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Terrorist Babble and the Limits of the Law: Assessing a Prospective Canadian Terrorism Glorification Offense

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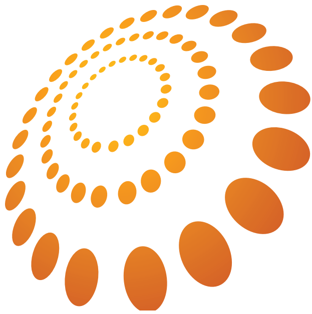

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Terrorist Babble & the Limits of the Law: Assessing a Prospective Canadian Terrorism Glorification Offence

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Abstract

Since 2007, the Canadian government has repeatedly expressed interest in a terrorism "glorification" offence, responding to internet materials regarded by officials as terrorist propaganda and as promoting "radicalization". In the wake of the October 2014 attacks, this idea clearly remains on the government's shortlist of responses. This article addresses the merits of such a criminal offence. It include 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. 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 new glorification offences could have counter-productive practical public safety effects. Instead, we recommend modest amendments to the existing criminal law allowing the government to respond effectively to speech that is *already* criminal under existing Canadian terrorism or other criminal offences. Specifically, we favour a carefully constructed means of deleting (or at least "hiding") the most dangerous forms of already criminal internet speech.

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" employable by a judge in deciding whether communication 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. And so exactly what measures the government is contemplating was not clear at the time of this writing.

However, on several occasions since 2007, government politicians have expressed interest in a terrorism "glorification" offence, responding to internet materials regarded by officials as terrorist propaganda and as promoting "radicalization".[3] The stated inspiration for this idea was a 2006 UK anti-glorification law. Minister MacKay's 2014 statements suggest this idea remains on a shortlist of measures viewed as complementing Canada's existing anti-terrorism law.

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 glo-

1 Steven Chase and Josh Wingrove, "Terror fight turns to Internet, sparking new free-speech debate," Globe and Mail (Oct 30, 2014).

2 Standing Senate Committee on National Security and Defence, Evidence (November 17, 2014), Gary Robertson, Assistant Deputy Minister, National and Cyber Security Branch, Public Safety Canada, available at http://www.parl.gc.ca/content/sen/committee/412/SECD/51734-E.HTM.

3 Stewart Bell and Kathryn Blaze Carlson, "Tories aim to fill terrorism law gaps," National Post (Nov 16, 2011). See also Standing Committee on Public Safety and National Security, Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues, 39th Parl., 1st Sess. (March 2007), online: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2798914&Language=E&Mode=1&Parl=39&Ses=1.

rification (and *apologie du terrorisme* offences); and, the restraints that the *Charter* would place on any similar Canadian law. 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 on-line communications in terrorist radicalization, before highlighting the range of strategies designed to counter terrorist use of the internet.

In Part II, we examine the extent to which speech associated with terrorism is currently criminalized in Canadian law, asking what gaps remain. Here, we suggest that current debate about the need for new speech-based offences has radically underestimated the extent to which existing criminal and terrorist offences in Canada could apply to terrorist-related speech.

In Part III, we then address glorification offences, focusing particular attention on European (and especially United Kingdom) criminal law. We conclude that these European analogues are ill-suited to Canada's social and legal environment. 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 concerned that new glorification offences could have counter-productive effects, playing into terrorist narratives of the West opposing radical forms of Islamic thought not clearly related to violence.

We are, however, also concerned about the threat of terrorist violence revealed by the October 2014 attacks, the December 2014 attack in Sydney and the rise of Western foreign terrorist fighters in a foreign civil war. We believe that this groundswell could change the security terrain in Western states dramatically, with accompanying downstream effects on civil rights. We recommend amendments to the existing criminal law allowing the government to respond effectively to speech that is *already* criminal under existing Canadian terrorism or other criminal offences. Specifically, we favour a carefully constructed means of deleting (or at least "hiding") the most dangerous forms of already criminal internet speech.

Our proposal builds on an amendment in the 2001 *Anti-Terrorism Act* that allows judges to order the deletion of hate speech from the internet.[4] The extension of these powers to other forms

4 Criminal Code, R.S.C., 1984, c. C-46, s. 320.1

of speech that are currently criminal under Canada's existing terrorism offences 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 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 hearing.

Part I. 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,[5] 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, Dalgaard-Nielsen's important 2010 meta-analysis[6] 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".[7]

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 (AQ) inspired" to describe this ideology.[8]

5 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.

6 Ibid.

7 Ibid at 798.

8 See the recommendation in Islamic Social Services Association, United Against Terrorism (2014) at 33, online: http://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 (International Institute for Counter-Terrorism, 2014) at 11, available at http://www.ict.org.il/Article/26/Foreign%20Fighter%20Involvement%20in%20Syria at 7, n.33. 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, CA: University of California Press, 2005) and chapter 1 in particular; Abdullah Saeed, "Jihad and violence: changing understandings of Jihad among Muslims," Terrorism and Justice: Moral Argument in a Threatened World (Melbourne: Melbourne University Press, 2002).

1. Radicalization in Context

A first point to emphasis 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."[9] McCauley and Moskalenko posit that radical 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."[10]

They also propose a "pyramid of opinion radicalization". 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 defence 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 defence.[11] 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.[12]

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.[13] They dispute, however, 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.[14] For instance, while 5% of

9 Clark McCauley and Sophia Moskalenko, "Toward a Profile of Lone Wolf Terrorists: What Moves an Individual from Radical Opinion to Radical Action," (2014) 26 Terrorism and Political Violence 69 at 70.

10 Ibid.

11 Ibid.

12 Ibid at 71. Some of those data do suggest that in that 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.

13 Ibid at 73

14 See discussion in Sophia Moskalenko and Clark McCauley, "Measuring Political Mobilization: The Distinction between Activism and Radicalism", (2009) 21 Terrorism and Political Violence 239 at 240.

