁶ The phrase in sub-section (7)(a), “likely to be understood,” demands a higher standard of proof than “capable of being understood.” 676 PARL. DEB., H.L. (5th ser.) (2005) 700.

¹⁶⁷ See also Terrorism Act 2006, c. 11, § 4 (U.K.).

¹⁶⁸ See *id.* § 3(9).

There is a defense under section 3(5) and (6) if the person can demonstrate to a legal burden of proof¹⁶⁹ that he has “taken every step he reasonably could” to prevent a repeat statement or took “every step he reasonably could” to deal with it once aware of it.¹⁷⁰ The phrase, “every step he reasonably could” is arguably meant to impose a higher duty of attention than “taking reasonable steps,” a standard which may be satisfied overall without taking some reasonable steps. The threat regarding failure to comply is not tantamount to the commission of an offense through endorsement under sections 1 or 2, since other elements of those offenses must be proven, nor are all Convention offenses covered by section 2. Furthermore, the refusal to comply with a notice is not itself an offense, nor even is there any police power to enforce the takedown of materials.

Critics felt it to be mistaken that these restrictions on freedom of expression do not engage a judicial officer, who, more likely than a commercial service provider, could be expected to stand up for the principle of expression.¹⁷¹ The government’s retort was that judicial process would cause undue delay in a “fast-moving world.”¹⁷² The possibility that an over-enthusiastic police officer might tread too heavily, however, is taken up by the *Home Office Guidance on Notices Issued under Section 3 of the Terrorism Act 2006*, which was promised in response to parliamentary apprehensions.¹⁷³ The Guidance advises that notices can be initiated by any constable but in practice ought to be confined to officers of the Metropolitan Police Service Counter-Terrorist Command who are trained and experienced in electronic policing. They will apply in writing or electronically, setting out reasons for the giving of the notice, to an

¹⁶⁹ 678 PARL. DEB., H.L. (5th ser.) (2006) 217. This burden of proof is said to be fair and reasonable. 676 PARL. DEB., H.L. (5th ser.) (2005) 709. Lord Carlile viewed it as an evidential burden. Carlile Report, *supra* note 98, at ¶ 25. The courts may impose an evidential burden. *Sheldrake v. Dir. of Pub. Prosecutions*, [2004] UKHL 43, [2005] 1 A.C. 264 (appeal taken from Eng.).

¹⁷⁰ Terrorism Act 2006, c. 11, §§ 3(5)(a), 3(6)(b) (U.K.).

¹⁷¹ See 679 PARL. DEB., H.L. (5th ser.) (2006) 168; Carlile Report, *supra* note 98, at ¶ 27.

¹⁷² 676 PARL. DEB., H.L. (5th ser.) (2005) 677.

¹⁷³ 442 PARL. DEB., H.C. (6th ser.) (2006) 1472; HOME OFFICE, GUIDANCE ON NOTICES ISSUED UNDER SECTION 3 OF THE TERRORISM ACT 2006 (2007).

authorizing officer of superintendent rank or above. There should also be consultation with the Association of Chief Police Officers Terrorism and Allied Matters policy lead.¹⁷⁴

This Guidance, not amounting to formal “law,” may not save the scheme from challenge under Articles 6, 10, and 13 of the European Convention by web publishers. Aside from lacking legal credentials, the scheme does not require reasons to be given, does not pay express regard to free expression, and does not encompass any scheme for objections.¹⁷⁵

The potential operation of section 3 has to be curtailed by the impact of the Electronic Commerce Directive¹⁷⁶ where an information society service provider acts as an automatic “conduit” of information (Article 12), a provider of a cache for information (Article 13), or a host of information without actual knowledge of illegal activity (Article 14). It is also forbidden under Article 15 to impose a general obligation on providers, when providing the services covered by Articles 12, 13, and 14, to monitor the information that they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. The government conceded during debates on the 2006 Act that UK-based providers who are blocked from taking action against information held on a computer in a third country by the laws of that land will be viewed as having a reasonable excuse under section 3(2).¹⁷⁷ It was also conceded that section 3(5), as applied to repeat statements, should not be interpreted as imposing a duty of general monitoring or prevention.¹⁷⁸ There was also the promise that the police should first act against the webmaster rather than the service provider.¹⁷⁹ The Electronic Commerce Directive (Terrorism Act 2006)

¹⁷⁴ *Id.* at ¶¶ 13-16.

¹⁷⁵ *See* Zaoui v. Switzerland, App. No. 41615/98, (2001).

¹⁷⁶ Council Directive 2000/31/EC, arts. 12-14, 2000 O.J. (L 178) 12-13 (EU); *see* Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, arts. 17-19 (U.K.).

¹⁷⁷ 676 PARL. DEB., H.L. (5th ser.) (2005) 671.

¹⁷⁸ *Id.* at 672; *see also* HOME OFFICE, *supra* note 173, at ¶ 42.

¹⁷⁹ 676 PARL. DEB., H.L. (5th ser.) (2005) 612. This point is not reflected in the Guidance, paragraph 10. HOME OFFICE, *supra* note 173, at ¶ 10.

Regulations 2007¹⁸⁰ further clarify the relationship to the Electronic Commerce Directive. The government resisted any further domestic exemption for common carrier services.¹⁸¹

Alongside section 3, the download of Internet materials may be prosecuted as an offense of the possession of information useful to terrorism contrary to section 58 of the Terrorism Act 2000. An example is *R v. Muhammed*, where the defendant downloaded a vast amount of information from the Internet and was involved in the running of the At-Tibyaan website.¹⁸² There is also an offense under section 59 of incitement of terrorism abroad where the act would, if committed within jurisdiction, constitute any offense listed in section 59(2).¹⁸³ The listed offenses are meant to equate roughly to the definition of “terrorism” in section 1 of the Terrorism Act. An illustration is *R v. Tsouli* who, under the tag of “Irhabi 007” was convicted of inciting terrorism abroad (as well as fraud) arising from his websites which carried praise for beheadings and other terrorist violence.¹⁸⁴ In *R v. Saleem*, the defendants, including Abu Izzadeen (Trevor Brooks), were charged with inciting terrorism overseas under section 59 (and also offenses under section 15) arising from DVDs of speeches in 2004 that encouraged support for the *mujahideen* in Fallujah and elsewhere in Iraq.¹⁸⁵ Since there was no evidence that funds had been collected or terrorism committed, the sentence of four and a half years was reduced by one year.

(b) Implementation

The penalties under sections 1 and 2 are, on indictment, imprisonment not exceeding seven years, a fine, or both; on summary conviction in England and Wales, imprisonment not

¹⁸⁰ See Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007, S.I. 2007/1550 (U.K.).

¹⁸¹ 677 PARL. DEB., H.L. (5th ser.) (2006) 611. “Electronic communications network” is defined in the Communications Act 2003, c. 21, § 32 (U.K.).

¹⁸² [2010] EWCA (Crim) 227 [5, 6], [2010] 3 all E.R. 759 (Eng.).

¹⁸³ HOME OFFICE AND NORTHERN IRELAND OFFICE, LEGISLATION AGAINST TERRORISM, 1998, Cm. 4178, ¶¶ 4.18-19 (U.K.).

¹⁸⁴ [2007] EWCA (Crim) 3300, [2008] 2 Cr. App. R. (S.) 45 (Eng.).

¹⁸⁵ [2009] EWCA (Crim) 920 [44].

exceeding twelve months¹⁸⁶ (six months in Scotland or Northern Ireland), or a fine not exceeding the statutory maximum, or both.

