

CRIMINALIZING TERRORIST BABBLE: CANADA'S DUBIOUS NEW TERRORIST SPEECH CRIME

CRAIG FORCESE* AND KENT ROACH**

Before the introduction of Bill C-51, the Canadian government expressed interest in a terrorism “glorification” offence, responding to Internet materials regarded by officials as terrorist propaganda and as promoting “radicalization.” Bill C-51 introduces a slightly less broad terrorism offence that applies to those who knowingly promote or advocate “terrorism offences in general” while knowing or being reckless as to whether terrorism offences “may be committed as a result of such communication.” This article addresses the merits of these new speech-based terrorism offences. It includes analyses of: the sociological data concerning radicalization and “radicalization to violence”; existing offences that apply to speech associated with terrorism; comparative experience with glorification crimes; and the restraints that the Charter would place on any similar Canadian law. We conclude that a glorification offence would be ill-suited to Canada’s social and legal environment and that even the slightly more restrained new advocacy offence is flawed. This is especially true for Charter purposes given the less restrictive alternative of applying existing terrorism and other criminal offences to hate speech and speech that incites, threatens, or facilitates terrorism. We are also concerned that the new speech offence could have counter-productive practical public safety effects. We favour that part of Bill C-51 that allows for court-ordered deletion of material on the Internet that was criminal before Bill C-51, namely material that counsels the commission of terrorism offences. However, Bill C-51’s broader provision that allows for the deletion of material that “advocates or promotes the commission of terrorism offences in general” suffers the same flaws as its enactment of a new offence for communicating such statements.

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* Associate Professor, Faculty of Law, University of Ottawa.

** Professor, Faculty of Law, University of Toronto. The authors wish to thank the editors at the *Alberta Law Review* for their excellent editing advice. They also note that components of this article are further developed in more detailed form in Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015).

I. INTRODUCTION

Just over a week after the October 2014 murder of two Canadian Armed Forces personnel and an armed assault on Parliament's Centre Block, Justice Minister Peter MacKay suggested his government was considering new means of controlling Internet communications supporting "proliferation of terrorism" in Canada. "There's no question," he urged, "that the whole issue around radicalization and the type of material that is often used that we think is inappropriate, and we think quite frankly contribute to ... the poisoning of young minds, that this is something that needs to be examined."¹ The Minister reportedly pointed to European laws addressing this issue, and suggested that while new powers would infringe on free speech, it would be possible to establish an "objective standard" that would be employable by a judge in deciding whether communications promoted terrorism.

Weeks later, a government official at a Senate hearing confirmed that the government was considering "glorification" of terrorism on the Internet, possibly using hate speech and hate crimes as a model.² In that testimony, the official signaled the need to proceed cautiously, given the government's promotion of an open Internet.

Soon after, in January 2015, the government tabled in Parliament its new anti-terrorism law. Bill C-51 introduced an offence that, while not as broad as the United Kingdom and French-style glorification offences, may still be characterized as a sweeping "speech crime." The new offence would punish for up to five years, anyone "who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general..." while knowing or being reckless that "any of those offences may be committed, as a result of such communication."³

Bill C-51 also contains new provisions to allow court-ordered deletion of such material from the Internet, as well as deletion of material that "counsels the commission of a terrorism offence."⁴ Despite extensive criticism and controversy about these provisions,⁵ the government has not amended these provisions and they may soon become law.

Starting with Prime Minister Harper's comments when introducing Bill C-51 at a campaign style rally in Richmond Hill that violent jihadism "is not a human right ... it is an

¹ Steven Chase & Josh Wingrove, "Terror fight turns to Internet, sparking new free-speech debate," *The Globe and Mail* (30 October 2014), online: <www.theglobeandmail.com/news/politics/debate-emerges-over-internet-terror-threats-and-canadian-civil-liberties/article21377070>.

² Senate, *Proceedings of the Standing Senate Committee on National Security and Defence*, 41st Parl, 2nd Sess, No 11 (17 November 2014), online: <www.parl.gc.ca/content/sen/committee/412/SECD/11EV-51734-E.htm>.

³ Bill C-51, *An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015, c 16 (assented to 18 June 2015), SC 2015, c 20 [Bill C-51], amending *Criminal Code*, RSC 1985, c C-46, s 83.221(1).

⁴ *Ibid.*

⁵ See e.g. Kent Roach & Craig Forcese, "Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence" (3 February 2015), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2560006>; Kent Roach & Craig Forcese, "Bill C-51 Backgrounder #4: The Terrorism Propaganda Provisions" (22 February 2015), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2568611>; David Schneiderman, "What Lessons Have We Learned about Speech in the Aftermath of the Paris Attacks?" in Edward M Iacobucci & Stephen J Toope, eds, *After the Paris Attacks: Responses in Canada, Europe, and around the Globe* (Toronto: University of Toronto Press, 2015) 159 at 159-66.

act of war,”⁶ the government has been dismissive of rights-based concerns about the new offence and C-51 generally. Nor has the government dispelled concerns that the new speech crime captures a sweeping range of opinion several orders removed from actual violence. Indeed, Justice Minister Mackay tabled a document in the Senate’s pre-study of the bill that argued the proposed offence targeted those who “actively encourage that some sort of unspecified action should be taken to do something bad against Canadians or our allies, or to do something to support extreme jihadism. Whether specific or unspecified, these statements are harmful.”⁷

In the article that follows, we focus on: “radicalization” and “radicalization to violence”; existing offences that apply to speech associated with terrorism; comparative experience with glorification (and *apologie du terrorisme* offences); the new Canadian offence and deletion procedures in Bill C-51, and the restraints that the *Charter*⁸ places on speech-based offences and deletion procedures. We proceed in four main sections. First, we examine the phenomenon of “radicalization to terrorist violence” from an empirical and sociological perspective, focusing on post-9/11 terrorism. We then summarize scholarship on the role of online communications in terrorist radicalization before highlighting the range of strategies designed to counter terrorist use of the Internet.

In Part III, we examine the extent to which speech associated with terrorism is currently criminalized in Canadian law, asking what gaps remain. Here, we suggest that the government and much of the current debate about Bill C-51 has radically underestimated the extent to which existing criminal and terrorist offences in Canada could apply to terrorist-related speech. The state of the existing law is relevant to the question of whether the new offence and deletion procedures can be justified under section 1 of the *Charter* as a reasonable limit.

In Part IV, we then address glorification and anti-terror speech offences, focusing particular attention on European (and especially UK) criminal law. We conclude that these European analogues are ill-suited to Canada’s social and legal environment. While narrower than these European examples, the new C-51 speech crime is also overly sweeping. This is especially true for *Charter* purposes, given the less restrictive alternative of applying existing terrorism and other criminal offences to hate speech and speech that incites, threatens, or facilitates terrorism.

We are, however, also concerned about the threat of terrorist violence revealed by the October 2014 attacks in Canada and a number of attacks elsewhere. The security threat requires a comprehensive anti-violent extremism response. Moreover, in our view, criminal offences and court-ordered deletion orders can occupy a legitimate and constitutional part of this response; albeit at the strong and coercive end of a spectrum of responses.

⁶ Janyce McGregor & Kady O’Malley, “Stephen Harper makes his case for new powers to combat terror,” *CBC News* (30 January 2015), online: <www.cbc.ca/news/politics/stephen-harper-makes-his-case-for-new-powers-to-combat-terror-1.2937602>.

⁷ Senate, Standing Committee on National Security and Defence, *Misconception about the new offence of Advocating Terrorism Offences* (April 2015) [unpublished] [*Misconception about the new advocacy offence*].

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

To this end, we would support the application of existing laws that prohibit hate speech and actions that counsel the commission of terrorism offences. Thus, we support the relatively small part of Bill C-51 that provides for court-ordered deletion of material that counsels the commission of terrorism offences. This latter provision builds on an amendment in the 2001 *Anti-Terrorism Act* that allows judges to order the deletion of hate speech from the internet.⁹ The extension of these powers to other forms of speech that were criminal under Canada's terrorism offences as they existed before Bill C-51 would, in our view, constitute a proportionate (and indeed, still sweeping) response to speech that in some cases may lead to terrorist violence of the type seen in the October 2014 terrorist attacks. At the same time, our proposal has the important restraint of ensuring that any deletion orders are made by an independent judiciary, after a fair, open, and adversarial hearing.

Unfortunately, Bill C-51 also creates the possibility of a variety of end runs around this system. One such end run is that the executive can informally negotiate deletion arrangements with Internet providers who may be wary of prosecution or bad publicity. Customs officials will also be given powers to seize "terrorist propaganda." A second end run — one that has been confirmed by testimony of government officials on C-51 — is that the Canadian Security Intelligence Service (CSIS) could obtain warrants to take actions to reduce threats to the security of Canada by disrupting websites inside or outside of Canada. This would be a covert and less restrained means of disrupting expression on the Internet, tied not to *Criminal Code* definitions and adversarial procedures, but to an *ex parte* and generally secret warrant process governed by a more expansive definition of threats to the security of Canada.

II. RADICALIZATION AND TERRORIST VIOLENCE

A. PATTERNS OF TERRORIST RADICALIZATION

Any legal response to a social ill must be informed by sociology. While there is a vast literature on radicalization and violence, empirical studies are comparatively uncommon,¹⁰ and the conclusions of this research must be regarded as partial and provisional. Nevertheless, a growing corpus of empirical research focuses on radicalization to violence (or "terrorist radicalization"). Many of these studies are relatively recent, and focus on post-9/11 preoccupations with religious terrorist radicalization. For instance, Anja Dalgaard-Nielsen's important 2010 meta-analysis examines research on so-called homegrown "militant Islamism" in Europe and on the "process in which radical ideas are accompanied by the development of a willingness to directly support or engage in violent acts."¹¹

⁹ *Criminal Code*, *supra* note 3, s 320.1.

¹⁰ There are good reasons for this dearth of empirical research. There are obvious ethical difficulties in conducting such studies, and evident logistical reasons why the subjects of the studies may decline cooperation or misrepresent their views. See discussion in Anja Dalgaard-Nielsen, "Violent Radicalization in Europe: What We Know and What We Do Not Know" (2010) 33:9 *Studies in Conflict & Terrorism* 797 at 811–12 [Dalgaard-Nielsen, "Violent Radicalization"].

¹¹ *Ibid* at 798.

The obvious academic and policy preoccupation with this species of radicalization raises sensitivities, not least in relation to the terms used to describe it. In this article, we shall employ the term “al Qaeda-inspired extremism” to describe this ideology.¹²

1. RADICALIZATION IN CONTEXT

A first point to emphasize in discussing the literature on radicalization and radicalization to violence is to underscore distinctions between these concepts. Radicalization may be defined as “changes in beliefs, feelings, and actions in the direction of increased support for one side of a political conflict.”¹³ Clark McCauley and Sophia Moskalenko posit that radical al Qaeda-inspired (AQ-inspired) political discourse arises in a four-part “narrative frame”: “(1) Islam is under attack by Western crusaders led by the United States; (2) *jihadis*, whom the West refers to as “terrorists,” are defending against this attack; (3) the actions they take in defence of Islam are proportional, just, and religiously sanctified; and, therefore (4) it is the duty of good Muslims to support these actions.”¹⁴

They also propose a “pyramid of opinion radicalization.”¹⁵ At the base of this structure are Muslims who do not subscribe to any of the four parts of the AQ-inspired discourse. In the tier above them is a smaller tranche of those who agree that the West besieges Islam. Next are those who also believe that AQ-inspired terrorists act in defense of Islam, and with moral and religious justification. Finally, the peak of the pyramid encompasses the even smaller group of persons who subscribe not only to these views, but also believe that it is a Muslim’s duty to participate in Islam’s defense.¹⁶ McCauley and Moskalenko point to polling data supporting their view that the numbers of people ascribing to the views associated with each tier of the pyramid generally declines the further up the pyramid one climbs.¹⁷

To supplement their radicalization diagram, McCauley and Moskalenko also propose an action radicalization pyramid, running from the politically inert at the base, through activists, to radicals, and then to terrorists at the much smaller pyramid tip.¹⁸ They dispute, however,

¹² See the recommendation in Shahina Siddiqui et al, *United Against Terrorism: A Collaborative Effort Towards a Secure, Inclusive and Just Canada* (Winnipeg, Ottawa & Winnipeg: Islamic Social Services Association, National Council of Canadian Muslims & Royal Canadian Mounted Police, 2014) at 34, online: <www.nccm.ca/wp-content/uploads/2014/09/UAT-HANDBOOK-WEB-VERSION-SEPT-27-2014.pdf>. We note, however, that other terms are prevalent in the counter-terrorism literature, especially the concept of “jihadi” used as a shorthand for an extremist interpretation of Islam contemplating a military struggle against, among others, the West. See e.g. J Skidmore, “Foreign Fighter Involvement in Syria,” (Herzliya: International Institute for Counter-Terrorism, 2014), online: <www.ict.org.il/Article/26/Foreign%20Fighter%20Involvement%20in%20Syria> at 13–19. Where these alternative expressions are used in materials to which we cite, we reproduce them. We acknowledge, however, that *jihad* is a religious term with multiple meanings, and nuance is often missed in invoking it in public discourse. See David Cook, *Understanding Jihad* (Berkeley: University of California Press, 2005) and chapter 1 in particular; Abdullah Saeed, “Jihad and Violence: Changing Understandings of Jihad Among Muslims” in CAJ Coady & Michael P O’Keefe, eds, *Terrorism and Justice: Moral Argument in a Threatened World* (Melbourne: Melbourne University Press, 2002) 72.

¹³ Clark McCauley & Sophia Moskalenko, “Toward a Profile of Lone Wolf Terrorists: What Moves an Individual From Radical Opinion to Radical Action” (2014) 26:1 *Terrorism and Political Violence* 69 at 70 [McCauley & Moskalenko, “Lone Wolf Terrorists”].

¹⁴ *Ibid* at 71.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*. Some of this data does suggest that, in the United Kingdom in 2005, at least, the base layer of those Muslims who disputed every aspect of the AQ-inspired discourse was smaller than the layer of people who at least believed that the West was engaged in a conflict with Islam.

¹⁸ *Ibid* at 73.

a “stage theory” to this typology, or that individuals progress linearly from one stage to another. Political ideology and grievance is not a conveyor belt to terrorist activity.¹⁹ For instance, while 5 percent of adult UK Muslims (a number that translates to 50,000 persons) told pollsters in 2005 that suicide attacks were justified, there have been only a few hundred terrorism arrests in the UK since 9/11.²⁰ It stands to reason that 5 percent understates those with violent views, since many poll respondents would not willingly espouse such controversial opinions. But even assuming this low percentage is accurate, McCauley and Moskalenko calculate that only 1 in every 100 persons espousing the most extreme AQ-inspired narrative make the move to violence.²¹

The process of radicalization to violence is, therefore, more complex than simply harbouring radical opinion. Non-violent radical groups may, in some cases, be in competition with violent radical entities,²² not their “farm teams.” Moreover, there are instances where people are drawn to violence without first developing radical ideas.²³ In short, the connection between radical and extremist ideas and an actual willingness to engage in terrorist violence is tenuous.

2. RADICALIZATION TO VIOLENCE

Given these findings, establishing exactly in which circumstance a person may move from radical ideas (or even political indifference) to violent action is an important research and policy question. Empirical studies to date suggest no single socio-economic profile for a person radicalized to violence in Europe. These individuals “vary widely in terms of age, socioeconomic background, education, occupation, family status, previous criminal record, and so on.”²⁴ These individuals are, in fact, “strikingly normal in terms of the socioeconomic variables analyzed.”²⁵

Still, Europe-wide case study research²⁶ points to a finite number of personality types or roles within radicalized terrorist groups:

The *leader* — frequently a charismatic and idealist individual with a strong interest in politics and an activist mindset. The *protégé* — the young, intelligent, at times vocationally or educationally accomplished individual who admires the entrepreneur and shares his activist mindset. The *misfit* — a person with a troubled background, maybe with a record of involvement with petty crime or with drug abuse. Finally, the

¹⁹ See discussion in Sophia Moskalenko & Clark McCauley, “Measuring Political Mobilization: The Distinction Between Activism and Radicalism” (2009) 21:2 *Terrorism & Political Violence* 239 at 240–41 [Moskalenko & McCauley, “Measuring Political Mobilization”].

²⁰ McCauley & Moskalenko, “Lone Wolf Terrorists,” *supra* note 13 at 72.

²¹ *Ibid.*

²² Moskalenko & McCauley, “Measuring Political Mobilization,” *supra* note 19 at 240.

²³ McCauley & Moskalenko, “Lone Wolf Terrorists,” *supra* note 13 at 72.

²⁴ Dalgaard-Nielsen, “Violent Radicalization,” *supra* note 10 at 805.

²⁵ *Ibid.* at 805.