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 United Kingdom since 9/11.[15] It stands to reason that 5% 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.[16]

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,[17] not their "farm teams". Moreover, there are instances where people are drawn to violence without first developing radical ideas.[18] 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 questions. Empirical studies to date suggest no single socioeconomic 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."[19] These individuals are, in fact, "strikingly normal in terms of the socioeconomic variables analyzed".[20]

Still, Europe-wide case study research points to a finite number of "personality types or roles" within radicalized terrorist groups.[21] The "leader" is "a charismatic and idealist individual with a strong interest in politics and an activist mindset". The "protégé" is a "young, intelligent, at times vocationally or educationally accomplished individual who admires the entrepreneur and shares his activist mindset." The "misfit" often comes from "a troubled background, may-

15 McCauley and Moskalenko, above note 9 at 72.
16 Ibid.
17 Moskalenko and McCauley, above note 14 at 240.
18 McCauley and Moskalenko, above note 9 at 72.
19 Dalgaard-Nielsen, above note 5, at 805, citing Edwin Bakker, Jihadi terrorists in Europe (The Hague: Cliengendael, 2006).
20 Dalgaard-Nielsen, above note 5, at 805.
21 Ibid at 806, citing Peter Nesser, Jihad in Europe: Exploring the motivations for Salafi-Jihadi terrorism in Europe post-millenni um (Oslo: Department of Political Science, University of Oslo, 2004).

be with a record of involvement with petty crime or with drug abuse". Finally, the "drifter" is a "person who appears to join the group through social connections to individuals already in the group or in the group's periphery."[22]

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'".[23] 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."[24] Often living on the margins, these are often 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. [25]

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 appear to provide intellectual and social leadership to the rest of the group"[26] 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

22 Dalgaard-Nielsen, above note 5, at 805.
23 Ibid at 806 and 807.
24 Ibid at 807, citing Mairke Slootman and Jean Tillie, Processes of radicalization. Why some Amsterdam Muslims become radicals (Amsterdam: Institute for Migrations and Ethnic Studies, University of Amsterdam, 2006).
25 Dalgaard-Nielsen, above note 5 at 807.
26 Ibid.

self-assured".[27] 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."[28]

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."[29] Specifically, "[t]he charismatic leader provides a sense-making device for the group, identifying an external 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."[30] 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 Terrorist Tool

Both terrorist organizations and radicalized individuals make use of the internet,[31] including

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27 Ibid.

28 Ibid.

29 Mirra Noor Milla, Faturochman and Djamaludin Ancok, "The impact of leader-follower interactions on the radicalization of terrorists: A case study of the Bali bombers," (2013) 16 Asian Journal of Social Psychology 92 at 92.

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

31 See the analysis by Jialun Qin et al, "Analyzing terror campaigns on the internet: Technical sophistication, content richness, and Web interactivity," (2007) 65 Int. J. Human-Computer Studies 71.

as an "'information weapon' to increase their visibility and to publicize their activities."[32] 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, 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.[33]

"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).[34]

Finally, terrorist publicity and propaganda aims to generate support for causes, and justify actions. The internet provides 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."[35] 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.[36]

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32 Francesca Bosco, "Terrorist Use of the Internet," in U. Gurbuz (ed), Capacity Building in the Fight against Terrorism (IOS Press, 2013) at 40.

33 Ibid at 43. See also Craig Espeseth, Jessica Gibson, Andy Jones and Seymour Goodman, "Terrorist Use of Communication Technology and Social Networks," in U.F. Aydogdu (ed) Technological Dimensions of Defence against Terrorism (IOS Press, 2013) (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 for Peace Press, 2006) (speaking of "instrumental" use of the internet).

34 Bosco, above note 32 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 (Report submitted to the US National Institute of Justice, October 2011) at 6, available https://www.ncjrs.gov/pdffiles1/nij/grants/236867.pdf.

35 Bosco, above note 32 at 42.

36 Ibid.

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.[37] 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."[38] 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."[39]

Other researchers see the internet as influential, although to varying degrees.[40] For instance, Sageman's influential "leaderless jihad" thesis posits that the internet facilitates a loose, leaderless network of independent, leaderless terrorist organization.[41] Moreover, internet propaganda may fuel moral outrage that may trigger violence action.[42] 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.[43]

In the most comprehensive quantitative analysis of AQ-inspired internet discussion forums

37 See, e.g., discussion in David Benson, "Why the Internet is Not Increasing Terrorism," (2014) 23(2) Security Studies 293 at 315 et seq. See also discussion in Espeseth, above note 33 at 94.
38 Dalgaard-Nielsen, above note 5 at 808.
39 Ibid at 810.
40 For summary, see Peter Neumann, "Options and Strategies for Countering Online Radicalization in the United States," (2013) 36(6) Studies in Conflict & Terrorism 431 at 435 et seq.
41 See, e.g., Marc Sageman, Leaderless Jihad: Terror Networks in the Twenty-First Century (Philadelphia: University of Pennsylvania Press, 2008).
42 Ibid.
43 Bosco, above note 32 at 92.

known to these authors, the most common source of discussion (97%) was religion.[44] 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, A-Q inspired internet activity is not benign. A total of 37% of discussions included "an explicit or implicit call for Jihad",[45] and these threads often attracted high numbers of participants. Twenty percent of discussions included explicit "calls or encouragement for future terrorist activities."[46] Calls for martyrdom arose in 8% of discussions.[47] Combined, the authors report that calls for jihad, terrorist activity, and martyrdom arose in 2/3 of discussions.[48]

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.[49]

Grappling with this prospect poses serious policy challenges. We address legal issues in the second and third parts of the paper. Here, we identify some of the practical challenges, following Newmann in dividing possible responses into "reducing supply" and "reducing demand".[50]

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

44 Erez, above note 34 at 64.
45 Ibid at 68.
46 Ibid at 69.
47 Ibid at 69.
48 Ibid at 69.
49 Espeseth, above note 33 at 95.
50 Neumann, above note 40.

for its cost and the inevitable controversy it would provoke.[51]

More targeted shuttering of offensive websites is part of the European approach. Under s.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.