In *R v. Rahman*, the conviction of Rahman under the Terrorism Act 2006, section 2(2)(f), arose from an instruction to disseminate to six named persons a letter containing instructions for the distribution of Al-Qa'ida propaganda and a description of fighting.¹⁸⁷ Mohammed sold Islamist materials at stalls in the North of England, some which breached section 2. The Court of Appeal gave guidance that: any reduction in sentence for recklessness rather than intention would be small; the volume and content of the material disseminated would be relevant; section 2 offenses are likely to be less serious than breaches of sections 57 and 58 of the Terrorism Act 2000.¹⁸⁸ The conviction under section 2 of Shella Roma underlines the sentencing point. A three-year community order sufficed for seeking to print and distribute an extremist pamphlet.¹⁸⁹ Likewise, the “Blackburn Resistance” consisting of Ishaq Kanmi, Abbas Iqbal, and Ilyas Iqbal, were accused of promoting through Internet forums martyrdom operations against Prime Ministers Blair and Brown, as well as filming “military” exercises in a Blackburn Park for propaganda purposes.¹⁹⁰

¹⁸⁶ Subject to the Commencement of the Criminal Justice Act 2003, c. 44, § 154(1) (U.K.).

¹⁸⁷ [2008] EWCA (Crim) 1465, [2008] 4 All E.R. 661 (Eng.). Note also Malcolm Hodges, who was convicted in 2008 of reckless encouragement of jihadis to attack accountancy organizations. *Man Urged Terror Attacks on Accountancy Institutes – 10 Years after Failing Professional Exams*, MAIL ONLINE (Feb. 19, 2008), <http://www.dailymail.co.uk/news/article-516448/Man-urged-terror-attacks-accountancy-institutes-10-years-failing-professional-exams.html>.

¹⁸⁸ *Rahman*, [2008] EWCA (Crim) at ¶¶ 5, 7, 41. The sentences were five and a half years (Rahman) and two years (Mohammed). *Id.* at ¶49.

¹⁸⁹ *‘Holy War’ Mum Spared Jail*, MANCHESTER EVENING NEWS (Mar. 30, 2009), http://menmedia.co.uk/manchestereveningnews/news/s/1105509_holy_war_mum_spared_jail.

¹⁹⁰ Kanmi was sentenced to three years, Abbas Iqbal to two years, and Ilyas Iqbal to fifteen months under section 58. Russell Jenkins, *Ishaq Kanmi Faces Jail for Soliciting Murder*, TIMES (London), May 11, 2010, at 40; Kim Pilling, *Jihadi Terror Obsession Led to Pair’s Conviction*, INDEP., June 23, 2010, available at <http://www.independent.co.uk/news/uk/crime/jihadi-terror-obsession-led-to-pairs-conviction-2008115.html>.

Section 28 provides for an alternative mode of disposal of section 2 materials, modeled on Schedule 3 of the Customs and Excise Management Act 1979.¹⁹¹ A justice of the peace (or sheriff in Scotland) may issue a search and seizure warrant if satisfied that there are reasonable grounds for suspecting that articles falling within sections 2(2)(a) to (e)¹⁹² are likely to be found on any premises. Proceedings for forfeiture may then be taken on information laid by, or on behalf of, the Director of Public Prosecutions, except in Scotland where no special process is specified.¹⁹³

Forfeiture procedures are governed by Schedule 2. By paragraph 2, the relevant constable must give notice to owners or, in default, occupiers of the premises where the article was seized.¹⁹⁴ Any person disputing forfeiture may give written notice within one month under paragraph 3 to any police station in the police area in which the premises where the seizure took place are located.¹⁹⁵ If no such counter-claim is issued, the article can be treated under paragraph 5 as automatically forfeited at the end of the relevant periods.¹⁹⁶ If there is a counter-claim, the relevant constable must decide under paragraph 6 whether to proceed.¹⁹⁷ If so, the court can make an order if it finds that the article was liable to forfeiture at the time of seizure, and it is not satisfied that its forfeiture would be inappropriate.¹⁹⁸ If either the constable does not take proceedings or the court is not convinced to order forfeiture, the article must be remitted.¹⁹⁹ The venues for these civil proceedings can be, in England or Wales, either in the High Court or in a magistrates' court (with appeal to the Crown Court); in Scotland, either in

¹⁹¹ *Compare* Terrorism Act 2006, c. 11, § 28 (U.K.), *with* Customs and Excise Management Act, 1979, c. 2, §§ 139, 143, 145, sch. 3 (Eng.).

¹⁹² The private possession covered by section 2(2)(f) is thereby excluded. There is also a saving for legally privileged materials under the Police and Criminal Evidence Act, 1984, c. 60, § 19(6) (U.K.). 676 PARL. DEB., H.L. (5th ser.) (2005) 1244.

¹⁹³ Terrorism Act 2006, c. 11, § 28(5), (10).

¹⁹⁴ *Id.* § 28(2), sch. 2.

¹⁹⁵ *Id.* § 28(3), sch. 2.

¹⁹⁶ *Id.* § 28(5), sch. 2.

¹⁹⁷ *Id.* § 28(6), sch. 2.

¹⁹⁸ *Id.* § sch. 2 para. 6.

¹⁹⁹ It can be disposed of if it is not practicable within twelve months. *Id.* § 28(13).

the Court of Session or in the sheriff court; and in Northern Ireland, either in the High Court or in a court of summary jurisdiction (with appeal to the county court).²⁰⁰

Disposal by this route follows the pattern of section 3 of the Obscene Publications Act 1959.²⁰¹ The danger, however, is that this administrative route underplays the value of free expression. An owner or occupier might conceivably decline to take on the forces of the state and incur a dubious reputation. Lord Carlile argued that the jurisdiction should be exercised by professional district judges (magistrates' courts) and not magistrates,²⁰² although a lay element is desirable in principle.

No use has yet been made of section 3 because service providers are highly responsive to police "advice."²⁰³ Indeed, the Guidance suggests making contact with the service provider before any notice is issued and that a "voluntary approach" should be adopted where the provider is not viewed as encouraging publication.²⁰⁴

A practical enforcement measure, which may strengthen section 3, is the establishment in 2010 by Home Office of a website which invites members of the public to report Internet pages that carry messages of hate, extremism and terrorism.²⁰⁵ This follows the initiative of the Internet Watch Foundation which deals with child pornography.²⁰⁶ Examples of terrorism materials include bomb-making, weapons, or poisons instructions and guides to targets, while violent extremist content is said to include "videos of beheadings with messages of 'glorification' or praise for the attackers; speeches or essays calling for racial or religious violence; messages intended to stir up hatred against any religious or ethnic group; chat forums with post-

²⁰⁰ *Id.* §§ 28(7) & (10).

²⁰¹ See GEOFFREY ROBERTSON, *OBSCENITY* ch. 4 (1979); Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 3 (Eng., Wales).

²⁰² Carlile Report, *supra* note 98, at ¶ 75.

²⁰³ See HOME OFFICE, *supra* note 173, at ¶ 27.

²⁰⁴ *Id.* at ¶¶ 27, 29 Annex C.

²⁰⁵ *Reporting Terrorist and Extremist Material Online*, HOME OFFICE, <https://reporting.direct.gov.uk/> (last visited Mar. 14, 2011).

²⁰⁶ INTERNET WATCH FOUND., <http://www.iwf.org.uk/> (last visited Mar. 14, 2011).

ings calling for people to commit acts of terrorism.”²⁰⁷ The reports are channeled to the police, although whether the sites are closed under section 3 may depend on intelligence gathering considerations.