²⁶ Peter Nesser, “Jihad in Europe; Recruitment for Terrorist Cells in Europe” (Paper delivered at the FFI Seminar, Oslo, 15 March 2006) in *Paths to Global Jihad: Radicalisation and Recruitment to Terror Networks. Proceedings from a FFI Seminar, Oslo, 15 March 2006* (Kjeller: Norwegian Defence Research Establishment, 2006), online: <www.investigativeproject.org/documents/testimony/41.pdf>.

drifter — a person who appears to join the group through social connections to individuals already in the group or in the group's periphery.²⁷

Each of these types may radicalize to violence for different reasons, suggesting there is no one profile useful in understanding terrorist radicalization. Leaders and protégés “join through a deliberate and conscious process driven by political grievances.” Misfits see membership as a means to start afresh and deal “with personal problems or a troublesome past.” Drifters are motivated by such things as “loyalty to friends, peer pressure, coincidental encounters with a charismatic recruiter, or in search of ‘adventure.’”²⁸ These misfits and drifters may be bereft of radical ideas, and motivated by interpersonal preoccupations. They are, in other words, members of AQ-inspired groups by happenstance, and not by ideological predisposition — at least initially.

Other studies support these findings. An examination of radical recruitment in Holland suggested three central influences behind terrorist radicalization. First, some individuals radicalize in a quest for “meaning, stability, and respect.”²⁹ Often living on the margins, these are usually individuals with a history of petty crime and educational difficulties.

Second, some individuals radicalize to violence in “search for community.” Former “outsiders” with “quiet and intense” religious beliefs and distinguished by a “pious lifestyle” fall into this class.³⁰

Last, some persons radicalize to violence as a reaction to perceived injustices committed against Muslims in conflict areas such as Afghanistan or the Palestinian territories, or in Europe — for example, terrorism-related arrests in the Netherlands. Importantly, “these individuals typically appear to provide intellectual and social leadership to the rest of the group”³¹ and are more sophisticated than their fellows. That is, they are “typically more resourceful, better educated, slightly older, more knowledgeable about religious texts, better Arab-speakers, and in general more self-assured.”³² These views may alienate more moderate co-religionists. In the result, ideological radicals “tend to expend much energy on criticizing competing and nonviolent interpretations of Islam, in which their followers might potentially find alternative sources of community and meaning.”³³

Other researchers have emphasized the particular importance of these leaders in cementing a move to radicalization by others. As one recent study on radicalization to violence and the Bali bombings observed, “[t]he credibility of individuals taking on leadership roles is one of the main factors that leads individuals to join terrorist groups.”³⁴ Specifically, “[t]he charismatic leader provides a sense-making device for the group, identifying an external

²⁷ Dalgaard-Nielsen, “Violent Radicalization,” *ibid* at 805 [emphasis in original]. See also Nesser, *ibid* at 11–13.

²⁸ *Ibid* at 806–807.

²⁹ *Ibid* at 807.

³⁰ *Ibid*.

³¹ *Ibid*.

³² *Ibid*.

³³ *Ibid*.

³⁴ Mirra Noor Milla, Faturochman & Djamaludin Ancok, “The impact of leader-follower interactions on the radicalization of terrorists: A case study of the Bali bombers” (2013) 16:2 *Asian J of Social Psychology* 92 at 92.

cause for the members' frustration and alienation. They help promote a potent 'us versus them' psychology, setting in motion powerful group dynamics centred on ideology."³⁵ These findings suggest that "charismatic leaders" may be a catalyst that can mobilize others, including protégés, misfits, and drifters.

B. THE INTERNET AND TERRORIST RADICALIZATION

Although studies on radicalization to violence provide interim conclusions at best, they generally support a thesis that interpersonal social ties — especially with a charismatic "leader" — has in the past been a more important cause of radicalization than more diffuse sources of inspiration. This finding has implications for recent debates about the role of the Internet in terrorist radicalization. In this section we examine past research on terrorist use of the Internet, focusing specifically on its role in terrorist radicalization.

1. THE INTERNET AS A TERRORIST TOOL

Both terrorist organizations and radicalized individuals make use of the Internet,³⁶ including "as an 'information weapon' to increase their visibility and to publicize their activities."³⁷ Francesca Bosco divides Internet activities related to terrorism into three classes: use as an organizational tool, waging psychological terror, and publicity and propaganda.

Organizational use of the Internet includes coordination of activities, and data mining for publicly available information on a variety of topics including potential targets, means and methods of weapon use, and fundraising. Internet social networking features also facilitate recruiting and training across disparate geographical space, a matter discussed further below.³⁸

"Waging psychological terror" includes terrorist group communications claiming responsibility for attacks and actions, vilifying and demoralizing target audiences through disinformation, delivering threats with the intent to create fear and a sense of helplessness, and the distribution of horrific images (such as execution videos).³⁹

³⁵ *Ibid* at 99. For a discussion of charismatic authority in terrorist groups, see David C Hofmann & Lorne L Dawson, "The Neglected Role of Charismatic Authority in the Study of Terrorist Groups and Radicalization" (2014) 37:4 *Studies in Conflict & Terrorism* 348.

³⁶ See the analysis by Jialun Qin et al, "Analyzing terror campaigns on the internet: Technical sophistication, content richness, and Web interactivity" (2007) 65:1 *Intl J Human-Computer Studies* 71. Francesca Bosco, "Terrorist Use of the Internet" in Uğur Gürbüz, ed, *Capacity Building in the Fight Against Terrorism* (Amsterdam: IOS Press, 2013) 39 at 40.

³⁸ *Ibid* at 43. See also Craig Espeseth et al, "Terrorist Use of Communication Technology and Social Networks" in U Feyyaz Aydoğdu, ed, *Technological Dimensions of Defence against Terrorism* (Amsterdam: IOS Press, 2013) 91 (also listing cyberattacks, recruitment, training, command and control, tactical use, fundraising, and communication as among the ways in which terrorists use the Internet); Gabriel Weimann, *Terror on the Internet: The New Arena, the New Challenges* (Washington, DC: United States Institute of Peace Press, 2006).

³⁹ Bosco, *supra* note 37 at 41–42. For a similar typology of Internet uses by terrorist groups, see Edna Erez, Gabriel Weimann & A Aaron Weisburd, *Jihad, Crime and the Internet: Content Analysis of Jihadist Forum Discussions*, grant report submitted to the National Institute of Justice (Rockville: National Criminal Justice Reference Service, 31 October 2011) at 6, online: <<https://www.ncjrs.gov/pdffiles1/nij/grants/236867.pdf>>.

Finally, terrorist publicity and propaganda aims to generate support for causes, and justify actions. The Internet “provide[s] a virtual library of terrorist material, granting easy access to everything from political, ideological and theological literature to videos of assaults and attacks, and even video games.”⁴⁰ Terrorist websites may deploy “imagery and symbols of victimization and empowerment to spread their message” and online publications may include everything from art intended to inspire, to terrorist “manuals” on everything from bomb-making to email encryption.⁴¹

2. THE CONTESTED ISSUE OF RADICALIZATION BY INTERNET

Some of the uses detailed above are passive — data mining, for instance. Other Internet uses are more active. For example, persons radicalized to violence create content then consumed by others. This active use is most often invoked in discussions of the link between the Internet and radicalization. The precise nature of the latter relationship is, however, debated.

Some analysts doubt a causal relationship between terrorist use of the internet, radicalization, and violence.⁴² Dutch empirical research suggests that

[t]he youngsters in the [research] sample did not radicalize due to *Imams*, parents, surfing on the Internet, or individually seeking out extremist texts and propaganda. They radicalized due to interaction with a significant other — a charismatic leader, a family member, or a trusted peer — and frequently within smaller groups increasingly isolated from the rest of society.⁴³

The significance of this group leader far outstrips that of other, potential sources of radicalization: “Online propaganda or fiery Internet preachers might prime an individual toward a certain way of thinking, but seem secondary to real-life relationships when it comes to violent radicalization.”⁴⁴

Other researchers see the internet as influential, although to varying degrees.⁴⁵ For instance, Marc Sageman’s influential “leaderless jihad” thesis posits that the Internet facilitates a loose, leaderless network of independent, leaderless terrorist organization.⁴⁶ Moreover, Internet propaganda may fuel moral outrage that may trigger violence action.⁴⁷ The Internet’s interactive aspect may compound this effect. Internet “forums and websites act as an echo chamber where only the same opinions and ideas are discussed,” creating a new normal for participants who are constantly exposed to the ideas.⁴⁸

⁴⁰ Bosco, *ibid* at 42.

⁴¹ *Ibid.*

⁴² See e.g. David C Benson, “Why the Internet Is Not Increasing Terrorism” (2014) 23:2 Security Studies 293 at 315 ff. See also Espeseth et al, *supra* note 36 at 94.

⁴³ Dalgaard-Nielsen, “Violent Radicalization,” *supra* note 10 at 808 [citation omitted] [emphasis in original].

⁴⁴ *Ibid* at 810.

⁴⁵ For summary, see Peter R Neumann, “Options and Strategies for Countering Online Radicalization in the United States” (2013) 36:6 Studies in Conflict & Terrorism 431 at 435 ff.

⁴⁶ See e.g. Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (Philadelphia: University of Pennsylvania Press, 2008).

⁴⁷ *Ibid.*

⁴⁸ Espeseth et al, *supra* note 38 at 92.

In the most comprehensive quantitative analysis of AQ-inspired Internet discussion forums known to these authors, the most common source of discussion (97 percent) was religion.⁴⁹ Most of these discussion threads focused on Islamic doctrine, and not on espousing hatred towards other groups or traditions. Such findings are relevant when assessing how new offences targeting such material affect fundamental freedoms including freedom of expression and freedom of religion.

At the same time, AQ-inspired Internet activity is not benign. A total of 37 percent of discussions included “an explicit or implicit call for Jihad,”⁵⁰ and these threads often attracted high numbers of participants. Twenty percent of discussions included “explicit calls or encouragement for future terrorist activities.”⁵¹ Calls for martyrdom arose in 8 percent of discussions.⁵² Combined, the authors report that calls for jihad, terrorist activity, and martyrdom arose in two-thirds of discussions.⁵³

In sum, while the Internet alone may not be a cause of radicalization to violence, it may serve as a “driver and enabler for the process of radicalization”; a forum for radicalizing propaganda; a venue for social networking with the like-minded; and then, a means of data mining during the turn towards violence.⁵⁴

Grappling with this prospect poses serious policy challenges. We address legal issues in the second and third parts of the article. Here, we identify some of the practical challenges, following Peter Neumann in dividing possible responses into “reducing supply” and “reducing demand.”⁵⁵

3. REDUCING SUPPLY

A supply-based strategy aims to reduce terrorist use and access to the Internet. Such approaches range from the heavy-handed to the more subtle.

a. Deletion and Prosecutions

The sheer size of cyberspace makes Internet filtering for radical content very difficult. European states and Australia have purportedly considered “network-level filtering” as a means to exclude extremist material from their Internet. In each instance, the government rejected this idea for its cost and the inevitable controversy it would provoke.⁵⁶

⁴⁹ Erez, Weimann & Weisburd, *supra* note 39 at 64.

⁵⁰ *Ibid* at 67–68.

⁵¹ *Ibid* at 69.

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ Espeseth et al, *supra* note 38 at 95, citing Mitchell D Silber & Arvin Bhatt, “Radicalization in the West: The Homegrown Threat” (New York: New York City Police Department, 2007) at 8, online: <www.nypdshield.org/public/siteFiles/documents/NYPD_Report-Radicalization_in_the_west.pdf>.

⁵⁵ Neumann, *supra* note 45.

⁵⁶ *Ibid* at 439.

More targeted shuttering of offensive websites is part of the European approach. Under section 3 of the UK's *Terrorism Act 2006*, a police constable can serve notice that a website should remove unlawful terrorism materials and this may be a factor in subsequent criminal prosecutions.⁵⁷

As this example suggests, in some European states, criminal laws reach glorification of terrorism, including on the Internet, and impose penal sanctions for such speech. We discuss this approach in greater detail below, but note here that the effectiveness of incarceration as a de-radicalization tool is unclear from the empirical research. Some people may be deterred by the risk of surveillance, prosecution and detention.⁵⁸ Incarceration may increase the costs of violent extremism and deter continued participation.⁵⁹ On the other hand, there are “numerous examples of further radicalization taking place in prisons.”⁶⁰ Moreover, persons more inclined to extremist positions may regard the state's (over)reaction to radicalization as justification for resistance.⁶¹

The timing of coercive, law and order responses may also be relevant. One Dutch case study found “a display of governmental strength through harsh counterterrorism measures can be efficient but have a higher rate of success when the terrorist or radical constituency already displays signs of weariness (caused by too many victims within their own ranks or too-violent attacks).”⁶² The authors posit that, in relation to AQ-inspired radicalization in Holland, “indignation and frustration about discrimination and perceived acts of injustice is still so high and — on the other hand — the number of terrorists and attacks so low... that exceptionally harsh responses are not accepted (yet), but on the contrary would only serve to heighten existing tensions.”⁶³

All of this is to say that criminalizing conduct related to, but distant from, terrorist violence comes with costs, one of which may bolster the very dynamics of radicalization the criminal law seeks to combat. Such observations counsel close consideration of less coercive tools and raise the risk that the enactment of heavy-handed speech offences might be counter-productive in preventing terrorism.

b. Less Intrusive Approaches

Neumann notes the practice of “hiding” extremist online content — essentially working with private sector services such as Google to remove this material from search engines and hyperlinks.⁶⁴ This does not ban material, but does make it harder to find — the equivalent of keeping a book in a library, but removing it from the card catalogue. In Europe, search providers responding to local laws on Holocaust denial have cooperated in hiding content.

⁵⁷ *Terrorism Act 2006* (UK), c 11, s 3.

⁵⁸ Dalgaard-Nielsen, “Violent Radicalization,” *supra* note 10 at 808.

⁵⁹ Anja Dalgaard-Nielsen, “Promoting Exit from Violent Extremism: Themes and Approaches” (2013) 36:2 *Studies in Conflict & Terrorism* 99 at 103 [Dalgaard-Nielsen, “Promoting Exit”].

⁶⁰ *Ibid.*

⁶¹ Dalgaard-Nielsen, “Violent Radicalization,” *supra* note 10 at 808.

⁶² Froukje Demant & Beatrice de Graaf, “How to Counter Radical Narratives: Dutch Deradicalization Policy in the Case of Moluccan and Islamic Radicals” (2010) 33:5 *Studies in Conflict & Terrorism* 408 at 423.

⁶³ *Ibid.*

⁶⁴ Neumann, *supra* note 45 at 443.

After a famous French case involving Nazi memorabilia, Google implemented its own measures.⁶⁵ Such self-regulation, however, raises issues about transparency and whether a private company will be sufficiently attentive to freedom of expression and legal definitions of prohibited speech.

More recent and evolving developments in Europe in respect to the so-called “right to be forgotten”⁶⁶ demonstrate that such hiding is technically feasible.⁶⁷ The resulting interaction between private and public regulation of speech deserve close monitoring. One possible disadvantage is a lack of full transparency about what speech is being limited.

c. Second Order Consequences of Reduced Supply

Even if various measures reduce the supply of terrorist propaganda, this may not necessarily be a net gain to public safety. Terrorist internet activity is a source of both strategic and tactical intelligence. For instance, intelligence services (and indeed, open-source researchers) may conduct “sentiment analyses” by examining “online platforms—static websites, online forums, blogs, Twitter, videos, and discussion threads—to detect shifts in intentions and priorities, pick up on arguments, cleavages, fault lines, and new tactics.”⁶⁸

“Network analysis,” meanwhile, may allow intelligence services to plumb social-networking sites “to identify the people who are involved in processes of radicalization and recruitment.”⁶⁹ In fact, “extremist forums and social-networking sites are essential for *identifying lone actors* with no real-world connections into extremist milieus.”⁷⁰ These solitary threats often are active online, leaving “virtual traces” that analysts may use to anticipate their intentions and mark sudden changes in behaviour signaling such things as “escalating (and increasingly specific) threats, requests for bombmaking instructions, contacts with foreign-based insurgent groups, or announcements of imminent action.”⁷¹ If studies suggesting that “the most dangerous indicator of potential for lone wolf terrorism is the combination of radical opinion with means and opportunity for radical action”⁷² are correct, this electronic signature may be the only way to match opinion with a sudden lurch towards acquiring the means. Likewise, this electronic trail may also constitute evidence for subsequent investigations and prosecutions.

⁶⁵ Isabelle Rorive, “What Can Be Done Against Cyber Hate? Freedom of Speech Versus Hate Speech in the Council of Europe” (2009) 17:3 *Cardozo J Intl & Comp L* 417 at 418–19.

⁶⁶ *Google Spain SL v Agencia Española de Protección de Datos (AEPO)*, C-131/12 (European Court of Justice).