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. [52] Incarceration may increase the costs of violent extremism and deter continued participation.[53] On the other hand, there are "numerous examples of further radicalization taking place in prisons".[54] Moreover, persons inclined to extremist positions may regard the state's (over)reaction to radicalization as justification for resistance.[55]

The timing of coercive, law and order responses may also be relevant. One Dutch case study "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)."[56] They 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."[57]

All of this is to say that criminalizing conduct related to, but distant, from terrorist violence comes with costs, one of which may be bolster the very dynamics of radicalization the criminal law seeks to combat. Such observations counsel close consideration of less coercive tools

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51 Neumann, above note 40 at 439.
52 Dalgaard-Nielsen, above note 5, at 808.
53 Anja Dalgaard-Nielsen, "Promoting Exit from Violent Extremism: Themes and Approaches," (2013) 36(2) Studies in Conflict & Terrorism 99 at 103.
54 Ibid.
55 Dalgaard-Nielsen, above note 5, at 808.
56 Froukje Demant and Beatrice de Graaf, "How to Counter Radical Narratives: Dutch Deradicalization Policy in the Case of Moluccan and Islamic Radicals," (2010) 33 Studies in Conflict & Terrorism 408 at 423.
57 Ibid.

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 on-line content – essentially working with private sector services such as Google to remove this material from search engines and hyperlinks.58 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. After a famous French case involving Nazi memorabilia, Google implemented its own measures.[59] 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"[60] demonstrate that such "hiding" is technically feasible.[61] 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 public safety gain. 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."[62]

"Network" analysis, meanwhile, may allow intelligence services to plumb social-networking

58 Dalgaard-Nielsen, above note 5, at 443.

59 Isabelle Rorive "What Can Be Done Against Cyber Hate?: Freedom of Speech Against Hate Speech in the Council of Europe" (2009) 17 Cardozo J of International and Comparative Law 417 at 418-419.

60 Google Spain, European Court of Justice, C-131/12 (13 May 2014).

61 BBC News, "Google sets up 'right to be forgotten' form after EU ruling" (30 May 2014), online: www.bbc.com/news/technology-27631001.

62 Neumann, above note 40 at 450.

sites "to identify the people who are involved in processes of radicalization and recruitment."[63] In fact, "extremist forums and social-networking sites are essential for identifying lone actors with no real-world connections into extremist milieus."[64] 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 bomb making instructions, contacts with foreign-based insurgent groups, or announcements of imminent action."[65] 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"[66] 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.

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."[67]

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63 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," Studies in Conflict & Terrorism, DOI: 10.1080/1057610X.2014.974948 (Open Access: 17 Oct 2014).

64 Neumann, above note 40 at 451. For a study using internet material in an effort to identify lone wolf impulses, see J Brynielsson et al, "Analysis of Weak Signals for Detecting Lone Wolf Terrorists," (2012) Intelligence and Security Informatics Conference (EISIC), 2012 European, DOI: 10.1109/EISIC.2012.20. See also Todd Waskiewicz, "Friend of a Friend Influence in Terrorist Social Networks," 2012 World Congress in Computer Science, online: http://worldcomp-proceedings.com/proc/p2012/ICA6143.pdf.

65 Neumann, above note 40 at 451.

66 McCauley and Moskalenko, above note 9 at 83.

67 Dalgaard-Nielsen, above note 5 at 811.

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."[68] In his view, these strategies are "well-placed" given "what social psychology tells us about cognitive consistency, dissonance, and reactance".[69] 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.[70] 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".[71]

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".[72]Strategies for doing so vary, but include obvious efforts to rebut "cult personalities", challenge extremist ideology[73] and especially to address "legends of injustice and oppression".[74] In some sense, counter-narratives seek to outcompete more pernicious speech in the famous "marketplace of ideas" associated with an open society.

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."[75] Generic anti-radicalization strategies reportedly favoured by Canadian Muslim community leaders include:

> acknowledging the existence of Islamophobia; establishing a dialogue with various Muslim

68 Dalgaard-Nielsen, above note 53 at 110.
69 Ibid.
70 Ibid.
71 Ibid.
72 Neumann, above note 40 at 443.
73 Bosco, above note 32 at 45.
74 Demant and de Graaf, above note 56 at 421.
75 Neumann, above note 40 at 444.

> 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 [religious and civil society] community-based organizations [and government]; 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.[76]

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 things, Muslim thought-leaders with messages contrary to those of AQ-inspired extremists.[77]

Likewise, government might enable connections between community groups and public relations and media professionals able to assist in crafting more compelling messages.[78] 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.[79]

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 purposes of simplifying the broad range of radicalized internet use, we propose a simple "expression spectrum," reflected in figure 1.

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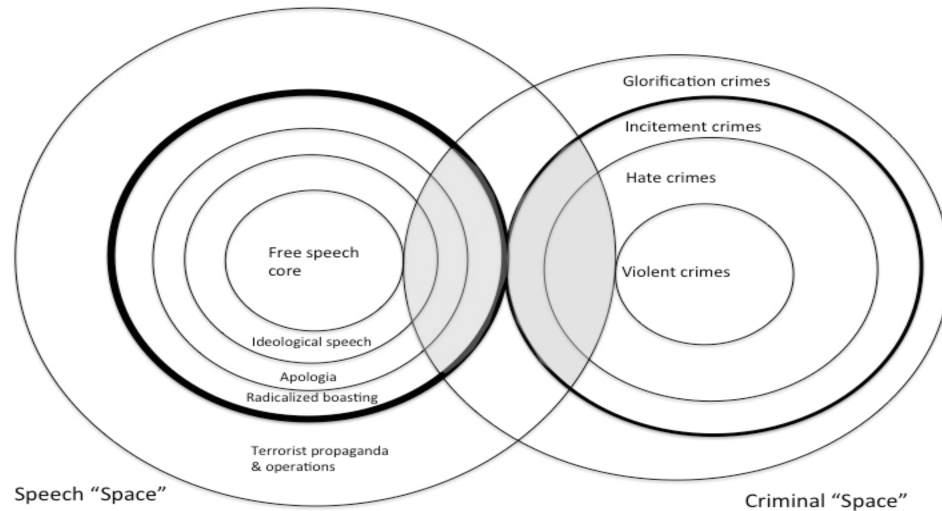
76 Kawser Ahmed, James Fergusson, and Alexander Salt, Perceptions of Muslim Faith, Ethno-Cultural Community-based and Student Organizations in Countering Domestic Terrorism in Canada, Canadian Network for Research on Terrorism, Security and Society Working Paper Series No. 14-12 (November 2014) at 5,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

77 Neumann, above note 40 at 444.

78 Ibid.

79 Bosco, above note 32 at 45.

Figure 1: Overlapping Speech and Criminal "Spaces"



The interior circle is labeled "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 labeled "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.