There is no international system to replicate “take down” measures in other jurisdictions, even though the amended EU Framework Directive on Combating Terrorism recites that “[t]he Internet is used to inspire and mobilise local terrorist networks and individuals in Europe and also serves as a source of information on terrorist means and methods, thus functioning as a ‘virtual training camp.’”²⁰⁸

(c) *Foreign Comparisons*

The notion of *apologie du terrorisme* appeared in some European jurisdictions well before 2001.²⁰⁹ Thus, the French Law of July 29, 1881 on Freedom of the Press, article 24(4), makes it an offense to utter an *apologie* for attacks on human life or criminal damage that endangers life.²¹⁰ The Spanish Penal Code, article 578, defines apology in the context of terrorism as praise of specified (terrorist) offenses or bringing about the discredit, contempt, or humiliation of victims or their families.²¹¹ The offense itself, in article 18(2) requires the presentation of ideas or doctrines that praise or justify a crime or its perpetrator, but in a way which, by its nature and circumstances, amounts to a direct incitement to commit an offense. Neither

²⁰⁷ *Reporting Extremism and Terrorism Online*, DIRECTGOV, http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Counterterrorism/DG_183993 (last visited Mar. 14, 2011).

²⁰⁸ Council Framework Decision, 2008/919/JHA, ¶4, 2008 O.J. (L 330) 21 (EU); see also Ulrich Sieber & Phillip Brunst, *Cyberterrorism and Other Use of the Internet for Terrorist Purposes – Threat Analysis and Evaluation of International Conventions*, in *CYBERTERRORISM – THE USE OF THE INTERNET FOR TERRORIST PURPOSES* 9, 97 (2007).

²⁰⁹ See OLIVIER RIBBELINK, “APOLOGIE DU TERRORISME” AND “INCITEMENT TO TERRORISM” 7 (2004).

²¹⁰ Loi Sur la Liberté de la Presse du 29 juillet 1881, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=vig>.

²¹¹ Código Penal, Ley Orgánica 10/1995, de 23 noviembre, available at <http://www.legislacionline.org/documents/action/popup/id/3812>.

jurisdiction uses the offense frequently,²¹² but its deployment in Spain has resulted in the closure of two Basque newspapers.²¹³

Other jurisdictions have responded to the European Convention of 2005 by the passage of new offenses. The German Criminal Code, section 91, passed in 2009, forbids instruction in the commission of a serious act of violence that endangers the state provided the instruction encourages the commission of the act.²¹⁴

Away from the influence of the European concept of *apologie*, the Canadian House of Commons Standing Committee on Public Safety and National Security called for an offense of glorification in 2007, but it has not been enacted.²¹⁵ Likewise, the Australian Law Reform Commission firmly rejected an offense of “encouragement” or “glorification” of terrorism; such an offense would be too vague and would amount to “an unwarranted incursion into freedom of expression and the constitutionally protected freedom of political discourse.”²¹⁶ Publications, films, and computer games, however, can be refused classification under the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 if deemed to advocate the doing of a terrorist act.²¹⁷ This system, operated through the Office of Film and Literature Classification, appears unduly cumbersome and blunt since it fails to

²¹² RIBBELINK, *supra* note 209, at 35, 39.

²¹³ See Ian Cram, *Regulating the Media: Some Neglected Freedom of Expression Issues in the United Kingdom's Counter-Terrorism Strategy*, 18 TERRORISM & POL. VIOLENCE 335 (2006).

²¹⁴ See Ulrich Sieber, *Blurring the Categories of Criminal Law and the Law of War – Efforts and Effects in the Pursuit of Internal and External Security*, in CRIMINAL LAW BETWEEN WAR AND PEACE – JUSTICE AND COOPERATION IN CRIMINAL MATTERS IN INTERNATIONAL MILITARY INTERVENTIONS 35 (Stefano Manacorda & Adan Nieto Martin eds., 2009).

²¹⁵ GARRY BREITKREUZ, SUBCOMMITTEE ON THE REVIEW OF THE ANTI-TERRORISM ACT, RIGHTS, LIMITS, SECURITY: A COMPREHENSIVE REVIEW OF THE ANTI-TERRORISM ACT AND RELATED ISSUES 12 (2007).

²¹⁶ AUSTRALIAN LAW REFORM COMMISSION, FIGHTING WORDS: A REVIEW OF SEDITION LAWS IN AUSTRALIA, 2006, ALRC 104, at ¶ 6.24.

²¹⁷ Act 179 of 2007.

take account of the circumstances of publication and consumption.²¹⁸

Advocacy offenses are of course constrained by U.S. constitutional law, which demands express propagation of immediate law violation that is likely to occur,²¹⁹ though less imminent and less explicit “true threats” may alternatively have found a conviction.²²⁰ The U.S. constitutional rejection of speech content offenses may also come into play.²²¹ Yet, as already noted, the federal offense of “seditious conspiracy” in 18 U.S.C. § 2384 was invoked against Sheik Omar Abdel Rahman, who stirred his congregation to “do jihad with the sword, with the cannon, with the grenades, with the missile.”²²²

²¹⁸ See *Search the Classification Database: The Absent Obligation*, CLASSIFICATION WEBSITE, <http://www.classification.gov.au/www/cob/find.nsf/d853f429dd038ae1ca25759b0003557c/5cc402f1a0d9132aca25767100790d52?OpenDocument>; *Search the Classification Database: Join the Caravan*, CLASSIFICATION WEBSITE, <http://www.classification.gov.au/www/cob/find.nsf/d853f429dd038ae1ca25759b0003557c/fbd9763e67191abdca257671007ad267?OpenDocument>. Repeal is recommended by the Law Council of Australia, Anti-Terrorism Reform Project. ANTI-TERRORISM REFORM PROJECT, LAW COUNCIL OF AUSTRALIA, A CONSOLIDATION OF THE LAW COUNCIL TO AUSTRALIA’S ADVOCACY IN RELATION TO AUSTRALIA’S ANTI-TERRORISM MEASURES § 6.3.3(1) (2009). An attempt to block the film, *The Baader-Meinhof Complex*, under German privacy laws was rejected. Birgit Clark, *In Dubio Pro Arte? No Ban for the Film Der Baader-Meinhof-Komplex*, 20 ENT. L. REV. 178 (2009).

²¹⁹ *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Interpretation of these terms has become less rigorous. *Al-Timimi v. Jackson*, 379 F. App’x 435 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 475 (2010). Compare Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655 (2009), with D.G. Barnum, *Indirect Incitement and Freedom of Speech in Anglo-American Law*, 3 EUR. HUM. RTS. L. REV. 258 (2006), and Eric Barendt, *Incitement to, and Glorification of Terrorism*, in *EXTREME SPEECH AND DEMOCRACY* 445 (Ivan Hare & James Weinstein eds., 2009).

²²⁰ *Virginia v. Black*, 538 U.S. 343 (2003); *Watts v. U.S.*, 394 U.S. 705 (1969); *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

²²¹ *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); see Ellen Parker, *Implementation of the UK Terrorism Act 2006 – The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom Versus the United States*, 21 EMORY INT’L L. REV. 711, 747 (2007).

²²² *U.S. v. Rahman*, 189 F.3d 88, 104, 107 (2d Cir. 1999); see John Alan Cohan, *Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of Government*, 17 ST. JOHN’S J. LEGAL COMMENT. 199 (2003). Note also the offense of weapons training. 18 U.S.C. § 842(p) (West 2010); Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 280 (2005).

ASSESSMENT

There may be two aspects to a critique of the banning of militant speech about terrorism in the ways pursued by the Terrorism Act 2006. The first is to assess whether these are legitimate tactics for a smart militant democracy. A ban should be ruled out if it infringes basic values and thereby delegitimizes the state response. The second approach might inquire as to whether viable alternative methods can have more impact without such impingement upon fundamental values. In this way, the question becomes whether the infringement upon expressive and associational rights is a proportionate tactic.