⁶⁷ “Google sets up ‘right to be forgotten’ form after EU ruling,” *BBC News* (30 May 2014), online: <www.bbc.com/news/technology-27631001>.

⁶⁸ Neumann, *supra* note 45 at 450.

⁶⁹ *Ibid* at 451. For an academic example, see e.g. Jytte Klausen, “Tweeting the *Jihad*: Social Media Networks of Western Foreign Fighters in Syria and Iraq” (2015) 38:1 *Studies in Conflict & Terrorism* 1.

⁷⁰ Neumann, *ibid* at 451 [emphasis in original]. For a study using Internet material in an effort to identify lone wolf impulses, see Joel Brynielsson et al, “Harveting and analysis of weak signals for detecting lone wolf terrorists” (2013) 2:1 *Security Informatics* 1. See also Todd Waskiewicz, “Friend of a Friend Influence in Terrorist Social Networks” (Paper delivered at the World Congress in Computer Science, 17 July 2012), online: <weblidi.info.unlp.edu.ar/worldcomp2012-mirror/p2012/ICA6143.pdf>.

⁷¹ Neumann, *ibid* at 451.

⁷² McCauley & Moskalenko, “Lone Wolf Terrorists,” *supra* note 13 at 83.

4. REDUCING DEMAND

An alternative approach is to combat terrorist radicalization by reducing the number of persons attracted to and by extremist Internet content. Demand minimizing is essentially a form of de-radicalization.

The literature on de-radicalization suggests no one model suits all radicalized personality types. While measures that establish alternative social communities or economic opportunities may draw some away from radicalism, leaders — more strongly ideological — are likely unresponsive to such tools. Dalgaard-Nielsen suggests that “preventive and disengagement efforts should probably be based on the attempt to impact on the thinking of these individuals through credible anti-violence voices in their own community coupled with various attempts at democratic inclusion, to combat the notion that constitutional politics is an ineffective way of seeking to address grievances.”⁷³

In a meta-study focusing on de-radicalization programs in Europe, South East Asia and the Middle East, Dalgaard-Nielsen notes “all place emphasis on trust building, on a constructive and benevolent rather than accusatory approach, and on demonstrating a fair and professional approach on part of the authorities.”⁷⁴ In her view, these strategies are “well-placed” given “what social psychology tells us about cognitive consistency, dissonance, and reactance.”⁷⁵ Dalgaard-Nielsen recommends against “fixed curriculum, mandatory ideological re-education, and a strong reliance on the power of rhetoric and arguments,” given the risk of reinforcing rather than dissuading radical views.⁷⁶ Instead, “external intervention should stay close to the potential exiter’s own doubt, make the influence attempt as subtle as possible, use narratives and self-affirmatory strategies to reduce resistance to persuasion, and consider the possibility to promote attitudinal change via behavioral change.”⁷⁷

These strategies obviously extend beyond propagation of counter-narratives. However, counter-narrative is an important tool in any such approach, one that might usefully be represented on the Internet. Counter-narrative strategies do not curb speech, but rather try to drown out radicalized speech in favour of “pluralism, democracy, and the (peaceful) means through which good ideas can be advanced.”⁷⁸ Strategies for doing so vary, but include obvious efforts to rebut “cult personalities,” challenge extremist ideology⁷⁹ and especially to address “legends of injustice and oppression.”⁸⁰ In some sense, counter-narratives seek to out-compete more pernicious speech in the famous “marketplace of ideas” associated with an open society.

⁷³ Dalgaard-Nielsen, “Violent Radicalization,” *supra* note 10 at 811.

⁷⁴ Dalgaard-Nielsen, “Promoting Exit,” *supra* note 59 at 110.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Neumann, *supra* note 45 at 443.

⁷⁹ Bosco, *supra* note 37 at 45.

⁸⁰ Demant & de Graaf, *supra* note 62 at 421.

But counter-narrative in this context is not ham-handed government propaganda. Government's primary role is to help "create awareness, convene relevant nongovernmental actors, build capacity, and foster media literacy."⁸¹ Generic anti-radicalization strategies reportedly favoured by Canadian Muslim community leaders include:

[A]cknowledging the existence of Islamophobia; establishing a dialogue with various Muslim groups; educating policy makers; developing university courses on terrorism; forming positive relationships with local and federal agencies; re-invigorating mosque-based programs; utilizing available tools for new immigrant and refugee integration; devising a multi-party collaborative relationship among local NGO-RCMP-FEBO community-based organizations; deepening the role of immigration and multiculturalism ministries ethno-cultural projects; carrying out transparent, responsible security profiling, and stopping the use of terrorism rhetoric as a political tool by media.⁸²

More specific, Internet-related strategies include Internet safety and awareness programs, sensitizing young people and their parents to extremist messaging, in addition to online bullying, predators, and pornography. Other approaches include cooperation with technology companies willing to provide technical assistance, grants, free advertising, or other support that facilitates the online presence of, among other things, Muslim thought-leaders with messages contrary to those of AQ-inspired extremists.⁸³ Likewise, government might enable connections between community groups and public relations and media professionals able to assist in crafting more compelling messages.⁸⁴ Still other initiatives may include such things as government support for victims of terrorism to document on the Internet their own suffering in answer to the glorification imagery of terrorist ideologues.⁸⁵

C. DISCUSSION

The discussion in this Part suggests that radicalized Internet use is variable, ranging from religio-ideological debate through to operational conduct. For the purpose of simplifying the broad range of radicalized Internet use, we propose a simple expression spectrum, reflected in Figure 1.

The interior circle is labelled "Free speech core" — speech that raises no concern from the optic of terrorist radicalization. This would include everything not otherwise accounted for in the subsequent circles.

The next ring is labelled "Ideological speech." Intentionally positioned near the core, these exchanges include debates on religious and political doctrine, sometimes strongly and indeed fiercely urged but not linked on their face to violence. Such discussions may address one or all of the four-part AQ-inspired "narrative frame" discussed above.

⁸¹ Neumann, *supra* note 45 at 444.

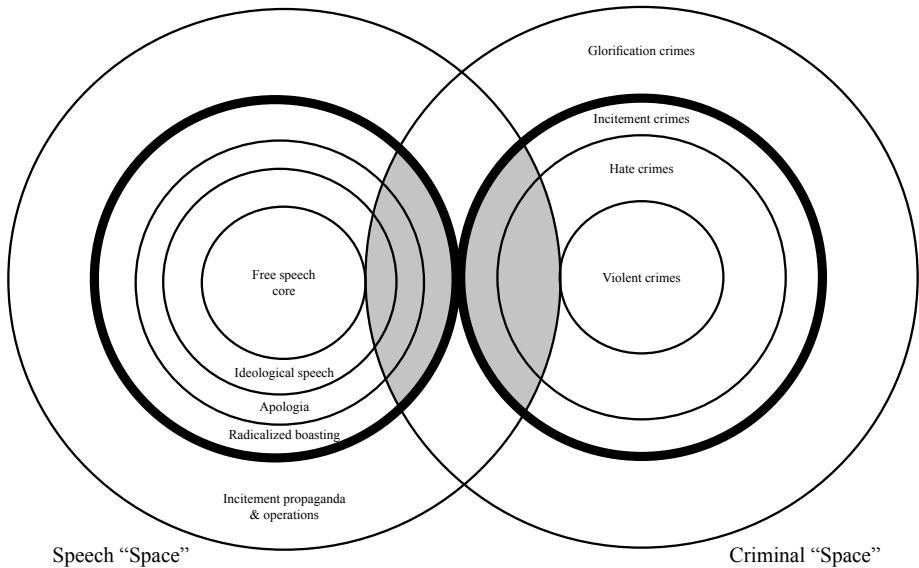
⁸² Kawser Ahmed, James Fergusson & Alexander Salt, "Perceptions of Muslim Faith, Ethno-Cultural Community-based and Student Organizations in Countering Domestic Terrorism in Canada" (2014) Canadian Network for Research on Terrorism, Security and Society Working Paper No 14-12 at 4-5, online: <library.tsas.ca/media/TSASWP14-12_Ahmed-Fergusson-Salt.pdf>.

⁸³ Neumann, *supra* note 45 at 444.

⁸⁴ *Ibid.*

⁸⁵ Bosco, *supra* note 37 at 45.

FIGURE 1: OVERLAPPING SPEECH AND CRIMINAL “SPACES”



“Apologia” is one further step removed from the core. This speech involves celebrations and justifications of past acts of violence. These views would be consistent with the peak of McCauley and Moskaleiko’s “opinion radicalization pyramid.” But even assertions of a personal duty to take up arms is not itself the taking up of those arms, or even an express urging that others do so. That is, for our purposes, apologia is not linked to violence except to the extent that such statements communicate approval of conduct that might then be emulated (but which is not itself called for in the statement).

“Radicalized boasting” exists in a more difficult nether region between apologia and intentional incitement propaganda. As discussed above, AQ-inspired Internet fora clamour for jihad, terrorist acts, and martyrdom. In this respect, they favour and endorse future acts of violence, but may be (and presumably usually are) a form of chest-thumping, far removed from operational intent or ability. In this respect, they constitute a form of boasting, albeit one that affirms a violence-oriented world view. For our purposes, however, this boasting falls short of the incitement to hate associated with a hate crime, discussed further below, or outright counselling or instructing a terrorism offence.

Next, we include a ring labelled “Incitement propaganda and operations.” This is Internet speech amounting to hate propaganda or intentionally focused on furthering the objectives of terrorist groups, whether in terms of recruiting or inciting or threatening actual violence. It also includes the communication of operational tools and techniques that further terrorist purposes and the planning of terrorist acts.

The “Speech ‘space’” created by these concentric zones overlaps with another series of circles labelled “Criminal ‘space.’” The next Part has two purposes. First, we examine how existing crimes in the criminal space overlap with aspects of speech space. We then ask

whether the criminal space should be expanded in Canada to include glorification crimes that reach even further inwards towards the free speech core.

III. LEGAL RESPONSE TO TERRORIST RADICALIZATION

While there are numerous crimes in the Canadian *Criminal Code* that do or could implicate speech or expression as part of the *actus reus* of the offence,⁸⁶ we confine our discussion to the four sets of provisions in Canadian law that most clearly address the facts at issue in this article; that is, terrorist radicalization. Collectively, these provisions reach quite far in criminalizing conduct that does and is intended to provoke criminal conduct, including terrorism. These areas are: hate propaganda and sedition, uttering threats, counselling, and various offences tied to terrorist activity. In some cases, these offences are outcome dependent in the sense that they may not apply unless a specific, pernicious consequence is likely (or occurs). In many other instances, however, the crimes are outcome independent and would apply regardless of whether some additional consequence is likely to occur.

A. EXISTING PROVISIONS

1. OUTCOME DEPENDENT SPEECH CRIMES

Canadian law sometimes takes the view that certain speech is pernicious if it is tied or linked to a particular outcome. For instance, it is an offence under Canada's hate propaganda laws to communicate statements in any public place and incite "hatred against any identifiable group where such incitement is likely to lead to a breach of the peace."⁸⁷ "Hatred" reaches "[o]nly the most intense forms of dislike,"⁸⁸ such as an "emotion of an intense and extreme nature that is clearly associated with vilification and detestation."⁸⁹ This crime targets a fallout from the speech — namely, a likelihood of breach of the peace or the promotion of hatred. The fact of speaking does not appear to suffice absent evidence of one of these outcomes.

2. OUTCOME INDEPENDENT SPEECH CRIMES

Many other Canadian speech crimes are "outcome independent" — that is, the act of speaking suffices, regardless of knock-on effects.

⁸⁶ See e.g. *Criminal Code*, *supra* note 3, s 51 (intimidating Parliament or a legislature), s 53 (inciting to mutiny), s 63 (unlawful assembly), s 83 (prize fights), s 131 (perjury), s 136 (witness giving contradictory evidence), s 163 (corrupting morals), s 168 (mailing obscene matter), s 175 (causing disturbance, indecent exhibition, loitering, etc.), s 241 (counselling or aiding suicide), s 296 (blasphemous libel), s 297 (defamatory libel).

⁸⁷ *Ibid.*, s 319(1).

⁸⁸ *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 at para 101 [*Mugesera*].

⁸⁹ *R v Keegstra*, [1990] 3 SCR 697 at 777 [*Keegstra*].

a. Overview

Counselling under the *Criminal Code* has both outcome dependent and independent variants. For instance, a person who counsels another to be a party to an offence is deemed a party to that offence if the counselled person then perpetrates the offence. Moreover, the counselling person is a party to every offence that the personal counseled commits “that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.”⁹⁰ But counselling can also be a crime even if no crime is ever committed.⁹¹

“Counsel” under the *Criminal Code* “includes procure, solicit or incite.”⁹² In the Supreme Court of Canada’s words, “[t]he *actus reus* for counselling will be established where the materials or statements made or transmitted by the accused *actively induce* or *advocate* — and do not merely *describe* — the commission of an offence.”⁹³ More specifically, “counsel” means “‘advise’ or ‘recommend (a course of action)’; ‘procure’, as ‘bring about’; ‘solicit’ as ‘ask repeatedly or earnestly for or seek or invite’, or ‘make a request or petition to (a person)’; and ‘incite’ as ‘urge’. ‘Procure’ has been held judicially to include ‘instigate’ and ‘persuade.’”⁹⁴

To be culpable, the accused must also have “either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused’s conduct.”⁹⁵ This requires proof of subjective fault, although there is some disagreement among commentators about the specific level of subjective fault.⁹⁶

More specific outcome independent speech crimes include advocating or promoting genocide — that is, speech tied to the intent to destroy in whole or in part any identifiable group, killing members of the group, or “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.”⁹⁷

Likewise, and subject to several defences, it is a crime to communicate statements other than in private conversation that wilfully promotes (that is, “actively supports or instigates”)⁹⁸ hatred against any identifiable group.⁹⁹ “Identifiable group” means “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability.”¹⁰⁰ Here, “[t]he offence does not require proof that the

⁹⁰ *Criminal Code*, *supra* note 3, s 22(2).

⁹¹ *Ibid*, s 464.

⁹² *Ibid*, s 22(3).

⁹³ *R v Hamilton*, 2005 SCC 47, [2005] 2 SCR 432 at para 15 [*Hamilton*] [emphasis in original].

⁹⁴ *Ibid* at para 22 [citations omitted].

⁹⁵ *Ibid* at para 29.

⁹⁶ Most commentators have concluded that the fault requirement in *Hamilton*, *ibid*, is recklessness: see e.g. Eric Colvin & Sanjeev Anand, *Principles of Criminal Law*, 3rd ed (Toronto: Thomson Canada, 2007) at 570. One of us has argued, however, that the fault requirement is slightly higher because it requires awareness that an offence is likely to be committed as distinct from the mere possibility of an offence being committed, as is usually associated with recklessness. See Kent Roach, *Criminal Law*, 6th ed (Toronto: Irwin Law, 2015) at 148–50.

⁹⁷ *Criminal Code*, *supra* note 3, s 318(2)(b).

⁹⁸ *Mugesera*, *supra* note 88 at para 101.

⁹⁹ *Criminal Code*, *supra* note 3, s 319.

¹⁰⁰ *Ibid*, s 318(4).

communication caused actual hatred... The intention of Parliament was to prevent the risk of serious harm and not merely to target actual harm caused.”¹⁰¹ At issue is simply whether the communication expressed hatred, measured against the understanding of a reasonable person,¹⁰² and that the speaker desired “that the message stir up hatred.”¹⁰³ The latter intent may be inferred from the content of the speech itself, the circumstances in which it arose, “the manner and tone used, and the persons to whom the message was addressed.”¹⁰⁴ Other authorities stress that, to be guilty of wilfully promoting hatred, the accused must either intend or be wilfully blind to the promotion.¹⁰⁵ These are higher forms of fault than the subjective recklessness that may be sufficient to convict a person of a counselling offence.

A more antiquated speech offence is sedition. It is still a crime to speak “seditious words,” publish a “seditious libel” or participate in a “seditious conspiracy.”¹⁰⁶ The seditious intent at the core of these acts is presumed to exist where a person teaches or advocates or publishes or circulates any writing that advocates “the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.”¹⁰⁷

The *Criminal Code* also penalizes more general threats. It is a crime for anyone who, “in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person; (b) to burn, destroy or damage real or personal property; or (c) to kill, poison or injure an animal or bird that is the property of any person.”¹⁰⁸ This offence might apply to much terrorist speech, but some might object that it does not single out the terrorist motive. Nevertheless it is subject to the same maximum penalty of five years imprisonment in the case of threats of death or bodily harm as Bill C-51’s new offence of advocating or promoting terrorism offences in general, discussed below.

b. Terrorist Speech

After 9/11, Parliament enacted a host of crimes that, broadly speaking, “double-down” on the counselling concept. The application of these terrorist crimes to speech acts has been under-appreciated.¹⁰⁹ One reason why the speech reach of Canada’s 14 separate terrorist offences¹¹⁰ is not fully understood is because of the complex way that these offences were drafted.