"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 Moskalenko'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 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 labeled "terrorist 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 in inciting 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 labeled "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.

Part II: 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,[80] 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 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,

80 See, e.g., Criminal Code, R.S.C. 1985, c. C-46, 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), s. 241 (counselling or aiding suicide), s. 296 (blasphemous libel), s. 297 (defamatory libel).

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, because 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".[81] "Hatred" reaches only the most "intense forms of dislike":[82] "emotion of an intense and extreme nature that is clearly associated with vilification and detestation".[83]

With this crime, one element appears to be fall-out from the speech – that, a likelihood of breach of the peace or the promoting of hatred. The fact of speaking does not appear to suffice, absent evidence of one of this outcome.

2. Outcome Independent Speech Crimes

a) Overview

In most other cases relevant to this article, the fact of speaking the impugned words suffices, assuming that the requisite intent is also present. That is, the speech is criminal, independent of any particular outcome.

Most generally, in the *Criminal Code's* general incitement provision, counselling has both outcome dependent and independent sub-offences. 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

81 Ibid, s. 319.
82 Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40 at para. 101.
83 R. v. Keegstra, [1990] 3 SCR 697 at 777.

likely to be committed in consequence of the counselling".[84] But counselling can also be a crime even if no crime is ever committed.[85]

Counselling under the *Criminal Code* "includes procure, solicit or incite".[86] 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".[87] 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'".[88]

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."[89] This requires proof of subjective fault.[90]

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".[91]

Likewise, and subject to several defences, it is a crime to communicate statements other than in private conversation that willfully promotes (as in "actively support" or "instigate")[92] hatred against any identifiable group.[93] "Identifiable group" means "any section of the public distin-

84 Criminal Code, above note 80, s.22.
85 Ibid, s. 464.
86 Ibid, s.22.
87 R. v. Hamilton, 2005 SCC 47 at para. 15.
88 Ibid at para. 22.
89 Ibid at para. 29.
90 Most commentators have concluded that the fault requirement in Hamilton, above note 87, is recklessness. Eric Colvin and Sanjeev Anand Principles of Criminal Law 3rd ed (Toronto: Thomson, 2007) at 570. One of us has argued, however, that it is slighter higher because it requires awareness that is an offence is likely to be committed as distinct from the mere possibility of an offence being committed usually associated with recklessness. Kent Roach Criminal Law 5th ed. (Toronto: Irwin, 2012) at 143.
91 Criminal Code, above note 80, s.318.
92 Mugesera, above note 82 at para. 101.
93 Criminal Code, above note 80, s. 319.

guished by colour, race, religion, ethnic origin or sexual orientation."[94] Here, "[t]he offence does not require proof that the communication caused actual hatred. …The intention of Parliament was to prevent the risk of serious harm and not merely to target actual harm caused."[95] At issue is simply whether the communication expressed hatred, measured against the understanding of a reasonable person,[96] and that the speaker desired "that the message stir up hatred".[97] 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".[98] Other authorities stress that to be guilty of willfully promotion of hatred, the accused must either intend[99] or be willfully blind[100] to the promotion. 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".[101] 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".[102]

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".[103] This offence might apply to much terrorist speech, but some might object that it does not single out the terrorist motive and is subject to only a maximum penalty of five years imprisonment in the case of threats of death or bodily harm.

94 Ibid, s-s. 318 and 319.
95 Mugesera, above note 82 at para. 102.
96 Ibid at para. 103.
97 Ibid at para. 104.
98 Ibid at paras. 105 and 106.
99 Keegstra, above note 83
100 R. v. Krymowski [2005] 1 S.C.R. 101.
101 Criminal Code, above note 80, s.61.
102 Ibid, s.59.
103 Ibid, s.264.1.

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.[104] One reason why the speech reach of Canada's 14 separate terrorist offences[105] is not fully understood is because of the complex way that these offences were drafted.

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(b) defines "terrorist activity" broadly to include a variety of politically or religious 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 subclause of s.83.01(b) that states that a terrorist activity also includes "a conspiracy, attempt or threat to commit such act or omission…or counselling in relation to any such [violent] act or omission."[106]

This subclause drew no adverse comment from the Supreme Court in *R. v. Khawaja*,[107] concerning the constitutionality of the "terrorist activity" definition. 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. And then the terrorist activity to which this

104 Our position in this paper 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. The latter upheld the definition of terrorist activities and the s.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.

105 The available terrorist offences are contained in Criminal Code, above note 80, s.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.

106 Ibid, s.83.01(b)

107 Above note 104

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 s.83.01.

For instance, the inclusion of counselling and threatening in the definition of "terrorist activity" means that a person is culpable for soliciting funds[108] in relation to a terrorist activity that itself involves nothing more than the speech acts of counselling or threating to commit a terrorist activity.

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, s.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.

Further, even if a person does not instruct an actual terrorist activity, instructing *anything* for a terrorist group is a crime. Section 83.21 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". On its face, this offence could apply 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

108 Criminal Code, above note 80, s.83.03(a)

members of a terrorist group.

Other manners in which "speech piled on speech" crimes in the anti-terrorism law expose people to criminal culpability are distilled in table 1. Whether these "speech piled on speech" offences 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 "the 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."[109] Instead, what is requires is conduct "capable of materially enhancing the abilities of a terrorist group *to facilitate or carry out a terrorist activity*",[110] as measured by the nature of the conduct and the surrounding circumstances.[111]

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. So 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.

109 Khawaja, above note 104, at para. 50-51.
110 Ibid at para. 51 (emphasis in original).
111 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.[112]	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.[113]	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.[114] 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".[115]	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.[116]	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.[117]	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.[118]	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.[119]	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.