Inherent Infringement?

On the first approach, it has already been argued that expressive speech and associational activity that encourages violence need not be tolerated.²²³ In *Zana v. Turkey*,²²⁴ the applicant's statement of sympathy for the Partiya Karkeren Kurdistan (PKK) was regarded as exacerbating a violent situation and could be punished, even though he was a mayor in the region. In *Gündüz v. Turkey*,²²⁵ the leader of an Islamic sect criticized moderate Islamic intellectuals and called his supporters to produce "one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet." Even as a rhetorical flourish, such language did not deserve protection from the European Court of Human Rights, nor, at the extreme end of the margin of appreciation, did a cartoon in praise of the September 11 attacks, published in the Basque Country in *Leroy v. France*.²²⁶ But where, as in *Arslan*

²²³ See *Arrowsmith v. United Kingdom*, App. No. 7050/75, DR 19, p.5, 3 E.H.R.R. 218, 219 (1978).

²²⁴ App. No. 18954/91, 1997-VII, 27 E.H.R.R. 667 (1999); see also Howard Davis, *Lessons from Turkey: Anti-terrorism Legislation and the Protection of Free Speech*, [2005] EUR. HUM. RTS. L. REV. 75; *Falakaoglu v. Turkey*, App. Nos. 22147/02, 24972/03, available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>; *Sürek v. Turkey* (No. 1), App. No. 26682/95, 1999-IV Eur. Ct. H.R. 51; *Sürek v. Turkey* (No. 3), App. No. 24735/94, [1999] Eur. Ct. H.R. 53.

²²⁵ App. No. 59745/00, 2003-XI, 2, 41 E.H.R.R. 5 (2005).

²²⁶ App. No. 36109/03, available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

v. Turkey,²²⁷ the Court was sure that the words used did not incite violence, then it defended statements that alleged that the Turkish state oppressed the Kurds and so explained Kurdish “resistance” and “intifada.” As made clear in *Gerger v. Turkey*,²²⁸ broad words such as “resistance,” “struggle,” and “liberation” do not necessarily constitute an incitement to violence, but may do so when reporting the utterances of hunger striking prisoners.²²⁹ Latitude is also accorded to the neutral reporting of the declarations or interviews of terrorist representatives by media professionals, as in *Sürek and Özdemir v. Turkey*,²³⁰ to artistic and academic speech,²³¹ and to demonstrators protesting about genuine issues of public concern.²³² However, the limits of tolerance were again demonstrable in the judicial reviews of bans imposed in Spain upon major Basque nationalist political parties, namely, Batasuna in 2002 and Herritarren Zerrenda in 2004, as well as the disqualifications of individual Basque party candidates. The European Court of Human Rights determined that the banning of parties sympathetic to Euskadi Ta Askatasuna (ETA) met a pressing social need which had been fully considered by national courts whose margin of appreciation was to be respected, especially given its reflection of the “international preoccupation with condemning apology of terrorism.”²³³

²²⁷ App. No. 23462/94, [1999] Eur. Ct. H.R. 41, ¶ 48; *see also* *Erdoğan v. Turkey*, App. No. 25723/94, 2000-VI Eur. Ct. H.R. 223; *Ceylan v. Turkey*, App. No. 23556/94, 1999-IV Eur. Ct. H.R. 44.

²²⁸ App. No. 24919/94, [1999] Eur. Ct. H.R. 46, ¶ 50; *see also* *Erdoğan v. Turkey*, App. Nos. 25067/94, 25068/94, [1999] Eur. Ct. H.R. 45; *Okçuoglu v. Turkey*, App. No. 24246/94, [1999] Eur. Ct. H.R. 48; *Polat v. Turkey*, App. No. 23500/94, [1999] Eur. Ct. H.R. 49.

²²⁹ *Saygili v. Turkey* (No. 2), App. No. 38991/02, [2009] Eur. Ct. H.R. 296.

²³⁰ App. Nos. 23927/94, 24277/94, [1999] Eur. Ct. H.R. 50; *see also* *Sürek v. Turkey* (No. 2), App. No. 24122/94, [1999] Eur. Ct. H.R. 52; *Sürek v. Turkey* (No. 4), App. No. 24762/94, [1999] Eur. Ct. H.R. 54.

²³¹ *Başkaya v. Turkey*, App. Nos. 23536/94, 24408/94, 1999-IV Eur. Ct. H.R. 42; *Karataş v. Turkey*, App. No. 23168/94, 1999-IV Eur. Ct. H.R. 47.

²³² *Yılmaz v. Turkey*, App. No. 68514/01, *available at* <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

²³³ *Herri Batasuna v. Spain*, App. Nos. 25803/04, 25817/04, ¶ 91, *available at* <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

It may be concluded that being one step removed from direct incitement to violence and being uncertain that anyone is roused to action and/or that any offense will result from publication may all cast doubt on the compliance of sections 1 and 2 of the 2006 Act with rights to expression.²³⁴ However, judgment can only be finalized in the context of specific facts, and no British case has as yet been taken to Strasbourg. The cited precedents are not clear-cut indications as to how a British application would be treated, for the level and nature of enforcement in Britain are certainly not equivalent to those in Turkey. For instance, the Kurdish politician, Leyla Zana, was convicted in Turkey for a speech delivered at the University of London in 2008 which was not the subject of any British legal action.²³⁵

A further possible criticism of the Terrorism Act 2006, based on its wording and inherent imprecision of “incitement” and other terms in sections 1 and 2, is that the Act is riddled with uncertainties and anomalies.²³⁶ The precise mechanisms by which radicalization turns into extremism and begets terrorism are unclear, and the 2006 Act might prove counterproductive where it “blurs rather than clarifies the lines between radicals and terrorists.”²³⁷ However, the English courts have viewed words such as “insulting,”²³⁸ as compatible with Article 10, while the European Court of Human Rights has upheld the term “breach of the peace.”²³⁹ On that basis, it is doubtful

Action was taken in France on grounds of foreign funding. *See* Parti Nationaliste Basque v. France, App. No. 71251/01, [2007] Eur. Ct. H.R. 5561.

²³⁴ *See* JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 24, at ¶ 34; Barendt, *supra* note 219, at 445, 447, 458-59; Hunt, *supra* note 124, at 452.

²³⁵ *Pro-Kurdish Politician Sentenced to 15 Months in Prison*, BBC Monitoring Service (Anatolia, Turk.), July 28 2009. She was sentenced to fifteen months' imprisonment under the Anti-Terror Law 1991 (Act 3713) art. 7(2) for propaganda on behalf of a terrorist organization.

²³⁶ JOINT COMMITTEE ON HUMAN RIGHTS, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005-05 HL 75, HC 561), at ¶ 27-28; *see also Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 7, U.N. Doc. A/61/267 (Aug. 16, 2006) (*prepared by* Martin Scheinin).

²³⁷ Choudhury, *supra* note 139, at 487.

²³⁸ *Hammond v. Dir. of Pub. Prosecutions*, [2004] EWHC (QB) 69, ¶ 26 (Eng.).

²³⁹ *See Steel v. United Kingdom*, App No. 24838/94, 1998-VII Eur. Ct. H.R. 95; *Hashman v. United Kingdom*, App No. 25594/94, 1999-VIII Eur. Ct. H.R. 133.

whether the 2006 Act is intrinsically more incapable of acting as a guide to action.

Disproportionate Infringement?