¹⁰¹ *Mugesera*, *supra* note 88 at para 102.

¹⁰² *Ibid* at para 103.

¹⁰³ *Ibid* at para 104.

¹⁰⁴ *Ibid* at para 106.

¹⁰⁵ *Keegstra*, *supra* note 89 at 775–77.

¹⁰⁶ *Criminal Code*, *supra* note 3, s 61.

¹⁰⁷ *Ibid*, s 59(4).

¹⁰⁸ *Ibid*, s 264.1.

¹⁰⁹ The position taken in this article does not address whether such offences are justified — only that they can apply to speech acts and are likely constitutional in light of the Supreme Court’s decision in *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555 [*Khawaja*]. The latter upheld the definition of terrorist activities and the section 83.18 participation offence from *Charter* challenges. One of the authors (Roach) discloses he represented an intervener in that case who argued that the definition of terrorist activities violated the *Charter*.

¹¹⁰ The available terrorist offences are contained in *Criminal Code*, *supra* note 3, ss 83.02, 83.03, 83.04, 83.12, 83.18, 83.19, 83.191, 83.2, 83.201, 83.202, 83.21, 83.22, 83.23, and 83.231.

i. Speech Embedded in the Concept of “Terrorist Activity”

An element incorporated in almost all of the 14 terrorist offences is the definition of “terrorist activity” in section 83.01 of the *Criminal Code*. Section 83.01(1)(b) defines “terrorist activity” broadly to include a variety of politically or religiously motivated acts of violence designed to intimidate the public with regards to its security or compel governments, international organizations, or even “persons” to act. More notable in the speech context is a little noticed segment of section 83.01(1) that states that a terrorist activity also “includes a conspiracy, attempt or threat to commit any such act or omission ... or counselling in relation to any such [violent] act or omission.”¹¹¹

This subclause drew no adverse comment from the Supreme Court in *Khawaja*, concerning the constitutionality of the “terrorist activity” definition.¹¹² Its effect is to extend criminal liability beyond the broadly defined terrorist offences to include inchoate forms of criminal liability such as counselling as well as the speech act of threatening to commit such activities. As will be seen, this provision could even apply to threatening or counselling a terrorist activity that itself is based on a speech act. In other words, existing law could pile speech liability on top of speech liability by criminalizing “speech” threatening to commit a terrorist act that itself is based on speech. Specifically, the many special terrorism offences relating to funding, facilitating, instructing terrorist activities, and participation in a terrorist group can criminalize activity that is based largely on particular forms of expression. Consequently, the terrorist activity to which this expression is linked may itself be the simple speech act of counselling or threatening the commission of the more kinetic acts of violence listed in section 83.01. For instance, the inclusion of acts of counselling and threatening in the definition of “terrorist activity” means that a person is culpable for soliciting funds in relation to a terrorist activity that itself involves nothing more than the speech acts of counselling or threatening to commit a terrorist activity.¹¹³

ii. “Piled” Terrorist Speech Crimes

The “piling” of speech crimes is even more obvious with other offences that are even more emphatically speech related. These include instructing “to carry out terrorist activity” and also “instructing to carry out activity for a terrorist group.” Thus, section 83.22 of the *Criminal Code* makes it an offence punishable by life imprisonment to knowingly instruct,

directly or indirectly, any person to carry out a terrorist activity whether or not (a) the terrorist activity is actually carried out; (b) the accused instructs a particular person to carry out the terrorist activity; (c) the accused knows the identity of the person whom the accused instructs to carry out the terrorist activity; or (d) the person whom the accused instructs to carry out the terrorist activity knows that it is a terrorist activity.

As already noted, “terrorist activity” itself may involve speech acts of threatening or counselling, and so it would be a crime to instruct someone to threaten an act of terrorist violence.

¹¹¹ *Ibid*, s 83.01(1).

¹¹² *Supra* note 109.

¹¹³ *Criminal Code*, *supra* note 3, s 83.03(a).

Further, even if a person does not instruct an actual terrorist activity, instructing *anything* for a terrorist group is a crime. Section 83.21 of the *Criminal Code* makes it an offence punishable by life imprisonment to knowingly instruct a person to carry out “any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity.” As discussed further below, this offence applies to propagandists who post material on the Internet or engage in other speech acts, so long as their purpose is to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity. Asserting “lend support to your brothers in arms” may, in fact, be a crime, if those “brothers in arms” are members of a terrorist group.

Other manners in which “the piling of speech” crimes in the anti-terrorism law expose people to criminal culpability are distilled in Table 1. Whether these piling of speech crimes are entirely outcome independent is unclear. In its construal of the participation offence, the Supreme Court of Canada has rejected the notion that merely marching in a non-violent rally organized by the charitable wing of a terrorist group would be a crime, even when done with the specific intent of lending credibility to the group and therefore to augment its ability to conduct terrorist activities. The Court concluded:

[T]he context makes clear that Parliament did not intend for the provision to capture conduct that creates no risk or a negligible risk of harm.... A purposive and contextual reading of the provision confines “participat[ion] in” and “contribut[ion] to” a terrorist activity to conduct that creates a risk of harm that rises beyond a *de minimis* threshold.¹¹⁴

Instead, what is required is conduct “capable of materially enhancing the abilities of a terrorist group *to facilitate or carry out a terrorist activity*,”¹¹⁵ as measured by the nature of the conduct and the relevant circumstances.¹¹⁶

If this logic were applied to the other anti-terrorism provisions such as instruction (as seems likely), speech is criminalized only so long as there is more than a *de minimis* risk of harm stemming from that speech. Therefore, marching in a protest may not satisfy this *de minimis* standard, but recording a video with the express purpose of recruiting persons to a terrorist group likely does. Likewise, preaching a duty to engage in terrorist activity or to join a terrorist group likely amounts to terrorist instruction and participation.

¹¹⁴ *Khawaja*, *supra* note 109 at paras 50–51.

¹¹⁵ *Ibid* at para 51 [emphasis in original].

¹¹⁶ *Ibid* at para 52.

TABLE 1: OTHER EXAMPLES OF SPEECH-BASED TERRORISM OFFENCES

Crime	Elements	Possible example
Facilitation	Knowingly facilitating a terrorist activity, even if no particular terrorist activity was foreseen or planned when facilitated and no terrorist activity is carried out (<i>Criminal Code</i> , s 83.19).	Urging a publisher to print a tract that threatens retaliation or violence if demands are not met.
Leaving Canada to facilitate	Leaving or attempting to leave Canada to commit acts outside Canada that would constitute knowingly facilitating terrorist activities if committed in Canada (<i>Criminal Code</i> , s 83.191).	Leaving Canada in order to urge a publisher to print a tract that threatens retaliation or violence if demands are not met.
Participation	Participating knowingly in, or contributing directly or indirectly, to any activity of a terrorist group, to enhance its ability to facilitate or carry out terrorist activity. Participation or contribution includes, among other things, “recruiting a person to receive training” or to facilitate or commit a terrorism offence. A court is instructed to consider a number of factors in deciding whether an action contributes to any activity of a terrorist group, including whether the accused “uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group” (<i>Criminal Code</i> , s 83.18).	Telling someone to join a group, one of whose purposes is to threaten violence against those who oppose its political or religious agenda.
Leaving Canada to participate	Leaving or attempting to leave Canada for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be a participation offence (<i>Criminal Code</i> , s 83.181).	Leaving Canada for the purpose of producing a video encouraging others to join a group, one of whose purposes is to threaten violence against those who oppose its political or religious agenda.
Commission of any other offence for a terrorist group	Committing an indictable offence for the benefit of, at the direction of or in association with a terrorist group (<i>Criminal Code</i> , s 83.2).	Threatening someone for the benefit of a group, one of whose purposes is to threaten violence against those who oppose its political or religious agenda
Leaving Canada to commit any other offence for a terrorist group	Leaving or attempting to leave Canada for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence, for the benefit of, at the direction of or in association with a terrorist group (<i>Criminal Code</i> , s 83.201).	Leaving Canada to threaten someone for the benefit of a group, one of whose purposes is to threaten violence against those who oppose its political or religious agenda
Leaving Canada to commit an offence that is also a terrorist activity	Leaving or attempting to leave Canada for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence, if the act or omission constituting the offence also constitutes a terrorist activity (<i>Criminal Code</i> , s 83.202).	Leaving Canada in order to counsel someone to counsel another to commit an act of violence that is a terrorist activity or threatening to commit a terrorist activity.

iii. Terrorist Speech in Practice

Existing offences have been used successfully against terrorist-linked speech in the past. For example in the 2010 *Namouh* case,¹¹⁷ the accused was charged and successfully prosecuted for (among other things) “enthusiastically participat[ing] in most of [a terrorist group’s] propagandistic activities.” For example, the accused participated in conveying “a message to Austria and Germany threatening terrorist action if their soldiers are not withdrawn from Afghanistan.”¹¹⁸ The accused also participated in most of the group’s more clearly propagandistic activities, including (as described by the Court):

1. analyzing the speeches of Al Qaeda leaders
2. inciting violent jihad
3. calling for support for jihadist groups
4. redistributing Al Qaeda materials
5. acting as a spokesperson for captured jihadists
6. singing the praises of jihadist leaders who died for the cause
7. ensuring the security of online communications between jihadists
8. taking part in psychological warfare
9. providing military training with the purpose of implementing violent jihad
10. producing a series of videos called the “Caliphate Voice Channel,” with the aim of transmitting news from the jihadist front
11. publishing jihadist magazines online
12. acting as an official media outlet for two groups taking part in terrorism.¹¹⁹

The accused was deeply invested in his cause and was not an idle apologist of things terroristic. This undoubtedly contributed to his conviction of various terrorism offences. The behaviours cited by the Court in support of the participation and facilitation convictions range from outright threats to speech more distantly linked to violence, and some that may even have amounted to forms of radicalized boasting. Nevertheless, this speech contributed to the convictions, because it was committed in actual participation with a terrorist group. A conviction such as this demonstrates that even speech removed from actual violence can be penalized under present law, when done in conjunction with a terrorist group.

3. DISCUSSION

Taken together, these existing criminal provisions (especially when considered alongside the general attempt, counselling, and conspiracy provisions in the *Criminal Code*)¹²⁰ address what we have labelled in Figure 1 as “Incitement propaganda and operations”; that is, Internet speech *intentionally* targeted at furthering the objectives of terrorist groups, whether in terms of recruiting, counselling, threatening, inciting and the communication of operational tools, and techniques that further terrorist purposes.

¹¹⁷ *R v Namouh*, 2010 QCCQ 943, 74 CR (6th) 376, 2010 QCCQ 943 (CanLII) at para 11 [*Namouh*] (cited to unofficial English translation).

¹¹⁸ *Ibid* at para 10.

¹¹⁹ *Ibid*.

¹²⁰ *Supra* note 3, ss 22, 24, 464, 465.

With an important caveat, our current law would not reach “radicalized boasting,” as we define this concept. Such boasting may favour future acts of violence, but it is not directly tied to operational intent or ability. It is speech that falls short of the incitement to hate associated with a hate crime, and does not directly intend to incite or threaten an offence. Moreover, to the extent it amounts to instruction, the risk posed by this colourful speech does not cross a *de minimis* harm threshold. Statements like “all real Muslims should engage in military jihad” would rarely cross the threshold from “radicalized boasting” to “incitement propaganda or operations.”

Nor would apologia for past acts of violence — videos celebrating the 9/11 hijackers or some “9/11 truther” pronouncements, for example. And statements about whether jihad is about self-defence in a Western war with Islam would be ideological speech, far removed from Canada’s existing speech criminalization rules.

The caveat to these conclusions arises in *Namouh*. That case appears to demonstrate that radicalized boasting (and potentially any other speech) can be penalized under existing law, not per se, but where it is done in sufficient proximity to a terrorist group to amount to a “participation” crime. Put another way, speech can be an ingredient of the criminal participation where it enhances the ability of a terrorist group to carry out terrorist activity. However, the same statements, made in isolation and independent of any connection to a terrorist group could presumably not be penalized.

The issue, therefore, is whether Canadian law should reach beyond this current limit to penalize *directly* radicalized boasting, apologia, and even ideological speech. This approach would emulate the pattern used in some European jurisdictions. It might, however, have serious practical disadvantages, suggested by the discussion in Part II.

The criminalization of radicalized boasting might send some such speech further underground and in doing so deprive investigators of the strategic and tactical intelligence benefits associated with relatively unconstrained speech. As noted, an open source electronic bread crumb trail may be the best means of unravelling conspiracies and of detecting “lone wolf” terrorists in the making, and may provide both intelligence and evidence for future state action.

Suppressing speech of the radicalized boasting, apologia, and ideological speech sorts may also compound the sense of persecution and the Islamic “us” and Western “them” discourse that fuels part of the AQ-inspired “narrative frame.” Put another way, it may be a disproportionately aggressive legal strategy that induces blowback. Additionally, it risks martyring banned speech and giving it both a higher profile than it would otherwise have, and a “resistance chic.” Criminalizing speech, in other words, may lend a terrorist-inspired movement a soap box on which to renew its appeal.

This is especially true since, in the Internet space, criminalized speech is not usually suppressed speech. Uncomfortable discourse might simply migrate to places beyond the reach of the government, such as Internet servers in the US or other jurisdictions with more

absolute free speech traditions.¹²¹ Canada is not an electronic island, as China attempts to be. There is no serious prospect that, in an open society, all radical speech can be blocked by some nation-wide firewall. Likewise, the sheer volume of speech captured by more aggressive rules on speech would make it difficult to regulate, even with the full cooperation of Internet service providers and search engine companies.

It is also not clear what real purpose is served by incarcerating radical boasters — it seems unlikely that prison will mellow their opinions. It seems more likely that a heavy handed criminal response will harden their resolve and propel their progress toward outright violence.

Finally, as discussed in the next Part, Canada would also venture into extremely uncertain constitutional terrain if it enacted an aggressive new speech offence. Before reaching that question, we examine some of the Western jurisdictions that have gone beyond criminalizing incitement of terrorism and have deployed novel concepts of terrorist glorification.

B. GLORIFICATION OFFENCES

In 2005, the United Nations Security Council called upon all states to “[p]rohibit by law incitement to commit a terrorist act or acts,” to prevent this conduct and to deny safe haven to those who have been guilty of such conduct.¹²² A recommendation rather than a legally binding commandment, Resolution 1624 also condemned emphatically “attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts.”¹²³

For European states, the Security Council call echoed an obligation inscribed in the May 2005 Council of Europe *Convention on the Prevention of Terrorism*.¹²⁴ The latter obliges parties to criminalize unlawful and intentional

“public provocation to commit a terrorist offence” mean[ing] the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of [a terrorist offence], where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.¹²⁵

Labelled generically “incitement” offences, such provisions include direct incitement and also, in some states, more attenuated, or indirect forms of encouragement, endorsement or glorification. *Apologie* is the European term capturing the latter concept: a 2004 Council of Europe working group defined *apologie du terrorisme* as “public expression of praise,

¹²¹ Note, however, that persons in Canada have been prosecuted for posting hate speech on American servers provided that there is a sufficient connection with Canada. See e.g. *R v Noble*, 2008 BCSC 215, 2008 BCSC 215 CanLII; *R v Bahr (GD)*, 2006 ABPC 360, 434 AR 1.

¹²² UNSC, 5261st Mtg, UN Doc S/Res/1624 (2005) at 3.

¹²³ *Ibid* at 1.

¹²⁴ *Council of Europe Convention on the Prevention of Terrorism*, 1 June 2007, 2488 UNTS 129, CETS No 196.

¹²⁵ *Ibid*, art 5. See also EC, *Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism*, [2008] OJ, L 330/21 at 22.

support or justification of terrorists and/or terrorist acts.”¹²⁶ In this article, we refer to this concept as “glorification,” except where different terms are used in the state’s own laws.

1. CONTINENTAL EUROPEAN TERRORISM GLORIFICATION CRIMES

There are differences of scope in European offences. Danish law criminalizes incitement, including in relation to terrorism offences.¹²⁷ The offence reaches statements of appreciation (in other words, glorification), but the accused reportedly “must have had the intention to contribute to the execution of a concrete offence, that is, the intention to commit criminal offences in general will not be sufficient to constitute an offence.”¹²⁸ This requirement would seem to foreclose prosecution for simple expression of approval (for example, for past terrorist acts).