112 Criminal Code, above note 80, s.83.19
113 Ibid, s.83.191
114 Ibid, s.83.18.
115 Ibid.
116 Ibid, s.83.181.
117 Ibid, s.83.2.
118 Ibid, s.83.201.
119 Ibid, s.83.202.

3. Discussion

Taken together, these existing criminal provisions (especially when considered alongside the general attempt, counselling, conspiracy provisions in the Code)[120] address what we have labeled in Figure 1 as "terrorist 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.

Our current law would not, however, 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" voiced in a mosque or on Twitter would rarely cross the threshold from "radicalized boasting" to "terrorist 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 issue, therefore, is whether Canadian law should reach beyond its current limits into the radicalized boasting, apologia and even ideological speech zones. This approach would emulate the pattern is some European jurisdictions. It might, however, have serious practical disadvantages, suggested by the discussion in Part I.

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

120 Ibid, ss. 22, 24, 464, 465.

trail may be the best means of unraveling 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 risk 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 the AQ-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 United States 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.

As discussed in the next part, Canada would also venture into extremely uncertain constitutional terrain if it enacted a glorification 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

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. R. v. Noble 2008 BCSC 251; R. v. Bahr 2006 ABPC 360.

122 S/Res/1624 (2005), para 1.

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*. The latter obliges parties to criminalize unlawful and intentional "public provocation to commit a terrorist offence"; i.e., "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."[124]

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, support or justification of terrorists and/or terrorist acts".[125] In this article, we refer to this concept as "glorification", except where different terms are used in the state's own laws.

Most European states have general incitement provisions extending to all crimes.[126] Incitement crimes aimed specifically at terrorism have been uncommon.[127] In 2004, a survey conducted by the Council of Europe concluded that only eight of forty-five states possessed incitement to terrorism offences. Of these, only three – Denmark, Spain and France -- also penalized glorification.[128] Since the 2004 survey, the United Kingdom has also created a glorification offence.

123 Ibid, preamble.

124 16.V.2005, Art. 5. The EU Council in Article 1 of a 2008 Framework Decision 2008/919/JGA called for member states to enact a public provocation of terrorism offence in similar terms.

125 Council of Europe, Committee of Experts on Terrorism, "Apologie du Terrorisme" and "Incitement to Terrorism": Analytical Report (Strasbourg: Council of Europe Publishing, 2004) at 5, online: http://www.academia.edu/8883578/_APOLOGIE__DU_TERRORISME_and_incitement_to_terrorism_an_Analytical_Report_for_the_Committee_of_Experts_On_Terrorism_CODEXTER_of_the_Council_of_Europe

126 Ibid at 13.

127 For the practice in other states, see state reports to the Security Council's Counter-terrorism Committee, pursuant to Security Council resolution 1624 (2005), online: http://www.un.org/en/sc/ctc/resources/1624.html.

128 Council of Europe, above note 125 at 28.

1. Continental European Terrorism Glorification Crimes

Even as between these four states, however, there are differences of scope. Danish law criminalizes incitement, including in relation to terrorism offences.[129] 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".[130] This requirement would seem to foreclose prosecution for simple expression of approval for, e.g., past terrorist acts.

Spanish penal law, for its part, includes a concept of "provocation", defined as "direct incitement, through the press, radio or any other similarly effective means of publicity, or before a group of individuals, to the perpetration of an offence."[131] It also includes a more generic concept of *apologie*: "the 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."[132] 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".[133]

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.[134] Notably, the direct incitement to terrorism provision resulted in a single conviction between 1994 and July 2014.[135]

129 Danish Penal Code, section 136. See discussion in Council of Europe, above note 125 at 9.

130 Ibid at 28.

131 Spanish Penal Code, article 18.1. See discussion in Report of Spain on the Implementation of Security Council Resolution 1624 (2005) on further measures to combat terrorism (S/2007/164) at 2, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/309/63/PDF/N0730963.pdf?OpenElement

132 Spanish Penal Code, article 18.1. See discussion in Report of Spain above note 131 at 2.

133 Ibid at 2, citing Spanish Penal Code, article 578.

134 **Loi du 29 juillet 1881 sur la liberté de la presse**, articles 23 and 24. See discussion in Letter dated 14 July 2006 from the Permanent Representative of France to the United Nations addressed to the Chairman of the Counter-Terrorism Committee (S/2006/547) at 3, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/440/46/PDF/N0644046.pdf?OpenElement

135 France, Projet de loi renforcant les dispositions relatives a la lutte contre le terrorisme Etude d'Impact, Nor: INGTX1414166L/Bleue-1 (8 juillet 2014) at 13.

In comparison, 14 convictions were entered for *apologie* offences.[136] In five instances, *apologie du terrorisme* was the sole charge.[137]

The most notorious of these cases appears to be that of Denis Leroy. The accused was prosecuted for producing a cartoon portraying the 9/11 attacks, accompanied with the caption "We all dreamed of it…Hamas did it", 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 Mr. 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*. 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.[138] 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.[139]

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 United Kingdom government. The Blair government also invoked the resolution as partial justification for revamped anti-terrorism measures, including new glorification crimes.

The United Kingdom *Terrorism Act 2006* introduced two new offenses, aimed at speech:

136 Ibid.

137 Ibid at 14.

138 Projet de loi renforcant les dispositions relatives a la lutte contre le terrorisme, Assemblee Nationale, Texte Adopte no. 415 (29 octobre 2014), art. 4.