The test of proportionality might initially be tested out in relation to the question whether the myriad of clearer and less contentious offenses, which already circumscribe militant speech, make irrelevant the more sweeping (and therefore more dangerous) efforts of the Terrorism Act 2006.²⁴⁰ Offenses already within the terrorism legislation catalogue include the offenses under sections 58 and 59, as already noted. Beyond that category, soliciting murder under section 4 of the Offences against the Person Act 1861 can be used even when no victim is specified.²⁴¹ Public order offenses can apply to outrages such as beheading videos²⁴² or vituperative protests outside an embassy.²⁴³ The availability of alternative charges was illustrated by the first recorded conviction under the 2006 Act. Arising from materials in his possession when arrested at Glasgow Airport, Mohammed Atif Siddique was convicted not only of collecting and distributing terrorist materials, but also of offenses under sections 54, 57, and 58 of the Terrorism Act 2000, plus the Scottish offense of breach of the peace.²⁴⁴

In response to this point, a significant factor in the justification of sections 1 and 2 must reside in its ability to catch a wider range of militant speech—not just concerned with “information” as under section 58 or calls to arms abroad as under section 59—and yet still limited by the element of emulation of

²⁴⁰ *But see* JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 236, at ¶ 25.

²⁴¹ *See* R v. Saleem [2007] EWCA (Crim) 2692 (Eng.); R v. Hamza [2006] EWCA (Crim) 2918 (Eng.); R v. El-Faisal [2004] EWCA (Crim) 456 (Eng.); T. O’Donoghue, *Glorification, Irish Terror and Abu Hamza*, 170 JUST. OF THE PEACE 291, 291 (2006).

²⁴² *See* David Lister, *Man Jailed for Showing Beheading Video*, TIMES (London) Sept. 29, 2005, at 3.

²⁴³ *See* Ian Cobain & Nick Fielding, *Banned Islamists Spawn Front Organizations: Al-Ghurabaa tries to Ensure Survival with Groups Across UK*, GUARDIAN (London) July 22, 2006, <http://www.guardian.co.uk/uk/2006/jul/22/terrorism.world>.

²⁴⁴ Michael Howie & John Robertson, *Eight Years in Jail for Scottish Muslim who Boasted of Plan to Become Suicide Bomber*, SCOTSMAN (Edinburgh) Oct. 24, 2007, at 7; David Lister, *Student was Part of Canadian Terror Plot*, TIMES (London), Sept. 18 2007, at 31. For the views of his lawyer, see *Re Anwar* [2008] J.C. 409 (Scot.).

action. Subject to the exception of the largely unexplained non-glorifying indirect incitements, these are not pure speech crimes,²⁴⁵ but they do seek to intervene before one militant speaker generates multiple militant actors.²⁴⁶ Nevertheless, there may be four important qualifications to any endorsement.

First, the application of these offenses in the context of foreign regimes is problematic.²⁴⁷ This point is really a criticism of the definition of “terrorism” in section 1 of the Terrorism Act 2000 and the extension of jurisdiction for offenses listed under section 17 of the Terrorism Act 2006. However, the effect can be illustrated when the section 1 offense is applied to support the revered Nelson Mandela who condoned acts of political violence against official property during his term of imprisonment,²⁴⁸ or for the statement of Cherie Booth, the wife of Prime Minister Tony Blair, that “in view of the illegal occupation of Palestinian land I can well understand how decent Palestinians become terrorists.”²⁴⁹ What if Saddam Hussein were still in power and called upon the British government to take action against any surviving “terrorists” of Dujail who, in 1982, had attempted to assassinate him (reprisals against whom resulted in his execution in 2006)? Plots against the Libyan regime were possibly encouraged a decade or so ago,²⁵⁰ then there was rapprochement after the lifting of international sanctions in 2003,²⁵¹ then even greater hostility, through sustained military intervention, was sanctioned by the United Nations in 2011.²⁵² Conversely, plots against Syria are openly tolerated.²⁵³ The ex-

²⁴⁵ Hunt, *supra* note 124, at 450-56.

²⁴⁶ See Owen Fiss, *Freedom of Speech and Political Violence*, in LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE 70, 75 (Raphael Cohen-Almagor ed., 2000).

²⁴⁷ JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 236, at ¶ 12.

²⁴⁸ Lionel Bernstein, *Rivonia: Telling It as It Was*, AFRICAN NAT'L CONG., July 2, 1988, <http://www.anc.org.za/show.php?include=docs/arts/1988/rivoniak.html>.

²⁴⁹ 438 PARL. DEB., H.L. (5th ser.) 844 (2005).

²⁵⁰ Allegations were made by David Shayler. See Press Release, Posting of David Shayler, MI6 Plot to Assassinate Colonel Gaddafi: Police Enquiry Confirms Plot is not “Fantasy” (Nov. 11, 2001), available at <http://cryptome.org/shayler-gaddafi.htm>.

²⁵¹ UN SCR 1506 of September 12, 2003.

²⁵² UN SCR 1973 of March 17, 2011.

²⁵³ See Richard Beeston, *Exiles Plot to Overthrow Syria's Baathist Regime*, TIMES (London), June 5, 2006, at 30.

tension of jurisdiction leads to a slippery slope of judgments which take sides in foreign disputes and sometimes in favor of despots.

The second qualification is that the policy of closing down channels of discourse may be counter-productive in political terms. Surely, the Northern Ireland experience illustrates the folly of freezing out political fronts. Whilst much of what violent groups have to say is unpalatable or even reprehensible, their views must be debated so that the extremists, government, and public can be educated and respond with intelligence,²⁵⁴ rather than receiving only the hateful bulletins of “martyrs” such as the July 2005 suicide bomber, Mohammed Siddique Khan.²⁵⁵ In line with these concerns, the European Court of Human Rights has been particularly wary of restraints on the speech of politicians.²⁵⁶ Likewise, even Lord Lowry recognized membership as a “political offence” in *R v. Adams*.²⁵⁷

Third, any gains from reducing the tolerance of extreme speech may be overshadowed by resentment of stigmatization and selective repression, which may hinder policing by reducing flows of intelligence.²⁵⁸ As stated by the House of Commons Home Affairs Committee,²⁵⁹ rather than the sole pursuit of suppression, “the Government must engage British Muslims in its anti-terrorist strategy.”

Fourth, the offenses in the 2006 Act go beyond what is required by the Council of Europe’s Convention on the Prevention of Terrorism of 2005.²⁶⁰ The militant United Kingdom govern-

²⁵⁴ 438 PARL. DEB., H.L. (5th ser.) (2005) 326.

²⁵⁵ *London Bomber: Text in Full*, BBC NEWS (Sept. 1, 2005, 22:01 GMT), <http://news.bbc.co.uk/1/hi/uk/4206800.stm>.

²⁵⁶ *Isak Tepe v. Turkey*, App. No. 17129/02, Eur. Ct. H.R. (2008); *Ass’n Ekin v. France*, App. No. 39288/98, 2001-VIII Eur. Ct. H.R.; *Castells v. Spain*, App. No. 11798/85, 236 Eur. Ct. H.R. (ser. A) (1992).

²⁵⁷ [1978] 5 N.I.J.B (BCC).

²⁵⁸ Choudhury, *supra* note 139, at 487, 481.

²⁵⁹ HOME AFFAIRS COMMITTEE, TERRORISM AND COMMUNITY RELATIONS, REPORT, 2004-05, H.C. 165-1, at ¶ 225.

²⁶⁰ *See* JOINT COMMITTEE ON HUMAN RIGHTS, THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM, REPORT, 2006-07 H.L. 26, H.C. 247, at ¶¶ 26-39; JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND

ment views this discrepancy as unproblematic,²⁶¹ but the consequent curtailments of rights may later be assessed as excessive in international forums.