Spanish penal law, for its part, includes a concept of “provocation,” defined as “when a direct incitation is present by means of the printing press, radio broadcasting or any other means with a similar effectiveness, affording publicity, or when persons have gathered, inciting the perpetration of a crime.”¹²⁹ It also includes a more generic concept of *apologie*:

[T]he expression, before a group of individuals or by any other means of communication, of ideas or doctrines that extol crime or glorify the perpetrator thereof. *Apologie* shall be criminalized only as a form of provocation and if its nature and circumstances are such as to constitute direct incitement to commit an offence.¹³⁰

However, Spanish criminal law also creates a separate, and seemingly broader offence of terrorism glorification: “glorification or justification, through any form of public information or communication, of ... [terrorism] offences ... or of persons having participated in their perpetration, or the commission of acts tending to discredit, demean or humiliate the victims of terrorist offences or their families.”¹³¹

French law, for its part, draws a distinction between direct incitement and a broad concept of *apologie*. The latter is a sweeping concept unlinked to any direct tie to terrorist action. Until recently, the relevant prohibitions were housed in French media law.¹³² Notably, the direct incitement to terrorism provision resulted in a single conviction between 1994 and

¹²⁶ Olivier Ribbelink, “*Apologie du terrorisme*” and “*incitement to terrorism*”, (Strasbourg: Council of Europe, 2004) at 12 [Council of Europe].

¹²⁷ *Penal Code*, Law No 126, 1930 (Denmark) s 136. See discussion in Council of Europe, *ibid* at 15–17.

¹²⁸ Council of Europe, *ibid* at 44.

¹²⁹ *Penal Code*, Organic Act 10/1995, BOE No 281 (Spain) art 18(1) [*Penal Code* (Spain)]. See discussion in UNSC, *Letter dated 19 March 2007 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council*, UN Doc S/2007/164 (22 March 2007) at 2, online: UNHCR <<http://www.refworld.org/docid/46de9f8c16.html>> [*Letter to UNSC*].

¹³⁰ *Letter to UNSC*, *ibid* at 2, citing *Penal Code* (Spain), *ibid*, art 18(1) (as found in the reformed statute: Organic Act No 7/2007).

¹³¹ *Letter to UNSC*, *ibid* at 2, citing *Penal Code* (Spain), *ibid*, art 578 (as found in the reformed statute: Organic Act No 7/2007).

¹³² *Loi sur la liberté de la presse*, JO, 30 July 1881, arts 23, 24. See discussion in UNSC, *Letter dated 19 July 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council*, S/2006/547 (20 July 2006) at 3, online: <www.geneva-academy.ch/RULAC/pdf_state/France.CTC_report06.pdf>.

2012.¹³³ In comparison, 14 convictions were entered for *apologie* offences.¹³⁴ In five instances, *apologie du terrorisme* was the sole charge.¹³⁵

The most notorious of these cases appears to be that of Denis Leroy.¹³⁶ The accused was prosecuted for producing a cartoon portraying the 9/11 attacks, accompanied with the caption “We have all dreamed of it ... Hamas did it,”¹³⁷ published in a Basque daily newspaper in southern France, days after 9/11. The French authorities charged the cartoonist with complicity in *apologie du terrorisme*. The penal court sentenced Leroy to a fine of 1,500 euros, concluding that the cartoon, with its caption, constituted an unequivocal celebration of murder. The appeal court, for its part, agreed that the cartoon valorized the 9/11 attacks, a holding upheld by the final French court of appeal. Both the appeal court and the *Cour de cassation* rejected claims that the conviction violated free expression protections in Article 10 of the *European Convention on Human Rights*.¹³⁸ The *Leroy* case ultimately reached the European Court of Human Rights on the free expression question, a matter discussed below. In October 2014, France revised and updated its restrictions, criminalizing in its penal law not just direct provocation of terrorist acts but also making public *apologie* for these acts a crime.¹³⁹ The new law also allows a judge to issue a stop order to internet service providers where connected to the criminalized incitement or *apologie* and manifestly illicit.¹⁴⁰

2. UNITED KINGDOM GLORIFICATION OFFENCES

a. Overview

Security Council Resolution 1624, discussed above, followed within weeks of the “7/7” attacks in London, and indeed was sponsored by the UK government. The Blair government also invoked the resolution as partial justification for revamped anti-terrorism measures, including new glorification crimes.

The UK *Terrorism Act 2006* introduced two new offences aimed at speech: “Encouragement of terrorism”¹⁴¹ and “Dissemination of terrorist publications.”¹⁴² Both impose maximum sentences of seven years imprisonment. In both instances, the crimes reach “indirect encouragement,” presumed to include statements or publications that glorify the commission or preparation of terrorism crimes, whether in the past, future, or generally, so long as members of the public could reasonably infer that the glorified behaviour was

¹³³ France, Assemblée Nationale, *Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme*, by M Manuel Valls & M Bernard Cazeneuve, Report No 2110 (9 July 2014) at 13.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* at 14.

¹³⁶ For a summary of the facts see European Court of Human Rights, Press Release, 681, “Chamber Judgment: *Leroy v. France*” (2 October 2008), online: <hudoc.echr.coe.int/eng-press?i=003-2501837-2699727>.

¹³⁷ *Ibid.*

¹³⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 art 10 [*European Convention on Human Rights*].

¹³⁹ France, Assemblée Nationale, “Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme,” *Compte rendu* No 2100 (8 July 2014) (President: Manuel Valls) art 4.

¹⁴⁰ *Ibid.*, art 6.

¹⁴¹ *Supra* note 57, s 1.

¹⁴² *Ibid.*, s 2.

conduct that was to be emulated in the existing circumstances. Glorification “includes any form of praise or celebration, and cognate expressions are to be construed accordingly.”¹⁴³ The publication offence “focuses not on the original publisher but on those who pass the publication on.”¹⁴⁴ It appears to reach Internet service providers (ISPs) and the owners of websites on which people can post statements.¹⁴⁵ In fact, a third provision in the UK Act established detailed rules for statements or publications communicated via the Internet (or electronically).¹⁴⁶ Once a constable gives notice to a person that — in the opinion of the constable — the statement or material is “unlawfully terrorism-related” and that it should be removed from public circulation, a person failing to comply within two days is presumed to endorse the statement or article. In practice, police give this notice in consultation with the Crown Prosecution Service.¹⁴⁷ The presumed endorsement is not an offence in its own right, but does narrow the basis for any defence if the person is then charged with encouragement of terrorism or dissemination of terrorist publications. “Unlawfully terrorism-related” includes material that directly or indirectly encourages or induces the commission, preparation, or instigation of a terrorism act, or which is likely to be useful in the commission or preparation of such acts. As with the two offences described above, glorification is presumptively an indirect encouragement.

The two 2006 offences supplemented another speech-related offence, found in the *Terrorism Act 2000*: “Collection of information.” Under this provision, it is a crime punishable with imprisonment of up to 10 years to collect or make a record of “information of a kind likely to be useful to a person committing or preparing an act of terrorism,” or possessing a document or record containing this sort of information.¹⁴⁸ In 2011, the independent reviewer of terrorism law observed:

Remarkably ... there is no requirement on the prosecution to show that the defendant had a terrorist purpose. The information however “*must, of its very nature, be designed to provide practical assistance*”; and it is a defence to the charge for the defendant to advance a reasonable excuse which the prosecution is unable to rebut. The [Crown Prosecution Service] does not take the view that mere curiosity will always be a reasonable excuse: the curious must thus place their faith in the restrained exercise of prosecutorial discretion.¹⁴⁹

¹⁴³ *Ibid*, s 20(2).

¹⁴⁴ UK, *Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, by David Anderson (London: Her Majesty’s Stationery Office, 2011) at para 10.7 [*Report on the Operation*].

¹⁴⁵ Tufyal Choudhury, “The Terrorism Act 2006: Discouraging Terrorism” in Ivan Hare & James Weinstein, eds, *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009) 463 at 467. *Terrorism Act 2006*, *supra* note 57, s 3.

¹⁴⁶ *Report on the Operation*, *supra* note 144 at para 10.8.

¹⁴⁷ *Terrorism Act 2000* (UK), c 11, s 58(1).

¹⁴⁸ *Report on the Operation*, *supra* note 144 at para 10.12 [footnotes omitted] [emphasis in original].

b. Anti-Terrorism Glorification Crimes in the UK Courts

The UK Home Office reports that between 11 September 2001 and March 2014, there were a total of 460 charges¹⁵⁰ and 220 convictions¹⁵¹ entered under anti-terrorism legislation in Great Britain. Of these, 48 persons were charged with the principal offence of collection of information under the *Terrorism Act 2000*. A total of 33 convictions were entered under this provision.

The *Terrorism Act 2006* came into force in April 2006. Between that time and March 2014, there were four instances in which the principal charges brought against a person were for encouragement of terrorism,¹⁵² and three convictions.¹⁵³ There were also 12 instances where the principal charge was for dissemination of a terrorist publication,¹⁵⁴ and eight convictions.¹⁵⁵

The speech offences have also featured in a number of reported cases from appellate courts. Speaking generally, these matters can be divided into two classes of cases. First, there are those in which the accused is charged with speech offences involving possession or dissemination of custom or self-made AQ-inspired material — sometimes recordings of the accused and confederates engaged in training. In some instances, the speech offence is redundant, in the sense that the behaviour recorded on the video probably amounts to a terrorist preparation offence, and indeed is proof of this crime.¹⁵⁶

In addition (or alternatively), some cases involve videos or other materials portraying things being blown up or people being killed, sometimes with laudatory narrative and sometimes in an instructional manner.¹⁵⁷ Examples would include an “anarchist cookbook” compiling bomb making instructions culled from the Internet,¹⁵⁸ or an AQ-inspired “how to” manual.¹⁵⁹ Some cases involved materials mixing what might be called extremist AQ-inspired polemics with “how to” suggestions on how to commit terrorist acts.¹⁶⁰ All this is the sort of behaviour that almost certainly would also be captured by Canada’s existing “incitement propaganda and operations” (see Figure 1) form of criminalized speech — especially, terrorist instruction, facilitation, and the more generic counselling offences. In other words, Canada can already accomplish what the UK has done in terms of most prosecutions.

¹⁵⁰ UK, Home Office, *Operation of police powers under the Terrorism Act 2000: data tables, financial year ending March 2014*, (28 August 2014) at table A_05a, online: <www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-data-tables-financial-year-ending-march-2014>.

¹⁵¹ *Ibid* at table A_08a.

¹⁵² *Ibid* at table A_05a.

¹⁵³ *Ibid* at table A_08a.

¹⁵⁴ *Ibid* at table A_05a.

¹⁵⁵ *Ibid* at table A_08a.

¹⁵⁶ See e.g. *R v Rahman*, [2008] UKHL 45, [2009] AC 129; *R v Iqbal*, [2010] EWCA Crim 3215, 2010 WL 5625104 [*Iqbal*].

¹⁵⁷ See *Iqbal*, *ibid*; *R v Gul*, [2013] UKSC 64, [2013] 3 WLR 1207 at para 2.

¹⁵⁸ *R v Brown*, [2011] EWCA Crim 2751, [2012] 2 Cr App R (S) 10 at para 14.

¹⁵⁹ *R v Ahmad*, [2012] EWCA Crim 959, [2013] 1 Cr App R (S) 17 at para 11 [*Ahmad*]; *Jobe v United Kingdom* (2011), No 48278/09, 53 EHRR SE17 [*Jobe*].

¹⁶⁰ *Ahmad*, *ibid* at para 11; *R v K*, [2008] EWCA Crim 185, [2008] QB 827.

The more troubling UK prosecutions involve a second class of cases: prosecutions for what might be described as extremist literature.¹⁶¹ A notable example is *R. v. Faraz*, a case in which a bookstore owner who had no role in specific terrorist plots was convicted of both dissemination of terrorist publications and collection of information offences, and sentenced for a term of three years. He then appealed to the Court of Appeal. It is worth reproducing in full the Court of Appeal's description of the materials at issue in the case:

The centrepiece of *Milestones* — *special edition* (count 1) was the work of Sayyid Qutb, a leading member of the Muslim Brotherhood, who was executed in Egypt in 1966 in consequence of his opposition to President Nasser and his suspected involvement in a plot to bring down his Government. The special edition was edited by the defendant in his pen name A B Al-Mehri. It contained a biography of the author of *Milestones*, and nine appendices containing works by various authors. The book was offered for sale in the form in which it was indicted in or about April 2006, some months after the Underground and bus bombings in London on 7 July 2005. The special edition was alleged by the prosecution to be a polemic in favour of the Jihadist movement encouraging violence towards non-believers. *Malcolm X, Bonus Disc* (count 2) was a DVD containing a film about the life of the deceased Muslim leader. It included a number of trailers and other recordings of interviews with the families of men who had died “fighting” US forces in Afghanistan and Israeli forces in the occupied Palestinian territory. It included footage of a suicide bomber driving to his death in Iraq. *21st Century Crusaders* (count 4) was a DVD. It purported to be a documentary focused upon the suffering of Muslims around the world. It included an interview with a masked man who defended terrorist attacks by or on behalf of Al-Qaeda. *The Lofty Mountain* (count 5) included a text written by Abdullah Azzam justifying the expulsion of the Russian occupation of Afghanistan in the 1980s. The work included a biography of Azzam, accounts of the Battle of the Lion's Den in 1987, in which Osama Bin Laden was a volunteer, the biography of a journalist who died while working as a medic in support of the fighters against US forces in Afghanistan in December 2001, and Azzam's account of Bin Laden's role in expelling the Russian army from Afghanistan. *Join the Caravan* (count 6) was a book founded upon a text by Sheikh Azzam. The translator's foreword praised his work and writing. *Defence of the Muslim Lands* (count 7) was also founded upon a text by Sheikh Azzam. Its appendices included a discussion upon the justification for suicide operations in Chechnya. Finally, *The Absent Obligation* (count 8) was a book whose central text was written in the 1970s by Mohammed Abdus Faraj, an Egyptian Muslim, who was implicated in the death of President Anwar Sadat of Egypt and was executed. The text argued for the need for jihad in defence of the Islamic faith against a corrupt ruler.¹⁶²

The accused sold 653 copies of *Milestones*, 424 copies of *Malcolm X*, 56 copies of *21st Century Crusader*, 9 copies of *The Lofty Mountain*, 11 copies of *Join the Caravan*, 27 copies of *Defence of the Muslim Lands*, and 16 copies of *The Absent Obligation*. At trial, two academic experts testified about radicalization, jihad, and the likely effect of the publications in the climate in which they were sold. The prosecution led evidence that several of the publications had been found in the possession of past terrorist plotters, and indeed offered a statistical portrait on this point.

In sentencing, the trial judge told the accused that it was “grossly irresponsible to publish these books in the way that you have published them.... They were published differently to appeal to young people who had recently converted to Islam or became more religiously

¹⁶¹ See in part, *R v Farooqi*, [2013] EWCA Crim 1649, [2014] 1 Cr App R 8 at para 39.
¹⁶² [2012] EWCA Crim 2820, [2013] 1 WLR 2615 at para 8 [*Faraz*].

inclined as they got older.... These books did glorify terrorism. They implied approving of such attacks as 9/11 or 7/7.”¹⁶³

For its part, the Court of Appeal concluded that the use of past cases in which terrorist plotters were found in possession of the impugned publications was unduly prejudicial, since “it is not known (and probably could not be reliably ascertained) how many young Muslim men, *who had no terrorist intentions whatsoever*, possessed the relevant material or other reasonably comparable material.”¹⁶⁴ On this ground, the convictions were quashed.

The Court of Appeal rejected, however, free speech arguments tied to the free expression right in the *European Convention on Human Rights*. This argument focused on count 1, concerning Sayyid Qutb’s *Milestones*. Scholars have called Qutb one of the “intellectual fathers of Islamic fundamentalism.”¹⁶⁵ *Milestones* (as it is known in English) was first published in 1964, and “marked the completion of Qutb’s transition from an Islamist to a radical Islamist and established him as the twentieth century’s most important Islamist thinker and writer.”¹⁶⁶ Among other things, the book propounded a doctrine of jihad as holy war of an offensive (and not purely defensive) nature.¹⁶⁷ Compared by some to Lenin’s *What is to Be Done*,¹⁶⁸ *Milestones* is a revolutionary tract that has clearly influenced Islamist militants, including the terrorist movement led by Osama bin Laden.¹⁶⁹ It is, however, more ideological treatise than a how-to guide to terrorism tools or tactics. Moreover, as these authors can attest, it is readily available — including on Amazon websites.

In *Faraz*, police reportedly alleged that the special edition of *Milestones* there at issue “was developed specifically to promote extremist ideology”.¹⁷⁰ The core question, however, was whether ideological expression (promotional or not) divorced from actual terrorist means or material was protected speech under Article 10 of the *European Convention on Human Rights*.