139 Ibid, art. 6.

"encouragement of terrorism"[140] and "dissemination of terrorist publications".[141] 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 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".[142]

The publication offence "focuses not on the original publisher but on those who pass the publication on".[143] It appears to reach internet service providers (ISPs) and the owners of websites on which people can post statements.[144] In fact, a third provision in the UK Act established detailed rules for statements or publications communicated via internet (or electronically).[145] 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.)[146] 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 or 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

140 Terrorism Act 2006, 2006 c.11, s.1.
141 Ibid, s.2.
142 Ibid, s.20.
143 David Anderson, Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006 (July 2011) at para. 10.7, online: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243552/9780108510885.pdf
144 Tufyal Choudhury, "The Terrorism Act 2006: Discouraging Terrorism," in Ivan Hare and James Weinstein (ed), Extreme Speed and Democracy (Oxford: Oxford University Press, 2009) at 467.
145 Terrorism Act 2006, 2006 c.11, s.3.
146 Anderson, above note 143 at para. 10.8.

a person committing or preparing an act of terrorism", or possessing a document or record containing this sort of information.[147] 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 CPS [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.[148]

b) Anti-terrorism Glorification Crimes in the UK Courts

The UK Home Office reports that between September 11, 2001 and March 2014, there were a total of 460 charges and 220 convictions entered under anti-terrorism legislation in Great Britain. Of these, 48 persons where charged with the principal offence of collection of information under the *Terrorism Act 2000*.[149] A total of 33 convictions were entered under this provision.[150]

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,[151] and 3 convictions.[152] There were also 12 instances where the principal charge was for dissemination of a terrorist publication,[153] and 8 convictions.[154]

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

147 Terrorism Act 2000, 2000 c. 11, s.58.
148 Anderson, above note 143 at para. 10.12.
149 UK Home Office, Operation of police powers under the Terrorism Act 2000: data tables, financial year ending March 2014, at table A_05a, online: https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-data-tables-financial-year-ending-march-2014.
150 Ibid at table A_08a.
151 Ibid at table A_05a.
152 Ibid at table A_08a.
153 Ibid at table A_05a.
154 Ibid at table A_08a.

indeed is proof of this crime.[155]

In addition (or alternatively), some cases involve videos or other materials portraying things being blown up and/or people being killed, sometimes with laudatory narrative and sometimes in an instructional matter.[156] Examples would include an "anarchist cookbook" compiling bomb making instructions culled from the internet,[157] or an AQ-inspired "how to" manual.[158] Some cases involved materials mixing what might be called extremist AQ-inspired polemics with "how to" suggestions on how to commit terrorist acts.[159] All this is the sort of behaviour that almost certainly would also be captured by Canada's existing "terrorist propaganda and operations" 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.

The more troubling UK prosecutions involve a second class of cases: prosecutions for what might be described as 'extremist literature'.[160] 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 Appellant in his pen name AB 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

155 See, e.g., R. v. Rahman, [2008] EWCA Crim 1465; R. v. Iqbal, [2010] EWCA Crim 3215 (CA)
156 See R. v Iqbal, above noted 155; R. v. Gul, [2014] 3 LRC 536 (UKSC) at para. 2
157 R. v. Brown, [2011] EWCA Crim 2751.
158 R. v. Ahmad, [2012] EWCA Crim 959; Jobe v. United Kingdom, (2011) 53 E.H.R.R. SE17.
159 Ibid at para. 11; R. v. K., [2008] 3 All ER 526 (CA)
160 See, in part, R. v. Farooqi, [2013] EWCA Crim 1649 at para. 39.

> 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.[161]

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 become more religiously inclined as they got older… These books did glorify terrorism. They implied approving of such attacks as 9/11 or 7/7".[162]

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

161 [2012] EWCA Crim 2820 at para. 8.

162 As reported BBC News, "Bookseller Ahmed Faraz jailed over terror offences," (13 Dec 2011), online: http://www.bbc.co.uk/news/uk-16171251.

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."[163] 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 – special edition*. Scholars have called Qutb one of the "'intellectual fathers' of the modern Islamic fundamentalist movement."[164] *Milestones* (as it is known in English) was first published in 1964, and is "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."[165] Among other things, the book propounded a doctrine of jihad as holy war of an offensive (and not purely defensive) nature.[166] Compared by some to Lenin's *What is to Be Done*,[167] *Milestones* is a revolutionary tract that has clearly influenced Islamist militants, including the terrorist movement led by Osama Bin Laden.[168] It is, however, more ideological treatise than "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".[169] The core question, however, was whether ideological expression (promotional or not) divorced from actual terrorist means or materiel 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

163 Above note 161 at para. 47.
164 John Zimmerman, "Sayyid Qutb's influence on the 11 September attacks," (2004) 16(2) Terrorism and Political Violence 222 at 222.
165 Ibid at 234.
166 Ibid at 235.
167 Ibid at 244.
168 Ibid at 240-241.
169 BBC News, above note 162.

disregard of the law of England and Wales, as free speech was not absolute.[170]

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 court's 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, in [e.g.] the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime".

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.[171] 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 censorship[172] or convictions for illegal hate speech or propaganda.[173]

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

170 Faraz, above note 161 at para. 57.

171 See European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens' Rights and Constitutional Affairs, Human Rights Concerns relevant to Legislating on Provocation or Incitement to Terrorism and Related Offences, Briefing Paper, PE 393.283 (March 2008) at 1, online: http://www.libertysecurity.org/IMG/pdf_HumanRights.pdf. Council of Europe, Freedom of Expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights (Strasbourg: Council of Europe, 2007) at 9, online: http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18%282007%29.pdf

172 See, e.g., Brind v. UK, ECHR Application number 18714/91; Ekin v. France, ECHR Application number 39288/98.

173 See, e.g., Surek v. Turkey, ECHR Application number 23927/94; Gunduz v. Turkey (No 1), ECHR Application number 35071/97; Erdogdu v. Turkey, ECHR Application number 25067/94.

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.[174] 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 a higher protection due to the right to free speech, but rather the (victimized) audience that needs protection…"[175]

In *Jobe v. UK*, 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 [the provision] 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."[176]

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 analysis by the European court, which accords member states a generous margin of appreciation.[177] 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-censor-

174 Requête n° 36109/03 du 2 octobre 2008, at paras. 45-48, online: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88657.
175 Uladzoslau Belavusau, "Experts in Hate Speech Cases: Towards a Higher Standard of Proof in Strabourg," Lukasz Gruszczynski and Wouter Werner (eds) Deference in International Courts and Tribunals (Oxford: Oxford University Press, 2014) at 261.
176 Jobe, above note 158.
177 Compare, e.g., these cases with the extensive necessity analysis conducted in Gundez v. Turkey, above note 173.

ship among all except the most risk loving members of the public.