As a proviso to this somewhat theoretical debate about proportionality, it should be realized that the United Kingdom goals are not full of *jihadi* demagogues, though there are certainly some in that category who have fallen foul not only of section 1 of the Terrorism Act 2006 but also sections 58 and 59 of the Terrorism Act 2000, and, above all, solicitation of murder.²⁶² The evidence from the statistics below is that any impact from the new offenses has been largely symbolic, much as predicted and probably as expected in line with the history of proscription.²⁶³ Few prosecutions and convictions have been recorded, though the impression from workers in the field, such as the police and groups such as Quilliam,²⁶⁴ is that militant speech in public has been toned down since 2006.

HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, REPORT, 2005-06 H.L. 75-1, H.C. 561-1, at ¶ 41.

²⁶¹ JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 24, at 7.

²⁶² Offences against the Person Act 1861, c.100, § 4 (U.K.).

²⁶³ *But see* Parker, *supra* note 221, at 712.

²⁶⁴ Interviews with Clive Walker, Professor of Criminal Justice Studies, University of Leeds, in Leeds and London (April & May 2010). Quilliam is a counter-extremism think tank that mainly concentrates on *jihadi* extremism and is largely funded by the government. QUILLIAM HOMEPAGE, <http://www.quilliamfoundation.org> (last visited Apr. 1, 2011).

Table 2: Terrorism Offense Convictions in Great Britain²⁶⁵

Date of conviction	Possessing materials section 57; Terrorism Act 2000	Possessing information - section 58; Terrorism Act 2000	Other offenses under Terrorism Act 2000	Inciting overseas - section 59; Terrorism Act 2000	Incitement - sections 1, 2; Terrorism Act 2006	Other offenses under Terrorism Act 2006	Total
2001/2	0	0	0	0	-	-	0
2002/3	5	1	0	0	-	-	6
2003/4	2	0	0	0	-	-	2
2004/5	1	1	0	0	-	-	2
2005/6	5	2	0	3	-	-	10
2006/7	8	5	0	1	1	10	25
2007/8	1	2	1	3	3	4	14
Total	22	11	1	7	4	14	59

Aside from the alternative more specific criminal offenses mentioned earlier, other approaches might be considered to see if they would be “smarter” than the Terrorism Act 2006 approach. For instance, a classical U.S. constitutional response might be to argue for more speech not less, and to overwhelm militant speech with more persuasive non-militant speech.

²⁶⁵ See LORD CARLILE, FIRST REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 (2006), *available at* <http://www.statewatch.org/news/2006/feb/laws-against-terror.pdf>; LORD CARLILE, SECOND REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 (2007), *available at* <http://www.statewatch.org/news/2007/feb/uk-pta-carlile-ann-report.pdf>; LORD CARLILE, THIRD REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 (2008), *available at* <http://www.official-documents.gov.uk/document/other/9781847265968/9781847265968.pdf>; LORD CARLILE, FOURTH REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 (2009), *available at* <http://www.official-documents.gov.uk/document/other/9780108508141/9780108508141.pdf>; LORD CARLILE, FIFTH REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 (2010), *available at* <http://www.official-documents.gov.uk/document/other/9781849871518/9781849871518.pdf>; LORD CARLILE, SIXTH REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 (2011), *available at* <http://www.official-documents.gov.uk/document/other/9780108510106/9780108510106.pdf>.

Surely the values of peace and democracy are more appealing than what one United Kingdom government minister, Liam Fox, recently referred to (in connection with Afghanistan) as the conditions of “a broken 13th-century country.”²⁶⁶ A fine example of this approach is that some jurisdictions have indeed sought to challenge extremist speech with more speech, especially on the Internet where the chances of actually closing down communications are dim because of the trans-border nature of internet servers. For instance, the Saudi Ministry of Islamic Affairs runs the “Campaign Assakina (or Al-Sakinah)” which focuses on the correct understanding of Islamic doctrines about violence.²⁶⁷ Yet, at the same time, there is also a very robust and at times abusive criminal justice and security campaign against *jihadis* in Saudi Arabia,²⁶⁸ while the impact of Campaign Assakina is untested. It might be thought to be problematic for western governments to intervene effectively in debates about Islamic religious doctrine, and the very process of backing selected independent Islamic scholars to speak on behalf of the state may obviously compromise their independence. Nevertheless, the United Kingdom government has dallied with this idea by funding activities such as the “Preventing Extremism Together” (PET) Scholars’ Roadshows, which involve the promotion of religious scholars who can offer alternatives to extremist doctrines.²⁶⁹ In addition, the Department for Communities and Local Government has floated the idea of a board of academics and scholars based in the Universities of

²⁶⁶ Alice Thomson, Rachel Sylvester & Deborah Haynes, *Fox Flies to Afghanistan with the Aim of Speeding up British Troop Withdrawal*, TIMES (London), May 22, 2010, at 8.

²⁶⁷ CAMPAIGN ASSAKINA FOR DIALOGUE HOMEPAGE, <http://en.assakina.com> (last visited Feb 10, 2011).

²⁶⁸ See *Saudi Arabia: Human Rights in Kingdom of Saudi Arabia*, AMNESTY INT’L, <http://www.amnesty.org/en/region/saudi-arabia/report-2009> (last visited Feb. 10, 2011). Reconciliation and “deradicalisation” do form a part of that campaign (the “Munasaha Programme”). See LEAVING TERRORISM BEHIND: INDIVIDUAL AND COLLECTIVE DISENGAGEMENT, ch. 10 & 13 (Tore Bjørge & John Horgan eds., 2009).

²⁶⁹ HOME OFFICE, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM’S STRATEGY, 2006, Cm. 6888, at ¶ 58.

Oxford and Cambridge to ensure that any false ideology is corrected.²⁷⁰

Another model for responding to militant speech (and militant deed) arises from the array of governmental responses to animal rights extremism, primarily directed at corporate targets.²⁷¹ Environmental, anti-war, and anti-globalization groups have sometimes adopted similar tactics. Whilst activists have not faced proscription, the armory of responses includes the application of “normal” laws and some new laws.²⁷²

The array of “normal” laws includes the mundane use of common law powers relating to breach of the peace,²⁷³ the Public Order Act 1986,²⁷⁴ the Malicious Communications Act 1988,²⁷⁵ and, above all, the Protection from Harassment Act 1997.²⁷⁶ Conspiracy to blackmail has been sustained against Greg Avery and others in relation to their campaigns against Huntingdon Life Sciences.²⁷⁷ Beyond the criminal law are anti-social behavior orders under section 1 of the Crime and Disorder Act 1998,²⁷⁸ or exclusion orders under section 46 of the Crim-

²⁷⁰ DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, PREVENTING VIOLENT EXTREMISM: NEXT STEPS FOR COMMUNITIES, ¶ 65 (2008).

²⁷¹ Individuals such as farmers may also be victims, as with the stealing of the body of Gladys Hammond. Nicola Woolcock, *Animal Rights Grave-Robbers are Jailed for 12 Years Each*, TIMES (London) May 12, 2006, at 37.

²⁷² See HOME OFFICE, *supra* note 62; HOME OFFICE, ANIMAL RIGHTS EXTREMISM: GOVERNMENT STRATEGY (2001).

²⁷³ The concept of breach of the peace in this context was upheld in *Steel v. United Kingdom*, App. No. 24838/94, 1998-VII Eur. Ct. H.R. 95.

²⁷⁴ Public Order Act 1986, c.64 (U.K.).