In *Faraz*, free expression interests attracted surprisingly superficial judicial treatment. Defence counsel urged that the publication was not an encouragement to unlawful terrorist acts, but rather the expression of political and religious opinion. In a view upheld by the appeal court, the trial judge instructed the jury to disregard the defence argument, to the extent it encouraged disregard of the law of England and Wales, as free speech was not absolute.¹⁷¹

¹⁶³ “Bookseller Ahmed Faraz jailed over terror offences,” *BBC News* (13 December 2011), online: <www.bbc.com/news/uk-16171251> [“Bookseller jailed”].

¹⁶⁴ *Faraz*, *supra* note 162 at para 47 [emphasis in original].

¹⁶⁵ Ainslie T Embree, “Utopias in Conflict: Religion and Nationalism in Modern India” in Bassam Tibi, ed, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (Berkeley: University of California Press, 1998) 36 at 42. See also John C Zimmerman, “Sayyid Qutb’s Influence on the 11 September Attacks” (2004) 16:2 *Terrorism & Political Violence* 222 at 222.

¹⁶⁶ Zimmerman, *ibid* at 234.

¹⁶⁷ *Ibid* at 235.

¹⁶⁸ Gilles Kepel, *Allah in the West: Islamic Movements in America and Europe*, translated by Susan Milner (Cambridge: Polity Press, 1997) at 162–63. See also Zimmerman, *ibid* at 234.

¹⁶⁹ Zimmerman, *ibid* at 240–41.

¹⁷⁰ “Bookseller jailed,” *supra* note 163.

¹⁷¹ *Faraz*, *supra* note 162 at para 57.

In the end, Faraz was successful in his appeal, but only because of the Crown's use of prejudicial evidence. Put another way, this was a procedural loss for the government, not a substantive indictment of glorification crimes. The Court voiced no complaint under free speech protections concerning a prosecution mounted against material that, from all accounts, fell squarely within the radicalized boasting, ideological speech, and apologia speech space.

3. GLORIFICATION AND EUROPEAN FREE EXPRESSION RIGHTS

The UK courts' approach in *Faraz* seems likely to satisfy the anemic free speech protections available in European law in the glorification area. As noted, Article 10 of the *European Convention on Human Rights* guarantees freedom of expression. It does so, however, subject "to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, [for example], in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime."¹⁷²

European case law requires that any restriction on free expression be prescribed by law, be justified with reference to one of the recognized limitations, and not be discriminatory. It also imposes a proportionality test, linking the aim pursued and the restriction on free expression, with disproportionate limits viewed as unnecessary in a democratic society.¹⁷³ The European Court of Human Rights has decided a number of cases in which free expression and anti-terrorism were at issue. Several have involved media broadcasts or commercial publications, prompting either state censorship¹⁷⁴ or convictions for illegal hate speech or propaganda.¹⁷⁵

Two more recent decisions have focused expressly on terrorist glorification provisions. In *Leroy* (discussed in detail above) the Court held that the French judge had acted reasonably in restricting free expression in a democratic society, given the modest penalty, the nature of the commentary, its timing in the immediate aftermath of 9/11, the support it lent a tragic crime, and its publication in a region with its own political sensibilities in relation to terrorism.¹⁷⁶ There is no express discussion of proportionality. As one commentator observed, "the Court is more inclined to discuss the idealization of terrorist attacks and the harmful effect of the [cartoon caption].... [I]t is not the speaker who enjoys

¹⁷² *Supra* note 138, art 10(2).

¹⁷³ EC, European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, "Human Rights Concerns Relevant to Legislating on Provocation or Incitement to Terrorism and Related Offences" by Susie Alegre, briefing paper PE 393.283 (Brussels: European Parliament, March 2008) at 1, online: <www.libertysecurity.org/IMG/pdf_HumanRights.pdf>; Council of Europe, Registry of the European Court of Human Rights & Directorate General of Human Rights, *Freedom of Expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights*, edited by Mario Oetheimer, in human rights files, No 18, (Strasbourg: Council of Europe Publishing, 2007) at 9, online: <www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18%282007%29.pdf>.

¹⁷⁴ See e.g. *Brind v United Kingdom* (1994), 77A Eur Comm'n HR DR 42; *Association Ekin v France*, No 39288/98, [2001] VIII ECHR 325.

¹⁷⁵ See e.g. *Sürek and Özdemir v Turkey*, No 23927/94 (8 July 1999) (ECHR); *Gündüz v Turkey*, No 35071/97, [2003] XI ECHR 259 [Gündüz]; *Erdoğan and Ince v Turkey*, No 25067/94, [1999] IV ECHR 187.

¹⁷⁶ *Affaire Leroy c France*, No 36109/03 (2 October 2008) (ECHR) at paras 45–48.

a higher protection due to the right to free speech, but rather the (victimized) audience that needs protection.”¹⁷⁷

In *Jobe*, the defendant was arrested in possession of “extremist Islamist material,” including terrorist training manuals. He was charged under the collection of information offence found in the *Terrorism Act 2000*. He was convicted, and appealed to the House of Lords (as it then was) and then to the European Court. The latter found his free expression complaint “manifestly ill-founded.” Any interference with free expression was both prescribed by law and

justified by the legitimate aims of the interests of national security and the prevention and disorder of crime. It was also necessary in a democratic society, particularly when s. 58 did not criminalise in a blanket manner the collection or possession of material likely to be useful to a person committing or preparing an act of terrorism; it only criminalised collection or possession of that material without a reasonable excuse. In the Court’s view, this is an entirely fair balance to strike.¹⁷⁸

Neither of these judicial discussions truly addressed issues of proportionality as would be required under section 1 of the *Canadian Charter of Rights and Freedoms*, including the requirements of rational connection, least drastic means, and overall balance. They are even perfunctory as compared to earlier Article 10 analyses by the European Court, which accord member states a generous margin of appreciation.¹⁷⁹ The European decisions fail to consider the broader issue of speech chill. Even an offence with a “reasonable excuse” defence deters speech. The risk of prosecution and the notoriety, expense and uncertainty of a trial process would prompt self-censorship among all except the most risk-loving members of the public.

Of note in considering the *Jobe* outcome, in 2011 the UK Independent Reviewer of Terrorism Legislation expressed concern about the *Terrorism Act 2006* speech provisions, describing them as complex and difficult to explain to juries. He also cautioned they had a potential “‘chilling effect’ on legitimate public discourse.”¹⁸⁰ As already noted, the reviewer also raised questions about the scope of the reasonable excuse defence to the collection of information offence, asking whether it would reach mere curiosity and “taking up arms against a tyrannical regime.”¹⁸¹

All told, the contemporary European glorification provisions have never been tested against a civil or human rights framework more demanding than the underwhelming protections in Article 10 of the *European Convention on Human Rights*.

¹⁷⁷ Uladzislau Belavusau, “Experts in Hate Speech Cases: Towards a Higher Standard of Proof in Strasbourg?” in Lukasz Gruszczynski & Wouter Werner, eds, *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford: Oxford University Press, 2014) 254 at 260–61.

¹⁷⁸ *Jobe*, *supra* note 159 at para 10.

¹⁷⁹ Compare e.g. these cases with the extensive necessity analysis conducted in *Gündüz*, *supra* note 175.

¹⁸⁰ *Report on the Operation*, *supra* note 144 at para 10.37 [emphasis in original].

¹⁸¹ *Ibid.*

IV. TERRORISM SPEECH CRIMES AND CONSTITUTIONAL PROTECTION OF FREE EXPRESSION

We turn now to the new speech crime proposed in Bill C-51, how it compares to glorification offences, and how it might be received in Canadian constitutional law.

A. BILL C-51'S NEW SPEECH OFFENCE

Despite its initial interest in European-style glorification offences, the government decided to pursue a different course, possibly inspired by an Australian offence enacted in 2014.¹⁸² Bill C-51 adds a fifteenth terrorism offence to the *Criminal Code* as section 83.221. It provides:

Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general — other than an offence under this section — while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.¹⁸³

The government has argued that this crime is necessary because existing offences will not capture active encouragement that “unspecified action should be taken to do something bad against Canadians or our allies, or to do something to support extreme jihadism.”¹⁸⁴ In other words, the new offence probably does not reach apologetics in the same way European glorification offences do. But it seems very likely to reach into the zone of speech that we have called “radicalized boasting” by criminalizing speech that does not directly incite terrorism offences or provide operational instructions for such crimes. The net effect is to reach further towards the core of free speech, a matter we discuss further below.

First, though, in this section we focus on the *actus reus* of the new offence, and the government's use of the *mens rea* elements of “knowledge” and “recklessness.”

1. A BROAD *ACTUS REUS* OF ADVOCATING TERRORISM OFFENCES IN GENERAL

a. Sort of Speech Covered

The new offence applies to statements. “Statements,” as defined in the *Criminal Code*, are “words spoken or written or recorded electronically ... gestures, signs or other visible representations.”¹⁸⁵ Thus, all statements whether written or oral or videotaped can be subject to the offence, and this could include signs and placards carried at public demonstrations. But the new offence also reaches purely private statements, made outside of the public space.

¹⁸² *Criminal Code Act 1995* (Cth), s 80.2C, as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), s 61.

¹⁸³ Bill C-51, *supra* note 3, cl 16, amending *Criminal Code*, *supra* note 3, s 83.221(1).

¹⁸⁴ *Misconception about the new advocacy offence*, *supra* note 7.

¹⁸⁵ *Criminal Code*, *supra* note 3, s 319(7) (this definition is incorporated in the new s 83.221 offence: *ibid*, s 83.221(2)).

This approach compares poorly with some other Canadian speech crimes. For instance, under the wilful promotion of hate speech offence in section 319(2) of the *Criminal Code*, private statements are exempted.

The astonishing reach of a broad new terror crime reaching purely private statements has obvious privacy implications. The wrong kind of purely private speech now becomes a crime, per se, and is now a topic for police surveillance through electronic intercept warrants.

It is also worth noting the extended orbit of the new crime; it extends beyond speakers. Those who attempt, assist, or conspire with others to communicate statements could be culpable, even though such extensions of criminal liability are specifically precluded under the Australian offence that may be the model for the new Canadian offence. Such a structure may make it more likely that the nexus between speech and actions that contribute to actual violence could become even more tenuous under the Canadian approach.

b. Concepts of “Advocate” and “Promote”

Furthermore, unlike in the Australian advocacy offence,¹⁸⁶ there is no definition of “advocate” in the Canadian offence. In *R. v. Sharpe*, the Supreme Court noted that the word “advocate” is not defined in the *Criminal Code*.¹⁸⁷ It defined “advocate” as “actively inducing” or “encouraging” (in that case) sexual activity with underage children.

“Promotes” is also not defined in the *Criminal Code*. In *Mugesera*, the Supreme Court stated in relation to the offence of wilful promotion of hatred that “[p]romotes’ means actively supports or instigates. More than mere encouragement is required.”¹⁸⁸

In discussions around the Bill, the government has relied upon these judicial interpretations of the terms in asserting that their meaning is understood. At the same time, a holistic approach must be taken to statutory interpretation. It is one thing to understand what is meant by advocating sexual activity with children or promoting hatred. It is quite another to determine with precision the scope of advocating or promoting “terrorism offences in general.”

In this respect, it is a serious mistake to “cut-and-paste” language from the hate crime and child pornography context and assume that it shall have the same meaning in the new provision. Unlike hate crime and child pornography provisions, the new provision is linked to extremely broad terrorism offences that already, in their reliance on concepts such as instruction, facilitation, participation, incitement, and threatening, reach substantial speech conduct.

¹⁸⁶ “Advocates” is defined in the Australian offence as “counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence” (*Criminal Code Act 1995*, *supra* note 182, s 80.2C(3) as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, *supra* note 182, s 61).

¹⁸⁷ 2001 SCC 2, [2001] 1 SCR 45 at para 56.

¹⁸⁸ *Supra* note 88 at para 101, citing *Keegstra*, *supra* note 89 at 776–77.

Basic statutory interpretation doctrine suggests that Parliament knows this, and must intend the new provision to reach beyond the already broad range of speech covered by these existing offences. Put another way, the cut-and-paste language may be pushed beyond its meaning in the hate crimes and child pornography offences by its redeployment as an anti-terror tool.

c. Concept of “Terrorism Offences in General”

The government also made a clear choice not to limit the offence to the advocacy and promotion of the more familiar term “terrorist activity” that, as discussed above, is already embedded in most terrorism offences. Instead it selected the term “terrorism offences in general” that includes all terrorism offences except the new advocacy offence itself.¹⁸⁹

The breadth of the term “terrorism offence in general” is troubling. The Justice Department backgrounder describing the new offence and justifying its reach argues “the current law would not necessarily apply to someone who instructs others to ‘carry out attacks on Canada’ because no specific terrorism offence is singled out.”¹⁹⁰

We are puzzled by this logic since it simply is not the case that the present terrorism offences depend on the accused being specific about the nature of the terrorist activity. If someone calls for Canada to be attacked, we have no reason to believe that the existing instruction offence is inevitably unavailable. This is especially true given section 83.22(2) — a provision that broadens the instruction offence so that a person can be guilty without even knowing the identity of those who are instructed.

Moreover, even if we are wrong and the existing offences do not apply to general calls to attack Canada, they could be clarified without creating a broad “new advocacy of terrorism offence in general” offence.

2. THE LIMITED RESTRAINING REQUIREMENT OF THE FAULT REQUIREMENTS

The government has selected the fault requirements of “knowingly” advocate and “recklessness” about whether a terrorism offence may be committed as a result of the communication. It has defended this doubtful approach on the basis that knowledge and recklessness “are valid *mens rea* concepts for the offence of counselling. They are, therefore, equally valid concepts for the proposed offence of advocating or promoting terrorism offences in general.”¹⁹¹

The government is correct that knowledge and recklessness are valid forms of subjective fault, but fault cannot be assessed in the abstract, but rather in relation to the prohibited act — in this case the expansive concept of “terrorism offences in general” discussed above.

¹⁸⁹ We assume that this exclusion means that one could not be convicted for communicating statements that advocate or promote the communication of statements that in turn advocate or promote terrorism.

¹⁹⁰ Canada, Department of Justice, “Criminalizing the Advocacy or Promotion of Terrorism Offences in General,” (Ottawa: DJ, 30 January 2015), online: <news.gc.ca/web/article-en.do?nid= 926049>.

¹⁹¹ *Misconception about the new offence of advocating terrorism, supra* note 7.

Under the new offence, the Crown must prove beyond a reasonable doubt that the accused knowingly advocates or promotes the commission of terrorism offences in general. In most cases, it seems likely that an accused will “know” the import of the statements that he or she has made, even if he or she does not desire a particular pernicious outcome. As such, this *mens rea* requirement will frequently be satisfied, and does not depend on the accused actually desiring a particular outcome.

The dangers of weakened “desire-free” *mens rea* or fault requirements have attracted commentary in other situations. A landmark US case affirmed that a person can be guilty of providing material support of terrorism, even if he or she only provides support with the intent to assist the humanitarian efforts of a listed terrorist group.¹⁹² Chief Justice Roberts stressed that there was no alternative because “Congress plainly spoke to the necessary mental state for a violation ... and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.”¹⁹³ Justice Breyer in his dissent warned that this logic had “no natural stopping point,” and that even a lawyer acting for a group might be said to have knowingly supported a terrorist group.¹⁹⁴

Similarly, the use of the word “knowing” as opposed to “wilfully” or “for the purpose of” in the new speech offence greatly broadens it relative to existing analogues. For instance, although the government has claimed that the offence is modelled in part on the hate speech provision, the latter speaks of “wilful” promotion of hatred in section 319(2) of the *Criminal Code*. In *Keegstra*, the Supreme Court of Canada narrowly upheld the main hate speech offence of section 319(2) of the *Criminal Code*, but stressed that its restrictions on freedom of expression were reasonable and proportionate in large part because of the requirement of proof that the accused “wilfully” promoted hatred.¹⁹⁵

More recently, the Supreme Court rejected the idea that lawyers and doctors could be guilty of the Canadian “participation” in a terrorist group offence. However, the Court stressed that this would be so because the section 83.18 “participation” offence required proof of a purpose to assist terrorism.¹⁹⁶

¹⁹² *Holder (AG) v Humanitarian Law Project*, 561 US 1 at 37–38 (2010).

¹⁹³ *Ibid* at 16–17.

¹⁹⁴ *Ibid* at 49.

¹⁹⁵ *Keegstra*, *supra* note 89, Dickson CJC (the majority endorsed a definition from Justice Martin of the Ontario Court of Appeal that views “wilful” as being “satisfied only where an accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose” at 774–75 [citations omitted]).