Of note in considering the *Jobe* outcome, the UK Independent Reviewer of Terrorism Legislation expressed concern about the *Terrorism Act 2006* speech provisions in 2011, describing them as complex and difficult to explain to juries. He also cautioned they had a potential "chilling effect" on "legitimate public discourse".[178] 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".[179]

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 the Article 10 of the *European Convention on Human Rights*. We turn to how a glorification offence might be received in Canadian constitutional law.

Part III: Glorification Crimes and Constitutional Protection of Free Expression

A. Free Speech Protection

Section 2(b) of the *Canadian Charter of Rights and Freedoms* 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 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".[180] 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

178 Anderson, above note 143 at para. 10.37.
179 Ibid.
180 Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 969, followed more recently in Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2 at para. 34.

sought to be conveyed".[181] 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".[182] Violence or threats of violence, for instance, may convey a meaning, but this method of expression is excluded from the scope of constitutional protection.[183] Last, the court must consider whether government action has as its purpose or effect the infringement of protected expression.[184]

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 only real issue under section 2(b), therefore, is whether the expression condemned by this offence is excluded from constitutional protections.

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* comprises mostly acts of violence or incitement or threats of violence. That conduct would, therefore, generally fall outside the scope of expression protected by section 2, including the extension of terrorist activity to include the threatening of terrorist activities. Likewise, counseling, conspiracy or being an accessory after the fact is "intimately connected to violence – and to the danger to Canadian society that such violence represents".[185] Acts of expression constituting these offences are not, therefore, protected by section 2.

The Court has never, however, suggested that the sort of speech captured by our concepts of radicalized boasting, apologia or ideological speech falls outside of the protected zone of section 2. This is speech that has no firm anchor in violence or threats of violence –indeed the statistical evidence discussed in Part I points to extremely weak correlations between this speech and violence.

In our view, any new glorification offence would therefore violate freedom of expression un-

181 Keegstra above note 83 at para. 30.
182 CBC, above note 180 at para. 37.
183 Ibid at para. 35.; Khawaja above note 104 at para 70
184 CBC, above note 180 at para. 38.
185 Khawaja above note 104 at para. 71.

der s.2(b) of the *Charter* because the expression in question would not qualify under the narrow exceptions for violence and threats of violence recognized by the Court. The government would then have the burden of establishing that a glorification offence was demonstrably justified.

B. Attempts to Justify a New Glorification Offence under Section 1

Even if criminalizing speech violated s.2, the offence might be saved under section 1, as was the case with hate speech.[186] Under the *Oakes* test, section 1 may save a rights-impairing measure where the government proves that the measure has an 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.[187]

1. Important Objective

For the purposes of this article, we presume a Canadian glorification provision would be aimed at forestalling participation in a terrorist group or in a terrorist activity. It is possible that the government might try to inflate the objective, perhaps by means of a preamble, to include preventing radicalization and extremism, as contemplated in *Security Council Resolution 2178*. The Supreme Court, however, has stressed the need for governmental objectives be defined "as precisely and specifically as possible"[188] and to avoid "vague and symbolic objectives"[189] that make it difficult to conduct section 1 analysis in a rational and evidence-based manner.

2. Rational Connection

Whether a rational connection can be drawn between such a provision and this objective would depend on the scope of the measure. As we have noted in Part I of this article, 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. Those persons speaking in this manner – or hearing those who do – and who then gravitate to terrorist activity

186 Keegstra, above note 83
187 *R v Oakes*, [1986] 1 SCR 103.
188 Thomson Newspapers v. Canada [1998] 1 S.C.R. 877 at para 98
189 Sauve v. Canada [2002] 3 S.C.R. 519 at para 22

is small, even tiny, given the amount of such speech and then the relative infrequency of terrorist activity. It might be very difficult indeed, as an evidentiary matter, to establish a rational connection in relation to a sweeping limitation on speech in the radicalized boasting, apologia and ideological speech categories. Then again, the courts might defer to the government's judgment on this matter, especially if they accept that the government's objective includes more than the prevention of terrorist violence.

3. Minimum Impairment

The critical obstacle to justifying a glorification 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 II of this article, if the government's objective is to forestall terrorism, there are obvious alternative measures that do that without violating free expression, or do so in a manner that is more clearly connected to actual harm. These include criminal prosecution under the existing law, including under 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[190] even though these prosecutions are relatively rare.

4. 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.[191] At the same time, the

190 R. v. Zundel [1992] 2 S.C.R. 731

191 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 that the benefits achieved by the law were "marginal"

section 1 test has been refined to ask a more nuanced question: are the harmful effects proportionate to not only the objective of measure, but also "the salutary effects that actually result from its implementation…"?[192] 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 evidence"[193] in support of the rights-limiting measures. 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.

Glorification offences would penalize substantial amounts of speech, 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-inspired violence would single out a particular subset of Canadian society disproportionately; that is, the Muslim community. Finally, as we have already observed, the measures may also be counterproductive, diminishing the very speech that may contain strategic and tactical intelligence for counter-terrorism investigators.

In sum, glorification offences would 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. Such offences would be constitutionally overbroad compared to existing offences and they would present substantial downside risk with very little upside benefit. In that respect, such a measure would be disproportionate

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compared to the "substantial" harms that the law caused to freedom of expression. Thomson Newspapers above note 188 at para 129

192 Dagenais v. CBC [1994] 3 S.C.R. 835 at 887.

193 Alberta v. Hutterian Brethren [2009] 2 S.C.R. 567 at para 85

C. An Alternative Proposal

For all of the reasons set out above, we do not favour a Canadian glorification offence. We do not, however, wish in this article simply to condemn one idea and not offer another. For one thing, there is obvious merit in pursing the counter-narrative and demand minimization strategies discussed in Part I. The additional question we pose here is whether there is merit in an additional, more legal reform, one that does not go so far as to ban speech now 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 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, not least that in the internet world, 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,[194] or the deletion of such material housed on-line.[195] 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.[196]

We see some merits in extending this approach to other types of speech *already* criminalized in Canadian criminal law; that is, speech lying in the terrorist propaganda and operations zone. With this sort of behaviour, a legislative choice has already been made that this type of speech is too proximate to violence to deserve free speech protections. Because it already lies on the criminal side of the divide, speech is presumably already chilled. A further, supplemental measure that allows the state to obtain a judicial order to compel its removal from web services does not exacerbate this phenomenon, nor should it be assumed that actual deletion of already unlawful speech would have the alienating effects that we fear would stem from a glorification law.