²⁷⁵ Malicious Communications Act 1988, c.27 (U.K.).

²⁷⁶ Protection from Harassment Act 1997, c.40 (U.K.); see *AGC Chems. Eur. Ltd. v. Stop Huntingdon Animal Cruelty*, [2010] EWHC (QB) B10, 154(24) S.J.L.B. 37, available at <http://www.bailii.org/ew/cases/EWHC/QB/2010/B10.html>; *Smithkline Beecham Plc. v. Avery*, [2007] EWHC (QB) 948, [2009] EWHC (QB) 1488; *Green v. DB Group Servs. (UK) Ltd.*, [2006] EWHC (QB) 1898, [2006] I.R.L.R. 764; *Oxford Univ. v. Webb*, [2006] EWHC (QB) 2490; *Hall v. Save Newchurch Guinea Pigs*, [2005] EWHC 372 (QB), 102(21) L.S.G. 33; *Chiron Corp. Ltd. v. Avery*, [2004] EWHC (QB) 493; *Emerson Devs. Ltd. v. Avery*, [2004] EWHC (QB) 194; *Huntingdon Life Scis. Group v. Stop Huntingdon Animal Cruelty*, [2004] EWHC (QB) 1231; *Daiichi U.K. Ltd. v. Stop Huntingdon Animal Cruelty*, [2003] EWHC (QB) 2337, [2004] 1 W.L.R. 1503; *Silverton v. Gravett*, [2001] EWHC (QB) 282; *Univ. of Oxford v. Broughton*, [2006] EWCA (Civ) 1305, (2006) 150 S.J.L.B. 1110, [2008] EWHC (QB) 75.

²⁷⁷ *R v. Avery*, [2009] EWCA (Crim) 2670.

²⁷⁸ Crime and Disorder Act 1998, c.37 (U.K.).

inal Justice and Courts Services Act 2000.²⁷⁹ An indefinite Anti-Social Behaviour Order, forbidding the organizing of any demonstration about animal experimentation, or any contact with Huntingdon Life Sciences, or linked persons or companies, was imposed on Avery and others alongside a nine-year prison sentence for blackmail since no remorse had been shown and future preventative measures were justified. Within the province of civil law, affected companies, traders, or farmers have also resorted to private injunctions.

Amongst the more specialist laws are sections 68 and 69 of the Criminal Justice and Public Order Act 1994,²⁸⁰ which establishes the concept of aggravated trespass.²⁸¹ By section 42 of the Criminal Justice and Police Act 2001, the police are given broad powers to direct protestors away from the residence of another where it is reasonably believed that the presence of the protestors amounts to harassment or is likely to cause alarm or distress.

The Serious Organised Crime and Police Act 2005²⁸² adds offenses involving interference with contractual relationships so as to harm animal research organizations (section 145) and the intimidation of persons concerned with animal research organizations (section 146). The latter are very broadly constituted in that they can be committed via the infliction or threat of an act amounting to any criminal offense or any tortious act causing loss or damage of any description.²⁸³ In *R v. Harris*,²⁸⁴ the defendant pleaded guilty to three offenses under section 145, involving criminal damage amounting to £29,000, such as slashing vehicle tires and gluing locks of companies that had traded with Huntingdon Life Sciences but were intimidated to desist. Concurrent sentences of two years' imprisonment were

²⁷⁹ Criminal Justice and Courts Services Act 2000, c.43 (U.K.).

²⁸⁰ Criminal Justice and Public Order Act 1994, c.33 (U.K.).

²⁸¹ See TOM BUCKE & ZOE JAMES, HOME OFFICE, TRESPASS AND PROTEST: POLICING UNDER THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994 190 (1998).

²⁸² Serious Organised Crime and Police Act 2005, c.15 (U.K.).

²⁸³ See the criticisms as to necessity and certainty in JOINT COMMITTEE ON HUMAN RIGHTS, SCRUTINY: SEVENTH PROGRESS REPORT, 2004-05, H.L. 97, H.C. 496, at ¶¶ 2.3-2.7.

²⁸⁴ [2006] EWCA (Crim) 3303, [2007] 2 Cr. App. R. (S.) 37.

imposed. A similar level of offending under section 145 was dealt with in the *Attorney-General's Reference No. 113 of 2007*.²⁸⁵ The offender pleaded guilty to six counts of blackmail, one count of attempted blackmail and five counts under section 145. Over a period of five years, she sent threatening messages to employees of a bank who provided financial services to Huntingdon Life Sciences, to a veterinary surgeon who provided services to a family that bred guinea-pigs for medical research, to the owner of a company that carried out maintenance work for an organization involved in animal research, and to another company. Some of the threats were by letters, which contained white powder, and one recipient was taken to hospital for decontamination. The offender, who had acted alone, had been sentenced to eight months' imprisonment, which was viewed by the Court of Appeal as unduly lenient. The Court considered that the starting point was six years. Aggravating factors were that she conducted a sustained campaign, that she gave the impression of acting on behalf of an organized and dangerous group, and that she sent unidentified powder (akin to anthrax). Two years' imprisonment was substituted.

Corporate law has also been amended. The Criminal Justice and Police Act 2001, section 45, allows for "confidentiality orders" to be issued by the Secretary of State (for Trade and Industry) relating to the addresses of company officers on grounds of serious risk of violence and intimidation. Next, following the sending of letters to shareholders of GlaxoSmith-Kline in 2006, asking them to ensure disinvestment from Huntingdon Life Sciences, the company obtained an injunction against "persons unknown."²⁸⁶ The government then moved to restrict access to shareholder identities. So, under the Companies Act 2006,²⁸⁷ section 116(3), any request for shareholder information must be accompanied by an explanation of purpose. If the company declines to grant the request, it may apply for court review. Next, by section 240, persons becoming direc-

²⁸⁵ [2008] EWCA (Crim) 22, [2008] 2 Cr. App. R. (S.) 22.

²⁸⁶ *GSK gets Order Against Activists*, *TIMES* (London), May 10, 2006, at 44; *see also* *Pelling v. Families Need Fathers Ltd.*, [2001] EWCA (Civ) 1280.

²⁸⁷ Companies Act 2006, c.46 (U.K.).

tors can request, without proof of serious risk, that their home addresses be kept on a separate list to which access will be restricted.²⁸⁸ Third, information about persons with whom the company has business arrangements can be withheld under section 417 so as to avoid, in the opinion of the directors, serious prejudice.

This mixture of criminal law and civil law responses against animal welfare extremists raises the question of whether a more subtle range of measures than those created under the Terrorism Act 2006 could be used against the practitioners of militant speech in favor of terrorism. The avoidance of proscription and offenses based on speech content may also make it a more appealing and constitutionally palatable model for other militant democracies, such as the United States. Indeed, there is evidence of such an approach already being followed in that jurisdiction. Thus, the Animal Enterprise Protection Act of 1992 and Animal Enterprise Terrorism Act of 2006 have promulgated in the United States an offense of causing disruption or damage to an animal enterprise, with enhanced penalties based on the level of economic damage and restitution orders, but subject to a saving for expressive conduct.²⁸⁹ This offense was upheld as constitutional in the “SHAC-7” case of *United States v. Fullmer*²⁹⁰ because of either the imminence of electronic attacks on the enterprises or the “true threat” against individual officers. The confinement to animal enterprises has meant that more general offenses, such as conspiracy to damage, must be raised against “eco-terrorism.”²⁹¹ Civil injunctions have also been used by Huntingdon Life Sciences

²⁸⁸ See also The Companies (Disclosure of Address) Regulations 2009, S.I. 2009/214 (U.K.).