¹⁹⁶ *Khawaja*, *supra* note 109 at para 42, citing Kent Roach, “The New Terrorism Offences and the Criminal Law” in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 151 at 161. The Court stressed that, “to be convicted, an individual must not only participate in or contribute to a terrorist activity ‘knowingly,’ his or her actions must also be undertaken ‘for the purpose’ of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity” (*Khawaja*, *supra* note 109 at paras 45–46). The use of the words “for the purpose of” in section 83.18 may be interpreted as requiring a “higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity” (Kent Roach, “Terrorism Offences and the Charter: A Comment on R. v. Khawaja” (2007) 11 Can Crim LR 271 at 285). To have the subjective purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, the accused must specifically intend his actions to have this general effect. The specific nature of the terrorist activity, for example the death of a person from a bombing, need not be intended; all that need be intended is that his action will enhance the ability of the terrorist group to carry out or facilitate a terrorist activity. Note that it has been argued elsewhere that subjective *mens rea* offences will only truly restrain the ambit of terrorism offences if they require proof of a terrorist purpose, and not simply knowledge or recklessness that there may be a result lying within one of the broadly defined terrorism offences: see Kent Roach, “Terrorism” in

In contrast, the new speech offence does not require a clear terrorist purpose. It only requires that the accused knowingly advocate or promote terrorism and is aware of a mere possibility that someone (perhaps a deluded or mentally instable person) may commit a terrorism offence as a result of the communication.

B. FREE SPEECH PROTECTION

1. FREE SPEECH LAW OVERVIEW

We turn now to free speech issues. Section 2(b) of the *Charter* guarantees everyone “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” Speaking generally, the Supreme Court of Canada has defined the breadth of this right widely, allowing government constraint on speech only when justified under section 1 of the *Charter* as necessary in a free and democratic society.

In deciding whether a given expression falls within the category protected by section 2(b), the court first considers whether the impugned conduct was “performed to convey a meaning.”¹⁹⁷ Expression is protected, regardless of content — “the term ‘expression’ as used in s. 2(b) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed.”¹⁹⁸ However, some forms of expression are excluded from protection because of the method or location of expression. Such exclusion only arises where the method or location “conflicts with the values protected by s. 2(b), namely self-fulfilment, democratic discourse and truth finding.”¹⁹⁹ Violence or threats of violence, for instance, may convey a meaning, but this method of expression is excluded from the scope of constitutional protection.²⁰⁰ Last, the court must consider whether government action has as its purpose or effect the infringement of protected expression.²⁰¹

A full-fledged UK or French-style glorification crime would indisputably target expression that conveys meaning — and specifically, the radicalized boasting, apologia and ideological speech illustrated in Figure 1. The new Bill C-51 speech crime is less aggressive, but it does reach toward the core of free speech by wrapping at least radicalized boasting into its orbit. The only real issue under section 2(b), therefore, is whether the expression condemned by this offence is excluded from constitutional protections. We do not think it is, and the extent the new speech offence restricts or chills this expression, the law is unconstitutional.

Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 812 at 828–29.

¹⁹⁷ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969. See also *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19 at para 34 [*Canadian Broadcasting Corp*].

¹⁹⁸ *Keegstra*, *supra* note 89 at 729 [citations omitted].

¹⁹⁹ *Canadian Broadcasting Corp*, *supra* note 197 at para 37 [citations omitted].

²⁰⁰ *Ibid* at para 35; *Khawaja*, *supra* note 109 at para 70.

²⁰¹ *Canadian Broadcasting Corp*, *supra* note 197 at para 38.

2. DOES THE NEW SPEECH OFFENCE VIOLATE SECTION 2 OF THE *CHARTER*?

The government will likely argue that the new speech offence does not violate section 2(b) of the *Charter* on the basis that actively inducing or encouraging the commission of terrorism offences is not protected expression. That is because it constitutes threats of violence or is a “thing directed at violence.”²⁰²

As already noted, violence and threats of violence are not protected forms of expression. For instance, the conduct declared “terrorist activity” in section 83.01 of the *Criminal Code* mostly comprises acts of violence or incitement or threats of violence. That conduct would generally fall outside the scope of expression protected by section 2(b), including the extension of terrorist activity to include the threatening of terrorist activities. Likewise, counselling, conspiring, or being an accessory after the fact is “intimately connected to violence — and to the danger to Canadian society that such violence represents.”²⁰³ Acts of expression constituting these offences are not, therefore, protected by section 2(b).

The government could have bolstered its position on section 2(b) by adhering to these established legal concepts. Specifically, it might have dramatically reduced the risk of *Charter* invalidation of its new speech offence by basing it on the already constitutionally approved concept of “terrorist activity,” as defined in the *Criminal Code*.

Instead, the government chose the broader and unknown phrase of “terrorism offences in general,” a concept that clearly includes offences not closely tied to immediate violence or threats of violence (such as terrorism financing). The vagueness of this concept should be read alongside the government’s explanation of what exactly it wishes to target: “nebulous” statements “actively encourage[ing] that some sort of unspecified action should be taken to do something bad against Canadians or our allies, or to do something to support extreme jihadism.”²⁰⁴

Given all this, the speech offence clearly reaches well beyond what we call “incitement propaganda and operations.” As noted, we suspect it is more than capable of capturing speech, at a minimum, in the radicalized boasting zone. This is important. Despite concluding that threats of violence are not protected forms of expression, the Court has never suggested that the sort of speech captured by the concepts of radicalized boasting, apologia or ideological speech falls outside of the protected zone of section 2(b). This is speech that has no firm anchor in violence or threats of violence — indeed the statistical evidence discussed in Part II points to extremely weak correlations between such forms of speech and violence.

We doubt the Court will now expand its willingness to exclude some forms of expression from section 2(b) to disallow radicalized boasting, apologia, or ideological speech constitutional protection. In past jurisprudence, the Supreme Court’s rationale for excluding threats of violence from expression has been that threats, no less than violence, “take away

²⁰² *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at para 108.

²⁰³ *Khawaja*, *supra* note 109 at para 71.

²⁰⁴ *Misconception about the new advocacy offence*, *supra* note 7.

free choice and undermine freedom of action. They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression.”²⁰⁵

The advocacy or promotion penalized by the new crime leaves the listener with a choice. You can advocate and promote “terrorism offences in general,” especially in some foreign land, without voicing a threat to do violence. To say “freedom fighters in the Ukraine should resist the Russian occupation with violence, even if it means bringing the conflict to Russian cities” does not directly threaten violence. It merely advances an argument in favour of that violence, leaving it to the listener to be persuaded or not of its merits. This is exactly the substance of free speech: the idea need not be palatable, but it remains an idea. David Schneiderman has likewise concluded that “[i]t would be surprising ... if the Court were to exempt speech from section 2(b) protection that is so far removed from threats of actual violence.”²⁰⁶

Our conclusion that the new speech crime covers expression protected under section 2(b) is bolstered by a number of other contextual factors.

First, the new concepts of “advocacy” or “promote” reach beyond the current concepts of “instruct,” “threaten,” and “counsel” found in the definition of terrorist activity. The fact that the new offence must be purposively interpreted as going beyond existing laws that criminalize both incitement and threats of terrorism is another reason why the Supreme Court should hold that the new offence has encroached into protected speech.

Second the offence cuts into protected expression because the government has deliberately omitted a range of defences for legitimate expression similar to those found in sections 83.01(1.1) and 319(3) of the *Criminal Code*. Section 83.01(1.1) was added as an amendment after the original post 9/11 anti-terrorism law was introduced into Parliament. It provides that “the expression of a political, religious or ideological thought, belief or opinion” does not come under the definition of “terrorist activity” under section 83.01(1.1)(b) “unless ... it satisfies the criteria of that paragraph.” This limited defence, as well as the limited armed conflict exception in section 83.01 of the *Criminal Code*, may be read into the new speech offence, but only to the extent that the concept of “terrorist activity” is incorporated in the reference to “terrorism offences in general.”

Not all terrorism offences as defined in the *Criminal Code* incorporate the concept of terrorist activity with its thought, belief and opinion, and armed conflict exceptions. For example, a terrorism financing offence need not involve a terrorist activity.²⁰⁷ Thus, a person who knowingly advocates or promotes the terrorist offence of giving funds to promote even the non-violent activities of a terrorist group would not have the advantage of any of these limited exemptions and could run afoul of the new speech offence.

Another relevant omission is that the offence does not contain the exemptions for good faith expression found in section 319(3) of the *Criminal Code*. The government has

²⁰⁵ *Khawaja, supra* note 109 at para 70 [citations omitted].

²⁰⁶ Schneiderman, *supra* note 5 at 165.

²⁰⁷ *Criminal Code, supra* note 3, s 83.02(b).

suggested that these exemptions are not appropriate because they also do not apply to offences of advocating genocide or to counselling offences. But a recurring flaw in the government's defence of the law is its underestimation of the effects of the broad reference to "terrorism offences in general" in this new offence. The advocacy of genocide or the counselling of crimes generally refer to determinate, relatively precise, and reasonably well understood and circumscribed concepts. In comparison, the reference to terrorism offences is novel, uncertain, vague, and (even in the government's explanation of it) broad and sweeping.

It is very likely, in this circumstance, that statements falling within the orbit of this new speech will have much more legitimacy as a form of expression than they would in the genocide or counselling context. To put it more concretely, there is a world of difference between saying "Tutsis should be massacred" versus "throwing off the yolk where people oppressed deserve our support, even where it requires violence" or "the African National Congress was right to use force against the Apartheid regime and deserves our support." In other words, it is much more likely that a person charged under the new speech offence might be able to establish that some of the statements made were true, or for the public benefit, or were good faith arguments of "an opinion on a religious subject or an opinion based on a belief in a religious text."²⁰⁸

Unlike those hate crimes analogues that do apply to private speech, these kind of defences are simply unavailable under the new speech offence. We believe that this is another reason to conclude that the new speech offence violates fundamental freedoms protected under section 2 of the *Charter*.

Finally, we note that the consent of the Attorney General of Canada or a provincial Attorney General is required for a prosecution under the new speech offence.²⁰⁹

At the same time, the Court has more recently affirmed that it cannot dismiss reasonable constitutional challenges by assuming an enlightened exercise of prosecutorial discretion, especially given that prosecutorial discretion is reviewed by the courts on deferential abuse of process grounds.²¹⁰ In other words, the fact that certain extra internal, bureaucratic checks and balances exist before prosecutions are brought is probably no answer to the concern that the new speech crime will have a chilling effect on a range of free speech. This would be yet another reason to conclude that the new offence violates section 2(b) of the *Charter*.

3. ATTEMPTS TO JUSTIFY THE SPEECH CRIME UNDER SECTION 1

Even if criminalizing the new speech crime violated section 2(b), the offence might be saved under section 1, as was the case with hate speech.²¹¹ Under the *Oakes* test, section 1 may save a rights-impairing measure where the government proves that the measure has an

²⁰⁸ *Ibid.*, s 319(3)(b).

²⁰⁹ *Criminal Code*, *supra* note 3, s 83.24.

²¹⁰ *R v Nur*, 2015 SCC 15, 385 DLR (4th) 1 at para 91.

²¹¹ *Keegstra*, *supra* note 89.

important objective, that there is a rational connection between the objective and the means, that there is a minimal impairment of the right in question, and that there is proportionality between the impact on the right and the benefits of the measure in question.²¹²

a. Important Objective

The government may argue that the objective of the new speech crime, much like the objective of the *Security of Canada Information Sharing Act* also contained in Bill C-51,²¹³ is related to all possible threats to the security of Canada and not simply the prevention of terrorism. Such a broad objective might also include preventing radicalization and extremism.

The Supreme Court, however, has stressed the need for governmental objectives to be defined “as precisely and specifically as possible”²¹⁴ and to avoid “vague and symbolic objectives”²¹⁵ that make it difficult to conduct the section 1 analysis in a rational and evidence-based manner. Specifically, the Court in 2004 read the objective of the *Anti-Terrorism Act, 2001* as the prosecution and prevention of terrorism offences, as opposed to the government’s broader proposed purpose of securing “national security.” It warned

[C]ourts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm. While the threat posed by terrorism is certainly more tangible in the aftermath of global events such as those perpetrated in the United States, and since then elsewhere, including very recently in Spain, we must not lose sight of the particular aims of the legislation.²¹⁶

Given the above, we would argue that the purpose of the new offence should be seen as the prevention of terrorism and terrorism offences. This means that the social science evidence outlined in Part I of this article suggesting a loose connection between speech and actual terrorist activity should be relevant to the section 1 analysis. In other words, just because persons are exposed to speech that advocates or promotes terrorism offences does not mean that they will necessarily or even generally commit such offences.

We would add that positing a government objective of “countering extremism” poses its own risk for the government position. That is because, as we discuss below, it is entirely likely that the new offence acts at cross-purposes to an objective of preventing radicalization and extremism.

²¹² *R v Oakes*, [1986] 1 SCR 103.

²¹³ Bill C-51, *supra* note 3, Part I.

²¹⁴ *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 98 [*Thomson Newspapers*].

²¹⁵ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 at para 22.

²¹⁶ *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 SCR 248 at para 39.

b. Rational Connection²¹⁷

As we have noted in Part II, the social science evidence suggests that the causal correlation between ideological speech, and even apologia or radicalized boasting, and terrorist activity is not at all a close or firm one. The available evidence suggests that most who are exposed to extremist speech and or who hold extremist attitudes will not make the choice to engage in violence. It might be very difficult indeed, as an evidentiary matter, to establish a rational connection between the offence and the actual prevention of terrorism offences.

Moreover, the literature noted above suggests that counter-violent extremism (CVE) programs may be our most important tool against radicalization to violence. But this initiative depends on willing participation by community members, especially those in the Muslim community given present preoccupations with AQ- and ISIS-inspired terrorism. Effective CVE programs require ample “pre-criminal space” in which those with radical views — but who show no violent tendencies — are able to voice their views. Put another way, it is a venue that must allow for radicalized boasting, if only to establish the errors and the dangers of such speech.

During CVE events, participants who are not themselves violent may make statements like “use of violence in defence of Islam is just and religiously sanctified and should be supported” or “bad things should be done to Canada because of its foreign policy.” These participants may be well aware that others at the CVE events may commit some form of terrorist offence, including sending money to a terrorist group.

After enactment of the new speech crime, “pre-criminal” CVE space could become a “criminal space,” and participation in these key counter-extremism events may be curtailed. A crime that undermines what may be the most important counter-radicalization tool by outlawing radicalized boasting seems unlikely to fare well under a rational connection test.

That said, we recognize that courts frequently defer at this preliminary stage of rational connection and might decline to second guess the government’s judgment on this matter, despite the absence of any real evidence supporting the government’s position.

c. Minimum Impairment²¹⁸

The critical obstacle to justifying the advocacy offence would be the need for the government to establish that it could not pursue its objectives as effectively by less rights-invasive means. As suggested in Part III of this article, if the government’s objective is to forestall terrorism, there are obvious alternative measures that do that without violating

²¹⁷ For a recent discussion of the rational connection requirement see *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3 at para 143.

²¹⁸ For a recent discussion of the minimal impairment requirement see *ibid* at para 149.

freedom of expression, or do so in a manner that is more clearly connected to actual harm. These include criminal prosecution under the existing law, as well as the hate and incitement provisions, and the new attempting to leave Canada to participate, facilitate, or commit terrorist activities offences. These are tools that comply with the *Charter*, and whose reach has not yet been fully explored by the government given the paucity of charges brought in this area.

The fact that these offences have not been used in this manner does not mean that the potential to apply the offences would not be considered under a section 1 analysis. For instance, in striking down the false news provision of the *Criminal Code*, the Court paid much attention to the less restrictive alternative of hate propaganda prosecutions even though these prosecutions are relatively rare.²¹⁹

d. Proportionality and Overall Balance

Even in the unlikely event that the Court did accept that there were no less drastic means of preventing terrorism and targeting terrorist speech, it has increasingly been prepared to compare the overall benefits of a rights infringing measure with its harmful effects.²²⁰ At the same time, the section 1 test has been refined to ask a more nuanced question: Are the harmful effects proportionate to not only the objective of the measure, but also “the salutary effects that actually result from its implementation”?²²¹ In answering this admittedly difficult and speculative question, courts should be attentive to failed opportunities to employ existing criminal offences. These existing laws may accomplish the same salutary counter-terrorism effects with much less violence to the *Charter*.

We recognize that the government does not have to provide proof positive that a new offence will prevent terrorism, but it does have to provide “reason and the evidence” in support of the rights-limiting measures.²²² It must also demonstrate that its anticipated benefits are proportionate to its harms. The benefits of the new offence are speculative whereas its harms to freedom of expression are manifest.

The new speech offence would penalize substantial amounts of expression, far removed, and not often causally related to terrorist activity. The chill effect on speech would be potentially enormous, and the scope of intrusive police investigation expanded. The preoccupation with AQ- and ISIS-inspired violence would single out a particular subset of Canadian society disproportionately; that is, the Muslim community. Unlike the religious and motive requirement in the definition of terrorist activities upheld in *Khawaja*,²²³ the new

²¹⁹ *R v Zundel*, [1992] 2 SCR 731 at 766–67.