194 Criminal Code, above note 80, s.320.
195 Ibid, s.320.1
196 Ibid s.320.1(5).

More than this, a provision allowing (but not obliging) the government to compel withdrawal of that already criminal speech lying within Canada's jurisdictional reach preserves a discretion to weigh operational intelligence and evidentiary benefits of continued speech with other considerations, including the speech's proximity to violence. In fact, the sheer scale of such speech would oblige the government to proceed judiciously, focusing on the most dangerous criminal expression. As criteria for identifying this sort of speech, we find instructive the "dangerous speech" concept[197] as distilled and amplified by MacLean in relation to lone wolf terrorism.[198]

If a deletion order for terrorist speech modeled on s.320.1 of the *Criminal Code* was sought, the judge could also, in appropriate cases, order that the custodian of a computer system "provide the information necessary to identify and locate the person who posted the material."[199] In such cases, a deletion order might facilitate prosecution of those who engaged in speech act that already are criminal under Canada's 14 terrorism offences.

For these reasons, we would favour a carefully constructed means of deleting the most dangerous of already criminal speech found in on-line environments. 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.

We caution, however, that not everyone will agree on which side of the free speech/criminalized speech line any given material lies. A significant burden should be placed, therefore, on government to demonstrate clearly and cogently to an independent judge the illegal nature of this material, before it is subject to a deletion order. The deletion of material protected under the

197 Kagonya Awori, with Susan Benesch and Angela Crandall, "Umati: Kenyan Online Discourse to Catalyze and Counter Violence," (2013) International Conference on Social Implications of Computers in Developing Countries 468, online: http://www.scribd.com/doc/146349033/Umati-Kenyan-Online-Discourse-to-Catalyze-and-Counter-Violence

198 Jesse MacLean, "Can 'Dangerous Speech' be used to explain 'Lone-Wolf' Terrorism?", Canadian Network for Research on Terrorism, Security and Society Working Paper Series No. 14-11 (November 2014), online at: http://library.tsas.ca/media/TSASWP14-11_MacLean.pdf.

199 *Criminal Code* s.320.1(1)(c). The judge would have to factor in the privacy interest in subscriber data recognized in R. v. Spencer 2014 SCC 43.

Charter's broad guarantee of freedom of expression should never be a simply executive decision, but one adjudicated in front of a court, ideally in a fully adversarial process. In this respect, the existing hate propaganda provisions in sections 320 and 320.1 of the *Criminal Code* are a substantial improvement on the scheme in the UK's *Terrorism Act 2006* because they require judicial decision and do not, as in the UK, rely on an executive decision.

Those who guard the integrity of the internet – including search engine providers and non-profit entities – should have standing to participate in any proceeding. At present, hate crime provisions in section 320.1(2) provide for notice and standing only to those who post the material or in the case of section 320(2) to those who occupy premises from which hate literature is seized. The problem is that such persons are unlikely to contest the proceedings because by doing so they would expose themselves to prosecution under the substantive hate speech offences.

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. Under our proposal, judges should also be careful to reject requests to delete speech that merely amounts to ideological speech, apologia or radicalized boasting. In other words, this administrative provision should not result in more speech being suppressed than the current law permits. The clear focus is on incitement, threats, and operational communications that facilitate terrorist activity.

Conclusion

In sum, we caution against an uncritical importation of a French, Spanish or United Kingdom glorification offences, even in response to the recent concerns about radicalization to violence.

We are opposed to such new offences for both pragmatic and principled reasons. As suggested in Part I of this article, the social science evidence suggests that there is a most tenuous link between radical speech and views and actual radicalization to violence. It is even possible

that the criminalization of such material may have the unintended effect of impeding intelligence investigations or fueling terrorist radicalization.

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, does not strike us as the appropriate way for a democracy to combat terrorism. Moreover, as examined in Part II of this article, we already have many criminal and terrorist offences that can apply to hate speech, inciting or threatening terrorism, or providing operational instructions about terrorism.

If the government did insist on a glorification offence, it would be subject to a full proportionality review that so far has been lacking in the European courts. Although the Canadian courts will accept the prevention of terrorism as an objective that is important enough to limit fundamental freedoms, the data we present suggests the government would have difficulty establishing a rational connection between a new offence and the prevention of terrorism. It would have even more difficulty establishing the minimum impairment of rights, given the broad array of existing offences applying to speech more closely connected to terrorism. The government would also struggle to defend the overall balance struck by the new offence, given its modest benefits and significant deleterious impacts.

That said, we accept that some law reform may be necessary to respond to the dangers of radicalization in the age of both the internet and the new siren song of the Islamic State. The government has yet to use Canada's existing 14 terrorism offences to target speech related to terrorism and it may be appropriate to commence prosecutions in some cases of speech that satisfies Canada's broad definition of terrorist activity, including the counselling and threatening of such broadly defined actions.

We also would not oppose enactment of softer measures that can influence the on-line environment where radicalization and, occasionally, radicalization to violence occurs. The first order of business would be pursuing a number of policy tools, and especially the development

of counter-narratives. It may also be advisable to consider the extension of judicial destruction and deletion orders that are available for hate propaganda to dangerous speech *already* criminal under Canada's existing 14 terrorism offence. Such an approach would not be successful in policing the internet for all such speech, but it could help hide speech that is already criminal from Canadian users and it might assist, in appropriate cases, with the identification and prosecution of those who posted speech that is already criminal.

We do not see this proposal as a silver bullet. It clearly will not singlehandedly solve the radicalization to violence problem – law rarely is the best solution to any social ill. But measured against other legal fixes discussed in this article, this strategy falls into the category of "the worst approach, except for all the others."