²⁸⁹ Pub. L. No. 102-346; Pub. L. No. 109-374; 18 U.S.C. § 43 (2009); see also Jared S. Goodman, *Shielding Corporate Interests from Public Dissent: An Examination of the Undesirability and Unconstitutionality of “Eco-Terrorism” Legislation*, 16 J.L. & POL’Y 823 (2008).

²⁹⁰ 584 F.3d 132 (3d Cir. 2009); see SHAC-7 HOMEPAGE, <http://www.shac7.com> (last visited Mar. 11, 2011).

²⁹¹ See *United States v. McDavid*, No. 2:06-cr-00035-MCE, 2008 WL 850307 (E.D. Cal. Mar. 28, 2008); Will Potter, *The Green Scare*, 33 VT. L. REV. 671; see also GREEN IS THE NEW RED, <http://www.greenisthenewred.com> (last visited Mar. 11, 2011).

and related enterprises against the American branches of their opponents.²⁹²

Another reason for emulation is the prospect of an impact that is more than symbolic. The Association of the British Pharmaceutical Industry (ABPI) reports a substantial decline in attacks and intimidation by animal extremists in the United Kingdom since the peak years of 2003 and 2004.²⁹³ The ABPI contends that civil injunctions and anti-harassment legislation have secured this impact, though its conclusion also relies upon the further factor of improved local policing (bolstered by extra central funding).²⁹⁴ A full assessment would also point to national policing improvements. The National Extremism Tactical Coordination Unit (NETCU)²⁹⁵ provides tactical advice to businesses. The National Public Order Intelligence Unit²⁹⁶ gathers and collates intelligence for policing purposes, while the National Domestic Extremism Team²⁹⁷ helps with investigations. All are headed by the National Coordinator for Domestic Extremism (within the NETCU) who reports to the Association of Chief Police Officer's Terrorism and Allied Matters

²⁹² See *Huntingdon Life Scis., Inc. v. Rokke*, 986 F. Supp. 982 (E.D. Va. 1997); *Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 29 Cal. Rptr. 3d. 521 (Cal. Ct. App. 2005); *City of Los Angeles v. Animal Def. League*, 37 Cal. Rptr. 3d. 632 (Cal. Ct. App. 2006); *SmithKline Beecham Corp. v. Stop Huntingdon Animal Cruelty USA*, 959 A.2d 352 (Pa. Super. Ct. 2008).

²⁹³ ASS'N OF THE BRITISH PHARM. INDUS. HOMEPAGE, <http://www.abpi.org.uk> (last visited Mar. 11, 2011). But there remained 70 instances of damage (146 in 2003; 177 in 2004) and 10 "home visits" (compared to 259 and 179).

²⁹⁴ See JOINT COMMITTEE ON HUMAN RIGHTS, DEMONSTRATING RESPECT FOR RIGHTS? FOLLOW-UP, REPORT, 2008-09, H.L. 141, H.C. 522; Mem. submitted by the Ass'n of the British Pharm. Indus., <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we14.htm>.

²⁹⁵ NATIONAL EXTREMISM TACTICAL COORDINATION UNIT HOMEPAGE, <http://www.netcu.org.uk> (last visited Mar. 11, 2011).

²⁹⁶ *The National Public Order Intelligence*, ASSOCIATION OF CHIEF POLICE OFFICERS, <http://www.acpo.police.uk/NationalPolicing/NCDENationalCoordinatorDomesticExtremism/TheNationalPublicOrderIntelligenceUnitNPOIU.aspx> (last visited Mar. 11, 2011); see 449 PARL. DEB., H.C. (6th ser.) (2009) 339w.

²⁹⁷ *National Domestic Extremism Team*, ASSOCIATION OF CHIEF POLICE OFFICERS, <http://www.acpo.police.uk/NationalPolicing/NCDENationalCoordinatorDomesticExtremism/NationalDomesticExtremismTeamNDET.aspx> (last visited Mar. 11, 2011).

Committee.²⁹⁸ However, despite all these changes, the most targeted company, Huntingdon Life Sciences, still complains that “insufficient consideration was given to counter-terrorism powers in what was widely considered in practice (but not in name) to be domestic terrorism.”²⁹⁹

Can this record of relative success be replicated using the same techniques against militant speech about terrorism? Arguably, it is easier to fashion and apply more limited responses to animal extremists. Their techniques are less dangerous since they more often than not target property not persons, and they appear to have clear fixations (above all, Huntingdon Life Sciences), which make the work of law enforcement much more predictable. Furthermore, their targets are primarily in the private sector rather than the public sector or the public itself. This difference inevitably has the effect of reducing the interest in symbolic condemnation through criminal justice. Nevertheless, the panoply of refined offenses plus civil law restraint is worthy of further consideration in the terrorism field. Civil law is playing an increasing role against terrorism as a way of empowering victims,³⁰⁰ and perhaps the state should see it as a weapon for shaping behavior that might encourage terrorism beyond just the financial arena.

CONCLUSIONS

The anti-terrorism legislation reflects long-standing notions of “militant democracy” in which a state based on legitimate foundations should be ready and willing to confront opponents who abuse its tolerance. However, even when this stance

²⁹⁸ *NCDE National Co-ordinator Domestic Extremism*, ASSOCIATION OF CHIEF POLICE OFFICERS, <http://www.acpo.police.uk/NationalPolicing/NCDENationalCoordinatorDomesticExtremism/Default.aspx> (last visited Feb. 10, 2011).

²⁹⁹ See JOINT COMMITTEE ON HUMAN RIGHTS, DEMONSTRATING RESPECT FOR RIGHTS? FOLLOW-UP, REPORT, 2008-09, H.L. 141, H.C. 522; Mem. submitted by Huntingdon Life Scis., <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we36.htm>.

³⁰⁰ See *Murphy v. Lord Chancellor*, [2007] NIQB 46, available at <http://www.bailii.org/ew/cases/EWHC/QB/2010/B10.html>; Debra M. Strauss, *Reaching out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307 (2008).

of state militancy is legitimate, consideration should be given as to whether, on a rights audit, less intrusive measures than associational or speech crimes would better distinguish the legitimacy of extreme speech which, for example, seeks the overthrow of the existing constitutional order and the illegitimate propagation of violence as the means to achieve it. The expanded basis for proscription and the added offenses in the Terrorism Act 2006 and most aspects of its application can probably be justified in terms of the relativist rights discourse of the European Convention. At the same time, the breadth of the definition of terrorism, including its extra-territorial application, compounds the dangerous latitude of these measures. These criticisms do not imply that extreme speech and associations should be tolerated, but they do emphasize that the main retort in a liberal democracy must be engagement. The “Prevent” strategies of CONTEST have latterly opened a new front which commendably seeks dialogue, and there may also be value in turning to civil law responses, as is often the inclination with animal extremists, instead of the blunter criminal law. Nevertheless, recent developments do firmly confirm that the tolerance of militant speech is on the wane, and that risk and offense aversion are driving new legislation. That trend is occurring within the United Kingdom, but it is also a regional and international movement, as represented by the United Nations Security Council Resolution 1624 and the reformulation of the EU Framework Decision on Combating Terrorism. As far as the United Kingdom state is concerned, there is some evidence from the modest statistics on enforcement to suggest that it is not just militant but smartly militant and appreciates that the prime message being conveyed is symbolic. However, the dangers remain both that chance events and provocations will prompt precipitate action against expressive and associational rights within the United Kingdom (as with Islam 4 UK) and that the United Kingdom will further foist its favored mechanisms onto other countries which have far less capacity for accountability or tradition of respect for individual rights.