²²⁰ For example, the Court has recognized that, while a ban of publishing opinion polls within 72 hours of an election may be the least restrictive means of preventing harms caused by inaccurate polls, the benefits achieved by the law were “marginal” compared to the “substantial” harms that the law caused to freedom of expression: see *Thomson Newspapers*, *supra* note 214 at para 129.

²²¹ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 887 [emphasis omitted].

²²² *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 85.

²²³ *Khawaja*, *supra* note 109 at para 83.

speech offence would have a very direct impact on chilling speech by outright criminalizing radicalized boasting. This may be massively counterproductive. CVE programs may be undermined, and the very speech that may contain strategic and tactical intelligence for counter-terrorism investigators may diminish.

In sum, the new speech crime could criminalize the expression of radical and unpopular sentiments that are not closely connected with violence, threats or incitement of violence, or operational communications that would facilitate terrorist activities. It could criminalize those who urge people to financially support the humanitarian activities of groups either listed as terrorist entities or who may be engaged in the use of force in civil wars, but who do not meet the strict “armed conflict” defence in the definition of “terrorist activity.”

By virtue of the inchoate parties-to-offences and conspiracy provisions that apply to all criminal offences, the new speech offence could criminalize those who simply assist others to convey such messages, provided they have knowledge of the measures and are subjectively aware of the possibility that some person (regardless of their mental state) may commit any or an infinite number of terrorism offences as a result of the communication.

It would not matter if the statements were made in private. It would not matter if the statements were true or expressions of religious or political opinions. The new offence is constitutionally overbroad compared to existing offences and it presents substantial downside risks with very little upside benefits. In that respect, the measure is grossly disproportionate.

C. SALVAGING THE CONSTITUTIONAL ASPECTS OF THE DELETION OF TERRORIST PROPAGANDA PROVISIONS

For all of the reasons set out above, we do not favour the new speech crime. We do not, however, wish in this article simply to condemn Bill C-51 and offer no constructive suggestions with respect to what we accept is a real and increasing security threat. As discussed in Part II of this article, there is obvious merit in pursuing the counter-narrative and demanding minimization strategies with respect to extremist speech. Indeed one of our concerns about the new speech crime is that it could make it more difficult for officials to engage with those who hold extremist views and as such are at risk (but far from probability) of being motivated towards violence. The additional question we pose here is whether there is merit in an additional, more modest legal reform; one that does not go so far as to ban speech currently lying well within the zone of protected speech, but which renders more effective the existing rules capable of reaching terrorist propaganda-style speech.

We have already described the considerable potency of combined rules on uttering threats, counselling an offence, hate crimes, and terrorist crimes. Outside of the hate crimes context, however, there is little the government can do in response to this sort of criminalized speech, other than prosecute those who speak in this fashion. Such a response raises obvious practical difficulties, for example, regarding the Internet world where the speaker may lie beyond the reach of the Canadian state.

Uniquely for hate crimes, however, the government may compel (through a court process) the destruction of printed material,²²⁴ or the deletion of such material housed online.²²⁵ An important feature of the latter *in rem* (or “against the thing”) provision is that it only requires proof on a balance of probabilities that the speech in question constitutes publicly-available hate propaganda.²²⁶

1. DELETION ORDERS

Bill C-51 builds on this precedent and adds a new *Criminal Code* provision that allows for the deletion of “terrorist propaganda” from the Internet after a contested hearing before a superior court or, in Quebec, a judge of the Court of Quebec.²²⁷

Unfortunately, however, the new terrorist propaganda deletion procedures added by Bill C-51 do not stop at the deletion of material that is already criminal, but piggyback on the new speech crime. They provide for the deletion of material that advocates or promotes terrorism offences in general. This raises all the issues discussed above about the overbreadth of the new offence and its potential to infringe freedom of expression. Moreover, unlike the new speech crime, section 83.223(5) only requires proof that the material constitutes “terrorist propaganda” on a balance of probabilities.

On the other hand, we support the reference in the proposed Bill C-51 provisions for deleting material “that counsels the commission of a terrorist offence.” This phrase contains well-understood legal concepts. It allows for the deletion of speech that is already criminal because it solicits, incites, or counsels the commission of a terrorist offence. A video that tried to solicit people to bomb is already criminal. Same a video that seeks to recruit persons to a terrorist activity or group. This speech would likely not be protected as freedom of expression under current Supreme Court jurisprudence.

It may be that this speech is located on servers far outside Canadian control, and cannot be truly removed from the Internet. But there is no reason why Internet service providers and search engine companies who do operate in Canada should not be enlisted through judicial order to minimize the reach of this material in Canada — that is, “hide” it from Canadian Internet users in manners analogous to the European “right to be forgotten” approach.

In sum, we see no reason why such material should not be deleted (to the extent possible) from the Internet, with the safeguards of a judicial authorization. Indeed we would even support an expansion of this provision to include material that instructs the commission of a terrorist activity.

²²⁴ *Criminal Code*, *supra* note 3, s 320.

²²⁵ *Ibid*, s 320.1.

²²⁶ *Ibid*, s 320.1(5).

²²⁷ Bill C-51, *supra* note 3, cl 16, amending *Criminal Code*, *ibid*, s 83.222(8) to incorporate the definition of “judge” in section 320(8) of the *Criminal Code*.

But we add a procedural proviso. In our view, Internet providers or civil society groups should be able to act as a form of special advocate to ensure adversarial challenge and sufficient respect for freedom of expression values in determining whether the Internet speech in question constitutes hate speech or a terrorist offence. We would add that judicial deletion judgments should be published and be subject to appeal. In this way, concerns about government overreach can be monitored. In addition, the values of public denunciation and deterrence of truly criminal speech would be maximized.

We note that Bill C-51's new section 83.233 appropriately provides for notice and broad rights of appeals from decisions about deletion orders and that a deletion order will not take effect until the appeal period has expired. However, we fear deletion hearings will frequently be one-sided hearings. This is because notice and appeal rights are restricted to the person who posted the material. Such a person will be at risk of prosecution for committing the new speech offence, and is hardly likely to appear to participate in an adversarial challenge to deletion proceedings. Even in cases where deletion applications raise novel and important points of law about what may constitute "terrorist propaganda," there may be no adversarial challenge at first instance and no appeal, even though a legal error by the issuing judge could both delete legitimate material and chill freedom of expression. This underlines the importance of judges being able to appoint *amicus curiae* to provide an adversarial challenge to government requests for deletion orders.

2. THE RISK OF END RUNS AROUND OPEN COURT DELETION ORDERS

a. Executive Deletion

We add another proviso. The lack of reported decisions on deletion of hate propaganda from the Internet since 2001 as well as the experience with executive-based deletion procedure under 2006 UK legislation leads us to have concerns that even if enacted, the new deletion orders will be rarely used. Rather than seek judicial orders, security officials may consult Internet providers and those in Canada known to post "terrorist propaganda" on the Internet and ask them to voluntarily delete or otherwise hide the material.

Such informal methods will escape judicial supervision and could involve demands to delete material that might be protected expression. The likelihood of such informal negotiation in the shadow of the law underlines the importance of adequate independent review of the security officials who may invoke the new terrorist propaganda deletion procedures.

These concerns are magnified by the prospect that, under a little noticed consequential amendment in Bill C-51, customs officials will become empowered to determine what is terrorist propaganda and to seize such material.²²⁸ This material would be seized under a

²²⁸ Bill C-51, *supra* note 3, cl 31, amending the Schedule to the *Customs Tariff*, SC 1997, c 36 at tariff item No 9899.00.00.

customs tariff that is now used to allow customs officials to seize and retain obscene material and hate propaganda at the border. This is typically done without a judicial order, in recognition of reduced privacy expectations at the border.²²⁹ The relevant customs directive provides for detention of material for up to 30 days while decisions are made about whether the material is prohibited from entering Canada.²³⁰

The Supreme Court of Canada determined in the first *Little Sisters Bookstore* case that customs officials had violated both freedom of expression and equality rights by targeting and retaining material imported by a gay and lesbian book store while allowing the same material destined to other sellers to enter the country.²³¹

It is not far-fetched to think that similar issues and claims of discriminatory profiling and violations of fundamental freedoms might be made in relation to the new category of terrorist propaganda — a concept even more complex and ambiguous than the obscenity provisions that were wrongly enforced by customs officials. It should also be noted that problems continued even after the Supreme Court ruling, but were not fully litigated after the Supreme Court denied *Little Sisters* advanced costs that were necessary to engage in another costly round of litigation.²³² And yet, the courts may provide the only recourse because the Canadian Border Services Agency is not subject to scrutiny by an independent review body. It must be underscored that all of Bill C-51 is enacted in what is already a deficient accountability and review environment. We note that four former Prime Ministers, retired Supreme Court judges, and former security reviewers and privacy commissioners raised concerns about Canada's inadequate review structure while Bill C-51 was being debated, but to no avail.²³³

²²⁹ *R v Simmons*, [1988] 2 SCR 495 at 527–28.

²³⁰ Canada Border Services Agency, “Memorandum D9-1-1: Canada Border Services Agency’s Policy on the Classification of Obscene Material” (Ottawa: CBSA, 26 October 2012), online: <www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-1-eng.pdf>. See also Canada Border Services Agency, “Memorandum D9-1-15: Canada Border Services Agency’s Policy on the Classification of Hate Propaganda, Seditious and Treason” (Ottawa: CBSA, 14 February 2008), online: <www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-15-eng.pdf>. The latter memorandum quite broadly defines hate propaganda that can be seized (*ibid* at para 8). At the same time, the memorandum recognizes a variety of defences to both seditious and hate propaganda material that would not be available for the new category of terrorist propaganda (*ibid* at paras 11–12).

²³¹ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120.
²³² *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38.

²³³ Jean Chrétien, Joe Clark, Paul Martin & John Turner, “A close eye on security makes Canadians safer,” *Globe and Mail* (19 February 2015), online: <theglobeandmail.com/globe-debate/a-close-eye-on-security-makes-canadians-safer/article23069152>. The signatories to the open letter noted that they: [S]hare the view that the lack of a robust and integrated accountability regime for Canada’s national security agencies makes it difficult to meaningfully assess the efficacy and legality of Canada’s national security activities. This poses serious problems for public safety and for human rights.

A detailed blueprint for the creation of an integrated review system was set out almost a decade ago by Justice Dennis O’Connor in his recommendations from the Maher Arar inquiry, which looked into the role that Canada’s national security agencies played in the rendition and torture of a Canadian citizen. Justice O’Connor’s recommendations, however, have not been implemented; nor have repeated calls from review bodies for expanded authority to conduct cross-agency reviews....

Canada needs independent oversight and effective review mechanisms more than ever, as national security agencies continue to become increasingly integrated, international information sharing remains commonplace and as the powers of law enforcement and intelligence agencies continue to expand with new legislation.

b. Deletion as CSIS Disruption

We raise yet another end run concern also created by Bill C-51. The current terrorist propaganda deletion procedures in the *Criminal Code* have the virtue of at least potentially being adversarial hearings held in open court. But there is an alternative warrant process provided for in Bill C-51 that may be more attractive to security officials seeking to disrupt or take down material on the Internet.

Part IV of Bill C-51 contemplates very different closed and one-sided hearings that would allow CSIS to obtain a warrant from the Federal Court to take measures to reduce a threat to the security of Canada. Bill C-51 expressly anticipates that CSIS threat reduction measures might violate *Charter* rights: The Bill suggests that the Federal Court may authorize measures that “will contravene a right or freedom guaranteed by the *Canadian Charter Rights and Freedoms* or will be contrary to other Canadian law.”²³⁴ The only restrictions are that such measures not intentionally or negligently cause death or bodily harm, obstruct justice or invade sexual integrity,²³⁵ and that they be reasonable and proportionate.²³⁶

We fear that CSIS threat disruption warrants could be used as a less demanding alternative to the terrorist propaganda deletion orders. They could authorize CSIS, with the assistance of the Communications Security Establishment, to take measures within or outside of Canada to reduce threats to the security of Canada. Such measures could include interference and blocking of both domestic and foreign websites.²³⁷ The state would not have to convince a judge that the material constituted terrorist propaganda as defined in the *Criminal Code*, but only that the disruption was a proportionate response to the even more expansively defined threats to the security of Canada in the *CSIS Act*. The latter concept includes not just terrorism, but also subversion and foreign influenced activities.

Unlike under the *Criminal Code* deletion provisions, there would be no requirement that targets be given notice. There would also be no possibility that they could participate in the warrant proceedings — such proceedings are secret and never disclosed.

In sum, this covert end run prospect creates an even greater threat and chill to freedom of expression than open criminal prosecutions or deletion proceedings. Targets may never know why their computers crashed. They will be in no position to challenge the practice. Accordingly, as worrying as some parts of the terrorist propaganda provisions added to the *Criminal Code* in Bill C-51 may be, the new CSIS threat reduction warrants provided in the

The other signatories included four former members of the Supreme Court, three former Justice Ministers, five former Solicitors General/ Ministers of Public Safety, three former members of SIRC, and a former Privacy Commissioner and Chair of the RCMP Complaints body.

²³⁴ Bill C-51, *supra* note 3, cl 42, amending *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 12.1(3) [*CSIS Act*].

²³⁵ Bill C-51, *ibid*, amending *CSIS Act*, *ibid*, s 12.2.

²³⁶ Bill C-51, *ibid*, amending *CSIS Act*, *ibid*, s 12.1(2).

²³⁷ See Ronald Deibert, “Who Knows What Evils Lurk in the Shadows?” in Iacobucci & Toope, *supra* note 5, 191 at 198–200 (discussing the Canadian Security Establishment’s offensive capabilities of disruption as revealed by the Snowden leaks).

bill are even broader, less restrained, and allow for covert as opposed to public incursions on *Charter* rights.

V. CONCLUSION

The government has not embarked in an uncritical importation of the French, Spanish, or UK glorification offences. Glorification offences are ill-suited for Canada's social and legal environment. The British prosecution of a bookstore owner not involved in any terrorist plots for selling the controversial works of Sayyid Qutb or Malcolm X, or the French prosecution of a cartoonist who in poor taste drew a cartoon about 9/11, are not an appropriate way for a democracy to combat terrorism. We have little doubt that a glorification offence would not survive *Charter* scrutiny even though they have survived more deferential forms of judicial review in Europe.

But the government's compromise position in the new speech offence and deletion procedures added to the *Criminal Code* by Bill C-51 themselves constitute a poor effort to reconcile anti-terrorism with constitutionalized free expression. The available research outlined in Part II of this article is not entirely robust and this remains a dynamic and changing area. Nevertheless, it suggests that the causal links between extremist material (which given present preoccupations, often means related to Islam) and actual violence are far from robust. Speech and Internet material appears to be more of a facilitator than an actual cause of radicalization to violence. This suggests that there may not even be a rational connection between the new offence and the important objective of preventing either terrorism or the commission of terrorism offences.

Even if such a rational connection is accepted, it is difficult to justify the new offence given, as examined in Part III of this article, because of the amount of speech that is already criminalized by existing offences. Canada has many criminal and terrorist offences that can apply to hate speech, inciting or threatening terrorism, or providing operational instructions towards terrorism.

We are concerned that the overall benefits of this new offence are speculative, while its harms to freedom of expression are quite clear.

Meanwhile, the efficacy of the proposed deletion procedures in Bill C-51 is likely to be low given the ease with which terrorist propaganda can migrate to less restrictive jurisdictions. Deletion orders directed at Canadian Internet servers may only result in the material being placed on foreign servers. This presents a danger of less restrained measures, including informal law enforcement, enforcement by customs officials, and the use of CSIS threat reduction warrants which could be used covertly and after non-adversarial warrant proceedings to disrupt internet sites both in Canada and abroad.

Finally, the limited efficacy of supply reduction strategies — such as the new speech offence and deletion procedures — speaks to the need for broader and less coercive measures

targeting violent extremism. Unlike the UK's *Counter-Terrorism and Security Act 2015*,²³⁸ Bill C-51 does not provide a statutory foundation for such demand reduction and multidisciplinary programs in schools, prisons, and elsewhere. Instead it focuses on a new speech offence and related deletion proceedings that risk undermining CVE efforts through the chill they cast.

The new speech offence has already been challenged and may well be struck down under the *Charter*.²³⁹ Until then, much of its damage (and we suspect much of its visceral appeal to some as an attack on "violent jihadism") will already be achieved.

In sum, the new speech offence is likely unconstitutional. Moreover, it is unnecessary and reckless.

²³⁸

(UK), c 6.

²³⁹*Corp of the Canadian Civil Liberties Assn v Canada (AG)* (21 July 2015), Toronto CV-15-532810 (Ont Sup Ct J), online: Canadian Civil Liberties Association <ccla.org/cclanewsite/wp-content/uploads/2015/08/Issued-Notice-of-Application-Bill-C-51-C1383715xA0E3A.pdf>.